



**Kibowen v Ruto & 15 others (Environment & Land Case 174 of 2015)  
[2024] KEELC 6998 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6998 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 174 OF 2015  
FM NJOROGE, J  
OCTOBER 24, 2024**

**BETWEEN**

**STEPHEN KIBOWEN ..... PLAINTIFF**

**AND**

**RAYMOND RUTO ..... 1<sup>ST</sup> DEFENDANT  
KIPKORIR RUTO ..... 2<sup>ND</sup> DEFENDANT  
KIPROP RUTO ..... 3<sup>RD</sup> DEFENDANT  
KIPCHUMBA RUTO ..... 4<sup>TH</sup> DEFENDANT  
CHEPCHIRCHIR RUTO ..... 5<sup>TH</sup> DEFENDANT  
CHEPKOECH RUTO ..... 6<sup>TH</sup> DEFENDANT  
LOICE YATOR ..... 7<sup>TH</sup> DEFENDANT  
SIMON RUTO ..... 8<sup>TH</sup> DEFENDANT  
JANE RUTO ..... 9<sup>TH</sup> DEFENDANT  
WILLY RUTO ..... 10<sup>TH</sup> DEFENDANT  
ALEX RUTO ..... 11<sup>TH</sup> DEFENDANT  
BENSON RUTO ..... 12<sup>TH</sup> DEFENDANT  
VALARY RUTO ..... 13<sup>TH</sup> DEFENDANT  
FRIDA RUTO ..... 14<sup>TH</sup> DEFENDANT  
GILBERT RUTO ..... 15<sup>TH</sup> DEFENDANT  
NANCY RUTO ..... 16<sup>TH</sup> DEFENDANT**



## JUDGMENT

### Pleadings

#### The Claim

1. By a further amended Plaint dated 20<sup>th</sup> March, 2023, the Plaintiff herein prays for Judgment against the Defendants jointly and severally and seeking the following orders:
  - a. A declaration that the Plaintiff is the legal owner of all that parcel of land known as Lembus/Kilombe/157 having purchased it in a public action on 27<sup>th</sup> May 2014.
  - b. A permanent injunction restraining the Defendants either by themselves, their agents, servants, employees, tenants or otherwise howsoever restraining them from further developing, felling trees and/or causing wanton destruction of structures, leasing or dealing with all that parcel of land known as Lembus/Kilombe/157 in a manner prejudicial to the interest of the Plaintiff.
  - c. An eviction order do issue against the defendants herein, their agents, servants, employees, or otherwise howsoever from all that parcel of land known as Lembus/Kilombe/157.
  - d. General damages for trespass.
  - e. Costs of the suit with interest till payment in full
  - f. Mesne profits at the rate of Kshs 1,552,550/- with interest quarterly from 16<sup>th</sup> May, 2015 till vacant possession is granted to the Plaintiff.
2. The plaintiff's case is that he purchased the suit land in this case from the Agricultural finance corporation (AFC) who sold it in exercise of their accrued statutory power of sale in 2014 for Kshs 5,000,000/- which consideration he fully paid.
3. AFC delayed in transferring the land to him. He sued in Eldoret ELCC No 218 of 2014 and obtained orders directing the AFC to discharge the suit property and transfer the same to him. Upon conclusion of that suit he learned that the defendants were in occupation of the suit land. The defendants violently resisted his attempts to take possession. They also embarked on wanton destruction and indiscriminate harvesting of trees on the suit land. He has suffered loss and damage. He has also lost and continues to lose Kshs 1,552,500/- quarterly since 16/5/2015 owing to the defendants' acts that prevent him from conducting commercial farming on the suit property. The defendants, with a view to defeating the plaintiff's claim, have also continued building new structures on the suit land. On the basis of the aforestated facts the plaintiff has sought the orders set out as herein above.

#### The Defence.

4. The defendants rely on a further amended defence dated 4/4/2023. In that pleading they state as follows: that the suit is an abuse of the process; that they are progeny to one Samuel Kipruto Chepkeitany who is the beneficial owner of the property and they have been in occupation of the suit land since childhood; that Samuel repurchased the suit land from Jeruto Tapkili Tengekyon who had been advanced a loan by the AFC upon her default on her financial obligations to the Corporation, and that Samuel took over the outstanding loan facility and the AFC accepted repayments towards its liquidation; that the auction at which the plaintiff alleged to have purchased the property was irregular and unlawful and a nullity and the statutory notice in respect thereto was not issued to the proprietor of



the suit land; that the impugned sale has been challenged in a suit to wit Eldoret High Court Civil Case Number 77 of 2018 Formerly Eldoret High Court ELC No 119 of 2017 – Jeruto Tapkili Tengekyon Samwel & Samwel Kipruto Chepkeitany v Agricultural Finance Corporation , Kolato Auctioneers & Stephen Kibowen. The defendants aver that the issue of whether the plaintiff has acquired title and interest in the suit land being the subject of pending litigation, the plaintiff is not entitled to the orders of relief sought in the present suit till the proceedings pending before the High Court in the aforesaid litigation is concluded. The defendants allege to be claiming under the rights of the plaintiffs named in the said pending litigation. They also maintain that the plaintiff is not entitled to costs in any event. They pray that the suit be dismissed with costs or be stayed pending the finalization of the other litigation mentioned herein before.

5. This court has noted that as per the record an application was made by the defendants vide a motion dated 21/3/2017, which motion was later dismissed, to have the present matter transferred to the Eldoret ELC for hearing and final determination and to be consolidated with Eldoret High Court Civil Case Number 77 of 2018 Formerly Eldoret High Court ELC No 119 of 2017 – Jeruto Tapkili Tengekyon Samwel & Samwel Kipruto Chepkeitany v Agricultural Finance Corporation, Kolato Auctioneers & Stephen Kibowen. Consequently, the hearing of the present suit began on 16/11/2020 when the plaintiff testified and closed his case and the defendants picked the baton from there, calling one witness on the same day and the matter was scheduled for further defence hearing on 9/12/2020 and after that, No further witness for the defence was ever called in the matter and the process was inundated with applications. On 30/5/22 Mr Konosi for the plaintiff notified this court that the Appeal in Court of Appeal had been dismissed and the court ordered the hearing to proceed from where it had reached while being dealt by Ohungo J.; Later, on 6/12/2023. He informed the court that the order from the Court of Appeal which had stayed the proceedings in this suit had been discharged when the appeal was dismissed and this court marked the defence case as closed and ordered parties to file submissions.

## **Evidence.**

### **Plaintiff's Evidence.**

6. PW1 – Stephen Kibowen, the plaintiff in this case testified orally and adopted his recorded a witness statement filed in this case as part of his evidence-in-chief. He stated that the suit property is known as Lembus/Kilombe/157 of which he is the registered owner. He got the plot following a suit involving Agricultural Finance Corporation (AFC). He has not been able to take possession since he purchased the property. His plan was to farm on the property upon its purchase. He was to cultivate hay. At that time one bale was selling at Kshs 300 (three hundred). If he had planted, he would have harvested 150 bales per acre. For the 70 acres he would have harvested 10,500 bales. The cost of production is about half the cost of each bale. His profit would upon computation using those figures translated to Kshs 1,500,000 per season. In a year, it is planted three times so the Kshs 1,500,000 would have to be multiplied by 3 to have an annual profit of Kshs 4,500,000. Normally, if well maintained, once planted, one can have the crop in the farm for up to 5 years. He also produced the documents in his list of documents dated 18th June 2015 as PExh 1 – 7 respectively. There was another case in Eldoret, HCC No 77 of 2018 (Eldoret) where he was named as a defendant alongside with the AFC and the auctioneer while the defendants herein together with others were named as the plaintiffs.
7. Cross-examination by Mr. Kibii PW1 stated that of all those who attended, there were at least about five serious bidders at the auction. He was issued with a Memorandum of Sale. After buying the land, he went to the Land Control Board and obtained a consent. He filed ELC 218/2014 because AFC had delayed transferring the plot to him and sought AFC to effect transfer. AFC did not cancel the auction.



The auction was held earlier in May 2014. AFC had refunded the Kshs 5 million PW1 had paid. In 2014 he sued only AFC because they are the ones who received his money; he did not sue the occupants of the land because he did not know them. He did not serve the occupants with his pleadings. He only got to know the names of the people claiming the plot when he went to take possession. When he bought the plot, the registered owner was Jeruto Tengekyon and AFC. He did not join in his case Jeruto Tengekyon because he was dealing with the lender and the borrower. AFC gave an explanation in court on why they did not give him transfer. However, he does not know the exact explanation AFC gave. He was aware that Tengekyon has sued AFC in Eldoret High Court in Eldoret HCC 77/2018 claiming that the plot was sold without notice to him. He was aware that Tengekyon has testified in the Eldoret case. The defendants herein are parties to Eldoret case. The defendants herein are the children of Mzee Samuel Chepkaitany. He was not aware if Samuel Chepkaitany owned the plot before Tengekyon. The defendants are currently in possession. The plot is located Muserechi, which is a dry area. The locals of Muserechi are livestock farmers and bee-keepers. The area is dry for most of the year. He does not personally know the defendants but he knows that there are 11 families on the plot. He sued the parents in the families. But he got to know the defendants' names from their neighbour. He does not know if there are any graves on the plot.

8. Under re-examination by Mr. Konosi he revealed that the judgment in ELC 218/14 addressed all the issues in the case; that the letter from AFC dated 1<sup>st</sup> October 2014 has a handwritten note stating that the cheques were returned since the matter was in court. He got to know the defendant's names when he went to take possession. Muserechi is about 41km from Nakuru, as one heads to Ravine. The people in the area plant hay, even now they are doing so. At that juncture the plaintiff's case was marked as closed.

#### **Defendants' Evidence.**

9. DW1 – Simon Ruto sworn, stated that he is the 1<sup>st</sup> defendant in this case, although the name “Raymond” has been used which is not his. He adopted his written witness statement in this case on dated 13th July 2015 as part of his evidence-in-chief. Plot No 157 initially belonged Samuel Kipruto Chepkaitany who was his father. He became registered owner on 11th November 1977. He remained owner until 5th February 1996 when Jeruto Tapkili Tengekyon became registered owner. Right now the registered Owner is Stephen Kibowen who became owner on 11th August 2015. Entry No 8 on the green card mentions ELC 218/2014. He produced a copy of the green card in respect of Lembus/ Kiplombe/157 as D. Exh 1. His father sold the plot to Jeruto T. Tengekyon on 2nd February 1996. Tengekyon was paying through a bank loan. He produced a copy of the sale agreement dated 2nd February 1996 as D Exh. 2. On 4th January 2013 Tengekyon sold the same plot to his father. His father took over the loan obligation. I produce a copy of an agreement dated 4<sup>th</sup> January 2013 as D. Exh 3. Upon buying the plot his father started paying the loan. He produced a copy of a letter dated 7<sup>th</sup> January 2013 from his father to AFC as DExh4. He produced copies of 7 receipts showing that his father paid AFC (D Exh 5A – 5G). In total, his father and Tengekyon paid AFC a total of Kshs 4,924,000. The plaintiff in this case bought the plot at Kshs 5 million. No notice issued by AFC issued either to his father or to Tengekyon. His father only got to know that the plot had been sold when he was sued in this case. Upon knowing that the plot had been sold, his father went to AFC Nairobi office. AFC then cancelled the sale and wrote a letter dated 1<sup>st</sup> October 2014. DW1 produced a copy of the letter as DExh. 6. AFC refunded the money the plaintiff had paid through letter dated 13<sup>th</sup> August 2014. In total Kshs 5 million was refunded in the form of cheques. He produced a copy of the letter as D. Exh. 7. Upon the cheques being issued, the plaintiff herein sued AFC in ELC 218/2014. There was No other defendant in that case. Judgment was delivered on 19<sup>th</sup> March 2015. The plaintiff herein wanted AFC to transfer the property to him but AFC delayed because it noted anomalies in



the sale. DW1 produced as D. Exh 8(a) copy of a replying affidavit sworn by Rose A. Ochanda on 29<sup>th</sup> March 2017 in Court of Appeal Civil Application No 12 of 2017 between Stephen Kibowen –vs- AFC. At paragraph 6 she mentions Nakuru ELC 218/2014. At paragraph 5 of that affidavit, she gave reasons for cancellation of the auction. Rose A. Ochanda was the Chief Manager, Legal Service at AFC. DW1 got to know about ELC 218/2014 when he was served with summons in ELC 174/2015 (the present suit). His father sought to join ELC 174/2015 and he did not succeed. He filed ELC 119/2017 which later became ELD HCCC 77/2018 (Eldoret). The plaintiffs in ELD HCCC 77/18 are Jeruto T. Tengekyon, Samuel Kipruto Chepkeitany, Simon Ruto, Willy Kiprop Ruto, Alex Kipchumba Ruto, Frida Chepchirchir Ruto, Gilbert Kipkorir Ruto and Nancy Chepchirchir Ruto. The defendants are AFC, Kolato Auctioneers and Stephen Kibowen. He produces as DExh. 9(a) copy of amended plaint in HCC 77/18 (formerly ELC 119/17) (). The complaint in Eldoret HCC 70/18 was that the suit land was sold without notice and without hearing, and that case is at the hearing stage with Jeruto T. Tengekyon already having given her evidence. The defendants' names as stated in ELC 174/2015 are not correct. He does not have any brother by the name Kipkorir Ruto. Currently, Samuel Kipruto Chepkeitany, Patrick Kurgat Rono, Loice Yator, Michael Kemboi Ruto, Richard Lembus Ruto, Daniel Kimutai Ruto, Simon Ruto, Jane Ruto, Willy Kiprop Ruto, Alex Kipchumba Ruto, Benson Ruto, Frida Chepchirchir Ruto, Gilbert Kipkorir Ruto, Nancy Chepchirchir Ruto, Josephine Chepchirchir Moindi are his brothers and sisters. DW1 is 52 years old. His grandfather was buried on the plot in 1979. His grandmother was buried on it in 1982. Others buried on it are: a brother who died as an infant in 1984; Richard Lembus Ruto who was buried in 2003 and his mother Pauline Chemaiywa Chepkeitany who was buried in 2013. The heirs of Michael and Richard are on the plot. In this case, over 10 of his brothers have been left out. He does not know the plaintiff. He prayed that this case be stayed pending determination of the Eldoret HCCC 77/18. He also prays that the plaintiff herein deposits the title deed in court pending determination of the case.

10. Upon cross-examination by Mr. Konosi DW1 stated that his name appeared in his witness statement as “Raymond” instead of “Simon”. He added that he had No objection to his name in the pleadings being amended to read “Simon” instead of “Raymond”. He was aware that the case documents referred to him though there are other names in the pleadings that are strange to him. The land is his ancestral land. He was aware that the property was sold in an auction. The 15 people whose names he gave in his evidence-in-chief are not all alive. Those who are not alive are Patrick Kurgat, Richard Lembus Ruto and Enock Kipkemoi Ruto. He does not remember how many houses are on the suit land. There is a letter which shows that Mr. Kibowen was refunded his money. Mr. Kibowen refused to take the money.
11. While under re-examination by Mr. Kibii DW1 stated that his father sold his property in Uasin Gishu so that he could repay the AFC loan; that Mr. Kibowen was refunded the money he had paid at the auction through letter dated 1<sup>st</sup> October 2014. He did not know the person who prepared the statement used “Raymond” as his name. He however signed it because the case is about their land.

#### **Submissions.**

12. The plaintiff filed submissions and a list and bundle of authorities on 10/1/2024. I have perused through the physical file and the Case Tracking System and I have found No submissions filed on behalf of the defendant.

#### **Analysis And Determination**

13. This court has considered the pleadings the evidence and the submissions on the record. The issues that arise for determination are as follows:



- a. Whether the plaintiff acquired legal interest in the suit land to the exclusion of the defendants and thus ought to be declared the owner thereof;
- b. Whether the defendants ought to be evicted from the suit land and whether they ought to be enjoined from any further interference with the suit land;
- c. Whether the plaintiff is entitled to general damages for trespass;
- d. Whether the plaintiff is entitled to mesne profits;
- e. Who ought to meet the costs of the suit.

The issues are addressed as herein under.

**a. Whether the plaintiff acquired legal interest in the suit land to the exclusion of the defendants and thus ought to be declared the owner thereof;**

14. It is not in doubt that the plaintiff purchased the suit land from the AFC. His claim is based on that sale. What the defendants contest is that the auction and sale alleged to have been conducted and which gave rise to the plaintiff's title was irregular and unlawful and a nullity for the reasons that they list at paragraph 5A of their further amended defence, to wit: that there was No valid statutory notice issued; that the amount sought to be recovered flouts the in duplum rule contrary to Section 44 of the [Banking Act](#); that No redemption notice and notification of sale were duly served as required by law; that the AFC never specified the extent of default by Jeruto as required by Section 90(2) of the [Land Act](#); that the AFC did not specify the exact amount that was required to be paid in remedy of the breach under Section 90 (2) (b) of the Act and that No valuation prior to sale was conducted.
15. The plaintiff gave evidence that the suit land, then registered under the name Jeruto Tapkili Tengekyon, was advertised for sale by AFC who were exercising their statutory power of sale, and that on 27<sup>th</sup> May 2014 he purchased the suit property for Kshs 5,000,000/- and paid the purchase price wholly. It transpired that the suit land had earlier been owned by the defendants' father prior to his selling it to Jeruto. The plaintiff later filed a suit against AFC, Nakuru ELC 218/2014, for delay in transferring the suit land to him and obtained orders against it. AFC was in that suit ordered to discharge the property and transfer the same to him.
16. The defendants' together with Jeruto instituted ELC 119/2017 which later became ELD HCCC 77/2018 (Eldoret) in which they sought orders of declaration that the auction at which the plaintiff purchased the suit land was unlawful and a permanent injunction restraining the defendants who included the plaintiff herein and AFC from interfering with the suit property or evicting them therefrom. Cancellation of the present plaintiff's title was also sought in that suit. That matter was concluded on 3/3/2022 and the suit was dismissed in its entirety. A perusal of the further amended defence dated 4/4/2023 discloses that the same issues that were raised in ELC 119/2017 (which later became ELD HCCC 77/2018 (Eldoret)) have been raised afresh in the present suit, and that has been done without a counterclaim on the record. The defendant's claim alleging inter alia irregularity in the auction was filed after the judgment in that suit. There was No justification for the defendants to raise those same issues which had been adjudicated on in respect of the same piece of land. Perchance the defendants are of the view that the present suit comprises of parties other than those in ELC 119/2017 (which later became ELD HCCC 77/2018 (Eldoret)) they are in this court's view quite mistaken for they are claiming under the title of Samuel Kipruto Chepkeitany, their father who was a party in the case earlier decided. The provisions of Section 7 of the [Civil Procedure Act](#) are applicable in this case. Section 7 of that Act provides as follows:



7. Res judicata

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

17. By virtue of the provisions of Section 7 above, any issue that ought to have been raised but was not raised in the already decided litigation regarding propriety of the process of the exercise of power of sale including disputed issuance of any valid statutory notice as required by law can not be validly raised by the defendants in the present suit. In the light of the afore going, the High Court having heard the case and dismissed the same, the issues now raised by the defendants in this suit are res judicata. The plaintiff in this case thus remains the registered owner of the suit land. The defendants have admitted so.
18. Further, which is worse, the final prayers in the defendants' further amended defence only seek temporary prayers to the effect that the present suit be dismissed or stayed pending the determination of ELC 119/2017 (which later became ELD HCCC 77/2018 (Eldoret)). This prayer in the defence is significant. It implies that the defendants recognized that the issues regarding validity of the exercise of the statutory power of sale would be determined in ELC 119/2017 (which later became ELD HCCC 77/2018 (Eldoret)). That being the case they were obliged to apply all the effort that they could to ensure that their claims as duplicated herein succeeded in that case. It is a sign that they were aware of that suit and that they ought to have concentrated therein all their claims relating to the suit subject matter. It is now rather late in the day to establish whether or not they did so. Section 7 of the [Civil Procedure Act](#) stipulates that that which ought to have been relied on in a former suit for either attack or defence is res judicata.
19. The previous litigation having ended in the plaintiff's favour, this court can not find that there was any fraud on the part of the plaintiff or the AFC in the sale transaction that sold the plaintiff the suit land as that issue was resolved. This court therefore finds for the plaintiff on the present issue and rules that the plaintiff acquired legal interest in the suit land to the exclusion of the defendants and thus ought to be declared the owner thereof.



**b. Whether the defendants ought to be evicted from the suit land and whether they ought to be enjoined from any further interference with the suit land;**

20. The plaintiff being the registered proprietor of the suit land his rights are indefeasible. Section 25 of the [Land Registration Act](#) provides as follows:

25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
- (2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

21. Section 26 of the LRA provides as follows:

26.

- (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
  - (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.

22. From the proceedings this court is unable to conclude that the defendants have established by evidence that they have any leases, charges and other encumbrances and /or conditions and restrictions expressly reflected on the register in their favour under Section 25(1)(a), or such liabilities, rights and interests as may affect the plaintiffs title which according to Section 28 of the LRA do not require noting on the land register; neither have the defendants established that the plaintiff holds the land under any trust in their favour or that they have his license. Their relationship with the former registered owner of the suit land is unhelpful in the present circumstances, for their right to be on the suit land vanished the moment it was sold to the plaintiff, and that loss was further emphasized when the suit filed against the sale (ELC 119/2017 (which later became ELD HCCC 77/2018 (Eldoret)) was dismissed by court. In the circumstances, as they are not lawfully on the land, are trespassers thereon, and this court agrees with the plaintiff's counsel's submissions to the effect that the defendants ought to be evicted and permanently enjoined in order to give vacant possession to the plaintiff for his utilization thereof.

**c. Whether the plaintiff is entitled to general damages for trespass;**

23. Trespass is actionable per se. Even where No specific loss or damage has been established to have occurred the court may upon proof of trespass award damages to a property owner whose land has been invaded by third parties see the case of *Ajit Bhogal v Kenya Power & Lighting Co Ltd* [2020] eKLR and also the case of *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR. It is correct that in the *Ajit Bhogal case*, the court awarded Kshs 20,000,000/= in respect of trespass on 1.5 acres of land. The plaintiff submits that Kshs 40,000,000/= is adequate as damages for trespass in the present case. However, in that case the trespass began in 1999 and the suit, commenced in November 2006, was finalized by a judgment delivered in November 2020, (after a 20-year period) and the suit land therein was of commercial use. In the *Ajit case (supra)* also, while the defendant developed the new electricity power line within its wayleave, it was apparent that the landowner's ability to utilize the affected land would still be severely limited for a long time to come.

24. In the *Kenya Power & Lighting Company Limited case (supra)* the Court of Appeal observed as follows:

“...there is concession that indeed two bungalows were constructed on their suit properties after the onset of the appellant's continuing trespass thereon but were neither rentable nor sellable.... We have given due consideration to the above rival positions, our take thereon is that in the absence of any rebuttal on behalf of Eunice, we agree with the appellant's assertion that if indeed its trespass on her parcel had rendered it useless, the same could not have been used as collateral for a financial facility from Family Bank.”

25. *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR was an appeal where the Trial court had awarded one claimant Kshs 12,000,000.00 for the loss of use of one acre, and Kshs 24,000,000.00 to the other claimant for the loss of use of two acres of their land. Both awards were based on the valuation reports tendered in evidence by the respondents without any objection from the appellant. The Court of Appeal in its final decision reduced these awards to Kshs



Kshs 6,000,000.00 and Kshs 12,000,000.00 respectively. In doing so the Court of Appeal held that there was

“...merit in the appellant’s complaint that the trial Judge failed to properly appraise and appreciate the extent of loss of use suffered by the respondents as a result of the appellant’s continued trespass to the suit properties hence erroneously basing compensatory damages on the value of the suit properties rendering the ultimate award arrived at excessive in the circumstances and therefore warrants interference by this Court...”

26. In the present case the plaintiff purchased the suit property is agricultural land measuring about 27.50 ha (about 67.9525 acres) in 2014 but obtained title in August 2015 after Nakuru ELC 218 of 2014 was finalized. It is also foreseeable that upon attaining vacant possession, the plaintiff herein will be able to utilize the entire land parcel for his purposes unhindered.
27. In *Fleetwood Enterprises Ltd v Kenya Power & Lighting Co. Ltd* [2015] eKLR it was held that the award of damages for trespass is discretionary in nature but which discretion should however be exercised by the Court judiciously after taking into consideration all relevant factors, and that the value of the land and the nature and extent of developments that would have been carried out thereon had the trespass not occurred are also a determining factor. In *Kenya Power & Lighting Company Limited v Fleetwood Enterprises Limited* [2017] eKLR it was held that the court is bound to assess and award damages on a case to case basis. It is trite that the quantum of general damages may be increased where the trespass is accompanied by aggravating circumstances to the detriment of the owner of the land. In the present case this court, upon perusal of the record including the interlocutory applications and the annexures which include photographs showing the harvesting of trees and charcoal burning attributed to the defendants, has found that there was deliberate disregard of the right of the owner of the land with the object of making a gain by their unlawful conduct which should be penalized. An award of Kshs 10,000,000/= is in the consideration of this court an appropriate award to the plaintiff as general damages for trespass to the suit land.
28. The plaintiff set out his computations in his submissions based on the fact that his intended business on the suit land was hay making. He urged that based on the production of hay 3 times annually at the sale price of Kshs 300/= per bale he would make Kshs 4,725,000/= per year. This sum multiplied by 10 (the number of years that he has been unable to have vacant possession of the suit land) amounts to Kshs 47,250,000/=.
29. It can not be gainsaid that the plaintiff has suffered massive loss by the denial of vacant possession. However, this court must take into account vicissitudes like the usual fluctuations of hay prices depending on mass production and the possibility of some unfavourable weather as factors militating against the achieving of that figure of Kshs 47,250,000/=. Having done so, this court is of the opinion that Kshs 20,000,000/= is an appropriate award under the heading of mesne profits.
30. In the light of the foregoing analysis this court is satisfied that the sum of Kshs 10,000,000/= and Kshs 20,000,000/= suffice as damages awardable to the plaintiff against the defendants for trespass and mesne profits respectively.

**d. to meet the costs of the suit.**

31. The defendants are still in occupation of the suit land despite the fact that they had averred in their defence that they were intent on awaiting the outcome of ELC 119/2017 (which later became ELD HCCC 77/2018 (Eldoret)). As they have failed to establish their right to be on or remain on the suit land, and have compelled the institution of this suit, they should bear the costs of this suit.



32. In the final analysis I find that the plaintiff has proved his claim on a balance of probabilities against the defendants and I enter judgment in his favour against them and I issue the following final orders:
- a. A declaration is hereby issued declaring that the Plaintiff is the legal owner of all that parcel of land known as Lembus/Kilombe/157 having purchased it in a public action on 27<sup>th</sup> May 2014;
  - b. An order of permanent injunction is hereby issued restraining the Defendants either by themselves, their agents, servants, employees, and/or tenants restraining them from further howsoever developing, felling trees and/or causing wanton destruction of structures, leasing or dealing with all that parcel of land known as Lembus/Kilombe/157 in a manner prejudicial to the interest of the Plaintiff;
  - c. The defendants by themselves, their agents, servants, employees, and/or tenants or any other person claiming under them shall remove themselves from the suit land known as Lembus/Kilombe/157 within 30 days of this judgment in default of which they shall be forcibly evicted from all that parcel of land known as Lembus/Kilombe/157;
  - d. The plaintiff is hereby awarded as against the defendants jointly and severally Kshs 10,000,000/= being general damages for trespass on his land Lembus/Kilombe/157;
  - e. The plaintiff is hereby awarded as against the defendants jointly and severally *mesne profits* in the total sum of Kshs 20,000,000/= from August 2015 till the date of this judgment;
  - f. The sum in (e) herein above shall attract interest at court rates till the date vacant possession is fully granted to the Plaintiff;
  - g. The defendants shall jointly and severally meet the costs of the suit with interest till payment in full.

**JUDGMENT DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 24<sup>TH</sup> DAY of OCTOBER 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI**

