



**Luka & 4 others v Taloi & 8 others (Environment & Land Case
E002 of 2021) [2024] KEELC 13307 (KLR) (21 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13307 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE E002 OF 2021
CG MBOGO, J
NOVEMBER 21, 2024**

BETWEEN

**BEN OLOISHORUA LUKA 1ST PLAINTIFF
JOSEPH MEITAMEI MPAAYEI (IN THEIR OWN CAPACITIES & AS
ADMINISTRATORS OF THE ESTATE OF LUKA KENAYIA MPATEEI & LUKE
LEMAYIAN) 2ND PLAINTIFF
SANE LUKE MPAYEEI 3RD PLAINTIFF
EMMANUEL TOIKAN MPAYEEI 4TH PLAINTIFF
MEITEIKINI LUKA 5TH PLAINTIFF**

AND

**RAITA TALOI 1ST DEFENDANT
SUYIANKA NKOORA 2ND DEFENDANT
TINTI SUYANKA 3RD DEFENDANT
KULAL TALOI 4TH DEFENDANT
MEISIASHI SAOLI 5TH DEFENDANT
MOITALEL LETOLUO 6TH DEFENDANT
MAKILI LETOLUO 7TH DEFENDANT
OLOLKIONOR 8TH DEFENDANT
SALANKAT NCHOE 9TH DEFENDANT**



JUDGMENT

1. By a plaint dated 14th January, 2021, the plaintiffs are seeking judgment against the defendants jointly and severally for: -
 - a. A permanent injunction restraining the defendants, their servants, workmen, agents and/ or anyone claiming through them from entering into and/or from trespassing, cultivating or in any way interfering with the plaintiffs use and enjoyment of land parcels number Cis Mara/ Nailoklok/ 85, Cis Mara/ Nailoklok/ 86, Cis Mara/ Nailoklok/ 87, Cis Mara/ Nailoklok/ 88, Cis Mara/ Nailoklok/ 89, Cis Mara/ Nailoklok/ 90 and Cis Mara/ Nailoklok/ 91.
 - b. An order of eviction against the defendants, their servants, workmen, agents, and/ or anyone claiming through them in respect of parcel no. Cis Mara/ Nailoklok/ 85, Cis Mara/ Nailoklok/ 86, Cis Mara/ Nailoklok/ 87, Cis Mara/ Nailoklok/ 88, Cis Mara/ Nailoklok/ 89, Cis Mara/ Nailoklok/ 90 and Cis Mara/ Nailoklok/ 91.
 - c. Mesne profits starting January 2003 to be computed upto and including the day the defendants cease to occupy the premises.
 - d. Costs and interest of the suit.
 - e. Any other relief the court deems fit to grant.
2. The gist of the plaint is that the plaintiffs are the beneficiaries of the estate of the late Luka Kenayia who was the registered owner of Cis Mara/ Nailoklok/ 25, and that prior to his demise, he subdivided the said land into Cis Mara/ Nailoklok/ 85 to 91 which are now the suit properties. The plaintiffs averred that prior to the subdivision of the land, the defendants under the guise of an amorphous entity, illegally trespassed and started cultivating on part of the land, and that their(plaintiffs') late father obtained orders against them on 23rd September, 2003 vide Miscellaneous Application number 897 of 2003.
3. The plaintiffs averred that the defendants have encroached further on the suit properties and almost completely engulfed their land. They also averred that they have undertaken illegal demarcation on the suit properties without the consent of the plaintiffs and that to their exclusion and on the various instances they have attempted to visit the land, that they have been chased away with poisoned arrows and clubs. They averred that they have been denied access and use of the suit properties besides being the registered owners. They averred that on 11th June 2012, the 1st defendant trespassed into the suit properties, and damaged the permanent structures and began erecting permanent structures thereon.
4. Besides the claim for eviction and permanent injunction, the plaintiffs sought mesne profits gained by the defendants to date and the loss suffered due to the illegal occupation.
5. The defendants filed their statement of defence dated 3rd April, 2021, and while they denied the contents of the plaint, they averred that the defendants have filed their plaint to deprive the plaintiffs of their legal property and to avert justice since the same is frivolous, and meant to defeat justice to the plaintiffs in this counter claim (sic).
6. The defendants sought for judgment against the plaintiffs for: -



- a. A permanent injunction restraining the 1st-5th defendants, their servants, workmen, agents and/ or anyone claiming through them from entering into and/or trespassing, cultivating or in any way interfering with the plaintiffs use and enjoyment.
 - b. Costs and interests of the suit.
 - c. Any other relief the court deems fit to grant.
7. This matter proceeded for hearing on 24th July, 2024. The 1st plaintiff relied on his witness statement dated 16th November, 2023 as his evidence in chief. He produced the documents contained in the list of documents dated 14th January, 2021 as P. Ex. Nos 1 to 10 respectively. The 1st plaintiff's evidence was that the defendants have encroached onto their parcel of land which initially belonged to their late father, Luka Kenaiya. He testified that when their late father passed on, together with one of his brothers, they applied for letters of administration in respect of his estate and that before his demise, their late father had subdivided the parcel of land into parcels no. 85 to 91. He went on to state that the seven parcels of land were distributed to all the sons save for parcel number 91 which he registered in his name.
 8. The 1st plaintiff testified that the defendants have occupied parts of parcel nos. 85, 86, 87, 88, 89, 90 and the whole of parcel number 91. He testified that they subdivided parcel number 91 amongst themselves. The 1st plaintiff further testified that before their father died in the year 2009, he had filed a suit against the defendants and obtained judgment in his favour, and that he died before he could execute the same. He prayed for judgment against the defendants and for the OSC Nairagie Enkare to supervise their eviction.
 9. Solomon Mugi Mwangi (PW2) introduced himself as a valuer and stated that he was engaged by the plaintiffs' advocate to determine the parcel value of the suit properties and the loss of profit. PW2 testified that he undertook the exercise and prepared a report dated 4th August, 2020 which he produced as P. Ex. No. 11. It was his testimony that he obtained the map for the area and conducted a search as well as visiting the suit properties. From his visit, he was able to establish the areas encroached with the assistance of a registered land surveyor using the market comparison approach and he was able to determine the acreages and value of the parcels as indicated in his report. He was also able to determine the loss of rent and profits of all the parcels as indicated in his report and the said loss of profit was for one year.
 10. The plaintiff filed their written submissions dated 2nd August, 2024 where they raised four issues for determination as listed below: -
 - a. Are the plaintiffs the legal owner of the suit properties?
 - b. Are the defendants guilty of trespass?
 - c. Whether the plaintiffs are entitled to compensation by the defendants?
 - d. Who is entitled to costs?
 11. On the first issue, the plaintiffs submitted that they have provided copies of all the titles of the suit properties, and that it is uncontroverted that the defendants illegally demarcated the suit properties without the consent of the plaintiffs and to their exclusion. Further, they submitted that the defence filed is shallow and shoddily drafted, and that does not in any way put any favourable response to the issues raised by the plaintiff as it consists of mere denials and does not seek prayers for dismissal of the plaintiffs' claim. They relied on the cases of Dr. Joseph Arap Ngok versus Justice Moiwo Ole Keiwua & 5 Others, Civil Appeal No. 60 of 1997.



12. On the second issue, the plaintiffs submitted that the defendants trespassed onto their properties and were a nuisance for illegally occupying the land despite the obvious objection from the plaintiffs and their father. To buttress on this submission, the plaintiffs relied on the case of Nakuru Industries Limited v S.S Menta & Sons [2016] eKLR.
13. On the third issue and while relying on the cases of Park Towers Limited versus John Mithamo Njika & 7 Others [2014] eKLR, and John Chumia Nganga v Attorney General & Another [2019] eKLR, the plaintiffs submitted that the nature, extent and level to which they may need to restructure the suit properties and taking into consideration the levels of inflation and the defendants' occupation for close to 12 years, damages in the sum of Kshs. 223,831,080/- is thus suitable as per the valuer's report.
14. On the fourth issue, the plaintiffs submitted that they have proven their case to the required standard, and that they are entitled to the reliefs sought as well as the costs of the suit. I have considered the pleadings, the evidence on record and the written submissions filed by the plaintiffs. The following are the issues for determination: -
 - i. Whether an order of eviction should issue against the defendants?
 - ii. Whether the defendants should be permanently restrained from interfering with the suit properties?
 - iii. Whether the plaintiffs are entitled to mesne profits?
 - iv. Who should bear the costs of the suit?
15. On the first issue, the 1st plaintiff tendered evidence to prove that they are the registered proprietors of the suit properties which was a result of subdivision of Cis Mara/ Nailokilok/ 25, and they were issued with certificates of title to that effect, which he produced as an exhibit. It was his testimony that the defendants had encroached on the suit properties and that they have damaged the permanent structures and interfered with the plaintiffs' enjoyment of the land. Whereas I note that the defendants filed their defence, I do agree with the plaintiffs in their submissions that the same consists only of mere denials and indeed, it is poorly drafted. Also, the defendants despite service of the court documents, they did not appear in court for the hearing to defend themselves and present their case. As it is, the evidence tendered by the plaintiffs is uncontroverted. Section 26(1) of the Land Registration Act provides: -

“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.”



16. Further, Section 24 (a) of the Land Registration Act states that,
- “subject to this Act, the registration of a person as a proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto...”
17. From the above provisions of the law, it is my view that the plaintiffs have satisfied the order of eviction owing to their registration as owners of the suit properties. There being no evidence to the contrary, the plaintiffs are entitled to an order of eviction.
18. On the second issue, I will apply the same principles contained in the foregoing paragraphs. The plaintiffs having proved that they are the registered owners, they are entitled to the rights and privileges arising therefrom, and as such a permanent order of injunction against the defendants is sufficient.
19. On whether the plaintiffs are entitled to mesne profits, Section 2 of the Civil Procedure Act defines mesne profits as follows:-
- “Mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession.”
20. Order 21 Rule 13 of the Civil Procedure Rules provides as follows: -
- “ 13.
- (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
 - (a) for the possession of the property;
 - (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
 - (c) directing an inquiry as to rent or mesne profits from the institution of such suit until—
 - (i) the delivery of possession to the decree-holder;
 - (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
 - (iii) the expiration of three years from the date of the decree, whichever event first occurs.
 - (2) Where an inquiry is directed under sub rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”



21. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR stated as follows:-

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another.”

22. The plaintiffs in claiming mesne profits filed a valuation report dated 4th August, 2020. I have perused the report and the suit properties were inspected on 24th July, 2020 and the same contains the acreage of the portions said to be encroached by the defendants. In their pleadings, the plaintiffs stated that the defendants demolished the permanent structures constructed on the suit properties but failed to substantiate the claim by providing any evidence. To that extent, this court is unable to determine whether indeed there were any structures either permanent or not to establish rent, if any, that has accrued over time. Looking at the report, and from the evidence tendered, it appears that the defendants have engaged in crop farming of both wheat and maize, and it is also clear that the plaintiffs seem not to have the intention to sell the properties. On land use as captured in page 7, the report speculates that the area under wheat had been rented to one large scale farmer. Indeed this remains only as speculation and it has not been proved. Having analysed the same, it is my considered view that the plaintiffs are entitled to the mesne profits as per the encroached areas as contained in page 10 of the report. This court will only limit itself to a scenario where the encroached areas were leased for farming and it will not therefore capitalize on any calculated costs of wheat farming as described in paragraph 8.

23. In calculating mesne profits, I have taken into consideration a reasonable amount at which an acre of the encroached area can be leased at Kshs. 5,000/- per season, multiplied by the encroached area i.e. for parcel 85 is 43.76, and the computed the same from the time of filing the suit which was in the year 2021. I have done so taking into consideration of the fact that the plaintiffs have not shown the steps they took to mitigate their loss from 2003 up to the time of filing the suit.

24. In other words, mesne profits is calculated as follows: -

1. Parcel No. 85- 43.76*5,000*4= 875,200/=
2. Parcel No. 86- 38.58*5,000*4=771,600/=
3. Parcel No. 87-37.19*5,000*4=743,800/=
4. Parcel No. 88- 48.41*5,000*4=968,200/=
5. Parcel No. 89- 59.08*5,000*4=1,181,600/=
6. Parcel No. 90- 65.44*5,000*4= 1,308,800/=
7. Parcel No. 91- 160.33*5,000*4=3,206,600/=
8. The total sum from the above computation is Kshs. 9,055,800/=.

25. Arising from the above, the plaintiffs have on a balance of probabilities proved their case and the plaint dated 14th January, 2021 is hereby allowed in the following terms: -

- i. A permanent injunction is hereby issued restraining the defendants, their servants, workmen, agents and/ or anyone claiming through them from entering into and/or from trespassing, cultivating or in any way interfering with the plaintiffs use and enjoyment of land parcels number Cis Mara/ Nailoklok/ 85, Cis Mara/ Nailoklok/ 86, Cis Mara/ Nailoklok/ 87, Cis



Mara/ Nailoklok/ 88, Cis Mara/ Nailoklok/ 89, Cis Mara/ Nailoklok/ 90 and Cis Mara/ Nailoklok/ 91.

- ii. An order of eviction is hereby issued against the defendants, their servants, workmen, agents, and/ or anyone claiming through them in respect of parcel no. Cis Mara/ Nailoklok/ 85, Cis Mara/ Nailoklok/ 86, Cis Mara/ Nailoklok/ 87, Cis Mara/ Nailoklok/ 88, Cis Mara/ Nailoklok/ 89, Cis Mara/ Nailoklok/ 90 and Cis Mara/ Nailoklok/ 91.
- iii. Mesne profits is hereby issued in the sum of Kshs. 9,055,800/- as tabulated in paragraphs 23 and 24 above.
- iv. The OCS Nairagie Enkare Police Station to supervise and provide security in compliance with order ii above.
- v. Costs of the suit to be borne by the defendants.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 21ST DAY OF NOVEMBER, 2024.

HON. MBOGO C.G.

JUDGE

21/11/2024.

In the presence of: -

Mr. Meyoki Pere – C. A

