

KENYA / JUDGMENT

Mwanzia & another v Moses

[2026] KEELC 5407 (KLR)

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Environment and Land Court

BEFORE

JG Kemei

CASE / FILE NUMBER

Environment and Land Case E144 of 2021

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Mwanzia & another v Moses (Environment and Land Case E144 of 2021) [2026] KEELC 5407 (KLR)
(7 September 2026) (Judgment) Neutral citation:

[2026] KEELC 5407 (KLR) Republic of Kenya In the Environment and Land Court at Nairobi
Environment and Land Case E144 of 2021 JG Kemei, J September 7, 2026 Between
Kennedy Mutuku Mwanzia 1 st Plaintiff Jeremiah Ndurumo Nderitu 2 nd Plaintiff and
Mathew Moses Defendant

Judgment

The Pleadings And Evidence 1. The Plaintiffs seek orders for; a. An order for eviction of the defendant from land parcels Nos Nairobi Block 136/16990 and Nairobi/Block 136 /16991[suit lands]. b. That the OCS Ruai Police Station do oversee the execution of prayer No 1 hereinabove c. Mesne profits for trespass and alienation d. Costs of suit. 2. At all material times, the Plaintiffs have been the bona fide registered proprietors of the two suit lands. They aver that in May 2020 the Defendant trespassed, encroached upon, and alienated the Plaintiffs' land parcels. 3. In his amended defence, the defendant denied the Plaintiffs' claim and contended that he is the rightful and legal owner of the suit lands, which he acquired in 2016 and on which he constructed his residence, where he has peacefully lived to date. He faulted the receipts and the share certificates relied on by the Plaintiff as inauthentic and urged the court to reject them. He contended that the share certificates, in particular, are dated after the alleged lease, thereby putting them in doubt. The search is not dated, and the referred payment slip has no nexus to the suit properties. 4. At the hearing, Kennedy Mutuku Mwanzia testified on his own behalf and that of the co-plaintiff, and relied on his witness statement dated 27/4/2021 as evidence in chief. He produced documents, which were accordingly marked as PEX 1 – 8.. 5. He stated that he and the co-plaintiff own the suit lands. The defendant trespassed in March 2020. They reported the trespass to the police, but the police ignored it and took no action. Despite his advocates writing demand letters to the defendant to vacate the suit lands, he has simply ignored them. 6. He stated that he

obtained the lease certificates as well as receipts confirming clearances from the Embakasi Ranching Company Limited [company]. That they obtained the clearances after surrendering non-member certificates to the company. Upon making payments, they collected the titles from the company's offices. That he obtained official searches from the Land Registry confirming that they are the registered owners of the suit lands. 7. Jeremiah Ndurumo testified and reiterated the evidence adduced by PW1. They purchased one of the suit lands from one Mbulu Makau. With respect to the 2nd parcel they acquired it directly from the Company. However, they did not enter into any sale agreement, as the transfer of the certificate of shares from his name to theirs was completed at the Company's offices. 8. DW1 – Mathew Moses Ongweni testified and relied on his witness statement dated 19/5/22 in evidence in chief. He produced documents marked as DEX NO 1-4 in support of his defence. 9. He stated that he is the legal owner of the suit land and produced copies of the leases and current searches in support of his defense. 10. It was his testimony that he acquired the suit land in 2016 from the company and thereafter constructed his residence. He paid all the requisite charges for the suit land. He is unaware that the plaintiffs reported him to the police station, and in any event, he has never been charged with any offence in respect of the suit lands. He has been in possession of the suit lands to date. 11. He stated that he has not produced the pink slip from the company which is addressed to the Land Registrar for the registration of the suit lands. The Written Submissions 12. The parties filed their written submissions, which I have read and considered.

Analysis And Determination

13. The key issue is who, between the Plaintiffs and the Defendant, owns the suit lands. In other words, have the Plaintiffs proved ownership of the suit lands, and, secondly, are they entitled to the orders of eviction and mesne profits? Who will meet the cost of the suit in any event? 14. It is not in dispute that the suit lands originate from Embakasi Ranching Company Limited. The Plaintiffs assert title to the suit lands. They aver that they purchased Plot Nos G184B [now Nairobi Block 136/16990] and V667 [now Nairobi/Block 136/16991] from Mbuli Makau and Embakasi Ranching Co Limited, respectively. Upon payment of the requisite fees, they were issued with titles to the same. 15. The Defendant has also asserted title to the suit lands. He claims to have purchased the suit lands from Embakasi Ranching Limited, made the requisite payments, and to have been issued titles. In addition, he took possession in 2016 and constructed his residence, which he continues to occupy to date. 16. It is trite that the burden of proof in a suit or proceeding lies with the person who would fail if no evidence at all were given on either side. The burden of proof as to any particular fact lies with the person who wishes the court to believe in its existence, unless any law provides that the proof of that fact shall lie with any particular person. 17. According to the provisions of Section 116 of the Evidence Act, the burden of proving that the suit land belongs to the Plaintiffs has been placed on the shoulders of the claimants. The adage that he who avers must prove applies. Section 116 states as follows; “ When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner. 18. The burden

therefore rests with the Plaintiffs to demonstrate that the suit lands do not belong to the Defendant. 19. In this case, it is undisputed that the parties claim the same parcels of land. Both the Plaintiffs and the Defendant assert ownership of the suit lands. The Plaintiffs' documentation of title is evidenced by the titles issued to them, whereas the Defendant holds leases registered in his name for the suit lands. 20. Where two parties claim the same parcel of land, as in this case, the court must look to the root of title to determine which of the two contestants has accounted for the validity of title without any break in the chain of documentation. This was the holding in the case of *Mbuthi v Osman & another* (ELC E004 of 2022) [2024] KEELC 387 (KLR) the court observed inter alia that:- "Proof of ownership of land is found in documentary evidence which lead to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law." 21. Double titling in Kenya is illegal as each parcel must be identified by one title. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 Others* [2015] eKLR, the Court of Appeal held: "Where there are two competing titles, the court must investigate the root of each title and determine which one was lawfully acquired." 22. Over time, judicial authorities in assessing cases concerning the ownership of titles originating from land buying companies have recognised generally consistent procedures employed by these entities in membership enrollment and land acquisition. This approach to land acquisition was common at independence in this nation, when large-scale farm proprietors emigrated to their countries of origin, and land was subsequently procured through land-buying companies for the purpose of settling Kenyans who collectively pooled their resources to acquire it. 23. These procedures encompassed the following: membership application; payment of shares to establish membership; issuance of a membership certificate or share certificate; conduct of a balloting exercise for the land; payment of survey fees and other associated charges; issuance of a ballot card indicating the land and its boundaries; maintenance of a membership register, which includes details such as the member's name, ballot number, plot number, address, identification card, and other pertinent information; and the issuance of a clearance certificate by the company confirming land ownership details to the Land Registrar, thereby facilitating the issuance of a title. 24. Bearing that in mind, the court will now examine the documentary evidence adduced by the parties to determine which of the two parties has demonstrated the root and legality of their title. In relation to the Plaintiffs, evidence was led to show that they acquired the suit lands from Embakasi Ranching Co Limited and Mbuli Makau, respectively. 25. The Plaintiffs adduced a plot ownership certificate No. 035478 for plot No. V6667, verified by the Company on 12/9/2019. On the back of the certificate is an endorsement from the Company stating "NOT ALLOTTED" as at 12/7/2011. The import of this is that this parcel of land was available for allocation to the Plaintiffs by the Company. Other endorsements confirm that the site was confirmed for title issuance and that it was signed or verified on 12/11/2019 by the Company's Vice Chair. The Plaintiffs' evidence was that they purchased this property from the Company, and the documents above confirm the root of the title. 26. The Plaintiffs further led evidence that Plot No. G184B, now Nairobi Block 136/16990, was purchased from

Mbuli Makau. They adduced a share certificate number 005065 in the name of the said Mbuli Makau, dated 10/4/2013; a plot ownership certificate No. 005065 in the name of Makau, dated 7/5/2001, showing payment of survey and engineering fees; and, on the back of the said certificate, an endorsement by the company that the plot is Allocated, dated 1994. It is also endorsed with the following words; “ Transfer plot N0 G184B Map 3 Kamau to Kennedy Mutuku Mwanzia, ID No 2579185, and Jeremiah Ndurumo Nderitu, ID No 7564630”

27. Subsequently, the Plaintiffs were issued with a non-member certificate of plot ownership No. 027757, which was verified by the company's officials on 13/2/2011. The Plaintiffs were then cleared to pay site visit fees. Further receipts were issued in 2019 for parcel 16691 as well for site visits. The Plaintiffs have produced pink copies dated 12/11/2019, both indicating the company's endorsement of the verifications dated 29/10/2019. Equally, they adduced copies of payment of legal fees to the law firm of Ngata Kamau for title processing.

28. The plaintiffs adduced evidence of leases and titles issued on 29/3/2019. Manual searches dated 14/4/2026 confirm the Plaintiffs' ownership particulars. In the absence of any adverse evidence impeaching the Plaintiffs' titles, the court finds no ground to hold otherwise.

29. I shall now turn to the documents produced by the Defendant. As already stated, without adducing any evidence to support it, the Defendant's case is that he purchased the suit lands from Embakasi Ranching Limited in 2016 and constructed a house in which he resides to date.

30. The Defendant adduced a receipt from Embakasi Ranching dated 15 October 2020, showing a payment of Kshs 20,000 for plot No V13672 issued in his name. This plot is different from plot Nos G184B and V1667, which later became the suit lands. During cross-examination, the witness acknowledged that the plot numbers on the receipts do not match the plots or lands involved in the suit. He further declared that he possesses no documents confirming the company's land allocation, has not paid for the land, and does not hold a plot certificate of ownership.

31. The witness further adduced leases dated 10/7/2019, which lack official titles. A close scrutiny shows that both leases bear the same bar code No. 1582232. It is customary that, for security reasons, lease bar codes differ for each lease document. This evidence further calls into question the authenticity of the leases. A search conducted on 3/3/26 reveals that the defendant has not yet been issued with a title deed despite holding a lease since 2019.

32. Section 2 of the Land Registration Act defines a lease or sublease, whether registered or unregistered, of land, as well as short-term leases or agreements to lease. A more comprehensive description is provided under the Land Act . Specifically, a lease is defined as the grant, with or without consideration, by the proprietor of land of the right to exclusive possession of that land. This definition includes the rights conferred, the instrument granting these rights, and sub-leases; however, it excludes agreements for lease.

33. A lease is not the end of the title process. The lease clears the way for title preparation and issuance. The lease is therefore the foundational document for the issuance of title. It contains the covenants or conditions under which the title is held. In the case of *Republic v. County Land Registrar Trans Nzoia County and another (Environment and Land Judicial Review case No. 1 of 2023)*, where the court observed inter alia that:- “ ...a lease document was not proof of ownership of a parcel of land but a Certificate of Lease [title] issued against the lease”

34. In the case of the Defendant, it is clear that he holds no title to the land. This

may be because a title had already been issued to the Plaintiffs for the same suit lands, thereby precluding any further issuance of titles to the Defendant. I say so because the lease issued to the Plaintiffs is dated 29/3/2019, whereas that of the Defendant is dated 10/7/2019. The court finds that the first in time prevails in the circumstances. 35. Having failed to prove any evidence of acquisition of the suit lands, particularly the discrepancy between the plot he purported to purchase and the suit lands in the leases he purports to hold, the court finds that the defendant has failed to show the root of title and consequently finds that the Defendant holds no title interest in the suit lands. 36. This court is mandated under section 80 of the Land Registration Act to cancel the lease held by the Defendant on grounds of illegality, in respect of which the Defendant is certainly actively involved. For whatever it is worth, the same is hereby cancelled. 37. In the end, and on a balance of probabilities and the evidence adduced before the court, the court finds that the suit lands belong to the Plaintiffs. Eviction 38. The Plaintiffs assert that they are the registered proprietors of the subject land, and that the defendant illegally encroached upon the property without their authorization. Despite repeated demands for the defendant to vacate the premises, they have continued to trespass. The Plaintiffs further informed the court that they have reported the matter to Ruai Police Station; however, their efforts have been unsuccessful, as the defendant remains on the land. Conversely, the defendant denies the act of trespass. 39. Section 3 (1) of the Trespass Act , Cap 294 stipulates provides that: “ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.” 40. Section 24 and 25 of the Land Registrations Act provides as follows;

24. Interest conferred by registration Subject to this Act—(a)the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and(b)the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.
25. Rights of a proprietor (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.” 41. It therefore follows that a land owner is entitled to protection as to quiet enjoyment of title unless any interference is permitted by law. 42. The defendant has

adduced evidence to show a house constructed on the suit land in support of the Plaintiffs claim of trespass. He stated that he entered the land in 2016 and still resides therein to date. The court finds that in the absence of any consent and or any justifiable reason to remain on the land, the defendant is a trespasser. 43. The Court of Appeal decision in the case of Kenya Power & Lightig Company Limited vs Fleetwood Enterprises Limited [2007] eKLR affirmed inter alia that where trespass is proven the affected party need not prove that it suffered damages or loss as a result of the trespass so as to be awarded damages because once the trespass is proved, the court is bound to assess and award damages on a case to case basis. 44. Additionally, I adopt the decision in the case of Duncan Nderitu Ndegwa vs KP& LC Limited & Another (2013) eKLR for the holding, inter alia, that once a trespass to land is established, it is actionable per se and indeed no proof of damage is necessary for the court to award damages. 45. In the circumstances of this case, the court finds that the Plaintiff is entitled to general damages for trespass. Considering the number of years of trespass since 2019, the court finds the sum of Kshs 500,000/= [Kenya Shillings Five Hundred Thousand only] adequate damages for the trespass. Mesne Profits 46. Section 2 of the Civil Procedure Act defines mesne profits as “ "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” 47. The Plaintiffs have sought an order of mesne profits for trespass. Section 2 of the Civil Procedure Act Cap 21 of the Laws of Kenya 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; 47. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded. The court 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” 48. Order 21 Rule 13 of the Civil Procedure Rules Provides as follows; “ 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 subrule (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. 49. With respect to mesne profits, it is trite that mesne profits are treated in the same way as special damages and must be pleaded and proved. The appellant failed to lead evidence in support of this claim, and the court finds

that, being unsupported, it fails. 50. In the end the court enters judgment in favour of the Plaintiffs as follows; a. A declaration that the suit lands belong to the Plaintiffs. b. The leases in the name of the Defendant are illegal, and the Land Registrar be and is hereby mandated to cancel them from the land register [if any]. c. It is hereby declared that the Defendant has trespassed onto the lands of the Plaintiffs without their consent. He is ordered to vacate the suit land within the next 90 days; in default, eviction shall ensue. d. General damages in favour of the Plaintiffs of Kshs 500,000/= [Kenya Shillings Five Hundred Thousand only] be and are hereby allowed e. That the OCS Ruai Police Station do oversee the execution of orders of this court. f. The prayer for mesne profits is disallowed g. Costs of suit shall be in favour of the Plaintiffs. 51. Orders accordingly DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7 TH DAY OF SEPTEMBER 2026 VIA MICROSOFT TEAMS. J. G. KEMEI JUDGE
Delivered virtually in the presence of: Ms. Wanjiru for the Plaintiffs Ms. Kageha for the Defendant CA- Mr Amos

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