



**Maina v Omariba & 2 others (Environment and Land Appeal E009 of 2024)
[2025] KEELC 1358 (KLR) (Environment and Land) (20 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1358 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT AND LAND APPEAL E009 OF 2024
EK WABWOTO, J
MARCH 20, 2025**

BETWEEN

DAVID MBUTHIA MAINA APPELLANT

AND

JOASH OMARIBA 1ST RESPONDENT

AMOS MOSE 2ND RESPONDENT

MWINDANI HAMISI NDEGWA 3RD RESPONDENT

*(Being an appeal from the judgment of Hon. C.K. Kithinji (PM)
in Voi CMCELC No. 22 of 2020 delivered on 5th June 2024)*

JUDGMENT

1. This is an appeal against the judgment of Hon. C. K. Kithinji – PM delivered on 5th June 2024. The Appellant being aggrieved by the said judgment filed a Memorandum of Appeal dated 2nd July 2024 which was premised on the following grounds:-
 - i. That the learned Magistrate erred in law and in fact in considering issues which ought to have not been considered.
 - ii. That the learned Magistrate erred in law and in fact in holding that the Appellant was not entitled to the reliefs sought in the plaint.
 - iii. That the learned Magistrate erred in law and in fact in failing to consider Appellant’s submissions and evidence on record.
 - iv. That the learned Magistrate erred in law and fact by failing to appreciate that the Plaintiff stood to lose part of the plot he had purchased legally as reflected in his documents of purchase.



- v. In view of the circumstances set out herein above, the learned Magistrate findings are insupportable in law or on the basis of the evidence adduced.
2. The Appellant thus sought for the following reliefs:-
- a. The appeal be allowed.
 - b. The Judgment in favour of the Respondent be reversed.
 - c. The Appellant be awarded costs of this appeal.
3. The Appeal was contested by the Respondents and pursuant to the directions issued by this court, it was directed that the same be canvassed by way of written submissions. The 1st and 2nd Respondents filed written submissions dated 31st January 2025 while the 3rd Respondent filed written submissions dated 5th February 2025. No written submissions were filed by the Appellant herein despite being granted time to do so.
4. In determining the issues raised in the Appeal, this court is cognizant of its duty on a first appeal. In [China Zhongxing Construction Company Ltd v Ann Akuru Sophia](#) [2020] eKLR it was stated as follows:
- “The appropriate standard of review established in these cases can be stated in three complementary principles:
- a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
 - b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
 - c. It is not open to the first appellate Court to review the findings of a trial Court simply because it would have reached different results if it were hearing the matter for the first time.”
5. The Court in the [China Zhongxing Construction Company Ltd](#) case (*supra*) cited the Court of Appeal for East Africa in *Peters v Sunday Post Limited* [1958] EA 424 where Sir Kenneth O'Connor stated as follows:
- “It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate court might itself have come to a different conclusion. I take as a guide to the exercise of this jurisdiction the following extracts from the opinion of their Lordships in the House of Lords in *Watt v Thomas* (1), [1947] AC 484.”
6. From the foregoing, the mandate of this court in the present instance is to evaluate the factual details of the case as presented in the trial court, analyze them and arrive at an independent conclusion, bearing in mind that the trial court had the advantage of seeing and hearing the parties.



7. Having considered the entire record of appeal together with the submissions filed by the parties, this court is of the view that the main issue for determination herein is whether this appeal is merited and warrants the grant of the reliefs sought.
8. The Appellant's case before the trial court was that he is the owner of the suit property measuring 100ft by 200ft within Kishamba B Group Ranch in Taita Taveta County having purchased the same from Hamisi Makange Ndegwa on 6th September 2010 inclusive in 2 acres. The 1st Respondent encroached on the same and was undertaking construction on a portion measuring 50ft by 100ft and that the 2nd Respondent had erected an iron sheet structure on another portion measuring 50ft by 100ft alleging to have bought it from the 3rd Respondent. The Respondents thus trespassed on the suit property upon which he sought for damages for trespass and an order for a permanent injunction.
9. The 1st Respondent denied the averments made by the Appellant and stated that if indeed the Appellant purchased the said property from Hamisi Makange Ndegwa then that would have been a different property from the suit property. It was also the 1st Respondent's case that he did not encroach but he carried out construction on the portion of the suit property because he is the legal beneficial and bonafide owner of the portion being unsurveyed land within Kishamba B Group Ranch measuring 135 by 100ft situated within Birikani Village within Voi Sub County and was not aware of any developments made by the 2nd Respondent.
10. The 2nd Respondent equally denied the averments made by the Appellant and stated if at all the Appellant purchased any property then the same is not the suit property. He equally stated that he is aware that the 1st Respondent is the legal, beneficial and or bonafide owner of that portion being unsurveyed land within Kishamba B Group Ranch measuring 135 by 100ft situated within Birikani village, Voi Sub County.
11. The 3rd Respondent on the other hand denied the claim and averments made by the Appellant. He averred that the parcel purchased from Hamisi Makange Ndegwa by the Appellant is distinct and separate from the suit property. He also averred that the 1st Respondent owns what he rightfully purchased from the 3rd Respondent.
12. The 1st and 3rd Respondent also filed Counterclaim against the Appellant before the trial court. The 1st Respondent filed a Counterclaim dated 11th December 2020 seeking for the following reliefs:-
 - i. A declaratory order that property rights in all that portion of land being an unsurveyed land within Kishamba b Group Ranch measuring 135 by 100fts situated within Birikani Village in Voi Sub County solely and absolutely rests in the 1st Respondent.
 - ii. Permanent injunction restraining the Appellant from trespassing onto the land.
 - iii. General damages.
 - iv. Costs.
 - v. Interest.
13. The 3rd Defendant on the other hand also raised a Counterclaim against the Appellant seeking for a permanent injunction, general damages for trespass and costs of the Counterclaim.
14. It is trite law that whoever alleges must prove and in the instant case it was upon the Appellant to prove his case and the 1st and 3rd Respondent to prove their Counterclaim since a Counterclaim is equally a separate claim which ought to be proven to the required standard.



15. From the evidence that was tendered herein during trial and which the court has considered and analysed, it is evident that the Appellant relied on the sale agreements dated 6th September 2010 and 15th July 2012. The 1st Respondent maintained that he acquired his portion legally and developed the same. The 3rd Respondent disputed signing any agreement between him and the Appellant. The 3rd Respondent's witness DW4 and DW5 testified that the 3rd Respondent did not sign the alleged agreements and or any agreement with the Appellant except the compromise at the Chief's meeting. The witness corroborated the 3rd Respondent's case on aspect. It also emerged that the Appellant conceded that Hamisi Makange only signed the agreement in regard to the 70 by 70 plot and the subsequent one he did not and hence therefore the documents relied upon by the Appellant were not genuine and could not have any force in law.
16. In view of the foregoing it is the finding of this court that the learned Magistrate properly analyzed the facts and the law and arrived at the correct decision in her judgment which cannot be interfered with by this court.
17. In conclusion, it is the finding of this court that the appeal is unmerited and the same is dismissed. Each party to bear own costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS AT VOI THIS 20TH DAY OF MARCH 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Njama for the Appellant.

Mr. Motuka for the 1st and 2nd Respondents.

Mr. Mutinda for the 3rd Respondent.

Court Assistant: Mary Ngoira

