



**Maina v Mwale (Environment and Land Appeal E005 of 2022)
[2023] KEELC 21012 (KLR) (25 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21012 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E005 OF 2022
DO OHUNGO, J
OCTOBER 25, 2023**

BETWEEN

PATRICK CHIMELI MAINA APPELLANT

AND

JULIUS MWALE RESPONDENT

*(Being an Appeal from the Judgment and Decree of the Senior Principal
Magistrate's Court at Butere (Hon. F. Makoyo, Principal Magistrate)
delivered on 18th November 2021 in Butere MCELC No. 66 of 2018)*

JUDGMENT

1. The background of this appeal is that the appellant filed a plaint dated 31st July 2017 in the High Court at Kakamega. The matter was later transferred to the Subordinate Court and became Butere MCELC No. 66 of 2018. The appellant averred that he was the registered proprietor of the parcel of land known as Marama/Lunza/3159 (the suit property) and that sometime in the year 2017, the respondent trespassed into the suit property and constructed a road thereon. He therefore prayed for judgment against the respondent for closure of the constructed road and opening of a previous road and a permanent injunction restraining the respondent, his servants, and agents from interfering with his peaceful possession of the suit property.
2. The respondent filed a defence in which he denied the appellant's allegations and averred that the portion of land claimed by the appellant was a public throughfare. He therefore urged the court to dismiss the suit.
3. Upon hearing the matter, the Subordinate Court (Hon. F. Makoyo, Principal Magistrate) delivered judgment on 18th November 2021 and dismissed the suit with no order as to costs.
4. Aggrieved, the appellant filed this appeal through Memorandum of Appeal dated 18th March 2022 wherein he prayed that the judgment be set aside and be replaced with an order granting the reliefs



sought in the plaint. Considering that the appeal was filed out of time, the appellant sought and obtained extension of time on 17th January 2023, through Kakamega ELCMISC No. E009/2022.

5. The following grounds of appeal were listed on the face of the Memorandum of Appeal:
 1. The Learned Trial Magistrate erred in fact and in law by failing to fully analyze and evaluate the evidence presented by the Applicant as required by the law by failing to consider the Survey report dated 25/5/2017 and filed by the Plaintiff on the 2nd day of August, 2017.
 2. That the learned trial Magistrate erred and/or misdirected himself in law in failing to take judicial notice of the contents of the Nation Newspaper dated 14th July, 2017.
 3. That the learned trial Magistrate erred and/or misdirected himself in law and fact by relying on mere oral allegations by the defendant as to evidence of the public thoroughfare and Notices of the Municipal Council in the absence of Cogent evidence.
 4. That the learned trial Magistrate erred and/or misdirected himself in law and fact by failing to make a finding that the Appellant had satisfied.
 5. That, the learned trial Magistrate erred and/or misdirected himself in law and fact by failing to hear a pending application on record dated the 31st day of July, 2017, filed by the Plaintiff seeking to call the Land Registrar and District Surveyor and blaming the plaintiff for the failure to call the aforementioned.
 6. The Learned Trial Magistrate erred in fact and in law by failing to appreciate the evidence tendered with regard to trespass onto the suit parcel.
 7. The learned trial Magistrate erred both in fact and in law when he made a finding that the Plaintiff had not proved his case on a balance of probabilities as is required by the Law.
6. The appeal was canvassed through written submissions. The appellant argued that based on his testimony and the exhibits that he produced, he proved his case on a balance of probabilities. He referred the court specifically to the copy of the title deed, certificate of official search, Chief's letter, a surveyor's report, mutation form and map. That on the other hand, the respondent merely adopted his witness statement but did not file any documents. The appellant further argued that he had discharged the burden of proof and that his evidence was uncontroverted. Relying on the cases of *C.K.K Estate (1973) Limited v County Government of Kiambu & another* [2018] eKLR, *Stanley Maira Kaguongo v Isaac Kibiru Kabuthia* [2022] eKLR and *Daniel Kenga Katana & 4 others v Dzitu Toto Bokole & 3 others* [2022] eKLR, he urged the court to allow this appeal with costs.
7. In reply, the respondent argued that the appellant did not produce any survey report and that the letter from Juliko Geospatial Consultants was not authenticated by the District Land Surveyor. Further, that the said letter did not give any name of a surveyor who authored it and whether the author was a licensed surveyor. Relying on the case of *Monica Wangu Wamwere v Attorney General* [2019] eKLR, the respondent went on to argue that the purported newspaper notice was of no probative value since it did not indicate when it was published and did not refer to the respondent but to an entity known as Mwale Medical and Technology City which was not joined in the case. He further contended that the appellant did not demonstrate certainty on the exact measurement of his land that was allegedly annexed or trespassed on and did not show the court where the purported old road was located or where the new one was purportedly dug. In conclusion, the respondent argued that the appellant did not prove his case and urged this court to dismiss this appeal with costs.



8. This being a first appeal, this court’s mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
9. I have carefully considered the pleadings, the grounds of appeal and the parties’ submissions. The issues that arise for determination are whether the appellant established his case and whether the reliefs sought ought to have issued.
10. Based on the material that the appellant produced including a copy of the title deed and certificate of official search dated 2nd July 2017, it is apparent that the appellant is the registered proprietor of the parcel of land known as Marama/Lunza/3159 (the suit property). The dispute before the Subordinate Court was however not on ownership of the suit property but on whether the respondent trespassed into the suit property and constructed a road thereon.
11. In an effort to establish his case, the appellant produced a copy of seventh edition of the Registry Index Map (RIM) for Marama/Lunza registration and mutation form dated 18th September 2009. The RIM does not capture the suit property. Instead, it shows land parcel number Marama/Lunza/1048 prior to its subdivision into Marama/Lunza/3158 and Marama/Lunza/3159. Consequently, it is of no help in verifying the appellant’s contention that there was provision for any road running through the suit property. A perusal of the mutation form shows that it was not signed by the Land Registrar and there is no evidence that it was ever registered. Once again, it cannot be an authority on existence and position of any access road.
12. The appellant also relied on a letter dated 25th May 2017 from Juliko Geospatial Consultants who stated in the letter that they

“ did not create any access road because all the parcels had access roads.”

The letter does not state whether it was authored by any particular licensed surveyor and does not annex any survey map showing the road allegedly created and its location on the ground. Worse still, the appellant did not call the District Surveyor to testify as to the location of any access roads vis a vis the alleged trespass and construction.
13. The burden of proof was upon the appellant and even if the respondent would not have defended the case, it was incumbent upon the appellant to prove his case. In the absence of a survey report supported with a survey map drawn after the alleged trespass and construction of the road, the appellant could not expect the court to just take his word for it on such a technical matter.
14. In view of the foregoing discourse, the learned magistrate’s conclusions in the matter cannot be faulted. The appellant did not establish his case and was not entitled to the reliefs that he sought.
15. I find no merit in this appeal, and I therefore dismiss it with costs to the respondent.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF OCTOBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:



The Appellant present in person

Mr Muhuyu holding brief for Mr Munzala for the Respondents

Court Assistant: E. Juma

