



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kyunguti v Kavoo (Environment and Land Appeal E008 of 2021)  
[2025] KEELC 3616 (KLR) (30 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3616 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT AND LAND APPEAL E008 OF 2021**

**TW MURIGI, J**

**APRIL 30, 2025**

**BETWEEN**

**JOHN MASILA KYUNGUTI ..... APPELLANT**

**AND**

**JOSEPH KILUVA KAVOO ..... RESPONDENT**

**JUDGMENT**

1. By a Memorandum of Appeal dated 9<sup>th</sup> September 2021, the Appellant appealed against the Judgment of Hon C.A Mayamba (PM) delivered on 20<sup>th</sup> August, 2021 in Kilungu MELC Case No. 3 of 2019 and set out seven grounds of appeal.

**Background**

2. The Appellant had sued the Respondent by way of a Plaint dated 9<sup>th</sup> February, 2019 seeking the following orders: -
  - a. A declaration that the Plaintiff is the lawful owner by way of purchase and litigation of 4.094 Hectares of land to be exercised from L.R No. 1757/6 and a consequential order of eviction and demolition against the Defendant whether by himself, wife, sons, daughters, agents and or persons claiming under or on his behalf from the Plaintiff's parcel of land measuring 4.094 Hectares.
  - b. An order of permanent injunction restraining the Defendant whether by himself, his wives, sons, daughters, agents, servants or persons claiming under him or on his behalf from entering upon, committing acts of wanton destruction, grazing, cultivating or in any other manner interfering with the Plaintiff's quiet use and occupation, of his 4.094 hectares comprised in land surveyed in land parcel number L.R. NO. 1757/6.
  - c. Costs of the suit.



- d. Any other or further relief as this Honourable Court may deem fit and proper to grant.
3. The Respondent filed a Statement of defence and Counterclaim dated 13<sup>th</sup> March, 2019. In the counterclaim, the Respondent sought the following orders: -
  - a. A declaration that the Defendant is the lawful owner of the 5-acre parcel of land in dispute.
  - b. That a permanent injunction do issue restraining the Plaintiff by himself, servants, agents, employees or any other persons acting on his behalf from trespassing, evicting, selling, letting and or in any other manner from interfering with the Defendant's quiet possession, occupation, use and peaceful enjoyment of all that 5 acre parcel of land in dispute.
  - c. That the Plaintiff be ordered to pay mesne profits to the Defendant and damages in view of the illegal occupation and destruction of the Defendant's parcel of land.
  - d. Costs of this suit together with interest.
4. The Plaintiff filed a reply to the defence and defence to the counterclaim dated 18<sup>th</sup> March 2019 and urged the court to dismiss the counterclaim with costs and enter judgment as prayed in the Plaintiff.
5. In the proceedings before the lower Court, the Appellant was the Plaintiff while the Respondent was the Defendant.
6. After the trial, the Learned Trial Magistrate delivered his judgment on 20/8/2021 in the following terms:-
  - a. Declaration is hereby granted that the Plaintiff is the owner of 10 acres from Parcel number L.R 1757/6 but the same is subject to the interest of purchasers Teresia Matolo and Paul Nyamai.
  - b. Declaration is hereby made that the Defendant is the lawful owner by purchase of 5 acres of land adjacent to the Plaintiff referred to herein as "disputed land".
  - c. An order of permanent injunction is hereby granted restraining the Plaintiff or his agent from entering into the said 5 acres herein referred to as "disputed land" without any colour of right.
  - d. The Plaintiff shall meet the costs of the entire suit as filed herein together with the counterclaim.
  - e. Having given these drastic orders, and considering that land is an emotive issue, the order (b) and (c) shall be stayed for a period of 90 days to allow the Plaintiff to relocate or file an appeal to this decision.
  - f. In relation to order (e), the stay period shall lapse after the 90 days with the Defendant being at liberty to move into his parcel of land without any further reference to this court or unless a stay order is granted by a competent court.
  - g. The Area OCS within the subject piece of land shall ensure public tranquility is observed during the transition period.
7. Being aggrieved, the Appellant appealed against the decision on the following grounds:-
  1. That the Learned Magistrate erred both in law and fact when he made a declaration that the Defendant is the lawful owner by purchase of 5 acres of land adjacent to the Plaintiff referred to as "disputed land" when there was no evidence to support such a finding.



2. That the Learned Magistrate erred both in law and fact when he issued an order of permanent injunction restraining the Plaintiff and or his agent from entering into the said 5 acres herein referred to as “disputed land” which land does not exist.
3. That the Learned Trial Magistrate erred both in law and fact by holding that the Plaintiff had not proved his case against the Defendant on a balance of probability against the strong evidence prosecuted before him.
4. That the Learned Trial Magistrate erred both in law and fact when he relied on the Defendant’s documents to arrive at his decision terming the same to be that of the Appellant.
5. That the Learned Trial Magistrate erred both in law and fact when he created and termed non-existent land as “disputed land” and proceeded to award the same to the Respondent.
6. That the Learned Trial Magistrate erred both in law and fact when he failed to appreciate any claim that the Respondent may have could only be made against the Appellant’s deceased father’s estate and not the Appellant.
7. That the Learned Trial Magistrate erred both in law and fact when he held that the Respondent had 5 acres termed as disputed land and yet the Respondent did not produce any document to support the same and failed to appreciate the Respondent’s documents were against his testimony
8. The Appellant prays for:-
  - a. This Appeal be allowed and the judgment of Hon. C. A Mayamba be set aside and judgment be entered in favour of the Appellant as prayed in the Plaint.
  - b. Costs of the Appeal.
9. The appeal was canvassed by way of written submissions.

### **The Appellant’s Submissions**

10. The Appellant filed his submissions dated 27<sup>th</sup> May, 2024. On behalf of the Appellant, Counsel submitted that the learned trial magistrate fell into error in holding that the Respondent is the lawful owner by purchase of 5 acres adjacent to the Plaintiff’s land. Counsel submitted that no evidence was adduced to support the finding since the receipts produced by the Respondent did not bear his names.
11. Counsel further submitted that the learned trial magistrate erred in granting the order of injunction since the land does not exist or is not defined. It was submitted that no evidence was adduced to show that the land purchased by the Respondent was part of the Appellant’s land.
12. Counsel contended that the Respondent’s counterclaim ought to have been made against the legal administrator of the estate of the Appellant’s father which the Appellant was not.
13. Concluding his submissions, Counsel urged the court to allow the Appeal as prayed.

### **The Respondent’s Submissions**

14. The Respondent filed his submissions dated 11<sup>th</sup> October, 2024.
15. On behalf of the Respondent, Counsel outlined the following issues for the court’s determination: -
  - a. Whether the learned trial magistrate erred in law and fact by declaring the Respondent as the lawful owner by purchase of the 5 acres of land adjacent to the Appellant’s property;



- b. Whether the learned trial magistrate erred in law and fact by issuing a permanent injunction restraining the Appellant and/or his agents from entering the disputed 5 acres of land therein;
  - c. Whether the learned trial magistrate erred in law and fact by holding that the Appellant did not prove his case against the Respondent on a balance of probabilities;
  - d. Whether the learned trial magistrate erred in law and fact by relying on the Respondent's documents to arrive at his decision;
  - e. Whether the learned trial magistrate created a non-existent land as the "disputed land" herein and awarding it to the Respondent hence erring in both law and fact;
  - f. Whether the learned trial magistrate erred in law and fact by failing to appreciate that any claim that the Respondent may have could only be made against the Appellant's deceased father estate and not the Appellant.
16. On the first issue, Counsel submitted that the Appellant acknowledged in his statement that the Respondent had purchased 5 acres from Kiou Hill Ranching and Farm Limited. It was submitted that the Respondent purchased the land in dispute measuring 5 acres in the year 1989.
  17. Counsel further submitted that the evidence tendered before the trial court illustrated the exact description of the land in dispute. Counsel submitted that the Respondent demonstrated in his evidence and through the sketch map prepared during the subdivision that the Appellant's 10 acres and his 5 acres are adjacent to each other.
  18. With regards to the second issue, Counsel submitted that the Appellant had failed to prove his case to the required standard.
  19. On the third issue, Counsel submitted that the learned magistrate relied on the evidence adduced by the parties to establish that there was a disputed parcel which formed part of the 10 acres being claimed by the Appellant.
  20. On the fourth issue, Counsel submitted that the Respondent had filed his documents in support of his claim. Counsel further submitted that the dispute was heard and determined on merits.
  21. On the fifth issue, Counsel submitted that the Appellant did not raise the issue that the claim ought to have been made against the estate of the Appellant's deceased father. To buttress his submissions, Counsel relied on the following authorities: -
    - i. Antony Francis Wareham t/a AF Wareham & 2 others v Kenya Post Office Savings Bank [2004] eKLR
    - ii. Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR
    - iii. Alice Njoki Mugo v KCB Bank Kenya Limited & another [2020] eKLR

### **Analysis and Determination**

22. The principles which guide a first Appellate Court were discussed in the case of *Selle & Another vs Associated Motor Boat Company and Others* (1968) 1 EA 123 where the Court of Appeal stated as follows:-

“An appeal to this court from a trial court by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are



that this court must reconsider the evidence, evaluate itself and derive its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge finding of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanour of a witness is inconsistent with the evidence in the case generally.

23. Similarly, in *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 the Court of Appeal held that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

24. At the trial the Plaintiff testified as PW1 and called one witness in support of his case. It was his testimony that sometime in the year 1989, he got word that there was some land that was being sold in Kalimbini area. That he registered himself as a member of Kiou Hill Ranching and Farm Limited and purchased 10 shares for Kshs 10,000/=. He further testified that he was allocated 10 acres while the Defendant who was also a member was allocated 5 acres. He went on to state that the Defendant in cahoots with the chief invaded his land while claiming ownership of the same. He denied the Defendant’s allegations that his land was adjacent to his land. He asserted that the Defendant should claim his land from his father.
25. PW2 a brother to the Plaintiff testified that he purchased 10 acres together with Jonathan Kitetu in the year 1989. That he gave his brother his 5 acres which are adjacent to his 10 acres because he had given him money to start off a business.
26. The Defendant testified as DW1 and called four witness in support of his case.
27. DW1 testified that he purchased land through the Plaintiff’s father. It was his testimony that the Plaintiff’s father facilitated the purchase of 20 acres out of which 10 acres belonged to the Plaintiff, 5 acres for himself and 5 acres for Jonathan Kitetu Ndolo. He further testified that the Plaintiffs father died before handing over the receipts to him. That the Plaintiff took advantage and annexed his land to his own land. He went on to state that in the year 2002, the Plaintiff and his brothers offered to compensate him with 5 acres in Ngaamba but he rejected the offer.
28. He further testified that in the year 1991, the Plaintiff was compelled by the elders including his father to compensate him with Kshs 5200/= after he destroyed his structures located within the disputed land.
29. He further testified that in the year 1992, the elders, neighbours, the Chief and the Assistant Chief met at the disputed land and demarcated his land from the Plaintiff’s land by fixing the boundary. That later on the Plaintiff sold 1 acre to Teresiah Matolo and 3 acres to Paul Nyamai.
30. DW2 testified that he was present when the disputed land was identified to the Defendant. It was his testimony that he heard the old man saying that the block of 20 acres belonged to the Plaintiff, the Defendant and Jonathan Kitetu Ndolo. He further testified that in the meeting held in the year 2002, the Plaintiff agreed to compensate the Defendant with another parcel of land.



31. DW3 the area chief, confirmed that he wrote the letter dated 17/3/2002 and admitted to having attended the meeting held in the year 2002.
32. DW4 testified that the Defendant is the owner of the disputed land. It was his testimony that the Plaintiff's father purchased 20 acres on behalf of the Plaintiff who was entitled to 10 acres, the Defendant and Jonathan Kitetu who were entitled to 5 acres each. It was his testimony that he got his share of 5 acres while the Plaintiff took the share belonging to the Defendant.
33. DW5 testified that the Plaintiff's father, Wallace Masila purchased 20 acres from his uncle on behalf of the Plaintiff whose share was 10 acres, Jonathan Kitetu 5 acres and the Defendant 5 acres. He further testified that he was tasked with the duty of coordinating the subdivision of the land amongst the three purchasers. He asserted that out of 20 acres, 10 acres belonging to the Plaintiff were sub divided up to the reserve while the other two were to get the remaining portion. He confirmed that he subdivided the land amongst the three purchasers.
34. The seven grounds of appeal can be condensed to the following issues for determination: -
- i. Whether the learned trial magistrate erred in law and fact in describing the suit property as disputed land and subsequently awarding it to the Respondent;
  - ii. Whether the learned trial magistrate analyzed and evaluated the evidence on record in arriving at his decision.
35. On the first issue, the Appellant lamented that the learned trial magistrate erred in law and fact by creating and terming non-existent land as disputed land and awarding the same to the Respondent. At paragraph 6 of the Defence and Counterclaim, the Respondent pleaded as follows: -
- “In response to the contents of paragraph 8 of the Plaintiff, the Defendant avers that as a member of Kiou Hills Ranching and Farm Limited, he owns two parcels of land measuring 5 acres each, namely, the disputed parcel adjacent to the Plaintiff's parcel of land and another undisputed parcel also measuring 5 acres situated about half a kilometre away where he has constructed his home.”
36. At paragraphs 5 and 6 of his Reply to Defence and Counterclaim, the Appellant pleaded as follows: -
- “
5. The contents of paragraphs 6 of the defence is denied and particularly deny the defendant had 2 parcels of land each measuring five acres and in answer thereof reiterate the contents of paragraph 8 of the plaintiff and puts the defendant into strict proof at the hearing hereof.
  6. In answer to paragraph 7 of the defence, the plaintiff avers that the defendant other than land he has built his home measuring 5 acres, he had no other land within Kiou Ranch and aver that it is the defendant who has encroached into the plaintiff's parcel of land by force wanting to cut himself land from the plaintiff's land.”
- Order 2 Rule 1 (2) of the Civil Procedure Rules provides as follows;
- “(2) In such proceedings if the defendant considers that the pleading does not contain sufficient information as aforesaid, the defendant may, at any time before the time limited by the summons for



appearance has expired, by notice in writing to the plaintiff, request further information as specified in the notice.’

37. The above provision grants the Defendant an opportunity to request for further information if he/she considers that the pleadings do not contain sufficient particulars on the subject cause of action.
38. In the matter at hand, no evidence was adduced to show that the Appellant requested for further information regarding the land in dispute. It is crystal clear that the Appellant understood the substance of the Respondent’s pleadings and explicitly responded to the issues raised therein. In my view, raising the objection to the description of the suit property at this stage is an afterthought.
39. From the foregoing, I find that the learned trial magistrate did not error in law or fact in describing the suit property as the “disputed land.”
40. With regards to the second issue, the Appellant faulted the learned trial magistrate for declaring the Respondent as the lawful owner by purchase of 5 acres adjacent to his land. The Respondent testified that he purchased the disputed 5 acres in the year 1989 through the Appellant’s father (Wallace Kyunguti) who died before he could handover the receipts to him. It was his testimony that the Appellant took advantage and merged his 5 acres to his land. His evidence was corroborated by DW2, DW3, DW4 and DW5.
41. DW5 who was assigned the role of coordinating the subdivision produced a sketch map showing how the block of 20-acres was subdivided amongst the 3 purchasers.
42. Although PW2 testified that he purchased 5 acres together with Jonathan Kitetu and gifted the same to the Plaintiff, he did not adduce any evidence in support of his claim. The evidence on record clearly shows that Wallace Kyunguti purchased 20 acres on behalf of the Plaintiff whose share was 10 acres, the Defendant and Jonathan Kitetu whose shares were 5 acres each.
43. It is also clear that the land was divided as per the sub-division scheme which ensured that the land was running parallel adjacent to each other such that the Appellant’s 10 acres were to the left running lengthwise from the upper side to the lower side. The remaining 10 acres on the right side were to be divided equally between the Respondent and DW4 with the Respondent occupying the lower side.
44. From the foregoing I find that the Respondent demonstrated to the satisfaction of the court that he purchased the disputed 5 acres which are adjacent to the Appellant’s 10 acres.
45. No evidence was adduced to show that the trial magistrate considered extraneous matters in arriving at his decision. From the foregoing, I find that the learned trial magistrate properly analyzed and evaluated the evidence presented before him in arriving at his decision.
46. The upshot of the foregoing is that I find the Appeal is devoid of merit and the same is hereby dismissed. Each party to bear its own costs.

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**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30<sup>TH</sup> DAY OF APRIL, 2025.**

In the presence of

Ms Kathike for the Respondent



Ms Muthoki holding brief for Kamolo for the Appellant

Susan – Court assistant

