



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi v Mwangi (Environment and Land Appeal E061 of 2022)  
[2025] KEELC 3400 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3400 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E061 OF 2022**

**JA MOGENI, J**

**APRIL 29, 2025**

**BETWEEN**

**LUCY WANGARI MWANGI ..... APPELLANT**

**AND**

**HENRY J. MUGO MWANGI ..... RESPONDENT**

*(Being an Appeal from the Judgment of Hon. J.A Agonda PM delivered on 21st June, 2022)*

**JUDGMENT**

1. This Judgment is in respect of this appeal which is a first appeal arising from the Judgment of Hon J.A Agonda PM dated 21<sup>st</sup> day of June, 2022, dismissing the Appellant's claim for the proprietorship of Ruiru Kiu Block 12/397.
2. The grounds in the Memorandum of Appeal are that:
  - i. That the learned Magistrate misunderstood the sit before her hence made orders that were not sought for.
  - ii. That the learned Magistrate erred in law and fact when she failed to appreciate that the dispute before her was not a contest for ownership of any property but that the Respondent had inadvertently constructed and/or developed on the Appellant's property imagining it to be his.
  - iii. That the learned Magistrate having misdirected herself resulting to erroneously find that certain documents were not provided by the Appellant to prove ownership while all along that was not the dispute hence the same were not filed in the trial Court.
  - iv. That the learned Magistrate erred in law and fact in declaring that the Respondent herein is the bona fide and legitimate owner of plot Ruiru Kiu Block 12/397 and all the title deeds emanating thereof.



- v. And other grounds to be adduced at the hearing therefrom.
3. Consequently, the Appellant sought the following orders against the Respondent: -
  - a. The Judgment of Hon J. A. Agonda delivered on 21<sup>st</sup> day of June 2022 be wholly overturned.
  - b. Costs of the appeal be provided for.
  - c. Any other orders that this Honorable Court may deem fit and just to grant.
4. A brief background to bring this appeal into perspective; is that vide a Plaint dated 26/07/2021, the Plaintiff/Appellant instituted a suit against the Defendant/Respondent, seeking an order of Eviction and for the Plaintiff/Appellant to be granted vacant possession of suit property title number, Ruiru Kiu Block 12/397, permanent injunction, general damages for trespass together with costs of the suit.
5. It was the Appellant's contention that sometimes in the year 2019; the Respondent entered into/ trespassed into the suit property and erected illegal structures thereon without the consent of the Appellant. That as a result of the said acts of trespass, the Appellant's right to own property was violated.
6. The Respondent denied the allegations of trespass and the particulars therein pleaded by the Plaintiff and maintained that he is the lawful occupier of L R No Ruiru Kiu Block 12/398 and has never encroached on the Appellant's land. It was also his testimony that he has built his home and resided therein since 1996 without any interference. Further that the case against the Appellant was heard and dismissed with costs hence the instant Appeal.
7. The Appeal was canvassed by way of written submissions, both parties filed their respective submissions which I have read and taken into consideration in arriving at my decision hereunder.
8. The Appellant condensed the grounds of Appeal into 7 main issues which I have considered in my determination. The Appellant contends that she is the registered owner of the suit property based on the Plaint she filed and relies on Section 26 (1) of the *Land Act* to support her contention. Further that the surveyor's report which she produced supports her claim that the Respondent did not construct on Plot 398 but on her plot 397 and that through the production of the cadastral maps, surveyor's report and her own witness statement she has proved on a balance of probability that the Respondent has fraudulently occupied her suit property.
9. She maintained that the Respondent failed to controvert the said evidence by proving that he was actually in his parcel of land and not that of the Appellant.
10. She further submits that the Respondent has not adduced any evidence before the Court for any reason to make the Court believe that the Defendant is in actual possession of property Land Title No Ruiru Kiu Block 12/398. Thus the Defendant has trespassed on the Plaintiff's suit property because he never called any evidence to prove otherwise. She thus maintained that the claim was for trespass.
11. In conclusion, Counsel submitted that he had discharged the burden of proof during trial by adducing evidence in support of his case and urged the Court to set aside the Judgment dated 21/06/2022 in so far as the same relates to the Respondent and the instant Appeal be allowed with costs.
12. The Respondent's Counsel on the other hand mainly submitted on the Appellant's claim against him; it was his contention that, whereas the Plaintiff stated that she visited the suit property in 2021 after being issued with the Certificate of Lease in 2020, on his part he has been in occupation of the suit property since 1992. That his brother who gave the suit property to him was a member of the land



buying company Ngara Mucokaniriria since 1981. That the brother was allotted plot 398 and which the Defendant has constructed upon a permanent home and rental houses.

13. It was his submissions that the Learned Magistrate did not err but that understood the issues that arose before the Court and thus rendered her Judgment. At the same time he avers that the pleadings and documents produced as exhibits were about ownership of and although the Appellant keeps bringing up the issue of trespass yet it is her contention that the Respondent has constructed on her suit property. That the Appellant produced land ownership documents.
14. The Respondent clearly stated that he entered upon the suit property Ruiru Kiu Block 12/398 in his statement of defence he denied the allegations of trespass and averred that he is in occupation of his own suit property and not the Appellant's parcel.
15. On whether the Respondent had trespassed onto the Appellant's property, it was Counsel's submission that the Trial Magistrate correctly found that no evidence was tendered before the Court by the Appellant to confirm any encroachment by the Respondent.
16. On the issue of the surveyor's report where he suggested that the parties should exchange parcels of land since according to him the Respondent was occupying the Appellant's plot but had left his parcel vacant. The Court stated that it is not the business of the Court to preside over exchange of parcels of land and that this is an issue that should have been settled out of Court.
17. She further stated that while referring to the report of the surveyor the plots that had issues were 396, 397 and 398. That the surveyor's report stated that plot 397 on the ground appeared as plot 398.
18. Counsel thus maintained that the Trial Magistrate correctly concluded that the Appellant had failed to prove trespass against the Respondent and urged the Court to dismiss the appeal in its entirety and uphold the decision of the trial Court with costs.
19. My duty, this being a first appeal, is to re-evaluate all the evidence that was adduced in the trial Court and make my own conclusions. In the case of *Oluoch Eric Gogo Vs. Universal Corporation Limited (2015) eKLR*, that duty was re-stated as follows: -

“As a first Appellate Court, the duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. As was espoused in the Court of Appeal case of *Selle & Another .v. Associated Motr Boat Co Ltd & Another 1968 E.A 123*, my duty is to evaluate and re – examine the evidence adduced in the trial Court in order to reach a finding, taking into account the fact that this Court had no opportunity of hearing or seeing the parties as they testified and therefore, make an allowance in that respect ....”
20. In the case of *Selle & Another Vs. Associated Motor Boat Company Ltd 1968 E.A 123*, the then Court of Appeal for East Africa held as follows with respect to a first appeal: -

“An appeal to this Court from a trial by the High Court is by way of a re – trial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must re – consider the evidence, evaluate it itself and draw it's 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 to follow the trial Judge's findings 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 based on the demeanour of a witness



is inconsistent with the evidence in the case generally (Abdul Hammed Saif .v. Ali Muhamed Sholan 1955 EACA 270.”

21. In Peters Vs. Sunday Post Limited 1958 E.A 424, Sir Kenneth O’connor stated thus: -

“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.”

22. Section 78(1) of the [Civil Procedure Act](#) provides that the powers of an Appellate Court are:-

- “(a) to determine a case finally;
- (b) to remend a case;
- (c) to frame issues and refer them for trial;
- (d) to take additional evidence or to require the evidence to be taken;
- (e) to order a new trial.”

Sub – Section (2) goes on to state that:-

“(2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.”

This Court shall therefore be guided by the above precedents and legal provisions, among others, in determining this appeal.

23. Having looked at the Record of Appeal, the Memorandum of Appeal herein and the rival submissions in totality; I find that the main issue for determination is whether this Court should interfere with the trial Court’s decision and set aside its Judgment and Decree delivered on 21<sup>st</sup> June, 2022.

24. The dispute between the Appellant and the Respondent herein is centered on the issue of trespass. It is the Appellant’s contention that the Respondent trespassed onto her land parcel No. LR No RUIRU KIU Block 12/397 and erected illegal structures thereon. In her submissions, she maintained that although the Respondent has the physical possession of the suit property the possession is not legal. Further that she produced a surveyor’s report which is uncontroverted by the Respondent in which the surveyor concludes that there should be a resurvey of the plots because from his observation the Respondent constructed on the Appellant’s plot. She averred that the onus was on the Respondent to controvert her averments and prove that the subject land actually belonged to him.

25. She had earlier applied and the Court had granted her permission to adduce additional evidence at the hearing. My perusal of the Court record reveal that the documents produced were similar to those produced during the trial. Except that she now added some receipts attached to the record of appeal at pages 20-30, an application form and the clearance certificate from the alleged company that she stated Aron Gitau Ngugi was a member of and had been allotted a plot.



26. The Respondent on the other hand maintained that he is the lawful occupier of suit parcel number LR No Ruiru Kiu Block 12/398 and denied any claims of encroachment onto the suit land parcel number LR No Ruiru Kiu Block 12/397 and thus urged the Court to uphold the decision of the trial Court and dismiss the Appeal with costs.
27. I will now proceed to re-evaluate and re-assess each of the party's claim from the trial Court record and the Judgment; to determine whether the Trial Magistrate rightly exercised his discretion in arriving at his decision issued on 21/06/2022.
28. The Appellant maintained that her claim against the Respondent was on trespass and not on ownership. That the Respondent has occupied plot Land Title No. Ruiru Kiu Block 12/397 physically on the ground as opposed to plot Land Title No. Ruiru Kiu Block 12/398.
29. I have looked at the Plaintiff's claim and I note at paragraph 3 the Plaintiff claims to be the registered proprietor of the lease of Title No. Ruiru Kiu Block 12/397 having purchased the same from Haron Ngugi Gitau. She further alleges at paragraph 4; that the Defendant without the Plaintiff's consent or authority trespassed into the Plaintiff's land known as land parcel Title No. Ruiru Kiu Block 12/397 and erected illegal structures.
30. My reading of the Sale Agreement dated 18/02/1997 state that at paragraph 4 that the seller who is Haron Gitau Ngugi was to put the buyer who is the Appellant into possession of the plot No. 397 immediately. Further that the purchaser was to pay Kshs. 130,000/- and the seller was to transfer the plot into the name of the purchaser on 19/02/1997.
31. It is therefore not clear how the purchaser only got to visit the suit property in 2019 and discover that the Defendant was on the suit property. This was 22 years after purchase of the suit property. The Appellant did not adduce evidence of what she was doing and/or explain why she was not on the suit property as the agreement had stated.
32. I have also looked at the Judgment of the trial Court and I note that in dismissing the case against the Respondent, the Trial Magistrate held in part as hereunder: -

“The Plaintiff having alleged that she was the registered owner of the suit land, she ought to have called officials from the said land company who have produced their records to confirm whether the Plaintiff was the registered owner after purchasing the land from Haron Gitau Ngugi. Further, Aron Gitau Ngugi was a crucial witness who would have shed light on how he acquired the suit land and subsequently transferred the same to the Plaintiff and whether they engaged a surveyor at the time the suit land was transferred to her.”
33. The Appellant contends that her claim was for trespass and now ownership of land but the two are related since one cannot claim that someone has trespassed on someone else's land. You must have an ownership of your land before you can claim trespass. Further the surveyor's report which was also examined by the Trial Magistrate did not help much.
34. It is trite law that he who alleges must prove, section 107(i) of the *Evidence Act* provides that: -

“Whoever desires any Court to give Judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”



## Determination

35. Following my critical review of the exhibits produced by the parties in the trial Court and I note that the Appellant did not tender any evidence in Court to prove his claims of trespass against the Respondent. All of the Appellant's exhibits were in relation to parcel No Title No. Ruiru Kiu Block 12/397. There was no evidence specifically touching on the Respondent's parcel No Title No. Ruiru Kiu Block 12/398 neither did the Appellant demonstrate the issue of encroachment into the suit land by the Respondent and by what extent
36. The onus was on the Appellant to provide sufficient proof in support of her averments. It is not enough for her to merely lay claim on trespass and shift the burden of proof to the Respondent to prove his ownership. Without any proof, the said averments remain unsubstantiated claims with no evidentiary value.
37. For example the receipts produced bear different names of the company the Appellant alleges to have applied to the company as a member and from whom she purchased a plot allotted to Haron Gitau Ngugi. She never produced the allotment document for the said Haron Gitau Ngugi, who then sold the plot to her that eventually gave her proprietorship.
38. The company appears to have different names as per the receipts produced by the Appellant. There is for example the receipt at page 30 which show the name of the Company as Ngara Muchokaniriria Co.ltd and the receipt was issued in July 1997 with the postal address being Box 73928 Nairobi. The receipts at page 23 show that the company's name is Ngara Mucokaniriria Co. Ltd these receipts were also issued in March and June 1997 and they show the postal address as Box 31871 Nairobi. Yet those at page 21 show that they were issued by Ngara Mucokaniriria Company Ltd whose postal address is Box 43218 Nairobi.
39. It is therefore not clear if the company kept changing its name and postal address or one wonders if the documents are from the alleged company at all. Among the additional documents produced by the Appellant is the application form by the Appellant dated 19/01/2000 which apparently allowed her to become a member of the said company. There is however no indication on the Application Form that show the transfer of the share of one Aaron Gitau Ngugi from whom the Appellant bought the suit property in 1997 to the Appellant.
40. At the same time, the application form indicates that she had already purchased the alleged suit property it is therefore not clear why she applied for membership three years after purchasing the suit property since she alleged to have bought shares from an existing member of the Ngara Mucokaniriria Company Ltd or Ngara Muchokaniriria Co. Ltd as the company is referred to.
41. In view of the foregoing, I am not persuaded to find in favour of the Appellant and I am persuaded to find that the learned Trial Magistrate exercised her discretion properly in dismissing the claim of trespass against the Defendant. The analysis and subsequent decision was purely made upon examination of the facts of the case and the evidence adduced in Court. I find no need to interfere with the said decision.
42. It is my conclusion that the Appeal is not merited and is therefore dismissed with costs to the Respondent. It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 29<sup>TH</sup> DAY OF APRIL, 2025.**

.....



**MOGENI J**

**JUDGE**

Judgement read in virtual Court in the presence of:

Appellant – Absent

Ms. Mwangi for the Respondent

Melita - Court Assistant.

