



**Nyamugara v Ogallo & another (Environment and Land Civil Appeal E018 of 2023) [2025] KEELC 3500 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3500 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND CIVIL APPEAL E018 OF 2023**

**NA MATHEKA, J**

**APRIL 29, 2025**

**BETWEEN**

**JANE MORAA NYAMUGARA ..... APPELLANT**

**AND**

**KENNEDY OGALO ..... 1<sup>ST</sup> RESPONDENT**

**PAUL MUSUNGU ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant, Jane Moraa Nyamugara, not being satisfied with the Judgment of Honourable H. Onkwani, PM, delivered on the 8<sup>th</sup> day of April, 2021, appeals to this court against the said Judgment on the following grounds:
  1. That the learned Magistrate misdirected herself in law concerning the provisions of Order 10 Rule 4 of the Civil Procedure (Amendment) Rules, 2020.
  2. That the learned Magistrate erred in fact when she found that the Defendants had entered appearance and were represented by an Advocate.
  3. That the learned Magistrate erred in law and in fact when she found that the Defendants' supposed Advocates had not been served with hearing notices.
  4. That the learned Magistrate erred in law and fact when she failed to give due regard to the elaborate evidence that showed there is a boundary dispute between the parties.
  5. That the learned Magistrate erred in law and fact when she failed to give any consideration to the submissions filed by the Plaintiff.
  6. That the learned Magistrate erred in law and fact when she made a finding that the Plaintiff had not proved her case on a balance of probabilities.



7. That the learned Magistrate failed to exercise her discretion and inherent powers judiciously when she failed to make orders necessary to meet the ends of justice.
2. The Appellant prays that the Appeal be allowed with costs and the orders of the trial Court be set aside, varied or substituted with the decision of this Honorable Court.
3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in Mbogo and another vs Shah (1968) EA 93 where it was held that;

I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do.”

4. It is the Plaintiff's contention that the Defendants despite being duly served with summons to enter appearance have failed to file a Defence within the requisite period and hence judgment should be entered in default of Defence.

Order 7, rule 1 of the Civil Procedure Rules provide that:

‘Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service.’

5. In the current scenario the Court takes judicial notice of the fact that the Defendants were duly served with summons to enter appearance through their advocates messrs Kinyanjui Njau Advocates on 26<sup>th</sup> May, 2017 but to date they have never filed a Defence and have neither divulged the reasons as to their failure to do so.

6. Further Order 10 rule 9 of the Civil Procedure Rules provides as follows:

Subject to rule 4, in all suits not otherwise specifically provided for by this Order, where any party served does not appear the plaintiff may set down the suit for hearing.’

7. Order 10 rule 10 of the Civil Procedure Rules further provides that

The provisions of rules 4 to 9 inclusive shall apply with any necessary modification where any defendant has failed to file a defence.

8. From the Plaint, the Plaintiff prays for judgement to be entered against the Defendants for:

1. A permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> Defendants whether by themselves, their servants, their agents or their proxies from selling, developing, transferring, charging leasing, alienating accessing, continuing to trespass onto or in any way interfering with the Plaintiff's ownership and quiet possession of the whole or any portion of Mavoko Town Block 11/373 and Mavoko Town Block 11/374.



2. An order of eviction to remove the 1<sup>st</sup> and 2<sup>nd</sup> Defendant from the Plaintiff's properties Mavoko Town Block 11/373 and Mavoko Town Block 11/374, at their own costs and that they forthwith give up vacant possession of the suit properties to the Plaintiff.
  3. Costs of this suit.
  5. Any other or further order that this Honourable Court may deem fit to grant.
9. I note the Defendants were served but failed to file any defence. From the prayers sought in the Plaintiff there was no claim for the liquidated. Insofar as the Defendants failed to file their Defence, I opine that this is a claim for unliquidated damages and since it is a land matter it was essential for the same to be set down for hearing on its merits. The procedure would be to enter interlocutory judgement in default of Defence and direct that the matter be set down for formal proof which was done.
10. The background of the matter is that the Appellant bought parcels of land known as Mavoko Town Block 11/373 and Mavoko Town Block 11/374 in 2000 from 94 Developers Limited and immediately fenced them off. The suit properties had been part of the mother title Parcel No. 350. She was issued with title deeds in 2008. Sometime in 2015 the Defendants trespassed onto her property. The Defendants were served but failed to attend court and the matter proceeded to formal proof.
11. The [Land Registration Act](#) is very clear on issues of ownership of land and Section 24(a) of the [Land Registration Act](#) provides as follows;

Subject to this Act, 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.”

Section 26 (1) of the [Land Registration Act](#) states as follows;

The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
12. The Appellants submitted that the hearing of the boundary dispute was done and the surveyor visited the properties to take measurements in August 2016. The proceedings of the dispute held on 10<sup>th</sup> August 2016 ruled that;
- There is no encroachment of parcel No. 350 as claimed by the complainant therefore it was properly fenced.
- The boundaries of parcel No. 351, 327, 212, 211, 63 & 5824 should be re established and properly marked on the ground.”
13. The survey report dated 25<sup>th</sup> May 2019 stated that the exercise of boundary identification and road reopening at Mavoko Town Block 2/374, 373,63,375,397,372,384 and 371 could not be carried out because some of the proprietors i.e. No. 275,394 and 372 summoned were absent on site.



14. Section 109 of the Evidence Act Cap 80 is clear that;

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

15. The well-known mantra "he who asserts must prove." Was well pointed out by the Court of Appeal in Jennifer Nyambura Kamau vs Humphrey Mbaka Nandi (2013) eKLR as follows;

We have considered the rival submissions on this point and state that Section 107 and 109 of the Evidence Act places the evidential burden upon the appellant to prove that the signature on these forms belong to the respondent. Section 107 of the Evidence Act provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as Section 108 of the Evidence Act provides, the burden lies on that person who would fail if no evidence at all were given on either side."

16. In James Muigai Thungu vs County Government of Trans-Nzoia & 2 others (2022) eKLR it was held that;

"It is now settled law that whosoever asserts the existence of a legal right or liability is vested with the burden to prove it except in so far as the law may expressly exempt him or her. Section 107 of the Evidence Act Chapter 80 Laws of Kenya succinctly states:

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

Also, further, Section 108 of the Act states thus:

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Again Section 109 of Act refers to the burden of proof of a particular fact. It states that:

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

17. In the instant case I have carefully perused the said reports and find that no evidence has been adduced to prove the said trespass. Without a survey report it is impossible to so ascertain.

18. Consequently, I find that the trial magistrate did not err in law and in fact when they failed to determine that the Appellant has proved their case on a balance of probabilities. I also find that the Appellant has failed to prove their case on a balance of probabilities and find that the appeal is not merited and is dismissed with no orders as to costs as it was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29<sup>TH</sup> DAY OF APRIL 2025.**

**N.A. MATHEKA**



**JUDGE**

