Nguta v M'Ndegwa & 3 others (Environment and Land Appeal E003 of 2023) [2025] KEELC 3346 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3346 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E003 OF 2023

JO MBOYA, J

APRIL 23, 2025

BETWEEN

JUDITH NGUTA ..... APPELLANT

AND

GITONGA ABRAHAM M'NDEGWA ..... 1ST RESPONDENT

MOSES KITHINJI MWONGERA ..... 2ND RESPONDENT

PETER MURITHI MI'NDEGWA ..... 3RD RESPONDENT

COUNTY GOVERNMENT OF ISIOLO ..... 4TH RESPONDENT

(Being an Appeal from the Judgment of Hon. E. Tsimonjero (S.R.M.) delivered on the 10th January 2023, in Isiolo CM ELC. No. 1 of 2020.)

JUDGMENT

1. The Appellant herein [who was the Plaintiff in the subordinate court] filed the Plaint dated the 4th January 2020 and wherein same [Appellant] sought various reliefs. The Plaint under reference was subsequently amended culminating into the amended Plaint dated the 20th January 2020 and wherein the Appellant sought for the following reliefs;

    i. The 1st, 2nd, 3rd, 4th and 5th Defendants be restrained permanently from trespassing onto plots numbers 153 and 154 Kulamawe Isiolo Town, Isiolo County.

    ii. The 1st, 2nd, 3rd, 4th and 5th Defendants be evicted from plots numbers 153 and 154 Kulamawe Isiolo Town, Isiolo County.

    iii. The 6th Defendant be restrained from transacting and/or transferring the suit premises namely plots 153 and 154 with the district land registrar to the 1st, 2nd, 3rd, 4th and 5th Defendants, but

in any event, the Plaintiff be issued with the title documents of the suit premises, namely, plots number 153 and 154, respectively.

iv. Costs of the suit.

2. The 1st and 4th Defendants duly entered appearance and filed a statement of defence and counterclaim dated the 2nd June 2020. Furthermore, the 6th Defendant entered appearance and filed a statement of defence dated the 22nd January 2021 and wherein the 6th Defendant denied the claim by and on behalf of the Appellant.

3. The 2nd and 5th Defendants neither entered appearance nor filed any statement of defence.

4. The suit by and on behalf of the Appellant was heard and disposed of vide judgment rendered on the 10th January 2023 and wherein the trial magistrate found and held that the Appellant had neither proved nor established her entitlement to plots numbers 153 and 154 Kulamawe, Isiolo Town within Isiolo County. To this end, the trial magistrate proceeded to and dismissed the Appellant's suit with costs to the 4th Defendant.

5. Additionally, the learned trial magistrate proceeded to and found that the 4th Defendant [now 3rd Respondent] had duly proved his counterclaim. In this regard, the court proceeded to and granted orders in favour of the 4th Defendant [now 3rd Respondent]. For good measure, the trial magistrate decreed that the 4th Defendant is the lawful proprietor of plot number 153 Kulamawe, Isiolo Town [formerly plot number 77B/Pesa].

6. Aggrieved by and dissatisfied with the judgment and decree of learned trial magistrate, the Appellant has filed the instant appeal vide Memorandum of Appeal dated the 9th February 2023. The memorandum of appeal under reference has highlighted the following grounds;

i. That the trial court erred in fact and in law by failing to appreciate that the plaintiff has been in occupation of plot no. 154-Kulamawe since 1970's and the process of land allocation was done while she was in occupation thereof.

ii. That the trial court erred in law and in fact by failing to delve into how the 3rd respondent was purportedly registered as owner of plot no. 153- Kulamawe yet it is evident from documents on record that the transmission was illegal.

iii. That the trial court erred in law and in fact by failing to appreciate that the 1st, 2nd and 3rd Respondents were trespassers who took advantage of here absence from the land.

iv. That the trial court erred in law and in fact by failing to address the process of determination of existing rights to land culminating to registration thereof and subsequently the payment of the relevant levies as per the terms of the allocating authority.

v. That the trial court erred in law and in fact by failing to address the claim of plot number 153-Kulamawe. which the appellant substantially proved to belong to Her.

7. The appeal came up for directions on the 18th March 2024 and on the 20th May 2024, respectively; whereupon the advocates for the parties covenanted to canvass and dispose of the appeal by way of written submissions. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

8. The Appellant filed written submissions dated the 3rd April 2024 whereas the 1st, 2nd and 3rd Respondents filed written submissions dated the 28th December 2024. Both sets of written submissions form part of the record of the court.

9. The Appellant has raised and highlighted three [3] salient issues for consideration and determination by the court. The issues raised by the Appellant are namely; that the learned trial magistrate erred in law in failing to find and hold that the suit plots had been lawfully and duly allocated to the Appellant pursuant to the presidential directive and hence the Appellant was the lawful owner of the suit plots; that the subsequent allocation [if any] of the suit plots to the 1st, 2nd and 3rd Respondents was irregular, illegal and thus unlawful; and that the suit properties having been lawfully allocated were therefore not available for subsequent allocation or re-allocation; and that the learned magistrate failed to apply and deploy the correct principles in determining the dispute before him.

10. Regarding the first issue, namely; that the learned trial magistrate erred in law in failing to find and hold that the suit plots had been lawfully and duly allocated to the Appellant pursuant to the presidential directive and hence the Appellant was the lawful owner of the suit plots, it was contended that the Appellant herein tendered and adduced evidence to demonstrate that same [Appellant] had been duly allocated the suit plots pursuant to a presidential directive. Furthermore, it was contended that following the issuance of the presidential directive, the Appellant was issued with the suit plots and thus the Appellant became the lawful and legitimate owner of the suit plots.

11. As pertains to the second issue, it was contended that to the extent that the suit plots had hitherto been allocated to and in favour of the Appellant, the suit plots ceased to exist for purposes of allocation or re-allocation to the 1st, 2nd and 3rd Respondents or at all. To this end, it was submitted that the suit properties could only be available for allocation or re-allocation [if at all] upon revocation of the previous allotment in favour of the Appellant.

12. To buttress the submissions that the suit plot could only be available for allocation or re-allocation [if at all] upon revocation of the previous allotment in favour of the Appellant, learned counsel for the Appellant has cited and referenced the decision in Republic v City Council of Nairobi & 3 Others [2014]eKLR.

13. Respecting the third issue, learned counsel has submitted that the Appellant having been duly and lawfully allocated the suit plots, her rights to and or interests over the suit property takes precedence over and in respect of any third-party claims including the claims by the 1st, 2nd and 3rd Respondents. In this regard, learned counsel for the Appellant invoked and espoused the principle of equity in terms of priority, namely; that first in time takes priority over the subsequent allotments.

14. In support of the foregoing position, learned counsel for the Appellant has cited and reference the holdings in Muto Ikiara M'rinkanya & Another v Gilbert Kabeere Mtomijiwe [1982-1988] 1KER 196 and Kenya Ihenya Co Ltd & Another v Njeri Kiribi [2019]eKLR, respectively.

15. In respect of the last issue, learned counsel for the Appellant has submitted that the actions and/or activities by the 1st, 2nd and 3rd Respondents were neither permitted nor consented to by the Appellants. In the absence of consent and permission by the Appellant, it was posited that the impugned actions and/or omissions therefore constitutes trespass.

16. Nevertheless, it was submitted that despite the evidence tendered by the Appellant, the learned trail magistrate failed to properly appraise the evidence and to apply the correct legal principles pertaining to and concerning trespass. To this end, it was contended that the learned trial magistrate therefore arrived at and reached an erroneous conclusion contrary to the weight of evidence on record.

17. To vindicate the submissions pertaining to the fact that the learned trail magistrate misconceived and misapprehended the law on trespass, learned counsel for the Appellant has cited and referenced the holding in the case of Eluid Njoroge Gachiri v Stephen Kamau Nganaga [2018]eKLR.

18. Flowing from the foregoing submissions, learned counsel for the Appellant has invited the court to find and hold that the appeal beforehand is meritorious and thus deserving of being allowed. In this regard, the court has been implored to allow the appeal and grant the reliefs that were sought at the foot of the amended Plaint dated the 20th January 2020.

19. The 1st, 2nd and 3rd Respondents filed written submissions dated the 28th December 2024 and wherein same have raised and canvassed three [3] salient issues for consideration and determination by the court. The issues raised by the named Respondents are namely; that the Appellant neither proved nor established her claim to and in respect of the suit plots or at all; the Appellant did not demonstrate that the 1st, 2nd and 3rd Respondents had trespassed onto [sic] the suit plot; and that the contention that plot number 153 Kulamawe Isiolo Town was fraudulently registered in the name of the 4th Defendant [3rd Respondent] was contrary to and outside the purview of the pleadings of the Appellant.

20. Regarding the first issue, namely; that the learned trial magistrate erred in law in failing to find and hold that the suit plots had been lawfully and duly allocated to the Appellant pursuant to the presidential directive and hence the Appellant was the lawful owner of the suit plots, it was submitted that the Appellant herein was tasked with the obligation of proving her claim to and in respect of the suit plots. In this regard, learned counsel for the named Respondents has submitted that the Appellant failed to tender and adduce evidence to demonstrate allotment of the suit plots in her favour.

21. It was the further submissions of learned counsel for the named Respondents that even though the Appellant had contended that same had been allocated the suit plots vide presidential directive, the Appellant did not produce [sic] the presidential directive to underpin the alleged allocation of the suit plots or at all.

22. In the absence of the presidential directive, which underpinned the Appellant's claim to the suit plots, it was contended that the Appellant had failed to discharge her obligation[s] in the manner stipulated vide Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.

23. As pertains to the 2nd issue, learned counsel for the named Respondents has submitted that having failed to tender and/or place before the court sufficient evidence to demonstrate ownership of the suit plots, the Appellant herein cannot be heard to contend that the 1st, 2nd and 3rd Respondents have trespassed onto [sic] the suit plots.

24. In any event, it was contended that the Appellant's contention based on the plea of trespass cannot hold sway in the absence of title to and in respect of the suit plots. For good measure, it was posited that a claim for trespass must be preceded by demonstration that the claimant has the right to immediate and exclusive possession of the designated land under dispute.

25. To buttress the submissions that the Appellant had failed to establish and demonstrate the plea of trespass, learned counsel for the named Respondents has cited and referenced the holding in the case of Municipal Council of Eldoret v Titus Gatitu Njao [2020]eKLR.

26. In respect of the third issue, learned counsel for the named Respondents has submitted that the contention by the Appellant that the transfer and registration of plot number 153 Kulamawe Isiolo Town in the name of the 3rd Respondent was fraudulent, is misconceived. In any event, it was submitted that the Appellant herein had neither impleaded nor raised the plea of fraud in her pleadings before the court.

27. Moreover, it was submitted that having not impleaded fraud, the Appellant herein cannot purport to travel beyond the pleadings that were filed in court. In particular, learned counsel for the named

Respondents has referenced the doctrine of departure which binds parties to their pleadings and not otherwise.

28. In support of the submissions touching on and concerning the doctrine of departure, learned counsel for the named Respondents has cited and relied upon the holding in the case of IEBC v Stephen Mutinda Mule [2013]eKLR, wherein the Honourable Court of Appeal held that parties are bound by their Pleading[s] and there is no room for AOB.

29. Arising from the foregoing, learned counsel for the named Respondents has therefore contended that the appeal beforehand is devoid and bereft of merits and hence same ought to be dismissed. To this end, the court has been invited to dismiss the appeal with costs.

30. The 4th Respondent did not file any written submissions or at all. For good measure, no submissions are traceable on the court tracking system [CTS].

31. Having reviewed the record of appeal; the pleadings filed by the parties; the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the instant appeal turns on two salient issues, namely; whether the Appellant tendered and produced credible evidence to demonstrate ownership of the suit plots or otherwise; and whether the learned trial magistrate misapprehended and misapplied the law as pertains to trespass or otherwise.

32. Before venturing to address the issues, which have been highlighted in the preceding paragraphs, it is imperative to appreciate that this being the first appellate court same is tasked with the mandate of undertaking exhaustive review, re-evaluation, re-appraisal and analysis of the evidence that was tendered before the trial court with a view to discerning whether the factual and legal conclusion arrived at by the trial court are well grounded and or otherwise.

33. Moreover, it is common ground that even though the court is at liberty to arrive at an independent conclusion taking into account the totality of the evidence on record, the court is obligated to give due regard to the fact that same neither heard nor saw the witnesses testify. To this end, the court is called upon to exercise due caution and circumspection before departing from the factual conclusion[s] of the trial court.

34. Pertinently, the position of the law is to the effect that the first appellate court is called upon to defer to the factual findings of the trial court unless there exists compelling reasons and/or basis to warrant departure from such findings and/or conclusion. Nevertheless, there is no gainsaying that the court is at liberty to depart from the factual findings and conclusion[s] of the trial court where it is demonstrated that the findings and conclusions are contrary to the weight of evidence on record; perverse to the evidence on record or better still, where there exists an error of principle on record and which vitiates the findings of the trial court.

35. The scope and extent of the jurisdiction of the first appellate court whilst discharging its mandate has been highlighted in a plethora of decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of 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 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 this respect..."

36. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the Court of Appeal held thus;

We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-

> " Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
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> "It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"
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> Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:
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> "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 and the witnesses".

37. Having taken cognizance of the principles espoused vide the various decisions referenced in the preceding paragraph[s], it is now apposite to revert to the subject matter and address the legal issues that were highlighted and adverted to herein before.

38. Regarding the first issue, it is imperative to observe that the Appellant had approach the magistrate court contending that same [Appellant] was lawfully allocated the suit plots vide presidential directive. In particular, the Appellant contended that on or about the year 1977; the then President of the Republic of Kenya, namely, H.E Jomo Kenyatta [now deceased] issued a presidential directive culminating into the allocation of plot number 1534 unto her. Furthermore, the Appellant contended that subsequently the said plot was subdivided culminating into the creation of plots number 153 and 154 Kulamawe Isiolo Town, respectively.

39. It was the further testimony of the Appellant that upon the allocation of the suit plots unto her, same proceeded to and paid the requisite statutory levies and the survey fees. In addition, the Appellant also averred that same subsequently commenced to and indeed paid rates in respect of the suit plots.

40. To vindicate her claim to and in respect of the suit plot, the Appellant tendered and produced before the trial court five documents, namely; a copy of the receipt dated the 13th November 1977; an invoice dated the 12th November 1997; bills from Isiolo County Government dated the 10th February 2017; application for PDP and finally letter dated the 4th June 2018 from the commission on administration of justice [SAJ].

41. The foregoing documentation constitutes the totality of the documentary evidence that was tendered and adduced before the trial court. For good measure, the trial court has adverted to and highlighted the said exhibits in the body of the judgment. Moreover, the trial court has thereafter ventured forward

and evaluated each and every document in an endeavour to discern whether the documents denote any ownership rights and/or entitlement in favour of the Appellant.

42. Be that as it may, there is no gainsaying that the learned trail magistrate after undertaking an exhaustive scrutiny and appraisal of the documents tendered on behalf of the Appellant came to the conclusion that the Appellant had neither demonstrated nor proved her entitlement to the suit plot. In particular, the learned trail magistrate observed that even though the Appellant had contended that same was allocated the suit plots vide presidential directive, same [Appellant] did not tender [sic] the presidential directive as part of her exhibits before the court.

43. The Appellant has now approached this court contending that the learned trial magistrate did not correctly evaluate the evidence on record and thus same [trial court] arrived at an erroneous conclusion. To this end, this court has been invited to re-evaluate the evidence on record and to return a finding that the Appellant is indeed the lawful owner of the suit plot.

44. The Appellant herein was the one laying a claim to ownership of the suit plots. In this regard, it was therefore incumbent upon the Appellant to tender and place before the court plausible, cogent and credible evidence and demonstrate that same [Appellant] was indeed allocated the suit plots. [See the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya].

45. The fact that the burden of proof lays on the shoulders of the claimant, in this case, the Appellant, has also been elaborated upon in various decision. In the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR), the Court of Apeal stated as hereunder;

> With respect, that was entirely a wrong approach to this case and the entire practice of civil litigation. Whether or not the appellant had not denied the facts by affidavit or defence, when the 1st respondent came to court, he was bound by law and practice to lay the evidence to support existence of the facts he pleaded. That is what we understand Section 108 of the *Evidence Act* to be demanding of a party like the 1st respondent that:
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> "The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

46. The Supreme Court of Kenya in the case of Dr. Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), stated as hereunder;

> 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;
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> " and section 109 of the Act declares 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."
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> 50. This Court in Raila Od*inga & others v Independent Electoral & Boundaries Commission & others, Petition No 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
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> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary.

In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

47. Bearing in mind that the burden of proof laid on the shoulders of the Appellant, it is now apposite to return to the matter and to ascertain whether the Appellant proved her case on a balance of probabilities.

48. To start with, it is the Appellant who contended that the suit plots had been duly and lawfully allocated unto her vide [sic] presidential directive. To this end, it was incumbent upon the Appellant to tender and produce before the court evidence of the existence of such presidential directive.

49. Nevertheless, there is no gainsaying that the Appellant herein failed to tender and or produce a copy of the presidential directive [if any] was ever in existence. The failure by the Appellant to tender and produce the presidential directive negates the Appellant's claim pertaining to the allotment of the suit plot.

50. Secondly, it is not lost on this court that what comprises of the suit plot was hitherto trust land. To the extent that what comprises the suit plots was hitherto trust land, the allocation thereof in the year 1977 could only have been done in compliance with the provisions of Section 53 of the Trust *Land Act*, Chapter 288, Laws of Kenya [now repealed].

51. Furthermore, it is also worth recalling that allocation of what hitherto comprised trust land could only be undertaken by the commissioner of land [now defunct] albeit with the concurrence and on the recommendations of the designated local authority. In this case, the designated local authority that could have issued the recommendation was the county council of Isiolo [now defunct]. See the provisions of Section[s] 114, 116 and 117 of the retired Constitution.

52. Moreover, the procedure attendant to allocation and/or alienation of land which hitherto formed part of the trust land was elaborated upon in the case of Ethics and Anti-Corruption vs Eunice N. Mogalia and another Civil Appeal No. 39 of 2019 [court of appeal at Kisumu] [unreported] where the Court of Appeal stated at paragraph *32* thus;

> "
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> "32. The first respondent was purportedly allocated government land under the government lands act and was to be issued with a certificate of lease in the form of a grant under the registration of titles act. How a government grant that was issued and accepted by the 1st respondent under the government lands act pursuant to which the government was to be the lessor changed to be the lease under the registered *land act* under which the municipal council of Kakamega became the lessee is a mystery.
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> As we have already stated, the government *land act* vested in the president and the commissioner of lands power to alienate government land as long as the procedure laid out in the act was followed. Trust *land act* on the other hand vested in the county council the power to alienate the land in their respective counties and the commissioner of lands had no power to alienate the same save as directed by the county council through a resolution. In the circumstances, we do not see how the letter of allotment dated 31st July 1998 under which the commissioner of lands offered to the 1st respondent a grant of the government land could have given rise to the lease dated 2nd June 2000 of trust land that was vested in the municipal council of Kakamega. So under what regime of the law was the commissioner of lands acting when he alienated the suit property? We ask this question because the two legal

regimes, that is the government lands act and the trust *land act* have different processes as regards to alienation of land". [Underlining Supplied].

53. Additionally, the elaborate process pertaining to allocation of what hitherto comprised trust land was also addressed in the case of Rinya Hospital Ltd v the Town Council of Awendo [2010]eKLR, where the court [per Justice D.K Musinga, Judge, as he then was] stated and held thus;

> However, the evidence of DW3 revealed that the County Council of Migori had not authorized the Commissioner of Lands to allocate the suit land to the plaintiff. Under section 53 of the Trust *Land Act*, the Commissioner of Lands administers Trust land of each county council as an agent for the council. He can only alienate such land with express authorization of the concerned county council. The PDP that was produced in court did not indicate that the County Council of Migori had given its approval. There was no evidence of any favourable comments having been made by the authorities concerned except that of the Director of Physical Planning. It was upon the plaintiff to prove that the County Council of Migori and all other relevant offices gave favourable comments before the Grant was issued.

54. To the extent that the suit plots which are claimed by the Appellant formed part of what was hitherto trust land [now public land] it was incumbent upon the Appellant to place before the court inter-alia the application to be allocated land addressed to the county council of Isiolo [now defunct]; the minutes of Isiolo county council recommending allocation; the letter of approval forwarding the minutes to the commissioner of land [now defunct] and the letter of allotment [if any] that was issued.

55. Suffice it to underscore that the Appellant neither tendered nor produced before the court any such evidence. In the absence of evidence of due allocation of the suit plots, there is no gainsaying that the Appellant did not prove her claim to and in respect of the suit plots.

56. To my mind, the learned trail magistrate came to and arrived at the correct finding that the Appellant had failed to prove her claim as pertains to the allotment of the suit plots. In this regard, the findings and conclusion of the learned trial magistrate are unassailable.

57. As pertains to the 2nd issue, namely; whether the learned trial magistrate failed to correctly apply the law as pertains to trespass, it is worthy to recall and reiterate that a claimant can only venture forward and prove trespass once same [claimant] has discharged the burden of demonstrating ownership of and or entitlement to the designated property. The evidence of ownership of or exclusive entitlement to the suit property, may be either on the basis of freehold or leasehold.

58. Pertinently, proof and demonstration of exclusive ownership of the suit property is a prelude to demonstrating trespass. For good measure, trespass denotes offensive intrusion or invasion unto the land belonging to another. [See Section 3 of the *Trespass Act*, Chapter 294 Laws of Kenya].

59. Trespass has similarly been defined and highlighted in the case of Municipal Council of Eldoret vs. Titus Gatitu Njau [2020]eKLR where the Court of Appeal expressed itself, inter alia, that:

> "Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership"

60. In the case of Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga (Civil Appeal 111 of 2018) [2024] KECA 1048 (KLR) (16 August 2024) (Judgment); the Court of Appeal spoke to and highlighted the meaning and tenor of what constitutes trespass.

61. For coherence, the Court stated thus;

53. Trespass is described under the *Trespass Act* Cap 294 to mean "any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof".

On the other hand, a continuing trespass is defined in Jowitt's Dictionary of English Law 2nd Edition (page or paragraph?) as follows:-

"A continuing trespass is one which is permanent in its nature; as where a person builds on his own land so that part of the building overhangs his neighbor's land".

In Black's Law Dictionary 8th Edition (page or paragraph?), a continuing trespass is defined as:-

"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property."

Finally, in Clerk & Lindsel on Torts 16th Edition, paragraph 23 - 01, it is stated that:-

"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues."

54. From the above definitions of the term "trespass" by the eminent learned authors, it is clear that any unauthorized entry whether present or continuous is trespass. In this case, it is indeed common ground that the appellant entered into and has remained in occupation of the suit property. The appellant's continued occupation of the said property from the 1st date of entry in so far as it is unauthorized by the respondent amounts to trespass and remains as such to date. The respondent's claim for trespass being a continued tort is, therefore, not time-barred. We find no fault with that finding by the trial court".

62. Though the Appellant had impleaded trespass, the moment the Appellant failed to demonstrate ownership of and/or entitlement to the suit plots, the claim pertaining to trespass fell by the wayside.

63. Consequently, I find and hold that the learned trial magistrate arrived at the correct conclusion in holding that the Appellant had equally failed to prove and establish the claim of trespass.

Final Disposition:

64. For the reasons which have been highlighted and captured in the body of the Judgment, I come to the conclusion that the appeal beforehand is devoid of merits. Same is a candidate for dismissal.

65. Consequently, and in the premises, the final orders of the court are as hereunder;

i. The Appeal be and is hereby dismissed.

ii. The Judgment and decree of the subordinate court be and is hereby affirmed.

iii. Costs of the Appeal be and are hereby awarded to the 1st, 2nd and 3rd Respondents only.

iv. The Costs of the proceedings before the subordinate court shall accord with the orders issued by the subordinate court.

66. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO ON THE 23 RD DAY OF APRIL 2025

OGUTTU MBOYA, FCIArb.

JUDGE.

In the presence of:

Mukami/Mutuma – Court Assistant.

Mr. Kaumbi for the Appellant.

Mr.Caleb Mwiti for the 1 st , 2 nd and 3 rd Respondents.

N/A for the 4 th Respondent.