



**Khisa v Lukurito & another (Environment and Land Appeal
E026 of 2023) [2025] KEELC 3222 (KLR) (3 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E026 OF 2023**

EC CHERONO, J

APRIL 3, 2025

BETWEEN

JAMES ALEC KHISA APPELLANT

AND

PETER SIMIYU LUKURITO 1ST RESPONDENT

JOHN WANJALA LUKORITO 2ND RESPONDENT

*(Being an appeal from the judgment and decree delivered on 12/06/2023
by Hon.G.Adhiambo (SPM) in Kimilili MC ELC 10 OF 2014)*

JUDGMENT

Introduction.

1. James Alec Khisa-the appellant herein was the plaintiff while Peter Simiyu Kukorito And John Wanjala Lukorito -the respondents herein were the defendants in the former suit being Kimilili SPM-ELC Case NO.10 of 2014.
2. The suit before the trial court was instituted by the Appellant vide a plaint dated 06/11/2013 where he averred that he is the registered owner of land parcel no. Kimilili/Kimilili/2736 and has lived thereon for the past 36 years. That sometime in the month of August 2013, the Respondents fenced off the land and prevented him from entering claiming ownership. He averred that the Respondents' actions were actuated by malice and set out particulars thereunder. He sought for judgment against the Respondent for;
 - a. Permanent injunction as per paragraph 9
-The plaintiff's claim to this honourable court against the defendants jointly for an order for a permanent injunction restraining the defendants by themselves, servants or agents or otherwise



whosoever acting under them from interfering with the possession and use of land parcel no. Kimilili/Kimilili/2736 and or in any manner.

- b. Costs.
- c. Interest.
3. The Respondents filed a joint statement of defence dated 06/01/2015 denying the appellant's claim. They denied the existence of land parcel no. Kimilili/Kimilili/2736 and averred that they reside on land parcel no. Kimilili/Kimilili/5386 and 5385 which are a sub-division of land parcel no. Kimilili/Kimilili/695 after filing a succession cause for their deceased's father's estate in Succession Cause No. 120 of 2004 (Estate of Lukorito Sanyanda). That they have been living on the said parcels with their siblings even before the demise of their father and therefore denied the Appellant's occupation. They sought to have the suit dismissed with costs.
4. During the hearing, the Appellant called three (3) witnesses while the Respondents did not call any witness since they were absent during the defence hearing date and their case was subsequently closed.
5. PW1 James Alec Khisa testified that he acquired the land measuring 2 ¼ acres through a sale agreement dated 22/04/1977(P-Exhibit 1) from one Kirimocho Mwasame (dcd). That his father acquired a certificate of title (P-Exhibit 2 & 3) and later transferred it to him. He produced copies of certificate of official searches to show the suit land is registered in his name as (P-Exhibit 4a-c). He produced payment receipts for the searches as P-Exhibit 4 and a green card as P-Exhibit 5. It was his evidence that he has been in possession, occupation and use of the suit land since the year 1977 with the Respondents occupying the neighbouring land. He testified that the alleged trespass took place on 16/08/2013 where the Respondents allegedly destroyed his maize plantation ready for harvest. That he reported the same to the area chief and a letter was issued dated 14/10/2013 and 18/03/2013 (MF1 6 & 8).
6. That he also reported to the police and the Agricultural office where they sent an officer who visited the suit land and assessed the damaged maize at Kshs. 374,900/= and prepared a report to that effect marked for identification as P-MF17. He stated that the suit land exists on the ground and made reference to a map from the provincial Survey records (MFI 9). That the suit land was a sub-division of land parcel no. Kimilili/Kimilili/672 which was sub-divided into eight (8) pieces from 2735-2742. He produced a mutation form as P-Exhibit 10. He produced a letter of consent for his transfer as P-Exhibit 11.
7. On cross-examination, he testified that the Respondent's father was a witness during his purchase of the suit land. He testified that there had been a previous dispute between plot.2736 and 695 where it was alleged that plot no. 2736 had encroached into 695.
8. The court stood down the witness and ordered for an independent surveyor's report. The Surveyor prepared a report and testified in court that he visited the concerned parcels of land i.e Kimilili/Kimilili/2736 and 5385 on 15/03/2018 and observed that the boundaries of Kimilili/Kimilili/5386 and 5385 were intact as contained in the area map sheet no.42 and demarcated by existing features. That land parcel no. Kimilili/Kimilili/2736 is a sub-division of Kimilili/Kimilili/672. In conclusion, he testified that Kimilili/Kimilili/2736 has no issue with Kimilili/Kimilili/5385 and 5386.
9. On further cross-examination, the witness stated that the surveyors report did not clarify the acreage of the parcels referred to.
10. On re-examination, he reiterated his evidence as above.
11. PW2 Richard Khisa adopted his witness statement dated 03/05/2018 and testified that he purchased the suit land in the year 1977 and transferred it to the Appellant who is his son.



12. PW3 John Simiyu Mucha testified that he bought the suit land from one Barnaba Vasitecha in the year 1956 and later sold it to Kirimonjo Mwasame who in turn sold it to the Appellant's father. That the Respondents do not have any proprietary rights over the land. On cross-examination, he testified that the Respondents' father occupied the land adjacent to the suit land.
13. Upon considering the testimony of the witnesses and the evidence adduced, the trial court dismissed the plaintiff's case with costs. The impugned judgment is what has given rise to this appeal.

The appeal.

14. In his Memorandum of appeal dated 26th June 2023, the Appellant raised fifteen (15) grounds of appeal as follows:
 - a. That the learned magistrate erred in law and/ or fact when she failed to hold that the appellant is duly bona fide registered owner of land parcel no. Kimilili/Kimilili/2736.
 - b. That the learned magistrate erred in law and/ or fact by positioning the 1st and 2nd respondents on the appellants land Kimilili/Kimili/2736 to persons who are strangers/trespassers.
 - c. The learned magistrate erred in law and in fact when she failed to condemn the 1st and 2nd respondents as unlawful trespassers.
 - d. The learned magistrate erred in law and in fact when she totally overlooked the evidence of the appellant.
 - e. The learned trial magistrate erred in law and in fact when she failed to hold that the evidence of the 1st and 2nd respondents was not outright and the evidence was totally an invention.
 - f. That the learned magistrate erred in law and/ or fact by admitting the strangers 1st and 2nd respondents on to appellants land with an aim of depriving the appellant in his sole property.
 - g. The learned magistrate failed to uphold/reinstate the prayers of the appellant sought by the appellant in civil suit Kimilili Civil case no. 10 of 2014.
 - h. The learned magistrate erred by failing to establish that the 1st and 2nd respondents who are the trespassers failed to convince the court of the reason of such trespass.
 - i. The learned magistrate erred by failing to hold that the 1st and 2nd respondents did not prove their case on a balance of probabilities and hence the evidence by the 1st and 2nd respondent failed to sustain judgment given by the learned magistrate.
 - j. The learned trial magistrate terribly failed in law and in fact when she held that the 1st and 2nd respondent have proved their action of such a trespass.
 - k. The learned trial magistrate erred in law and in fact when she totally overlooked the evidence of the appellant in a biased manner.
 - l. The learned trial magistrate erred in law and in fact when she misdirected herself in entertaining the 1st and 2nd respondents who had no proof of the facts.
 - m. The learned trial magistrate conducted proceedings with an already made up opinion.
 - n. The judgment was against the weight of the evidence adduced by the appellant.
 - o. The judgment was total miscarriage of justice.



15. The appellant asked the court to allow the appeal, set aside the trial courts judgment and costs of the suit.
16. When this appeal came for directions, the parties agreed to have the same canvassed by way of submissions.
17. The Appellant filed his submissions dated 06/02/2025 while the Respondents filed their submissions dated 12/02/2025.

Analysis and determination.

18. I have considered the record, the judgment by the trial Magistrate, the written submissions by learned Counsel as well as the applicable law. Conscious of my duty as the first Appellate Court in this matter, I have to reconsider the evidence, assess it and make my own conclusions on the evidence, subject to the cardinal fact that I did not have the advantage singularly enjoyed by the trial Magistrate, of seeing and hearing the witnesses as they testified. (See *Seascapes Ltd v. Development Finance Company of Kenya Ltd* [2009] KLR, 384). I am also reminded that this Court will not normally interfere with a finding of fact by the trial Court unless it is based on no evidence or on a misapprehension of the evidence or the Magistrate is shown demonstrably to have acted on wrong principle in reaching the findings he did. (See *Ephantus Mwangi & Another v Duncan Mwangi Wambugu* [1982-88] 1 KAR 278).
19. Having considered the pleadings, the evidence on record, the exhibits produced and the submissions filed, it is my view that, although the memorandum of appeal raises fifteen (15) grounds, the issue that commends for determination is whether the learned trial Magistrate erred by dismissing the Appellant's case.
20. The appellant's claim before the trial court is that he is the registered owner of land parcel no Kimilili/Kimilili/2736 and that the Respondents unlawfully encroached thereon. The Respondents on the other hand denied the claim alleging that they were not aware of the Appellant's claimed land and that they were in occupation of their respective parcels of land which are land parcel no. Kimilili/Kimilili/5385 and 5386. The parties and their witnesses re-asserted their various claims in their oral evidence save that it emerged that the appellants land is a sub-division of plot no.672 while the respondents land was sub-divided from land parcel No.Kimilili/Kimilili/695. It also emerges from the evidence by the Appellant's witnesses that the Respondents occupy the neighbouring land.
21. To better understand the case and the situation on the ground, the trial court ordered for an independent surveyor to visit the ground and prepare a report for the court's consideration. A survey was done by one Simiyu W. Amos, County Surveyor, Bungoma County dated 20/03/2018 and filed in court. In his report, the surveyor observed as follows;The boundaries of parcels Kimilili/Kimilili/5386 and Kimilili/Kimilili/5385 were intact and confirmed with the existing registry index map of Kimilili/Kimilili registration section sheet No.42.The physical features and land marks used for re-establishment of the boundaries for Kimilili/Kimilili/5385 and Kimilili/Kimilili/5386 were in place along the said boundary.Parcels Kimilili/Kimilili/2736 was a resultant sub division of parcels Kimilili/Kimilili/672.The original boundary of parcel Kimilili/Kimilili/672 and Kimilili/Kimilili/5386 was properly identified and re-established.In conclusion parcel Kimilili/Kimilili/2736 is not in dispute with parcels Kimilili/Kimilili/5385 and 5386. I therefore request the honourable court to give orders to re-establish all the boundaries of parcels Kimilili/Kimilili/2735-2742 which were subdivisions from parcel Kimilili/Kimilili/672.
22. From the analysis of the testimony by the witnesses and the report by the independent expert witness, it is not in dispute that the parties herein occupy and hold separate portions and title deeds. The point



of departure seems to be on the position/ location of the various parcels. The surveyor in his report has confirmed that all these parcel of land being LR NO. Kimilili/Kimilili/ 2736 as claimed by the Appellant and parcel of land no. Kimilili/Kimilili/5386 and 5385 as claimed by the Respondents exist on the ground. However, there was no evidence of encroachment from either of the plots presented by either the Appellant or the independent surveyor. As a matter of fact, the surveyor noted that there is no dispute with the parties parcels.

23. The Black's Law Dictionary 8th Edition defines trespass as "an entry on another's ground without a lawful authority, and doing some damage however, inconsiderable, to his real property." In Clerk & Lindsell on Torts 18th Edition at Paragraph 18-11 the definition of trespass is given as "any unjustifiable intrusion by one person upon land in possession of another... trespass is actionable at the instance of the person in possession and that proof of ownership is prima facie proof of possession."
24. Under Sections 107 to 109 of the *Evidence Act* Cap 80 Laws of Kenya, the burden of proof is on the person claiming to prove the alleged trespass. I find that it has not been proved that the Respondents trespassed onto the Appellant's land as claimed or at all. The Appellant's evidence was more focused on proving his ownership as opposed to the cause of action which was trespass which majors on the possession and occupation. The Principles on Injunction were established in the celebrated case of *Giella vs Cassman Brown & Co. Ltd* (1973) EA 358.
25. The upshot of my re-evaluation is that the Appellant did not prove his allegations of trespass on a balance of probabilities to warrant the grant of the reliefs sought. Consequently, I find no fault in the findings of the trial magistrate.
26. Ultimately, it is my finding that the appeal is without merit and the same is hereby dismissed with costs.
27. Orders accordingly.

DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 03RD DAY OF APRIL, 2025.

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HON.E.C CHERONO

ELC JUDGE

In the presence of;

Mr. Wattangah for the Appellant.

Respondent/Advocate-absent.

Bett C/A.

