



**Chebi v Mwaoka & 4 others (Environment and Land Appeal 44 of 2021)  
[2022] KEELC 14948 (KLR) (22 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14948 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT AND LAND APPEAL 44 OF 2021  
NA MATHEKA, J  
NOVEMBER 22, 2022**

**BETWEEN**

**JACOB MWAIKA CHEBI ..... APPELLANT**

**AND**

**MZEE SERA MWAOKA ..... 1<sup>ST</sup> RESPONDENT**

**KENYA KALUTU ..... 2<sup>ND</sup> RESPONDENT**

**TOLE MWAZAME ..... 3<sup>RD</sup> RESPONDENT**

**JULIUS MWAZAME ..... 4<sup>TH</sup> RESPONDENT**

**GODWIN KICHAMO ..... 5<sup>TH</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant appeals to the Environment and Land Court at Mombasa from the Judgement of Honourable F. M Nyakundi (SRM) delivered on the July 2, 2021 in Voi Principal Magistrate's Court ELC Case No. 16 of 2019 and sets forth the following grounds of appeal:
  1. That the learned magistrate erred in both law and fact in finding that the Appellant had not proved his case against the weight of evidence on record.
  2. That the learned magistrate erred in both law and fact in finding that the Appellant had trespassed into the respondents' land when there was no evidence on record to support such a finding.
  3. That the learned magistrate erred in both law and fact in making a finding that the Appellant had trespassed into the respondents' land when no such claim had been made to court by the respondents.



4. That the learned magistrate erred in both law and fact in taking into account extraneous matters in arriving at his decision.

**The Appellant seeks orders that;**

1. That the Judgement delivered on July 2, 2021 be set aside and all the consequential orders made thereto vacated.
2. That in the alternative this honourable court be pleased to subject the evidence on record into a fresh scrutiny and come up with its own findings.
3. That costs of this appeal be paid by the respondents to the appellant.
2. This court has considered the appeal and the submissions therein. The trial magistrate found that the Appellant was allocated approximately 3 acres in 2014 by the area chief and the boundaries marked by use of sisal plants. The issue that the Appellant is aggrieved with is the finding that the trial court that he never proved trespass to court by failing to produce a survey report that would indicate the boundaries between himself and the Defendants. The learned magistrate held that the appellant failed in his duty of adducing evidence for example, inviting court to conduct a site visit and ascertain the said trespass. The appellant through PW3, Samuel Mwakio Mwangoo filed a statement on October 1, 2020, which established that the suit property has no actual measuring with sisal planation showing the boundaries between each portion (reference is made to page 14 of the Record of Appeal). Further Tole Mwazame, the 3<sup>rd</sup> Respondent in his statement dated 21<sup>st</sup> October 2020 stated that when the plaintiff was given 3 acres, he was given 12 acres and he planted sisal plants to mark boundaries (reference is made to page 37 of the Record of Appeal).
3. From the evidence on record it is clear that the plaintiff does not know the exact acreage of the suit property, he estimated the land measurements to approximately three acres. The sketch map in the Minutes of the meeting conducted on November 8, 2014 indicating that 3 acres were allocated to the Plaintiff is not drawn to scale and could not be used as a point of reference by court in determining the acreage of the suit property. The said map also did not include details like neighboring parcels of land, details of adjoining paths and roads.
4. From the evidence, the suit property measuring approximately 3 acres situated within Mgeno Reserve, Taita Taveta County has not been adjudicated, demarcated or registered. Though the area is un-demarcated both the Appellant and Respondent claimed to know the boundaries of their portions which is apparently locally demarcated using sisal plants and bushes. There is no expert report produced by the plaintiff to confirm these averments and when a site visit was requested by the Defendants on February 4, 2021 the Plaintiff declined to do so. (reference is made to page 67 of the Record of Appeal). The Appellant did not also establish how they arrived at the acreage of the suit property.
5. Both parties admit that the suit property has been subject to arbitration by the local chief of the area. The Respondents produced annexed minutes of the proceedings of November 8, 2014 that was conducted by the then acting Chief Mr. Mwakireti (reference is made to page 12 of the Record of Appeal). The minutes indicate that the Mgeno Reserve is state land belonging to the government with the County Government of Taita Taveta as the trustee. It is stated;

*“Mgeno reserve ni state land ni eneo ya serikali na muthamini au trustee ni county government”.*



6. I find that the trial court did not err in law or in fact when the learned magistrate held that the Plaintiff did not adduce evidence to court that would warrant the identification of boundaries between him and the Defendants. The rights of the parties herein have not been adjudicated upon, there is no record of the parcel of land and there is even no plot number. The rights of the parties are best settled at the adjudication stage where boundaries will be fixed and title documents issued, whether as leaseholds from the County Government or registration of Mgeno reserve as community land. In view of the above reasons, I find that the appeal fails and I dismiss the same with no order as to costs as the appeal was undefended.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 22TH DAY OF NOVEMBER 2022.**

**N.A. MATHEKA**

**JUDGE**

