



**Kiplagat v Yatich & another (Environment and Land Appeal  
E061 of 2024) [2025] KEELC 1106 (KLR) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1106 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E061 OF 2024**

**A OMBWAYO, J  
MARCH 6, 2025**

**BETWEEN**

**PAUL KIBET KIPLAGAT ..... APPELLANT**

**AND**

**DAVID YATICH ..... 1<sup>ST</sup> RESPONDENT**

**AHMED KIRUI ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the ruling of Honourable A. Mukenga Principal Magistrate, Molo delivered on 24th January, 2024 in Molo ELC No 5 of 2022.
2. The Appellant filed a Memorandum of Appeal on 14th November, 2024 appealing against the said judgment on the following grounds: -
  1. That the learned Magistrate erred in law and fact that the appellant had failed to prove ownership on balance of probabilities over parcel No. Nakuru/Ngongongeri/688.
  2. That the learned Magistrate erred in law and fact that the suit land is a government forest land Trust Land illegally and fraudulently issued by government officials.
  3. That the learned Magistrate and the law and fact in failing to appreciate the government the government (sic) has to date slapped caveat over the main forest East and West.
  4. That the learned Magistrate erred in fact and law by failing to apply law properly regarding Trust land.
3. The Appellant seeks orders setting aside the trial court's judgment dated 24th January, 2024 and an order allowing the appeal.



## Brief Facts

4. The Appellant filed a suit against the Respondent vide a plaint dated 20th January, 2022 seeking orders for a permanent injunction against the Respondent from interfering with his land, an order confirming ownership of the land together with costs of the suit. The Respondent filed his statement of defence dated 2nd February, 2022 where he denied the allegations in the amended plaint. The trial magistrate found that the Plaintiff failed to prove his case on a balance of probabilities and proceeded to dismiss the suit with costs.
5. The Appellant being dissatisfied with the ruling lodged the instant appeal. The appeal be canvassed by way of written submissions.

## Submissions

6. Counsel for the Appellant filed his submissions dated 29th January, 2025 where submits that the Respondents failed to prove on a balance of probabilities that the government gazette trust land which the Appellant need not prove the same. He further submits that the caveat placed on Mau Forest was legitimate which is in place to date.
7. Counsel for the Respondent filed his submissions dated 6th January, 2025 where he submits that the question before the trial court was on occupation of the suit property by the Respondents and not whether there was a caveat on the Mau Forest complex. He went on to submit that during trial, the Respondents produced a copy of the title deed and register confirming ownership. He submits that the trial magistrate did not err in arriving at her determination and urged the court to dismiss the appeal with costs.

## Analysis and Determination

8. This court has considered the record of appeal and the parties' submissions and the sole issue for determination is whether the appeal is merited.
9. Being a first appeal, the court relies on a number of principles as set out in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123:

“...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. In particular this court is not bound necessarily 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 ...”

10. Further, in the case of *Mwangi V Wambugu* [1984] KLR 453 it was held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.
11. It was the Appellant’s case that he purchased the suit property from one George Kibiwott Kibet. He produced a sale agreement dated 17th January, 2022 and a copy of title in the vendor’s name. Upon cross examination, he confirmed that he was not the registered owner of the suit land. DW1, wife to the 2nd Respondent testified that she was the rightful owner of the suit land having taken possession in 1997. She confirmed that the 1st Respondent was her caretaker and she produced a copy of the title in her name. DW4, the Land Registrar, Nakuru produced a copy of the green card where he confirmed



that as per entry number 2, the suit land was registered in the name of Carolyne Jeruto Jebet and a title deed issued on 21st July, 1997 in her name.

12. It is trite law that he who alleges must prove as provided under Section 107(1)(2) of the *Evidence Act* which states 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. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person”

13. Further, Sections 109 and 112 of the same Act states;

“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.”

14. In the Court of Appeal case of *Palace Investments Limited V Geoffrey Kariuki Mwenda & another [2015] eKLR*, the court held as follows:

Denning J, in *Miller V Minister of Pensions [1947] 2 All ER 372* discussing the burden of proof had this to say; -

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties...are equally (un) convincing, the party bearing the burden of proof will lose because the requisite standard will not have been attained.”

15. It is this court’s view that the onus was on the appellant to prove ownership of the suit land. It is not in dispute that he only adduced a copy of the sale agreement and claimed that he was the legal owner. It is my view that he ought to have gone further to adduce documentary evidence in form of transfer forms and a title in his name to demonstrate that he was indeed the rightful owner of the suit land. He failed to prove the same and the learned trial magistrate rightfully found so. In the case of *Odinga & another V Independent Electoral and Boundaries Commission & 2 others; Aukot & another (Interested Parties); Attorney General & another (Amicus Curiae) (Presidential Election Petition 1 of 2017) [2017] KESC 42 (KLR)* the court held that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

16. It is not in contention that the Appellant vide his *Plaint* dated 20th January, 2022 sought for a permanent injunction against the Respondent and an order confirming that he was the rightful owner of the suit property. From the Supreme court decision in *Odinga & another V Independent Electoral and Boundaries Commission & 2 others (supra)* it is trite law that parties are bound by their pleadings



and any evidence led by any of the parties which does not support the averments in the pleadings or is at variance with the averments of the pleadings ought to be disregarded. The issue of whether there was a caveat on the Mau Forest complex was never pleaded by the Appellant to warrant the trial court interrogate it as an issue. The issue was on ownership which the trial magistrate rightfully based her finding on. In view of the same, I find that the trial magistrate did not err in finding that the Appellant failed to prove his case on a balance of probabilities. The upshot of the foregoing is that the appeal lacks merit and is hereby dismissed with costs. It is so ordered.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

**NAKURU ENVIRONMENT AND LAND COURT**

**ENVIRONMENT AND LAND COURT DATE: 2025-03-06 17:03:40**

**THE JUDICIARY OF KENYA**

