



**Manyasi v Kiragu (Environment and Land Appeal E006 of 2024)
[2025] KEELC 4126 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4126 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E006 OF 2024**

EC CHERONO, J

MAY 22, 2025

BETWEEN

APPOLLO OMUSULA MANYASI APPELLANT

AND

KARIUKI KIRAGU RESPONDENT

(Judgment (Being an appeal arising from the Judgment and decree of HON. C.MAUNDU CHIEF MAGISTRATE delivered on 16/01/2024 in BUNGOMA CMC ELC CASE NO 4 of 2018))

JUDGMENT

Introduction.

1. Apollo Omusula Manyasi (the Appellant herein) was the Plaintiff in Bungoma CMC ELC Case No 4 of 2018 where he had impleaded Kariuki Kiragu (the Respondent herein) seeking orders with respect to land parcels No East Bukusu/South Kanduyi/8XX2 and East Bukusu/South Kanduyi/8XX1 as follows;

a. Orders as prayed in paragraph 10 of the plaint.

The plaintiff's claim is for a permanent injunction restraining the defendant by himself or through his servants, agents and or representatives from interfering with the peaceful use of the plaintiff's portion in the title herein and an order of rectification and restitution of common boundary that was destroyed by the defendant.

b. Costs of the suit.

c. Any other relief this honourable court deems fit and just to grant.



2. The gist of the Appellants claim in the former suit was that he was the registered owner of land parcel No. E.Bukusu/S.Kanduyi/8XX2 measuring approximately 0.05ha while the Respondent who was his immediate neighbour occupies the adjacent plot comprised in title number East Bukusu/South Kanduyi/8XX1. That the Respondent has encroached and interfered with his peaceful occupation of the suit land by damaging, defacing and destroying the common boundary between the two titles. That on various occasions, the Land Register visited the suit parcels and rectified the boundary in question but the Respondent uprooted the same and remained in forceful occupation of his land.
3. In his defence, the Respondent denied damaging and or destroying the common boundary between the two land Parcels No.Ebukusu/S.Kanduyi/8XX1 and 8XX2 as alleged or has he encroached into the Appellant's land or in any way wasted the same. He averred that he is the registered proprietor of land parcel no. East Bukusu/South Kanduyi/8XX1 which is properly demarcated with physical boundaries. He confirmed that the Land Registrar and Land Surveyor visited the suit parcels on various occasions and rectified the boundaries but the Appellant has always been dissatisfied with the outcome. He sought to have this appeal dismissed with costs.

Parties evidence.

4. The hearing before the trial court proceeded by way of viva voce evidence.
5. PW1 Apollo Omusula Manyasi adopted his witness statement dated 15/12/2018 as his evidence-in-chief and produced in evidence the documents contained in his list of documents dated 15/12/2018 as P-Exhibit 1-18. On cross examination, he stated that the Respondent has occupied $\frac{3}{4}$ of his land and that the land registrar and surveyor have visited the site thrice.
6. PW2 Allan Onyango Babu identified himself the Land Registrar. He confirmed the registration status of the suit parcels of land and produced green cards for the two parcels as P-Exhibit 19a and 19b. On cross-examination, he stated that he did not have a report on the status on the ground and that he had not seen the reports dated 27/05/2003, 3/08/2006, 16/03/2007 and 02/08/2018. He however confirmed notices showed to him as summons by the Land Registrar to determine a boundary dispute. He stated that the land surveyor is the custodian of the maps of the area and that there are instances where a title is issued and there is no land on the ground.
7. PW3 Brian Wafula Kubwa identified himself as the Deputy-in-charge Survey office Bungoma County. He testified that when he visited the ground, it was noted that the parties claim the same land and that they were unable to survey the land because the Respondent resisted. That he wrote a letter dated 15/07/2022 produced as P-Exhibit 20 and that they are seeking for orders of security to undertake the survey. On cross-examination, he testified that the notices were in relation to 5 parcels of land and later to six parcels of land. That the reported dispute was not resolved since they were not given a chance to survey.
8. DW1 Gordon Kariuki Kiragu adopted his witness statement dated 14/07/2023 as his evidence-in-chief and produced into evidence seven documents contained in his list of documents dated 28/02/2019 as D-Exhibit 1-7. He denied encroaching into the Appellant's land. In cross-examination, he stated that he purchased his land in the year 1996 and obtained his title in 2017 and that the Appellant obtained his title on 15/06/1999.
9. Upon analysing the testimony of the witnesses and the documents produced in evidence, the trial court delivered the impugned judgment on 16/01/2024 in which the Appellant's suit was dismissed with costs.



10. Aggrieved by that judgment, the Appellants preferred this appeal in which he seeks to have the judgment and decree of the trial Court set aside, reviewed, quashed and be substituted with an order allowing his claim.
11. From his Memorandum of Appeal dated 2nd February 2024, the Appellant raised the following seven (7) grounds of appeal as follows:
 - a. That the learned Honourable magistrate erred in law and in fact when he only raised the issue of burden of proof upon the appellant against the respondent on the balance of probabilities.
 - b. That the learned magistrate erred in law and in fact by grossly misdirecting himself by disregarding the evidence for the appellant and thereafter arrived at a wrong decision and finding without substantial cogent basis in law.
 - c. That the learned honourable magistrate erred in law and in fact by not considering the appellants written submissions.
 - d. That the trial magistrate erred in law and in fact by suddenly declining to analyse the respondent's evidence and specifically the evidence of the Land Registrar and the County Surveyor in regard to the disputed parcels which clearly showed that there was a boundary dispute which needed to be fixed or resituated by the surveyor who had raised security concerns on the ground at the disputed parcels L.R. No. East Bukusu/South Kanduyi/8XX1 and 8XX2.
 - e. That the trial magistrate erred in law and in fact by not considering the evidence of the appellant that on the basis of the missing common boundary between the suit parcels, there was need to give a permanent injunction as as sought in the plaint against the respondent restraining him by himself or through his servants, agents and or representatives from interfering with the peaceful use of hs land comprised in LR No. East Bukusu/South Kanduyi/8XX2 but dismissed the appellants suit and thereby leaving the parties to be subjected to the continuous provocation and breach of peace on the ground.
 - f. That the trial magistrate erred in law and in fact in the circumstances by dismissing the appellants claim in favour of the respondent by not considering that the said judgment and decision has far reaching consequences to the appellants good title that the respondent had not filed a counter-claim to challenge the question of its validity in this court.
 - g. That the trial magistrate erred in law and in fact and was plainly wrong and biased in the interest of justice.

Parties submissions.

12. The parties agreed that this appeal be canvassed by way of written submissions.
13. The Appellant filed submissions dated 18/02/2025 in which he raised five issues. In his submission, the Appellant argued that the parties herein own the parcels of land in issue and that the trial court ought to have issued an order for security so that PW2 & 3 could visit the disputed portions and issue a comprehensive report on the issue in question. The Appellant further submitted that from the mutation forms produced, the Appellant's land does exist on the ground and that the Respondent has persistently refused to have the land surveyed which is the only way his level of encroachment can be determined. The Appellant further submitted that the trail court erred in declaring that his plot does not exist on the ground without there being a formal prayer for that order.



14. The Respondent also filed his submissions dated 21/03/2025 and submitted that the trial correctly placed the burden of proof on the Appellant as was discussed in the case of Ahmed Mohamed Noor v. Abdi Aziz Oman (2019) eKLR. It was further submitted that contrary to the allegation that the trial court did not consider the evidence and submissions, the court in its judgment clearly considered the same on paragraph 11 and 12. Lastly the respondent submitted that the appellant failed to provide sufficient evidence to prove his case. He urged this court to dismiss the appeal.

Analysis and determination.

15. This being a first appeal, this Court is guided by the principles laid down in the case of Okeno -V- R 1972 EA 32 where the then East African Court of Appeal stated at page 36 thus: “An Appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya -V- R 1957 EA 336) and to the appellate Court’s own decision on the evidence. The first appellate Court must itself weigh conflicting evidence and draw it’s conclusions – Shantilala M. Ruwala -V- R 1957 EA 570. It is not the function of a first appellate Court merely to scrutinize the evidence to see if there was some evidence to support the lower Court’s findings and conclusions; it must make it’s own findings and draw it’s own conclusions. Only then can it decide whether the magistrate’s findings should be supported. In doing so, it should make allowance for the fact that the trial Court has had the advantage of hearing and seeing the witnesses – see Peters -v- Sunday Post 1958 EA 424.” The above has been reiterated in subsequent cases. See for example Selle & Another -v- Associates Motor Boat Company Ltd 1968 EA 123 and Kiruga –v- Kiruga & Another 1988 KLR 348.
16. It is imperative to note that the Appellant is the registered owner of E.Bukusu/E.Kanduyi/8XX2 measuring 0.05ha, having been so registered on 15/06/1999 and a title issued on the same date while the Respondent is the registered owner of E.Bukusu/E.Kanduyi/8XX2 measuring 0.04ha having been so registered on 20/04/2017. That as per the mutation forms filed by the Appellant, the two parcels of land seem to be adjacent to each other. From the green card produced as P-Exhibit 19a & 19b, the two parcels of land were sub-divisions of plot NO. E.BUKUSU/S.KANDUYI/7XX2 and on sub-division, both parcels were registered in the name of John Muchiri Mutahi. Evidence on record has been tendered to suggest that land parcel no. E.Bukusu/E.Kanduyi/8XX2 does not exist on the ground. However, this evidence has not been substantiated with a survey report or a Registry Index Map (RIM).
17. This Court is alive to the Constitutional right of both the Appellant and the Respondent herein to own property as guaranteed under Article 40 of *the Constitution*. This Court has the mandate to protect proprietary rights of both parties herein. Thus, having read through the memorandum of appeal, pleadings and annexures thereto, analyzed the testimonies adduced in the trial court and guided by the rival written submissions and the authorities thereto, the issues that arise for determination from the seven (7) grounds of appeal are;
- a. Whether the Appellant proved his claim and was entitled to the prayers sought in the former suit?
 - b. Who shall bear the costs of this appeal?
18. On the first issue, the Appellant maintains that the Respondent encroached into his land while the Respondent denies and maintains that he is in occupation of his land. Both parties have title to their respective parcels of land and are claiming to have duly and legally obtained the same. Section 26 (1) (b) of the *Land Registration Act* gives sanctity to titles held by a registered proprietor. By dint of the above provisions, both parties have the right to have their titles protected by this Court. What is evident from



the Appellant's claim is that the Respondent has encroached on his land, and thus the reason he seeks an order of permanent injunction and for restitution of boundaries.

19. It is trite that an order of a permanent injunction fully determines the right of the parties. A permanent injunction is generally meant to perpetually restrain the commission of an act by a party in order for the rights of the other party to be protected. The Court under the provisions of Sections 1A, 3 & 3 A of the *Civil Procedure Act* has powers to grant the said order of permanent injunction if it is satisfied that the right of a party has been infringed, violated and/or threatened.
20. I am persuaded by the holding of the High Court in the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR where it was held inter alia as follows: "...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."
21. The Appellant's claim before the trial court was based on alleged encroachment and or trespass on his parcel of land by the Respondent who was his neighbour. In order to be granted an order for a permanent injunction, the Appellant ought to have proved that indeed there was illegal entry into his land by the Respondent in a manner degrading his land. He was required to tender evidence by way of a surveyor's report to show that the Respondent had made an illegal entry into his land and that there was no justification for the same.
22. The Appellant produced a title deed to his land indicating that the acreage was 0.05ha. In his evidence and apart from maintaining that the Respondent encroached into his land, the Appellant did not tender any evidence as to the extent of the alleged encroachment. Other than producing notices for determination of a boundary dispute and various receipts thereof, the Appellant failed to produce a report to back his claim over any encroachment or illegal occupation of his land by the Respondent.
23. The Respondent on the other hand maintained that he had not encroached into the Appellant's land. To the contrary, the Respondent alleged that the Appellant had closed/blocked an access road leading to his land and other parcels of land and produced a letter dated 30/11/2006 written by the District Commissioner Bungoma addressed to the Land Registrar and Surveyor (D-Exhibit 5).
24. Upon evaluating the entirety of the evidence and considering the nature of the relief sought, it is imperative to note that the Appellant was required to go beyond the established three-fold principles in *Giella v Cassman Brown & Co. Ltd* (1973) E.A. 358. He was obligated to prove his case on a balance of probabilities. This is because the grant of a permanent injunction was a final remedy, anchored on the strength of the evidence adduced at the trial.
25. It is my view that the Appellant did not adequately led any evidence to prove that the Respondent infringed violated or threatened his rights to land. The Appellant has not also demonstrated any harm that he will suffer if the permanent injunction order sought is not granted. Simply put, he did not adduce any shred of evidence to persuade the trial court that he is entitled to the equitable relief of a permanent injunction. This Court agrees with the findings of the trial court and therefore finds that the Appellant did not establish his case on a balance of probabilities.



26. The Appellant took issue with the trial court's dismissal of his claim, arguing that the court ought to have issued security orders to facilitate a survey of the two parcels of land. However, it is imperative to note that a suit belongs to the parties and not the court. It was the Appellant's duty to move the court by seeking appropriate orders. From the record, it is evident that no such application was made. The obligation to present a complete case rested solely with the Appellant. It is not the duty of the court to conduct investigations or gather evidence on behalf of litigants.
27. As the saying goes, *Fansus In Uno Falsus in Omnibus false in one thing false in everything*, the Appellant had built his case on quicksand and cannot therefore blame the court for finding that he had failed to prove any of his legal rights to land that had allegedly been infringed, violated and/or threatened by the Respondent.
28. As for costs, it is trite that cost ordinarily follow the event, unless exceptional circumstances have been shown. None has been shown and this court has no reason to deny the Respondent costs of this appeal.
29. Fortiori, my evaluation of the evidence and the applicable law to the facts of this case shows that the learned trial magistrate did not err in his findings and find no reason to upset his decision
30. In the result, I find no merit in this appeal which I hereby dismiss with costs.

Orders accordingly.

DATED, SIGNED and DELIVERED at BUNGOMA this 22nd day of May, 2025.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Appellant/Advocate-absent.
2. Respondent/Advocate-absent.
3. Bett C/A.

