



**Muema v Mwendu & another (Environment and Land Appeal
E037 of 2023) [2025] KEELC 4164 (KLR) (3 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4164 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E037 OF 2023**

AY KOROSS, J

JUNE 3, 2025

BETWEEN

FESTUS NGEI MUEMA APPELLANT

AND

JOSPHINE MWENDE 1ST RESPONDENT

**KATELEMBO ATHIANI MUPUTI FARMING & RANCHING CO-OPERATIVE
SOCIETY LTD 2ND RESPONDENT**

*(This is an appeal from the judgment of PM Hon. M.A. Otindo, which
was delivered on 22/11/2023 in Machakos CM ELC Case No. 56 of 2022)*

JUDGMENT

Background of the appeal

1. In the lower court, the 1st respondent instituted the primary suit in an amended plaint dated 22/06/2020. According to her, the 2nd respondent had initially allocated to her plot no. 1173 (“1173”) and on discovery of double allocation, plot no. 3295 (“3295”) measuring approximately 2.04 acres situated at Katelembo Athiani Muputi Farming & Ranching Co-operative Society Ltd (Katelembo) was allocated to her.
2. She claimed that 3295 and plot no. 3294 (“3294”), which was also in Katelembo and belonged to the appellant, were separated by a 9-meter road, but the appellant had trespassed onto 3295, claiming that it formed part of 3294.
3. She maintained that survey reports had revealed that there were no overlaps between these plots. However, it is observed by this court that these reports were never produced before the trial court.



4. In the end, she pursued a declaratory order that she was the legal allottee of 3295, a declaration that the revocation letter dated 18/5/2020 issued by the 2nd respondent revoking the allocation of 3295 to her was malicious, unjustified, illegal null and void and finally, she sought an order of permanent injunction restraining the appellant and 1st respondent from interfering with 3295.
5. In opposition, the appellant entered an appearance and filed a defence and counterclaim dated 29/01/2021; he denied the allegations levelled against him and argued that he legally obtained 3294 in 2011.
6. He stated he had peacefully occupied it since then until a turn of events in April 2020. He stated that the 1st respondent trespassed into 3294 and destroyed his avocado trees, which were valued at ksh. 50,200/-. In consequence, he sought orders of permanent injunction and compensation to the tune of kshs. 50,200/-.
7. The 2nd respondent equally entered an appearance and filed a defence dated 23/12/2020 and denied the claims against it by the 1st respondent and further maintained that 3295 is non-existent.
8. It was further argued that the allocation of 3295 to the 1st respondent was illegal as she was never its member or a purchaser for value and acquired it by exerting undue pressure on the 2nd respondent. In consequence, it was constrained to revoke the allocation of 3295.
9. Afterwards, the matter was heard, parties called their respective witnesses and produced several documents. In the appellant's case, his evidence was composed of that of himself and David Muya Ndeti. The 1st respondent's evidence was composed of herself and Meshack Mutinda Munguti. Lastly, the 2nd respondent's evidence was led by David Masila Muema.
10. In wisdom and to assist the court in arriving at its determination, the trial court conducted 2 site visits on diverse dates of 5/07/2023 and 11/08/2023. During these site visits, the 2nd respondent's surveyor, who was cross-examined by counsels, gave very insightful information concerning the disputed plots.
11. In the judgment rendered on 22/11/2023, the learned trial magistrate found that the 1st respondent had discharged the burden of proving that 3295 existed, it was allotted to her, and she was its rightful owner.
12. She also found her case was merited and granted the reliefs sought, and found the appellant's counterclaim lacked merit and dismissed it. Ultimately, the learned magistrate granted the following orders: -
 - a. That a declaration be and is hereby issued that the 1st respondent is the legal allottee of plot no. 3295 measuring 2.04 acres situated at Katelembo.
 - b. That a declaration be and is hereby issued that the revocation letter dated 18/5/2020 issued by the 2nd respondent revoking the allocation of plot no. 3295 to the 1st respondent is malicious, unjustified, illegal, null and void.
 - c. That a permanent order of injunction be and is hereby issued restraining the appellant and 2nd respondent whether by themselves, their servants, agents, employees, or any other person acting through them or under their instructions from entering upon, remaining thereon, cultivating, ploughing, planting, fencing, dealing or interfering in any other way with the 1st respondent's plot no. 3295 measuring 2.04 acres situated at Katelembo.
 - d. That the appellant's counterclaim against the 1st respondent be and is hereby dismissed.



- e. That the costs of the suit and the counterclaim be and are hereby awarded to the 1st respondent.

Appeal to this court

13. Dissatisfied, the appellant appealed to this court and filed a memorandum appeal dated 27/11/2023 in which he questioned the impugned judgment on several grounds, which are summarized inter alia, a) the judgment did not give a concise statement of case, points of determination, decision or reasons for the judgment, b) misapprehended the surveyor's testimony and observations during the site visit, c) ignored the appellant's testimony; and
14. D) Ignored that the 1st respondent failed to prove how she acquired 3295, e) was biased during the site visit, and lastly, f) failed to consider the respondents' submissions.
15. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment, enter a judgment in the appellant's favour and grant him the costs of the appeal.

Submissions.

16. This court has considered the well-argued submissions by the law firms of M/s. Kitindio Musembi & Co. Advocates for the appellant dated 16/09/2024 and those of M/s. Sila & Co. Advocates for the 1st respondent dated 25/03/2025 and is grateful to the counsels in that regard. Unfortunately, this court did not benefit from the 2nd respondent's submissions as they were not filed.

Issues for determination,

17. As rightfully submitted by the appellant's counsel and as held in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, as a 1st appellate court, this court is not necessarily bound to accept the findings of fact by the lower court but it conducts a retrial and its guiding principles are inter alia reconsider the evidence, evaluate it and draw its independent conclusions and bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.
18. Regarding the matter at hand, this court has anxiously considered the record, the impugned judgment, the submissions by learned counsels, the illuminating authorities cited on behalf of the respective parties and the law, and it has become necessary to address certain preliminary issues.
19. The 1st preliminary issue concerns the contents of the impugned judgment, of which the appellant has made heavy weather about in his grounds of appeal. Order 21 Rule 4 of the Civil Procedure Rules (CPR) envisages that a judgment should have a concise statement of fact, points for determination, decision thereon and reasons for such decision. In this case, the impugned judgment ticked off all these boxes.
20. The 2nd and last preliminary issue is about the 2nd respondent's submissions that were filed in the lower court on 16/10/2023 and not considered by the learned magistrate. For starters, the 2nd respondent has not preferred an appeal in that aspect, meaning it was satisfied with the judgment.
21. Further and as held in the Court of Appeal decision of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] KECA 642 (KLR), submissions are generally parties' "marketing language", with each side endeavouring to convince the court that its case is the better one and they do not constitute evidence. Thus, this court finds the 2nd respondent was not prejudiced by the non-consideration of its submissions by the learned trial magistrate.
22. In considering the repetitive grounds of appeal, they can adequately be summarised into 2 grounds, which are whether the learned trial magistrate erred in finding the appellant had not proved his case



and whether the learned trial magistrate erred in finding the 1st respondent had proved her case. This court proposes to handle the 2 issues conjunctively.

Analysis and Determination

23. The main issue that was the subject for determination before the trial court was whether there was trespass on 3294 and 3295. In the text of Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923, trespass to land is defined as follows: -

“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.

Page 927 of the same text addresses who may sue for trespass, and it states as follows: -

“Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”

24. The book of Blackstone, William. Commentaries on the Laws of England: Book III: of Private Wrongs, edited by Thomas P. Gallanis, Oxford University Press, 2016, pages 141-142, discusses the test of possession by the owner in the following words: -

“One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land.”

25. The common thread that streams through the definition of the term trespass by these eminent scholars is that ownership is not a precursor that enables one to sustain such a claim but that the land owner must also be in possession by entry and there has to be an unjustifiable entry into the land in possession of another.

26. In this case, the 1st respondent adduced documentary evidence showing the 2nd respondent was initially allocated 1173, but due to challenges of double allocation, she was allocated 3295. It would appear the person who allocated this 3295 to her never showed her the ground location of this land. This court is sure that if she had seen its location on the ground, she would have found it was occupied by the appellant and would not have conceded to the reallocation.

27. However, from the 1st respondent's evidence, particularly the photographs and letter dated 17/03/2020, it is clear she has never been put in possession of 3295 as the appellant had always been in possession, he had planted avocado trees therein and had developed it and that 3294 and 3295 overlapped each other.

28. It is also worth mentioning that the properties in dispute fall within an unsurveyed area. Hence, the participation in the site visits by the 2nd respondent's surveyor, Romana N. Kitusa, who was also involved in the dispute long before the suit was filed. Her input was very insightful in illuminating the map situation vis-à-vis the ground situation.

29. In her cross-examination by counsels, she was consistent in her evidence that the map situation did not tally with the ground situation. She stated 3294, which is also 3295, belongs to the appellant or the 1st respondent, and no roads existed between them. In other words, there was an overlap between the 2 plots. According to her, the exact place where 3295 should lie is where plot no 3290 stood.



30. She testified that the entire Katelembo map had a problem as occupancy was not based on the map, and if the map were implemented, it would result in demolitions and displacements. Further, maps could always be amended, a resurvey could be conducted, and she concluded that the map was unreliable. She also stated that if she were to apply the map situation in 3295, then it would mean it was vacant and 3294 occupied by the appellant.
31. Nonetheless, the ground situation told a different story in that what should have been 3294 is occupied by plot no.3291, which a stranger had occupied, albeit owned by the appellant. Additionally, what should have been 3295 is occupied by 3294. Put another way, there was a shift in the plots, and 3295 only existed on the map but not on the ground.
32. The learned magistrate appreciated this evidence on overlap and even stated so in the impugned judgment. However, this court finds she fell into grave error when she contradicted herself and stated that the disputed plots were distinguishable on the map and ground.
33. Recalling the meaning of trespass, which is a wrong against possession and that the 1st respondent has never entered 3295 and taken possession thereof as it is occupied by 3294, this court finds her claim never met the ingredients of trespass.
34. The court also finds the trial court erred in entering judgment in the 1st respondent's favour. This court also finds that, as per the ground situation, 3295 is non-existent whereas 3294 is existent.
35. Turning to the appellant's counterclaim, as per the ground situation, he has occupied 3294, having had it transferred to him on 31/10/2011, which was long before the 1st respondent acquired 3295. Thus, this court finds he was successful in his claim and he is entitled to quiet possession thereof.
36. As to special damages, he tendered a crop assessment report which showed that in the act of trespass by the 1st respondent, he suffered the loss of ksh. 50,200/-. The appellant's testimony that this damage was caused by the 1st respondent's agents was not disputed, and this court finds he is entitled to this amount.
37. Regarding general damages, it is trite law that trespass is actionable per se and having proved trespass, the appellant is entitled to general damages and this court draws guidance from the decision of Park Towers Limited vs. John Mithamo Njika & 7 others [2014] eKLR where the court stated: -

“...where trespass is proved, a party need not prove that he suffered any specific damage or loss to be awarded damages. The court in such circumstances is under the duty to assess the damages awardable depending on the unique facts and circumstances of each case.”
38. In the circumstances of this case, where the appellant did not lead any evidence on the amount of diminution in value of 3294 or the costs of its reinstatement, this court hereby assesses general damages at kshs. 200,000/-.
39. Accordingly, this court hereby finds that the appeal has merit and is hereby allowed with costs to the appellant, which shall be borne by the 1st respondent. This court hereby sets aside the learned magistrate's judgment and substitutes the same with the following final disposal orders: -
 - a. A permanent injunction is hereby issued against the 1st respondent restraining her, her servants and /or agents from entering, using, selling, alienating, interfering, occupying and/or in any way dealing whatsoever with plot no.3294 as it exists on the ground.
 - b. Judgment is hereby entered in favour of the appellant against the 1st respondent for the total sum of Kshs. 50,200/- as special damages.



- c. General damages for trespass are ordered in the sum of kshs. 200,000/- payable by the 1st respondent to the appellant.
- d. The 1st respondent's suit in the lower court is hereby dismissed with costs to the appellant and the 2nd respondent.
- e. The costs of the counterclaim in the lower court suit and appeal are awarded to the appellant.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 3RD DAY OF JUNE, 2025.

HON. A. Y. KOROSS

JUDGE

03.06.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr Sila for 1st respondent

M/s Muia holding brief for Mr Kibindyo for appellants

M/s Ngumbau holding brief for Mr. Mutie for 2nd respondent

Ms Kanja- Court Assistant

