

2. According to the respondent, he paid the requisite amendment charges and had always been in possession. He stated that, sometimes in September 2019, the appellant, without permission, intruded into the undeveloped portion of plot 8.
3. For these actions and as a result, the respondent sought orders that he be declared the legal and bonafide owner of plot 8 measuring 52 ft x 100 ft, a permanent injunction against the appellant, eviction, vacant possession, general damages and costs of the suit.
4. In response, the appellant maintained she owned and possessed plot no. 28, Ithithini Market (**“plot 28”**), measuring 22 ft x 100 ft, and in her view, it is the respondent who had trespassed onto plot 28 and not the other way around. She also argued that the expansion of plot 8 was fraudulent; it should be nullified, and the court should make a finding that plot 8 measures 40 ft by 100 ft.
5. In the end, she sought almost identical prayers as those of the respondent, only that hers were in respect to plot 28. As for plot 8, she sought a declaration that it be deemed to measure 40 ft by 100 ft and also sought the costs of the counterclaim.
6. To assist the court in ascertaining the accusations and counteraccusations that the parties had barbed at each other,

the trial court directed a survey of the 2 plots to be undertaken and a report to be filed in court. In compliance, the county surveyor, Daniel Mutiso Makau, who testified as **PW2**, filed his report in that aspect.

7. Subsequently, the matter was heard, parties called their respective witnesses and produced several documents. In the appellant's case, her evidence was composed of that of herself, Philip Mutinda Kathumo and Pius Kilonzo Nzioka, whereas that of the respondent was composed of himself and **PW1**.
8. In the judgment rendered on 14/02/2023, the learned trial magistrate found the respondent had discharged the burden of proof, the appellant had not proved her claim of fraud, the person who sold plot 28 to the appellant did not have the locus to sell it to her and found her a trespasser. Ultimately, the learned magistrate granted the following orders: -

a) A declaration hereby issues that the respondent is the rightful, legal and bonafide owner of plot no.8 Ithithini market in Miu location, measuring 52ft by 100ft or thereabouts.

b) An order of permanent injunction to restrain the appellant by herself, her servants and or agents or others whomsoever from using, trespassing, entering, building, constructing or in any manner whatsoever from interfering with the

respondent's peaceful occupation and use of his plot no.8 Ithithini market in Miu location, measuring 52ft by 100ft hereby issues.

- c) An order of eviction of the appellant from plot no.8, Ithithini market in Miu location, measuring 52ft by 100ft and compel the appellant to remove her building materials and demolish her developments on the said plot and in default the respondent be at liberty to remove and demolish the same at the appellant's cost.***
- d) An order of possession by the respondent of plot no.8, Ithithini market in Miu location measuring 52ft by 100ft or thereabouts.***
- e) General damages of Ksh. two hundred thousand (Ksh. 200,000) for trespass into the respondent's plot no.8, Ithithini market in Miu location, measuring 52ft by 100ft or thereabouts.***
- f) Costs of this suit with interest thereon at court rates from the date of judgment until payment in full.***

Appeal to this court

9. Aggrieved by this turn of events, the appellant appealed to this court, albeit late. Of significance is that though the appellant did not avail the order that extended time for her to appeal, upon perusal of the record of appeal, it has been established that in **Mutua v Mwangangi [2023] KEELC 20492 (KLR)**,

this court in a ruling rendered on 9/11/2023, granted leave to appeal out of time.

10. Immediately thereafter, the memorandum of appeal dated 11/10/2023 was filed, and it faulted the impugned judgment on 9 grounds.
11. Being aware of the shortcomings of the grounds as they were not concise and repetitive, in submissions dated 14/05/2024 filed by her law firm on record, **M/s. B.M Mungata & Co. Advocates**, counsel collapsed them into 2 grounds, which are rephrased as follows: **whether the learned trial magistrate erred in finding the appellant had not proved her case**, and **whether the learned trial magistrate erred in finding the respondent had proved his case**.
12. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment and grant costs of the appeal.

Submissions.

13. Apart from the appellant's counsel's submissions, submissions were also filed by the law firm on record for the respondent, **M/s. Kyalo, Muia & Co. Advocates** dated 16/09/2024. This court has considered these rival submissions and is indebted to counsels for the well-written and researched submissions.

Issues for determination, Analysis and Determination

14. As rightfully submitted by the appellant's counsel and considering this is a first appeal, this court is reminded that the task at hand is to reappraise, reassess and reanalyse the evidence as asserted by the parties on record and to establish if the findings reached by the learned magistrate should stand and give reasons if they do not. **See Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR.**
15. 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 the court adopts the 2 summarized grounds of appeal as contained in the parties' submissions as the issues arising for determination.
16. In considering the abridged grounds of appeal which are **whether the learned trial magistrate erred in finding the appellant had not proved her case** and **whether the learned trial magistrate erred in finding the respondent had proved his case** and for good order, they shall be handled conjunctively as the outcome of one has a bearing on the other.
17. The main issue that was the subject for determination before the trial court was whether there was trespass on plots nos. 8

and 28. 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 discourses as to 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.”

18. In the book of **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition, page 428**, trespass is discussed as follows:

“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the

land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land."

19. 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.
20. In this case, it was unchallenged that the plots in question were unregistered and were first issued in 1974. It was not disclosed whether they were registrable under the repealed **Registered Land Act** or the repealed **Registration of Titles Act**, but it is most probable that they fell under the latter regime that was later abolished. To this court's mind, the determination of the size of each plot will unravel whether the claim of trespass was proved.
21. In 1974, which is the first point of allotment, it was undisputed that plot 8, which was 40 ft x 100 ft, was given to the respondent. The respondent contended that the size that was allotted to him was expanded by a letter dated 8/09/2009 by the then council officers to 52 ft x 100 ft.

22. As for plot 28, it was designated to Pius M. Muindi in 1974. There was uncertainty as to how it changed hands, with possession resting in the appellant's hands.
23. Regarding ownership of plot 28, the impugned judgment found the appellant had not proved ownership of the suit property. To this extent, this court agrees with the learned magistrate. This is because, apart from the agreement for sale, she did furnish documents from the county government to prove ownership.
24. As a matter of fact, the report from the county surveyor demonstrates that plot 28 is still registered in the name of Pius Kilonzo, who testified to as **DW3**. In this respect, it can only be concluded that the purchase is yet to be perfected or otherwise.
25. Nevertheless, gleaning from the definition of trespass, failure to prove ownership did not defeat her claim, as what she needed to prove was that she was in possession of plot 28, which she was able to discharge. Therefore, this court finds the learned magistrate fell into grave error when she pegged the appellant's case on her ownership status without considering her possession thereof.
26. Concerning the issue of sizing of the respective plots, the respondent tendered minutes of a meeting by the then county council of Masaku, which simply stated as follows on plot 8: -

“Plot no. 8 registered in the name of S.S.M Ndaka is size 52 x 100 on the ground not 40 x 100 as shown in our records.

Recommendation: Council Registers be amended accordingly”

27. To sanction this, in a letter dated 8/06/2009 by the council, the sum of kshs. 9,890/- was demanded from the respondent, but he only paid 4,210/= which is almost $\frac{1}{2}$ of the requisite sum. In other words, he never fulfilled the terms of the amendment and/or perfected it. Further, the respondent never tendered copies of the register proving that it was amended to reflect the recommendation.

28. In the circumstances, this court finds the learned magistrate erred in the sizing of plot 8 and finds plot 8 measures 40 ft x 100 ft. Given the surveyor’s unchallenged report on encroachment, it also finds that the respondent has encroached onto neighbouring parcels of land.

29. About the appellant’s claim on plot 28, she equally did not tender a copy of the register of this property from the County Government of Machakos to illuminate on the sizing thereof.

30. However, in proof of the sizing, 2 documents were tendered to the trial court: the unchallenged surveyor’s report, which showed plot 28 was 20 ft by 100ft and a letter from the

subcounty administrator dated 9/10/2019, which disclosed that plot 28 was 22 ft by 100ft.

31. Having considered this set of documents and bearing in mind that the appellant called the surveyor as an independent expert witness and his report was unchallenged, this court finds the surveyor's evidence was reliable.
32. Additionally, it is observed that the appellant in seeking to establish the status of the plot. 8, paid kshs. 1000/- and a receipt was issued to her in that respect. Yet, there is no evidence that a similar process was followed in obtaining the letter dated 9/10/2019.
33. As a consequence, this court finds that the letter dated 9/10/2019 is unreliable as it was not supported by a register or record from the county government, nor was it obtained properly. Thus, this court finds the respondent is in possession of plot 28, and finds its size is 20 ft by 100ft. Further, parallel to the respondent, it finds that she has encroached onto neighbouring parcels of land.
34. There was also the issue of fraud that was pleaded and particularised in the appellant's claim, which she was required to prove to the requisite standard, which is below a reasonable doubt but above a balance of probability.

35. In this appeal, the appellant only questioned 2 particulars of fraud, which were that the defunct council could not re-allocate land that had already been allocated and that the council expanded plot 8 unprocedurally, causing it to overlap with plot 28.
36. On this issue of fraud, this court finds that these particulars of fraud were bound to fail, as the alleged culprit, whose function was taken over by the county government of Machakos, was not joined to the proceedings.
37. Accordingly, this court hereby finds that the appeal has merit and is hereby allowed with each party bearing their respective costs. This court hereby sets aside the learned magistrate's judgment and substitutes the same with the following final disposal orders: -

a) A declaration hereby issues that the respondent is the rightful, legal and bonafide owner of plot no.8 Ithithini market in Miu location, measuring 40ft by 100ft or thereabouts.

b) A declaration hereby issues that the size of plot no. 28, Ithithini market in Miu location is 20ft by 100ft or thereabouts.

c) That at the appellant's and respondent's costs, the county surveyor is hereby directed to, within 90 days hereof, point out to the parties herein the boundaries between plot no.8 and

plot no. 28 all located in Ithithini market in Miu location respectively measuring 40ft by 100ft and 20ft x 100ft or thereabouts.

d) Upon compliance with order (c) above and establishment of the extent of encroachment by either or both of the parties, the party in encroachment shall, within 180 days thereafter, remove himself or herself from the encroached portion and demolish any developments therein and in default, either party is at liberty to remove and demolish the same and recover the costs incurred as a civil debt.

e) An order of permanent injunction restraining the appellant by herself, her servants and or agents or others whomsoever from using, trespassing, entering, building, constructing or in any manner whatsoever from interfering with the respondent's peaceful occupation and use of his plot no. 8 Ithithini market in Miu location, measuring 40ft by 100ft.

f) An order of permanent injunction restraining the respondent by himself, his servants and or agents or others whomsoever from using, trespassing, entering, building, constructing or in any manner whatsoever from interfering with the appellant's peaceful occupation and use of her plot no. 28 Ithithini market in Miu location, measuring 20ft by 100ft.

g) Each party shall bear their respective costs of the lower court suit and the appeal.

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 Kyalo for respondent

M/s Mutuku holding brief for Mr Mutava for appellant

Ms Kanja court assistant