Bante v Lengesen (Environment and Land Appeal E016 of 2024)
[2025] KEELC 5032 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5032 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E016 OF 2024

JO MBOYA, J

JULY 3, 2025

BETWEEN

GUBAL HALAKE BANTE ..... APPELLANT

AND

KURO LENGESEN ..... RESPONDENT

JUDGMENT

1. The Appellant herein [who was the Plaintiff in the subordinate court] filed the plaint dated 22nd September 2020 and wherein same sought the following reliefs:

    a. An order of permanent injunction restraining the defendant, his family members, agents, employees and any other person claiming at his behest from interfering with the plaintiff's ownership and user of plot No. 69 Kambi Garba-Isiolo.

    b. Costs of the suit.

    c. Any other relief that this court may deem fit and expedient to grant.

2. The Respondent herein [who was the defendant in the subordinate court] duly entered appearance and thereafter filed a statement of defence dated 24th May 2021, wherein the respondent denied the claims by the appellant. Furthermore, the respondent also posited that same is the one who has been in occupation of three-quarters of the suit property. To this end, the respondent contended that the appellant does not have any lawful right[s] to and in respect of the suit property.

3. The suit by the appellant was heard and disposed of vide judgment rendered on the 9th August 2024 wherein the learned trial magistrate found and held that the appellant had not proved her case. In this regard, the trial court proceeded to and dismissed the appellant's suit, albeit with no orders to costs.

4. Aggrieved by and dissatisfied with the judgment and the consequential decree, the appellant has now approached this court vide Memorandum of Appeal dated 6th September 2024 and wherein same has highlighted the following grounds of appeal;

    i. That the learned trial magistrate erred in law and in fact by failing to appreciate that civil matters are decided on a balance of probabilities and the balance tilted in favour of the appellant in the trial.

    ii. That the learned trial magistrate erred in law and in facts in making a finding that the appellant had not proved ownership of her plot No. 69 Kambi Garba Isiolo despite the evidence by the county physical planner confirming the ownership.

    iii. That the trial magistrate erred in law and in facts by failing to have regard to the dispute resolution committee's finding that he disputed plot belongs to the appellant.

    iv That the learned trial magistrate erred in law and in facts and failing to find that the respondent's documents in support of his defence and ownership of the plot had no plot number to demonstrate ownership of any plot.

    v That the learned trial magistrate erred in law and in facts by failing to appreciate that the appellant's ownership of plot No. 62 Kambi Garba was not in dispute and she was only seeking to injunct the respondent from interfering with her occupation and utilization of the same.

    vi. That the learned trial magistrate erred in law and in facts by failing to weigh the balance of convenience in a suit for injunction.

    vii. That the learned trial magistrate erred in law and in facts by failing to appreciate that the evidence on record weighed in favour of the appellant.

    viii. That the learned trial magistrate erred in law and facts by not finding in favour of the appellant with the weight of evidence in support of her case against the weight of the evidence of the respondent in support of this defence.

5. The appeal beforehand came up for directions on the 2nd April 2025, whereupon the advocate for the parties confirmed that the record of appeal had been duly filed and served. Furthermore, it was confirmed that the record of appeal was complete.

6. Arising from the foregoing, the advocate for the parties covenanted to canvass and dispose of the appeal by way of written submissions. To this end, the court ventured forward and prescribed the timelines for the filing and exchange of the written submissions.

7. Learned counsel for the Appellant filed written submissions dated 28th April 2025; and wherein same has highlighted three [3] issues for consideration by the court. The issues highlighted by the appellant are namely, whether the appellant discharged her burden of proof on a balance of probabilities; whether the appellant is entitled to the reliefs sought; and who is liable to pay the costs of the appeal and those of the trial court.

8. Regarding the first issue, learned counsel for the appellant has submitted that the appellant tendered and produced before the court various documents confirming her ownership to the suit property. In particular, learned counsel submitted that the appellant produced a copy of the letter dated 23rd December 1985; authored by the Clerk- Isiolo county council [now defunct] confirming that the suit plot belongs to the appellant.

9. Additionally, learned counsel submitted that the appellant also tendered and produced before the court a copy of the minutes relating to the dispute resolution that was undertaken by a committee of the county government of Isiolo. To this end, the Learned Counsel referenced the minutes dated 23rd November 2012. Besides, learned counsel also added that the appellant and her witnesses tendered credible evidence before the court as opposed to the respondent, whose evidence was replete with contradictions and discrepancies.

10. Flowing from the foregoing, learned counsel for the appellant has submitted that the totality of the evidence that was tendered by the appellant was credible and thus proved the appellant's entitlement to the suit property. In this regard, it was contended that the learned trial magistrate failed to properly evaluate the evidence on record and thus arrived at an erroneous conclusion.

11. In respect of the second issue, learned counsel for the appellant has submitted that the burden of proof lay at the doorstep of the appellant. However, it was contended that as soon as the appellant tendered and discharged the evidential burden of proof, same shifted to the respondent to lay on the table credible evidence to rebut the appellant's claim. Nevertheless, it was posited that the respondent herein did not tender and or produce any credible evidence to contradict the appellant's case.

12. To buttress the foregoing submissions, namely; that the evidential burden of proof shifted to the respondent to rebut the appellant's claim, learned counsel for the appellant has referenced inter alia the holding in the case of Suleiman Kasuti Murunga v IEBC & 2 others [2018] eKLR and Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR, respectively.

13. Finally, learned counsel for the appellant has submitted that costs ordinarily follow the event; and in this regard, learned counsel invited the court to find that costs ought to be awarded to the appellant. Moreover, learned counsel invited the attention of the court to the provisions of section 27 of the *Civil Procedure Act*, Cap 21 Laws of Kenya.

14. Premised on the foregoing, learned counsel for the appellant implored the court to find and hold that the appeal beforehand is meritorious and thus same ought to be allowed.

15. The Respondent filed written submissions dated 8th May 2025 and wherein same highlighted three [3] key issues for consideration by the court. The issues raised by the respondent are namely, whether the appellant discharged the burden of proof as pertains to her claim to the suit property; whether the appellant is entitled to the reliefs sought and who ought to bear the costs of the appeal.

16. Regarding the first issue, learned counsel for the respondent submitted that the appellant herein had sought an order of permanent injunction against the respondent and thus it behooved the appellant to place before the court credible evidence to demonstrate the existence of a prima facie case. However, learned counsel contended that the appellant did not convince the trial court that same was entitled to an order of permanent injunction. To this end, learned counsel for the respondent has submitted that in the absence of a prima facie case, the appellant was not entitled to an order of permanent injunction.

17. As pertains to the second issue, learned counsel for the respondent has submitted that it is the appellant who filed the suit in the subordinate court and thus same bore the burden of proving her claim. Nevertheless, it was submitted that the appellant did not place any evidence before the court to satisfy the burden of proof. To this end, learned counsel for the respondent referenced the provisions of sections 107, 108, & 109 of the *Evidence Act*, Chapter 80, Laws of Kenya.

18. Additionally, it was submitted that in so far as the appellant had not discharged the burden of proof, the respondent was not called upon to rebut the claims by the appellant. For good measure, it was submitted that the evidential burden of proof could only shift to the respondent upon placement of

credible evidence before the court by the appellant. However, it was clarified that the appellant failed to meet the threshold and thus her case was rightfully dismissed.

19. In respect of the third issue, learned counsel for the respondent has submitted that the learned trial magistrate was correct in dismissing the appellant's suit and ordering each party to bear own costs. Nevertheless, it was posited that as pertains to the current appeal, same ought to be dismissed with costs to the respondent.

20. Having reviewed the record of appeal; the evidence tendered before the subordinate court [both oral and documentary] and upon consideration of the written submissions filed on behalf of the parties, I come to the conclusion that the determination of the subject appeal turns on one [1] singular/salutary issue namely; whether the appellant tendered and placed before the trial court plausible evidence to prove her claim to and in respect of the suit plot or otherwise.

21. Before venturing to address the solitary issue raised in the preceding paragraph, it is worth to recall that what is before me is a first appeal. To this end, it bears repeating that the jurisdiction of this court while entertaining a first appeal is circumscribed by the provisions of section 78 of the *Civil Procedure Act* Cap 21 Laws of Kenya.

22. In brief, this court is called upon to undertake exhaustive scrutiny, review, evaluation and appraisal of the entire evidence that was tendered before the trial court and thereafter to form/arrive at an independent conclusion. Furthermore, there is no gainsaying that this court is at liberty to depart from the factual conclusions and findings of the trial court. Nevertheless, it is instructive to observe that this court can only depart from the findings and conclusions of the trial court if and only if, the findings were made on no evidence; are perverse to the evidence on record; based on misapprehension of the evidence on record or better still, where it is shown that there exists a demonstrable error of principle which vitiates the findings of the trial court.

23. The scope and the jurisdictional remit of this court while entertaining and adjudicating upon a first appeal has been the subject of various judicial pronouncements. Recently, the Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited [Civil Appeal E011 of 2021] [2025] KECA 764 [KLR] [9 May 2025] [Judgment] where the court stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement. This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows: "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that

evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion [and this really is a question of law] the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage [which is denied to the courts of appeal] of having the witnesses before him and observing the manner in which their evidence is given... Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

24. With the foregoing in mind, I am now disposed to revert to the subject matter and engage with the factual matrix in an endeavor to discern whether the appellant placed before the court plausible, cogent and credible evidence to demonstrate that same is indeed the lawful owner and or proprietor of the suit property in the manner contended at the foot of Paragraph 4 of the Plaint dated 22nd September 2020.

25. To start with, it is important to recall and reiterate that the Plaintiff contended that same is the owner and the original allottee of plot No. Kambi Garba/69. Furthermore, the appellant had also posited that the plot in question was allocated to her by the County Council of Isiolo [now defunct] on the 3rd December 1985.

26. The foregoing averments form the crux of the appellant's case and thus the appellant was called upon to place before the trial court assorted evidence to demonstrate that the suit plot was indeed allocated unto her. It is common ground that any person, the appellants not excepted, who was desirous to be allocated part of what was previously trust land, was called upon to make an application in writing to the designated local authority. In this case, the designated local authority was the County council of Isiolo [now defunct]. [See Section 53 of the Trust *Land Act*, Cap 288 Laws of Kenya, [now repealed]. [See also the holding in the case of Rinya Hospital Ltd v the Town Council of Awendo [2010] eKLR].

27. Additionally, it is important to underscore that upon making the application to the designated local authority, the said local authority was enjoined to consider the application and thereafter to make appropriate recommendations. For good measure, the recommendations could only be made at the foot of the minutes of the council. In this regard, there is no gainsaying that the appellant bore the burden of placing before the court the minutes of the County Council of Isiolo. [now defunct].

28. Did the appellant tender and or produce before the court the minutes of the County Council of Isiolo or otherwise? The answer to the foregoing question is discernible from the submissions of learned counsel for the appellant, wherein same has stated thus;

> "Your Lordship, despite the fact htat the minutes dated 3rd December 1985 and the part development plan were marked for identification, the physical planner informed the court in his aforesaid report that same were genuine, the trial court failed to appreciate this evidence and only dismissed the same on the grounds that it was not conclusive. The report is/was very clear that the appellant's documents were genuine and plot number 69/ Kambi Garba belonged to the appellant and this is the exact information the trial court had directed to be availed in its orders of 21st June 2022."

29. It is the appellant who had contended that the suit plot was duly and lawfully allocated unto her. To this end, it was her burden to tender and produce the critical documents before the court. Suffice it to state that where documents are produced before the court, same are admitted as exhibits and thus such exhibits fall for consideration by the court, subject to proof and probative value; in the usual manner.

30. However, where documents are marked for identification, such documents do not constitute part of the record of the court. Instructively, such documents cannot be considered by the court in the body of the judgment. Such documents have no evidential value or at all.

31. To buttress the foregoing position, it suffices to reference the decision of the Court of Appeal in the case of Kenneth Nyaga Mwige v Austin Kiguta & 2 others [2015] eKLR, where the Court of Appeal discussed the legal implications of documents marked for identification.

32. For coherence, the court of appeal stated as hereunder;

> 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.
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> 19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties

and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam [1953] 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term "exhibit" should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State [1994] 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

33. The foregoing position was re-visited and reiterated by the Court of Appeal in the case of Finmax Community Based Group & 3 others v Kericho Technical Institute [2021] eKLR. [See also the decision in Billiah Matiang'i v Kisii Bottlers Ltd [2021] eKLR].

34. Having failed to tender and produce a copy of the application letter; the minutes of the county council of Isiolo [now defunct] and the part development plan, which are critical documents to underpin the process of allotment; and having similarly failed to tender a copy of the letter of allotment [if any], there is no gainsaying that the appellant did not demonstrate that same was ever allocated the suit plot.

35. Suffice it to state that it is the appellant who had contended that the suit plot was lawfully allocated to her. Moreover, it is also the same appellant who had posited that same is the owner of the suit property. To this end, it was incumbent upon the appellant to justify her claims.

36. Having failed to tender the documents, there is no way that the appellant can contend that same discharged the burden of proof. Instructively, the legal and evidential burden both lay on the appellant. Whereas the evidential burden of proof would shift subject to credible evidence being placed before the court, the legal burden of proof remains static.

37. In my humble view, the appellant herein cannot be heard to shift the blame to the respondent and to contend that the respondent did not place before the court evidence to rebut her appellant's claims. Simply put, the appellant did not discharge her burden and having failed to do so, the learned trial magistrate was right in finding and holding that the appellant's case was not proved.

38. Before concluding on this issue, it is appropriate to reference the decision of the Supreme Court in the case of Dr. Samson Gwer & 5 others v KEMRI [2020] eKLR, where the Supreme Court elaborated on the incidence of the legal and evidential burden of proof.

39. For coherence, the Supreme Court stated thus;

> " Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "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."
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> 50. This Court in Raila Od*inga & others v Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...
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> a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
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> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional. Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent."

40. I am alive to the legal position that was espoused by the Court of Appeal in the case of Ethics & Anticorruption Commission v Eunice Mugalia & another KSM Civil Appeal No. 39 of 2019; [unreported] and Funzi Island Development Ltd v The county council of Kwale [2014] eKLR. Suffice it to underscore that in both decisions, the Court of Appeal elucidated the process attendant to the acquisition of part of what was previously trust land.

41. To my mind, the appellant herein did not place before the court the requisite documentation that could have enabled the court to return a finding that same [appellant] was the true allottee and owner of the suit property. In this regard, the appellant's case was rightfully dismissed.

Final Disposition:

42. Flowing from the foregoing analysis, it must have become crystal clear that the appellant did not prove her case before the trial case. In addition, it then means that the appeal beforehand is devoid and bereft of merits.

43. In the premises, the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby dismissed.

    ii. The Judgment of the trial court be and is hereby affirmed.

    iii. Costs of the Appeal be and are hereby awarded to the respondents.

    iv The Costs in terms of clause [iii] shall be agreed upon and in default same shall be taxed by the Deputy Registrar of the court in the conventional manner.

44. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 3RD DAY OF JULY 2025.

OGUTTU MBOYA, FCIArb; CPM [MTI-EA].

JUDGE

In the presence of:

Mutuma – Court Assistant

Miss Mugo for the Appellant

Mr. Benjamin Ondari for the Respondent