Kivuthu v Mutea (Environment and Land Appeal E003 of 2024)
[2025] KEELC 5528 (KLR) (14 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5528 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E003 OF 2024

JO MBOYA, J

JULY 14, 2025

BETWEEN

MARY WAKARIMA KIVUTHU ..... APPELLANT

AND

RAEL GATABIRA MUTEA ..... RESPONDENT

JUDGMENT

1. The Respondent herein [who was the Plaintiff in the subordinate court], filed a Plaint dated 26th January 2013; and which Plaint was amended and subsequently re-amended, resting with the Further amended Plaint dated 11th August 2015 and wherein the respondent sought the following reliefs;

    a. Declaration that the plaintiff is the proprietor of plot and/or stall/premises No. 9 [formerly plot and/or stall No. 4A] situated within Meru Municipality at main bus park/stage and a declaration that the premises which was currently formerly occupied by and or leased to Meru Nissan Sacco limited is part of plot and/or stall and/or premises No. 9 [formerly plot and or stall No. 4A] and therefore the same belongs to the plaintiff.

    b. A permanent order of injunction restraining the defendant, his agent, servant and or employee or whomsoever acting on her behalf or instructions from entering, invading, moving into, trespassing upon, dealing with, leasing out and or in any other manner whatever from interfering with the plaintiff's peaceful enjoyment, ownership, use occupation and/or possession of plot and/or stall number 9 [formerly plot and/or stall No. 4A] and in particular part of her the aforesaid plot which was formerly occupied by and or leased to Meru Nissan Sacco Ltd situated within mere municipality main bus part/stage.

    c. An order that the defendant and/or any other person who has leased the suit premises from the defendant be evicted therefrom and the OCS Meru police station do provide security and ensure compliance with court orders.

d. Costs of the suit.

e. Any other remedy this Honourable court may find fit and just to grant.

2. The appellant who was the Defendant in the subordinate court duly entered appearance and thereafter filed a statement of defence and counterclaim. Suffice it to state that the appellant also sought various reliefs at the foot of the counterclaim dated 4th August 2015.

3. For ease of appreciation, the reliefs sought at the foot of the counterclaim are as hereunder;

i. Declaration that the defendant is the proprietor of plot and or stall/premises plot No. 10B [formerly plot No. 4B] within the main stage within meru municipality and the part the defendant had leased to Meru Nissan Sacco Ltd is part of plot No. 10B [formerly 4B] and the same belongs to the defendant.

ii. An order of permanent injunction restraining the plaintiff, her agents, servants, employees, assigns or nay other person claiming under her name from alienating, selling, disposing, mog into, trespassing, dealing with, leasing out or any other manner interfering with the defendant's peaceful occupation and possession of plot No. 4B [sic] now 4B and part of the disputed part of the plot that was leased to Meru Nissan Sacco Ltd within Meru Municipality main stage.

iii. Costs, interest and any other relief this Honorable court deems fit to grant.

4. The suit before the subordinate court was heard and disposed of *vide* Judgment delivered on 30th January 2024; wherein the learned Chief Magistrate found and held that the respondent had duly established and proved her claim to the requisite standard. To this end, the learned Chief Magistrate proceeded to and granted the reliefs sought at the foot of the further amended Plaint dated 11th August 2015. On the contrary, the learned Chief Magistrate found that the appellant had not proved her claim to the suit plot and thus the counterclaim was dismissed.

5. Aggrieved by the Judgment under reference, the Appellant has now approached this court *vide* the memorandum of appeal dated 2nd February 2024 and wherein the appellant has raised and highlighted the following grounds;

i. That the trial court erred in law and in fact by dismissing the appellant's counterclaim without giving any reasons and also failed to consider the part of the premises subject to the case was a toilet area of the hotel stall/plot 10B within Meru bus stage.

ii. The trial court erred in law and in fact by allowing the respondent's case and dismissing the appellant's counterclaim when the said court never considered the defendant's pleadings, documents filed and evidence adduced and the appellant's agreement where she had bought a hotel which had a toilet which became subject of the suit.

iii. The trial court erred in law and in fact by replying on the evidence of one person only Samuel Kiome who is alleged to have sold the plot stall 4A and 4B to the respondent and the appellant yet the court did not visit the locus in quo to establish whether the measurement indicated on the respondent agreement are the same one on the ground in respect of the two plots that are adjacent to one another (suit plot).

iv. The trial court erred in law and in fact by disregarding the evidence of Meru County's physical planner and the document that was produced in BPRT 12/26 Nairobi and Meru HCCC Appeal No. 8 of 2014.

v. The trial court erred in law and in fact by failing to find that since 2002, when the suit property was purchased the respondent herein filed her claim in 2013 and Stephen Munene Rintari had been filing suits and the respondent herein collusion with Samuel Kiome, Stephen Munene and to claim suit plot.

vi. The trial court erred in law and in fact by dismissing the appellant's counterclaim, yet the same was proved on a balance of probabilities and the respondents' claim was not.

vii. The trial court erred in law and in fact by allowing the respondent's claim when there was no evidence to support the same and same was not proved on a balance of probabilities.

viii. The Judgment was against the entire weight of evidence.

6. The appeal came up for directions on 11th March 2025; and on the 8th April 2025; whereupon it was confirmed that the appellant had duly filed and served a compliant record of appeal. Furthermore, the parties agreed to canvass and prosecute the appeal by way of written submissions. To this end, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

7. The Appellant filed written submission dated 25th April 2025; and whereupon the Appellant has raised two [2] key issues namely; that the learned trial magistrate failed to properly appreciate the evidence tendered by the appellant and thus arrived at an erroneous conclusion, which essentially deprived the appellant of ownership of the disputed portion of the suit plot; and the learned Chief Magistrate failed to give any reasons for the dismissal of appellants counterclaim.

8. Regarding the first issue, learned counsel for the appellant has submitted that the appellant tendered evidence before the court to demonstrate that same purchased plot number 4B [now 10B] from Samuel Kiome Rimbere. Furthermore, it was averred that upon purchase of the said plot, the vendor showed the appellant the extent of the plot that was sold and which included the portion pertaining to the toilet. Moreover, it was contended that the appellant herein is the one who had leased out the said portion to Stephen Munene.

9. It was the further submissions by learned counsel for the Appellant that when Stephen Munene failed to pay the rents, the appellant herein filed a complaint with the business premises rent tribunal [BPRT] seeking eviction of the said Stephen Munene.

10. Other than the foregoing, it was contended that the appellant also called the Physical Planner, namely; David Kinoti Arithi who testified before the court and produced various exhibits. In particular, it was contended that the said witness testified that the hotel had 3 rooms. Moreover, it was contended that the witness also testified that the counsel would not have built a hotel without a toilet area. To this end, it was posited that the toilet which constitutes the disputed portion of the suit plot forms part of plot number 10B belonging to the appellant.

11. In respect of the second issue, learned counsel for the appellant has submitted that the learned Chief Magistrate failed to give and or assign any reason[s] for the dismissal of the counterclaim. To this end, it was posited that the dismissal of the appellants' counterclaim was therefore erroneous and constituted a miscarriage of justice.

12. The respondent filed written submissions dated 7th June 2025; and wherein same has raised and canvassed three [3] salient issues for consideration. The issues raised by the respondent are namely; that the learned trial magistrate correctly reviewed and analyzed the totality of the evidence tendered and thereafter arrived at the correct conclusion; the respondent proved her case to the requisite standard of proof; that the appeal beforehand is devoid of merits.

13. Regarding the first issue, learned counsel for the respondent has submitted that the respondent tendered and produced before the court credible evidence demonstrating that same bought/purchased plot number 4A from Samuel Kiome Rimberia. Furthermore, it was posited that the plot, which was purchased by the respondent, measures 8 ft by 13ft. In addition, it was contended that the disputed portion falls within plot 4A [now plot 9] belonging to the respondent.

14. Additionally, it was submitted that the respondent called Samwel Kiome Rimberia as her witness and that the said witness testified and confirmed that it is him [Witness] who sold plot number 4A, [now plot number 9], to the respondent. Moreover, it was posited that the area of the said plot was duly captured and reflected in the body of the sale agreement.

15. Other than the foregoing, it was also submitted that the respondent, also called Stephen Munene who had been operating a business in the disputed portion of the suit property. In this regard, it was submitted that the said Stephen Munene also confirmed that the disputed portion of the suit property belongs to the respondent.

16. Premised on the foregoing, learned counsel for the respondent has submitted that the totality of the evidence that was tendered before the subordinate court established and confirmed that the disputed portion falls within plot number 4A [now plot number 9] belonging to the respondent.

17. As pertains to the second issue, learned counsel for the respondent has invited the court to find and hold that the appellant did not place before the court any plausible evidence to demonstrate her claim to and or in respect of the disputed portion of the suit property. To this end, it was posited that the appellant's counterclaim was rightfully dismissed.

18. In respect of the third issue, learned counsel for the respondent has submitted that the appeal beforehand is devoid of merits and thus same ought to be dismissed. Instructively, the court has been invited to dismiss the appeal with costs to the respondent.

19. Having reviewed the record of appeal, the evidence tendered before the trial court [both oral and documentary] and upon considering the written submissions filed by and on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on two [2] key issues, namely; whether the respondent duly proved her claim to the portion of the suit property or otherwise; and whether the appellant's counterclaim was merited [if at all].

20. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, namely, the Subordinate Court. By virtue of being a first appeal, this honourable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyse the findings of the court of first instance and thereafter to arrive at independent conclusions, taking into account the pleadings filed; evidence on record and the applicable laws. [See the provisions of Section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya].

21. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse the findings and observations of the trial court, this court is, however, called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless the findings of the trial court are informed by extraneous factors or, better still, are perverse to the evidence on record.

22. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of *Selle & Another v Associated Motor Boat*

Co. Ltd & Others [1968] EA 123, the Court of Appeal for Eastern Africa elaborated on the applicable principle and stated thus;

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that 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..."

23. Likewise, the extent and scope of the Jurisdictional remit of the first appellate court was also elaborated upon in the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, where the Court of Appeal held thus;

> We also wish to be guided by the reasoning of this court in the case of *Mwana Sokoni v Kenya Business Limited* (1985) KLR 931 page 934,934 thus:-
>
> > " Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in *Sottos Shipping v Sauviet Sohold*, The Times, March 16,1983.
> >
> > It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"
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> Again, in *Peters v Sunday Post Limited* (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:
>
> > " It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses"

24. Without endeavouring to exhaust the case law that elaborate on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the court of appeal in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, where the court held as hereunder;

> " As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in *Peters v Sunday Post Ltd* [1958] EA 424. In its own words: -
>
> Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

[See also the recent decisions of the Court of Appeal in *County Assembly of Kwale and Others v Dzila* [2024] KECA; *Kenya Urban Roads Authority and Another v Belgo Holdings Limited* [2025]KECA; and *Doshi v Justice Charles Chemutut and 7 Others* [2025]KECA]

25. Duly guided by the established position [ratio] which underlines the scope and extent of the jurisdiction of the 1st appellate court, I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appraised, analyzed and evaluated the evidence tendered by the parties and in particular, the Respondent [who was the Plaintiff before the trial court] and thereafter correctly applied the law in the course of determining the dispute between the parties.

26. Additionally, I am also well positioned to review and re-evaluate the factual matrix [evidence] presented before the trial court and thereafter endeavor to ascertain whether the factual findings arrived at by the trial magistrate accord with the evidence on record or better still, whether the conclusions arrived at were perverse to the evidence on record.

27. Back to the issues that were highlighted elsewhere herein before. To start with, it is imperative to recall and reiterate that it is the respondent who filed the suit before the subordinate court. To this end, it was incumbent upon the respondent to tender and place before the trial court cogent, plausible and credible evidence to demonstrate that the disputed portion fell within plot number 4A [now 9] and not otherwise.

28. It is instructive to note that the respondent herein testified before the trial court and thereafter called two witnesses, namely; Samwel Kiome Rimbere [PW 2] and Stephen Munene [PW 3]. It was the testimony of the respondent that same entered into a sale agreement with PW 2, who was the previous owner of plot number 4A [now plot number 9]. In addition, the respondent tendered and produced assorted documents, including a copy of the sale agreement, which was duly executed between herself and PW 2.

29. The evidence which was tendered by the respondent and the documents produced as exhibits were neither controverted nor challenged. Notably, the respondent herein was not cross-examined. To this end, the evidence of the respondent remained solid and steadfast.

30. Fast forward, the respondent called Samuel Kiome Rimbere. The testimony of the said witness was to the effect that same was previously the registered owner/allottee of plot number 4. Furthermore, the witness testified that same thereafter applied to the Municipal council of Meru [now defunct] for approval to sub-divide the plot into two. Additionally, the witness averred that his application for sub-division of plot number 4 was approved. Moreover, the witness testified that before the application for sub-division of plot number 4 into two portions, same [PW 2] removed what was the toilet and converted it into a business area.

31. Furthermore, it was the testimony of the said witness [PW2] that the portion which previously fell where the toilet was, formed part of plot 4A [now plot 9] belonging to the respondent. To this end, PW 2 [who was the vendor] in favour of both the respondent and the appellant confirmed that the disputed portion falls within the respondent's plot.

32. Other than the foregoing, there was also the testimony of Stephen Munene. Same testified that he had rented the disputed portion from the respondent and thereafter sublet the portion to Meru Nissan Sacco. Suffice it to state that copies of the single business permit were tendered and produced before the court and it showed that the permits which were issued to Meru Nissan Sacco [the Tenant in respect of the disputed portion] reflected that the said Sacco was operating within plot number 9 and not plot number 10B, the latter belonging to the appellant.

33. It is important to recall that the testimonies of the respondent, PW 2 and PW 3, were never subjected to any cross-examination. In this regard, it is evident that the totality of the evidence that was placed before the trial court was indeed plausible and credible. The said evidence was equally believable, taking into account the critical testimony of PW 2, who was the common vendor to both the appellant and the respondent.

34. Arising from the foregoing, I come to the same conclusion as the learned trial magistrate that the disputed portion falls within plot number 4A [now plot number 9] belonging to the respondent.

35. Turning to the appellant's claim to the disputed portion of the suit property. It is important to state that the appellant also laid a claim to the disputed portion of the suit property. Pertinently, the appellant posited that PW 2 showed her the portion forming plot 4B [now 10B] and according to the appellant, the area that was shown to her included the disputed portion.

36. On the other hand, it is also worthy to recall that the appellant also contended that it is her who has been using the disputed portion and thus the disputed portion belongs to her.

37. To buttress a claim to the disputed portion of the suit property, the appellant called 3 witnesses, two of whom are related to her. For good measure, DW 2 testified that same is married from the appellant's family. On the other hand, DW 3 confirmed that the appellant is his mother. To my mind, the testimony of DW 2 and DW 3, does not escalate the appellant's case any further. In any event, the issue at hand touches on and concern[s] whether the disputed portion falls within the Respondent's portion or otherwise; and hence the evidence of the vendor carries more weight in comparison to the evidence of DW2 and DW3.

38. The other witness who was called by the appellant was David Kinoti Arithi. Same testified as DW 4. However, it is worthy to reiterate that the testimony of this witness was premised more on speculation, conjecture and hypothesis.

39. To be able to understand the conclusion in terms of the preceding paragraphs, it is imperative to reproduce the testimony of DW 4 and more particularly, the salient portion while giving evidence in chief.

40. Same stated thus;

> " The hotel had 3 rooms. The council could not have built a hotel without a toilet area. The toilet formed part of the hotel. *Public Health Act* requirements demand that no hotel should be constructed without a toilet".

41. In my humble view, the foregoing excerpts are predicated more on conjecture and speculation. Same do not help in establishing whether the disputed portion falls within plot 4B [now 10B] belonging to the appellant. Furthermore, the said testimony does not seem to appreciate the position taken by PW 2, who was the allottee and who confirmed that before he applied for sub-division, the toilet was removed.

42. To my mind, the appellant herein did not place before the trial court any plausible and cogent evidence to demonstrate that the disputed portion forms part of plot no. 10B either in the manner claimed at the foot of the counter claim or at all. Suffice it to underscore that the appellant bore the burden of proving her counterclaim. [See the provisions of Sections 107, 108 and 109 of the *Evidence Act*, Cap 80, Laws of Kenya].

[See also the decision in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Mureithi* (2014) eKLR; *Dr. Samson Gwer & 5 others v KEMRI* (2020) eKLR and *Agnes Nyambura Munga v Lita Violet Shepard* (2018) eKLR, respectively.

43. Before concluding this issue, it is appropriate to address the complaint by the appellant that her counterclaim was dismissed without any reason being assigned for such dismissal. I have examined the judgment by the learned chief magistrate and I do agree that no reasons were indicated to underpin the dismissal of the counterclaim. It is instructive to state that it behooves the judicial officers and the judges alike to provide reasons for their decisions. [See order 21 Rule 4 of the *Civil Procedure Rules* 2010].

44. Nevertheless, even though no reasons were availed by the learned Chief Magistrate, it is apparent that upon allowing the claim by the respondent, the consequence thereof was to the effect that the cross-claim [Counter-claim] by the appellant stood dismissed. To this end, I apprehend that the reasons for the dismissal of the counterclaim are the reasons that underpin the findings in favour of the respondent.

45. Save for the foregoing, I beg to state that I have come to the same conclusion as the learned Chief Magistrate. Notably, the disputed portion being claimed forms part of plot No. 4A [now 9] belonging to the respondent.

Final Disposition:

46. For the reasons that have been highlighted in the body of the Judgment, I find and hold that the subject appeal is devoid and bereft of merits. To this end, the appeal courts dismissal.

47. Consequently, and 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 Learned Chief Magistrate dated 30th January 2024 be and is hereby affirmed.

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

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

48. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 14TH DAY OF JULY 2025.

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

JUDGE

In the presence of:

Mutuma – Court Assistant

Mrs. Mercy Kaume for the Appellant

Mr. Kaaria & Mr. Otieno for the Respondent