



**Kombudo v Muango (Environment and Land Appeal E027 of 2024)
[2025] KEELC 4985 (KLR) (3 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 4985 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E027 OF 2024**

SO OKONG'O, J

JULY 3, 2025

BETWEEN

OJWANG KOMBUDO APPELLANT

AND

GRACE MUSIMBI MUANGO RESPONDENT

(Being an appeal against the judgment and decree of Hon. E.N. Mwenda PM delivered on 23rd May 2024 in Kisumu CMC ELC No. 116 of 2019, Grace Musimbi Mwango v. Ojwang Kombudo)

JUDGMENT

1. This appeal is against the judgment delivered by Hon. E.N. Mwenda, PM on 23rd May 2024 in Kisumu CMC ELC No. 116 of 2019 (hereinafter referred to as “the trial court”). The Respondent brought a suit against the Appellant at the trial court through a plaint dated 3rd October 2019. The Respondent averred that she was at all material times the registered owner of all that parcel of land known as Kisumu/Migosi/87 (hereinafter referred to as “the suit property”). The Respondent averred that she was allocated the suit property by the Commissioner of Lands on behalf of the Municipal Council of Kisumu. The Respondent averred that the Appellant had without any right to do so constructed a permanent wall on the suit property thereby blocking the sewer line and depriving the Respondent of the sewerage services. The Respondent averred that the Appellant had also prevented the Respondent from accessing and using a sizeable portion of the suit property. The Respondent averred that the Appellant’s action was intended to dispossess the Respondent of the suit property. The Respondent prayed for judgment against the Appellant for; an order of eviction of the Appellant from the suit property and demolition of the Appellant’s wall and constructions thereon, a permanent injunction restraining the Appellant from entering upon, remaining on, taking possession of, carrying out any construction, or any other activity whatsoever on the suit property or any part thereof, and from alienating or interfering by any means howsoever, with the suit property, a declaration that the suit



- property lawfully belonged to the Respondent, in the alternative compensation at market rate, and costs of the suit.
2. The Appellant filed a defence to the Respondent's claim at the trial court on 24th October 2019. The Appellant denied the Respondent's claim in its entirety. The Appellant averred that he was not the owner of the parcel of land adjacent to the suit property and denied that he had erected a wall or any structure adjacent to the suit property. The Appellant denied that he had in any way interfered with or blocked the Respondent from accessing or using the sewerage line. The Appellant also denied that he had prevented or blocked the Respondent from accessing or entering, using or utilising any portion or part of the suit property. The Appellant averred that he had not occupied or taken possession of any portion of the suit property.
 3. The Appellant averred that the Respondent's suit was an abuse of the process of the court in that the Respondent's cause of action was based on a boundary dispute which should have been resolved in the first instance by the Land Registrar under Section 18 of the *Land Registration Act* 2012. The Appellant averred that the suit was defective and misconceived. The Appellant averred further that the Respondent had no locus standi to maintain the suit as she had not been issued with a title for the suit property. The Appellant denied the jurisdiction of the court to hear and determine the suit and intimated that it would raise a preliminary objection on the issue of jurisdiction and would urge the court to strike out the suit with costs.
 4. Together with the plaint, the Respondent filed a Notice of Motion application dated 3rd October 2019 seeking a temporary injunction restraining the Appellant from carrying out any construction, building, fencing, excavation or any other activity whatsoever on the suit property or any part thereof pending the hearing and determination of the suit. On 22nd July 2021, the trial court ordered that the Appellant's preliminary objection to the court's jurisdiction be heard first. The preliminary objection was argued and upheld by Hon. J.Wambilyanga SPM in a ruling delivered on 21st October 2021. The trial court held that the dispute between the parties was a boundary dispute which should have been determined in the first instance by the Land Registrar under Section 18 of the *Land Registration Act* 2012. The trial court found that it had no jurisdiction to entertain the suit and struck it out.
 5. The Respondent was dissatisfied with the trial court's decision on the preliminary objection and appealed against the same to this court in Kisumu ELCA No. E081 of 2021, Grace Musimbi Muango v. Ojwang Kombudo. This court heard the appeal and allowed the same in a judgment delivered on 26th October 2023 by Asati J. This court found that the dispute between the parties was not a boundary dispute and, as such, the trial court had erred in its finding that it had no jurisdiction to entertain the suit. The court reinstated the suit for hearing on merit by the trial court.
 6. The trial court heard the matter and delivered a judgment on 23rd May 2024. The trial court found that the Respondent had proved that the Appellant had developed his land beyond the sewer line and, as such, had encroached on the suit property. The trial court issued an order compelling the Appellant to remove the wall that had encroached on the suit property within 90 days failure to which the Respondent would be at liberty to demolish the same at the Appellant's cost, a permanent injunction restraining the Appellant from remaining upon or carrying out any activity on the suit property, and awarded the Respondent the costs of the suit.
 7. The Appellant was aggrieved by the decision of the trial court and preferred the present appeal. In his Memorandum of Appeal dated 24th May 2024, the Appellant challenged the judgment of the trial court on the following grounds;



1. The Learned Trial Magistrate erred in law and fact by failing to appreciate that the evidence tendered at the trial pointed to a boundary dispute which ousted his jurisdiction in view of the provisions of Sections 18 and 19 of the *Land Registration Act* 2012.
 2. The Learned Trial Magistrate erred in law and fact in failing to appreciate that the pleadings by the parties, particularly by the Appellant, pointed to a boundary dispute.
 3. The Learned Trial Magistrate erred both in law and fact in failing to independently analyse, assess and evaluate the evidence instead of relying on the decision of the appeal court in the appeal that was preferred by the Respondent against the ruling by the trial court on a preliminary objection resulting in a failure to apply the law on the evidence.
 4. The Learned Trial Magistrate erred in law and fact in going beyond and outside the evidence tendered by the parties and considering extraneous matters/factors in arriving at his decision.
 5. The Learned Trial Magistrate erred in law and fact in disregarding the admission or concession by both the Respondent and her witnesses that the dispute before the court was over the position of the boundary between the Respondent and the Appellant's parcels' of land.
 6. The decision, findings, judgment and conclusions by the Trial Magistrate were against the weight of the evidence on record.
8. The Appellant prayed that the appeal be allowed and the judgment and decree of the trial court be set aside and, in its place, judgment be entered for the Appellant dismissing the Respondent's suit with costs. The Appellant also prayed for the costs of the appeal. The appeal was argued by way of written submissions. The Appellant filed submissions dated 28th October 2024, while the Respondent filed submissions dated 4th December 2024.

The Appellant's submissions

9. The Appellant framed three issues for determination by the court, namely: whether the trial court had jurisdiction to try and determine the lower court suit, whether the Respondent proved her case to the required standard to entitle her to the orders granted by the trial court and who should bear the costs of the appeal. On the issue of jurisdiction, the Appellant reiterated that from the pleadings by both parties, it was clear that the dispute between the parties was over the boundary between the Appellant's parcel of land and the Respondent's parcel of land (the suit property). The Appellant reiterated that the trial court's jurisdiction to entertain the dispute was ousted by the provisions of Section 18(2) of the *Land Registration Act* 2012. The Appellant submitted that without jurisdiction, the trial court could not take any step. It had to lay down its tools. The Appellant submitted that the Respondent was under an obligation to exhaust the dispute resolution mechanism provided in Sections 18 and 19 of the *Land Registration Act* 2012 before moving to court. The Appellant submitted that the surveyor who was engaged by the Respondent to determine the boundary between the Appellant's and the Respondent's parcels of land could not be a substitute for the Land Registrar, who is statutorily mandated to determine boundaries.
10. On whether the Respondent had proved her case to the required standard, the Appellant submitted that the burden of proof of the allegations made in the plaint was upon the Respondent. The Appellant submitted that the Respondent did not discharge the said burden. The Appellant submitted that the Respondent did not establish that it was the Appellant who erected the wall which was the subject of the suit. The Appellant submitted that the Respondent did not prove her case on a balance of probabilities.



11. In conclusion, the Appellant submitted that the trial court lacked jurisdiction to entertain the Respondent's suit, which concerned a boundary dispute, and the Respondent also failed to prove her case to the required standard. The Appellant submitted that the Respondent was not entitled to the orders that were granted by the trial court. The Appellant urged the court to allow the appeal with costs.

The Respondent's submissions

12. The Respondent submitted that the issue of the jurisdiction of the trial court was completely determined by Asati J. in Kisumu ELCA No. 81 of 2021, *Grace Musimbi Muango v. Ojwang Kombudo* in which the court held that the trial court had jurisdiction to hear and determine the Respondent's suit as it did not concern a boundary dispute. The Respondent submitted that the Appellant did not appeal against the judgment of Asati J. The Respondent submitted that this court cannot sit on appeal against the decision of Asati J. The Respondent submitted that the issue was res judicata and could not be entertained by the court.
13. The Respondent submitted that, at the trial, the evidence by the surveyor, Patrick Opiyo, who gave evidence on behalf of the Respondent on the Appellant's encroachment on the suit property, was not controverted. The Respondent submitted that the Appellant neither called an expert witness nor produced any document in evidence. On the Appellant's contention that the Respondent did not prove her case to the required standard, the Respondent submitted that the Respondent established through documentary evidence that she was the owner of the suit property and that the Appellant had, without her permission, encroached on the property. The Respondent averred that the Appellant had, on the other hand, not proved ownership of the suit property, which he admitted was not owned by him. The Respondent submitted that she proved her case and was entitled to the orders that were granted by the trial court.
14. In conclusion, the Respondent urged the court to find that the trial court had jurisdiction to entertain the Respondent's suit and that the Respondent was entitled to the orders that were granted by the court. The Respondent prayed that the appeal be dismissed with costs to the Respondent.

Analysis and Determination

15. I have considered the pleadings filed before the trial court, together with the proceedings and the judgment of the court. I have also considered the memorandum of appeal filed by the Appellant against the said judgment and the submissions by the advocates for the parties. I agree with the submissions by the Appellant on the powers and the role of this court as the first appellate court. This being a first appeal, the court has to reconsider and re-evaluate the evidence on record and draw its own conclusions on the issues that were raised for determination before the trial court. In *Bwire v. Wayo & Sailoki (Civil Appeal 032 of 2021)* [2022] KEHC 7 (KLR), the court stated that:

“A first appellate is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”



16. In *Kenya Ports Authority v. Kuston (Kenya) Limited* [2009] 2 E.A 212, the Court of Appeal stated that:
- “On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”
17. In *Makube v. Nyamuro*[1983] KLR 403, it was held that the appellate court will not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See also, *Peter v. Sunday Post Ltd.* [1958] E.A 424.
18. I am of the view that the Appellant’s six (6) grounds of appeal can be summarised into three (3) grounds namely; whether the trial court erred in its finding that it had jurisdiction to entertain the Respondent’s suit, whether the trial court erred in its finding that the Respondent had proved her case against the Appellant to the required standard and whether the appeal should be allowed.
19. Whether the trial court erred in its finding that it had jurisdiction to entertain the Respondent’s suit.
20. I agree with the Respondent that the issue of jurisdiction of the trial court was settled by the judgment of Asati J. delivered on 26th October 2023 in Kisumu ELCA No. E081 of 2021, *Grace Musimbi Muango v. Ojwang Kombudo*, in which the court stated as follows:
17. I have read the Plaintiff and the Defence in the suit. I note that Section 18(2) ousts the jurisdiction of the court where the boundaries have not been determined under the Act. The Plaintiff does not refer to any boundary dispute. My reading of the plaintiff is that the dispute relates to an alleged act of trespass by the Respondent on the Appellant’s land. That the Respondent entered the land unlawfully and constructed a permanent wall thereon thereby blocking the appellant’s sewer line.
21. The Defence does not refer to any boundary or boundary dispute. The Defendant (sic) did not claim to own land that shares a common boundary with the Appellant. The Appellant (sic) did not claim that he was building the wall within his land. He simply denied the Appellant’s claim and raised the preliminary objection.
22. I do not find that the dispute before the trial court was a boundary dispute and hence within the ambit of Section 18 and 19 of the *Land Registration Act*.
23. I find that the trial court erred in finding that the dispute was a boundary dispute and that it had no jurisdiction.”
24. In a ruling delivered on 21st October 2021, the trial court held that it had no jurisdiction to hear and determine the Respondent’s suit as it was a boundary dispute and should have been determined by the Land Registrar in the first instance under Sections 18 and 19 of the *Land Registration Act* 2012. The decision of the trial court was overturned on appeal to this court. This court held that the dispute between the Appellant and the Respondent was not a boundary dispute and directed the trial court to proceed and hear the matter. The Appellant did not appeal the decision of this court on the issue of jurisdiction of the trial court. The trial court is bound by the decisions of this court. The issue of the



jurisdiction of the trial court having been settled by this court, the trial court could not be called upon to determine the issue again. The trial court was right when it stated that:

“The Superior Court having conclusively determined the question on jurisdiction it is no longer open to this court for determination”.

25. The Appellant has called upon me to find that the trial court had no jurisdiction to hear and determine the Respondent’s suit based on the pleadings and evidence. This court has no jurisdiction to do that. As correctly submitted by the Respondent, the issue was determined conclusively by a judge of this court. I have no power to sit on appeal against the judge’s judgment. I therefore find no merit in the Appellant’s grounds of appeal anchored on the issue of the jurisdiction of the trial court.
26. Whether the trial court erred in its finding that the Respondent had proved her case against the Appellant to the required standard.
27. In *Kurshed Begum Mirza v. Jackson Kaibunga* [2017] eKLR, the court stated as follows:
 - (16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”
28. In *Halsbury’s Laws of England*, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:
 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party’s case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
 14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
29. The majority of the Supreme Court in *Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others* [2017] eKLR stated as follows in paragraphs 132 and 133 of the judgment on the evidential burden of proof, which keeps shifting during the trial:
 - (132) Though the legal and evidential burden of establishing the facts and contentions which will support a party’s case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
 - [133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behoves the respondent to adduce evidence to prove compliance with the law...”



30. The Respondent's case was that she was the registered owner of the suit property and that the Appellant had trespassed on the property. The Appellant denied the trespass and contended that he was not the owner of the property adjacent to the suit property from which the trespass was said to have originated.
31. In the Court of Appeal, Fourth District, Division 1, California, in *Ralphs Grocery Co. v. Victory Consultants Inc.* (2017) 17Cal. App.5th 245, 261; CACI No. 2000, the court stated that:
32. In the instant action, Appellants have sued Respondents for trespass. "Trespass is unlawful interference with possession of property." (*Staples v. Hoefke* (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are:
- (1) the plaintiff's ownership or control of the property;
 - (2) the defendant's intentional, reckless, or negligent entry onto the property;
 - (3) lack of permission for the entry or acts in excess of permission;
 - (4) harm; and
 - (5) the defendant's conduct was substantial factor in causing the harm. (See CACI No. 2000)."
33. I am satisfied from the evidence on record that the Respondent proved that she was the owner of the suit property and that she was in possession thereof. In *Gitwany Investments Limited v. Tajmal Limited & 3 others* [2006] eKLR, it was held that title to land carries with it legal possession. To prove trespass, it was not necessary for the Respondent to prove that the Appellant was the owner of the parcel of land adjacent to the suit property. What was required was proof that it was the Appellant who committed the acts of trespass complained of. In his witness statement dated 13th February 2020 which the Appellant adopted as his evidence in chief, the Appellant referred to the parcel of land adjacent to the suit property on which he claimed the activities complained of were taking place as "our plot". The Appellant claimed that their activities were within their plot which was bigger than the Respondent's plot. Before the Respondent filed a suit against the Appellant, the Respondent's advocate served him with a demand letter dated 5th July 2019 asking the Appellant to stop encroachment on the suit property. The Appellant responded to the demand letter through a letter dated 12th July 2019. In the letter, the Appellant admitted that he was the one who had engaged "my fundis workmen" to plaster a boundary wall that the Respondent was complaining about. From the evidence tendered before the trial court, the Respondent proved that there was a way leave for a sewer line created along the common boundary between the suit property and the adjacent parcel of land, which the Appellant claimed to own with another. The Respondent also proved that the way leave was created over land that was ceded by the Appellant and the Respondent from their parcels of land. The Respondent also proved that the Appellant carried out construction works not only on the portion of the land that was set aside by him for the sewer line but also the portion that was surrendered by the Respondent for that purpose. According to the survey report prepared by Patrick Opiyo Adero, Licensed Land Surveyor dated 2nd July 2019, the Appellant had carried out development "on the sewer line". This finding was confirmed by the survey report from the County Government of Kisumu dated 22nd July 2019 in which Valentine Orio, Land Surveyor found that the Appellant took over "the whole way leave and subsequently erected a storey building on the sewer line reserve." The Appellant did not place any evidence before the trial court to controvert the findings of these two surveyors. I agree with the trial court that to the extent that the Appellant's development went outside the boundary of his land, extended to the land that he had surrendered for the sewer line way leave and covered the land that was



surrendered by the Respondent for the same purpose thereby taking over the whole land surrendered by the parties for sewer line way leave, the Appellant was not only a trespasser but was also acting illegally. The Appellant had no right to carry out development on land that was reserved for a sewer line. Due to the foregoing, I find no reason to disturb the trial court's finding that the Respondent had proved her case against the Appellant to the required standard.

Whether the Appeal should be allowed.

34. I have made a finding that the trial court had jurisdiction to hear and determine the Respondent's suit. I have also made a finding that the Respondent proved her case against the Appellant to the required standard. It follows from the foregoing that the appeal before me has no merit.

Conclusion

35. In conclusion, I find no merit in the Appellant's appeal. The appeal is dismissed with costs to the Respondent.

DELIVERED AND SIGNED AT KISUMU ON THIS 3RD DAY OF JULY 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Onsongo for the Appellant

Ms. Awuor for the Respondent

Mr. Lore-Court Assistant

