



REPUBLIC OF KENYA



**Mwatsahu v Nyakeri & 3 others (Environment and Land Appeal
E006 of 2023) [2025] KEELC 6120 (KLR) (23 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6120 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL E006 OF 2023
FM NJOROGE, J
SEPTEMBER 23, 2025**

BETWEEN

ALI YUSUF MWATSAHU APPELLANT

AND

MARGARET NYAKERI 1ST RESPONDENT

MGANDI KALULI 2ND RESPONDENT

KAPHATA MWASYA 3RD RESPONDENT

MASUMBUKO MWASYA 4TH RESPONDENT

JUDGMENT

1. The appellant herein being aggrieved by the judgment of Hon N. Chepchirchir, Principal Magistrate, delivered on 25/7/2023 filed a memorandum of appeal dated 23/8/2023 challenging the judgment on the following grounds: -
 1. That the learned magistrate erred in fact and in law in failing to appreciate the evidence before her on proof of ownership.
 2. That the learned magistrate erred in fact and in law in failing to appreciate the best evidence on proof of ownership of un-surveyed and un-demarcated land is primarily witness testimonies which were tendered in evidence by the Appellant as opposed to the Respondents who forego their right to be heard.
 3. That the learned magistrate erred in fact and in law by disregarding the Appellant's testimonies and documentary evidence before court on ownership of the land.



4. That the learned magistrate erred in fact and in law in totally disregarding exhibits produced by the Appellant and more particularly proceedings of Kasemeni Divisional Conflicts Resolution Committee and the agreement dated 22/4/2003.
 5. That the learned magistrate erred in fact and in law in making a shallow determination on the proceedings of Kasemeni Divisional Conflicts Resolution Committee without addressing herself on the history of the land narrated in the said proceedings and the finding thereof.
 6. That the learned magistrate erred in fact and law in holding that the Appellant did not call any witnesses to the suit when their testimonies were well captured in the proceedings at Kasemeni.
 7. That the learned magistrate erred in fact and in law in claiming that the Appellant did not call any local administration to support his claim when in fact she had issued summons to the Assistant County Commissioner (ACC) Kasemeni Sub-county who came and testified on behalf of the Appellant and confirmed the Appellant's ownership rights to the disputed land.
 8. That the learned magistrate erred in fact and in law in failing to take a proper record of the proceedings and points of reference shown to her by the Appellant during the site visit.
 9. That the learned magistrate erred in fact and in law failing to note that the illegal new constructions were within the Appellant's land as per the boundary set by the Kasemeni Dispute Resolution Committee and the said constructions were the genesis of the dispute herein.
 10. That the learned magistrate erred in fact and in law in failing to note that the Respondents had failed to defend the suit against them or prosecute the counterclaim.
 11. That the learned magistrate erred in fact and in law in awarding costs to the 1st Defendant for having filed a defence when she had not filed any defence.
 12. That the learned magistrate erred in fact and in law in failing to consider the magnitude of the dispute herein.
 13. That the learned magistrate erred in fact and in law in failing to consider the weighty submissions by the Appellant or address any of the issues raised in the Appellant's submissions.
2. The Appellant therefore prays: -
1. Allow this appeal and set aside, vary and/or review the judgment of Hon. N. Chepchirchir (PM) delivered at Mariakani on the 25/7/2023 by allowing the Appellant's claim as prayed in the plaint.
 2. Provide for costs of this appeal.
3. The memorandum of appeal was canvassed by way of written submissions. Notably, the Respondents did not file any submissions.
4. In his submissions, the Appellant contended that the trial court erred in both fact and law in dismissing his suit for trespass, demolition, and damages over a parcel of unregistered ancestral land situated at Kalani Sublocation, Mwavumbo Location in Samburu Sub-County, Kwale County. The land, measuring approximately 2.5 acres, is unregistered and unsurveyed and is claimed by the Appellant under customary law as ancestral land. The Appellant maintained that despite the lack of formal registration, he had consistently occupied and cultivated the land, including conducting rice farming, and had even leased part of it to a third party as far back as 2003.



5. To substantiate his claim, the Appellant relied heavily on the findings of a Divisional Conflict Resolution Committee that had previously adjudicated a dispute between him and the 3rd Respondent over the same land. The Committee ruled in his favour, demarcated boundaries, and drew a map indicating the portion belonging to him. The Assistant County Commissioner (ACC), who had been involved in those proceedings, testified before the trial court confirming the legitimacy of that process and the Appellant's claim to the land. The Appellant asserted that this decision was never appealed, and no contrary determination has ever been rendered.
6. The Appellant further contended that the 4th Respondent's alleged purchase of the land from the other Respondents is invalid. No written agreement was presented, and the Respondents offered no proof of consideration. He invokes Section 3(3) of the *Law of Contract Act*, and argued that no valid suit can be founded on an oral contract for the sale of land. To reinforce this point, he cited the decision in *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR, which affirms the necessity of written agreements in transactions involving interests in land post-2003. The Appellant also relied on the principle of *nemo dat quod non habet* and the recent decision of the Court of Appeal in *Kenya Post Office Savings Bank Staff Retirement Benefit Scheme v Attorney General & 7 others* [2025] KECA 438 (KLR), to argue that the 4th Respondent could not acquire valid title from persons who had no right to the land.
7. On the issue of locus standi, the Appellant submitted that he was entitled to bring the suit in his own right as a beneficiary of ancestral land under customary tenure, and not as a personal representative of a deceased estate. He relied on *Bahola Mkalindi Rhigo v Michael Seth Kaseme & Others* [2012] eKLR, where the Court held that customary land tenure permits individual claims over ancestral land without requiring succession documents. He submits that Article 63 of *the Constitution* recognizes customary land rights and does not subject them to the *Law of Succession Act*.
8. The Appellant asserted that the Respondents' actions constituted unlawful trespass; he avers that they entered the land without his consent, cut down trees, erected illegal structures, and fenced the property in violation of his rights. He relied on Section 3(1) of the *Trespass Act*, Cap 294, and maintains that the trespass was confirmed during the court's site visit, which showed the illegal developments, including permanent buildings erected in front of a surface dam situated within his portion of land as shown on the map drawn by the Committee.
9. The Appellant further submitted that the Respondents acted with impunity and without remorse. Despite demand notices and the previous resolution by local administration, they continued to interfere with his quiet possession of the land. He prayed for general damages of Kshs. 3,000,000 to compensate for loss of user, emotional distress, cost of demolitions, and restoration of the land. He relied on *Nakuru Industries Ltd v S.S. Mehta & Sons* [2016] eKLR and *Willesden Investments Ltd v Kenya Hotel Properties Ltd*, in which courts awarded damages even in the absence of precise valuation, based on circumstances of trespass. He also sought Kshs. 1,500,000 in exemplary damages, citing *Kenya Power & Lighting Co. Ltd v Ringera & Others* [2022] KECA 104 (KLR), where exemplary damages were awarded for cynical and oppressive trespass, and *Mikidadi v Khaigan & Another* [2004] eKLR, which affirmed that exemplary damages may be awarded where trespass is profit-driven or arrogantly executed. He also cited *David Gitau Thairu v County Government of Machakos* [2020] eKLR, where Kshs. 5,000,000 was awarded in similar circumstances.
10. On procedural grounds, the Appellant faulted the Respondents' Defence and Counterclaim, arguing that they are fatally defective; that the Respondents failed to file a verifying affidavit, list of witnesses, witness statements, or documentary evidence in support of their pleadings; they even withdrew their list of documents and preliminary objection via a notice dated 16/11/2021. As a result, the Appellant



- contended that their defence and counterclaim remained mere allegations unsupported by evidence. He cited *Gateway Insurance Co. Ltd v Jamila Suleiman* [2018] eKLR, *Trust Bank Ltd v Paramount Universal Bank Ltd*, and *Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya)*, where courts held that unproven pleadings cannot displace a plaintiff's unchallenged evidence.
11. The Appellant specifically challenged the trial court's findings, stating that the learned magistrate failed to appreciate or even acknowledge the uncontroverted testimony of the ACC and other committee members. He faulted the court for contradicting itself by recognizing the existence of a boundary dispute yet denying possession. He also challenged the finding that he failed to show proof of cut trees when there were permanent buildings erected over the same spot. The court, in his view, unfairly discounted his testimony and the supportive evidence from the site visit and the map.
 12. Finally, the Appellant argued that the Respondents ignored a formal demand dated 8/9/2020 and continued to trespass despite every opportunity for amicable resolution. He therefore urged the Court to allow the appeal, set aside the trial court's judgment, enter judgment in his favour as prayed in the plaint, and award him costs of both the appeal and the trial proceedings.
 13. This being a first appeal, I am mindful that the duty of this court as set out in the decision of *Selle & Another versus Associated Motor Boat Co. Ltd & Others* (1968) EA 123 is to reconsider the evidence, evaluate it and draw its own conclusion of facts and law, and this court will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law, or where its discretion was exercised injudiciously as held in *Mbogo & Another versus Shah* (1968) EA 93.
 14. Having said that, it is pertinent that this court sets out what transpired at the trial court.
 15. The Appellant filed a plaint dated 23/9/2021 seeking the following orders: -
 - a) A permanent Order restraining the Defendants, their Agents, servants, employees, proxies and/or assigns from constructing, cultivating, selling, trespassing, encroaching, grabbing or whatsoever dealing with all that land located at Kalalani Sublocation, Mwavumbo Location, Samburu Sub-County, Kwale County at the Junction of Kalalani Mavirivirini Road and the Road to Mwavumbo Secondary School Measuring Approximately 2.5 acres
 - b) An Order Directing the Defendants to Demolish the illegal structures erected on the suit property and vacate immediately
 - c) General, punitive, exemplary and Special Damages
 - d) Costs of the suit
 16. In the Plaint, the Appellant averred that he was at all material times the registered, beneficial, occupier and controlling owner of all that parcel of land located at Kalalani Sublocation, Mwavumbo Location, Samburu Sub-County, Kwale County at the Junction of Kalalani Mavirivirini Road and the Road to Mwavumbo Secondary School Measuring Approximately 2.5 acres (the suit property) being his ancestral land on which he has always resided on; that the 1st Respondent claims to have purchased the suit property from the 2nd Respondent and has since began construction and excavations thereon; that the 3rd and 4th Respondents have also continued to carry on cultivation on the suit property despite having unsuccessfully engaged the Appellant in a dispute adjudicated upon by the Divisional Conflicts Resolutions Committee- Kasemeni Division, in 2019.
 17. The Respondents filed a statement of defence and counterclaim dated 1/10/2021, but failed to file any list of witnesses or documents. This was noted by the trial court on 25/10/2022.



18. The Appellant testified in support of his case as PW1 and called one witness, Peter S. Ole Masaa (PW2), to corroborate his claim. In his testimony, the Appellant adopted his witness statement dated 22nd September 2021 and produced a demand letter (PEXH 3) and several photographs (PEXH 4) as part of his documentary evidence. He stated that he had inherited the suit land from his grandparents and had continued to supervise it over the years. Although he conceded during cross-examination that he lacked formal documentation proving ownership, he firmly maintained that the land was his ancestral property and added that no parcel in the surrounding area, including the suit land, had a registered title.
19. The Appellant further asserted that he had previously established his presence on the land by planting indigenous trees and erecting a house, both of which were later destroyed by the Respondents. Upon re-examination, he explained that the matter had been previously presented before the local chief and a conflict resolution committee, which determined that the suit land rightfully belonged to him. The committee not only issued a resolution to that effect but also drew a map demarcating his portion and directed that the 3rd Respondent relocate to a different section.
20. The second witness, Peter S. Ole Masaa (PW2), testified that he served as the Assistant County Commissioner of Kasemeni Division in Kwale County. He confirmed that in 2019, his office presided over a land dispute involving the Appellant and the 3rd Respondent concerning the suit property. PW2 stated that following the proceedings, a determination was made in favour of the Appellant. PW2 produced a copy of the official minutes of those proceedings as PEXH 1.
21. The trial court visited the site but ultimately dismissed the Appellant's claim for lack of sufficient proof.

Analysis And Determination

22. Having considered the grounds of appeal, submissions filed and the record of appeal presented before this Court, I find that the sole issue for determination is whether the appeal is merited.
23. The Appellant's case was based on an alleged customary ownership of unregistered ancestral land, inherited from his grandparents. In support, he relied on his own testimony, that of the Assistant County Commissioner (PW2), and the proceedings of a Divisional Conflict Resolution Committee conducted in 2019.
24. Section 107(1) of the *Evidence Act*, Cap 80 Laws of Kenya, provides as follows:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
25. Moreover, Section 108 and 109 of the *Evidence Act* place the burden of proof on the party who would fail if no evidence were adduced. In this case, even in the absence of a strong defence, the Appellant was still required to prove his case affirmatively. The mere absence of the Respondents' evidence cannot be a substitute for the Appellant's evidentiary obligation. The Appellant bore the legal burden to prove, on a balance of probabilities, that he had a valid claim to the suit land and that the Respondents were trespassers.
26. It is clear from the record that the Committee only dealt with a boundary dispute between the Appellant and the 3rd Respondent. The Committee did not adjudicate ownership of the land in issue. Consequently, the Appellant's reliance on the committee's resolution cannot be equated with formal recognition of his ownership rights, particularly where the suit property remains unregistered and unadjudicated.



27. The Appellant's claim, although not challenged through evidence by the Respondents, was not supported by documentation or credible independent testimony establishing longstanding, exclusive, and recognized occupation under customary tenure. During the site visit conducted by the trial court, it was observed that the suit property contained a fenced portion, a dam situated at the centre, stone-built toilets, a permanent stone building, three cement poles, and some shrubs. The fenced plot was notably vacant. The Appellant informed the court that he previously cultivated the land, but conceded that the existing buildings did not belong to him. He claimed that trees that once stood on the land had been cut down, and that a house he had constructed within the fenced portion was destroyed, with the debris allegedly washed away by rainfall over time. These assertions, however, remained unsubstantiated by any contemporaneous photographs or witnesses. In the absence of such corroborative material, and in light of Sections 107 to 109 of the *Evidence Act*, the trial court correctly found that the Appellant failed to discharge the legal burden of proof placed upon him.
28. Having carefully re-evaluated the evidence on record and the applicable law, I find no basis to interfere with the findings and conclusions of the trial court. The Appellant failed to prove, on a balance of probabilities, that he had any enforceable customary interest in the suit property. The evidence relied upon was insufficient, uncorroborated, and did not establish exclusive or continuous occupation, nor any clear acts of ownership capable of displacing the Respondents' possession.
29. Accordingly, the appeal is hereby dismissed in its entirety.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 23RD DAY OF SEPTEMBER 2025.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

