



**Chirumbani v Wemosia & 2 others (Environment and Land Appeal  
E018 of 2023) [2024] KEELC 6777 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 6777 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E018 OF 2023  
EC CHERONO, J  
OCTOBER 11, 2024**

**BETWEEN**

**EVANS MUNYIFWA CHIRUMBANI ..... APPELLANT**

**AND**

**EDWARD SIMBAUNI WEMOSIA ..... 1<sup>ST</sup> RESPONDENT**

**JULIUS SIMBAUNI ..... 2<sup>ND</sup> RESPONDENT**

**TOTOFICK INDECHE ..... 3<sup>RD</sup> RESPONDENT**

*(Being an appeal arising from the Judgment delivered by Hon. M.  
Munyekenye (SPM) in Webuye SPMCC No. 75 of 2010 delivered on 20/4/2010)*

**JUDGMENT**

**Introduction**

1. Evans Munyifwa Chirumbani referred to as the Appellant in this judgment filed this appeal on 28<sup>th</sup> March, 2023 against Edward Simbauni Wemosia, Julius Simbauni and Totofick Indeché referred to in this judgment as the Respondents.
2. The Appeal seeks to set aside the judgment and decree passed by Hon. M. Munyekenye, Senior Principal Magistrate in Webuye SPMCC No. 75 of 2010 for eviction orders against the Respondents, mesne profits and costs of both the primary suit and the appeal.
3. In the judgment and decree aforementioned, the learned Magistrate dismissed the Appellants case with costs to the Respondents. The Grounds of appeal as can be discerned from the Memorandum of Appeal can be summarized as follows;
  - i. The Learned Trial Magistrate erred in law and in fact when she held that the Plaintiff had not proved his case on the balance of the probabilities and dismissed the Plaintiff's suit.



- ii. The Learned Trial Magistrate erred in law and in fact when she conducted a phony site visit and yet heavily relied on it in her judgment.
  - iii. The Learned Trial Magistrate erred in law and in fact when she overlooked the Plaintiff's evidence and heavily relied on the defence evidence in writing her judgment.
  - iv. The Learned Trial Magistrate erred in law and in fact when she held that the Plaintiff had no right to complain against acarage because the Plaintiff himself brought a surveyor and processed for himself a title deed.
  - v. The Learned Trial Magistrate erred in law and in fact when she went personal and called the plaintiff 'a greedy person' against established principles of law of integrity and professionalism in legal practice.
  - vi. The Learned Trial Magistrate erred in law and in fact when she failed to award general damages for mesne profits to the Plaintiff as against the Defendants.
4. It was the Appellant's case in the Lower Court vide his amended plaint dated 16/12/2011 that on or about the 18/8/2006, he bought one (1) acre from the 1<sup>st</sup> Respondent to be carved out of land parcel no. Ndivisi/Ndivisi/2224 at a consideration of Kshs.154,000/= but was only allowed to occupy and utilize half (½) acre while the Respondents occupied and utilized the other half (½) acre. The Appellant further averred that on 31/8/2007, he bought another one acre from the 1<sup>st</sup> Defendant at a consideration of Kshs. 157,000/= but was only allowed to utilize 1 ¼ acres instead of the cumulative two (2) acres. The Appellant averred that the 1<sup>st</sup> Defendant refused to facilitate the issuance of a title leading him (the Appellant) to pursue the registered owner i.e. Wemosia Wanyonyi who was the 1<sup>st</sup> Respondents brother to cause for his registration as the proprietor of the 2 acres. He averred that he incurred Kshs. 3,600/= in transport costs as a result. He further averred that a title was eventually issued to him on 31/3/2009. The Appellant also stated that the Respondents have constructed semi-permanent structures on his land causing him losses and damages.
  5. In his testimony, the Appellant testified as the only witness where he reiterated the averments in his pleadings. It was his evidence that if he had been in use of his rightful portion, he would have earned about Kshs.30,000/= per acre which would translate to Kshs.60,000/= for the two acres. He further testified that he has been denied use of his land since 2015. In support of his case, he produced the following as exhibits;
    - Agreement dated 18/8/2006 -PExhibit 1
    - Agreement dated 31/8/2007 -PExhibit 2
    - Title deed Ndivisi/Ndivisi/2251 -PExhibit 3
    - Report by Land Registrar - PExhibit 4
  6. In cross-examination, he testified that the Respondents are living in his land parcel no. Ndivisi/Ndivisi/2251. It was his evidence that he did not have a record of the proceeds realized from his farming activities though he reiterated that he earned Kshs. 30,000/= in profits. He testified that he has tried to have the Respondents vacate his land but they have instead turned hostile. In re-examination, he explained that in the year 2007 and 2008, he harvested 20 bags which he sold at 1,800/= per kilogram and realized Kshs.36,000/= and took out Kshs. 6,000/= being the cost of inputs leaving him with Kshs. 30,000/= as profit.
  7. The 1<sup>st</sup> respondent equally testified as the only witness. He adopted his witness statement dated 19/3/2014 as his evidence in chief. He confirmed selling 2 acres to the Appellant on two separate



occasions i.e. on 18/8/2006 for Kshs.154,000/= and on 31/8/2007 for Kshs.186,000/=. He also confirmed that he did not issue the Appellant with a title deed but confirmed that he (the Appellant) has since obtained one for land parcel no. Ndivisi/Ndivisi/2251. He alleged that the Appellant has encroached into his land and has been asking for an exchange of land.

8. On cross-examination, the 1<sup>st</sup> Respondent stated that neither him nor his co-Respondents are in occupation of the Appellants land and that after purchasing the same for a period of 5years, the Appellant abandoned the land. He produced into evidence the following items;

Agreement dated 18/8/2006 -D1Exhibit 1

Agreement dated 31/8/2007 -D1Exhibit 2

Title deed Ndivisi/Ndivisi/2251 -D1Exhibit 3

9. The 3<sup>rd</sup> Respondent testified as the only witness and adopted his witness statement dated 22/8/2022 as his testimony- in- chief. He testified that he bought land from the 1<sup>st</sup> Respondent in the year 2006 and that he is in occupation of his portion. He testified that he lives in land parcel no. Ndivisi/Ndivisi/2251 which he was shown by the 1<sup>st</sup> Respondent. It was his evidence that the administrator of the estate of Wemosia Wanyonyi allocated him land parcel no. Ndivisi/Ndivisi/2969 but he did not occupy it. He testified that he purchased his portion before the Appellant bought his and that he was first on the ground.

10. In support of his evidence, he produced;

Agreement dated 18/1/2006 -D3Exhibit 1 Mutation form for Land Parcel Ndivisi/Ndivisi/2250 - D3Exhibit 2 Transfer form for parcel no.Ndivisi/Ndivisi/2969 - D3Exhibit 3 Consent from LCB - D3Exhibit 4 Demand letter dated 18/12/2019 -D3Exhibit 5

11. Thereafter, directions were taken to have this appeal canvassed by way of written submissions. The Appellant filed submissions dated 4/7/2024.

### **Legal Analysis And Decision**

12. I have carefully considered the entire appeal including the record of appeal and the submissions as well as the case law relied by the parties in the said submissions.

13. This being a first appeal, this Court is under a duty to consider the evidence adduced before the trial Court, evaluate it afresh and draw its own conclusions bearing in mind that the trial Court had the advantage of seeing and hearing the witnesses as they testified. Secondly, an appellate Court should not interfere with the exercise of the discretion of the trial Court unless it is satisfied that the Court misdirected itself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of its discretion and that as a result there has been an injustice. This was so held in the case of *Pithon Waweru Maina v Thuka Mugiria* Civil Appeal No. 27 of 1982 or eKLR 1983.

14. Although the Appellant raised Six (6) grounds of appeal, I am of the opinion that the issue that arise for determination can be summarized as follows;

- a. Whether the Appellant made a case for eviction of the Respondents
- b. Whether the Appellant is entitled to mesne profits
- c. Who bears the costs?



15. Before I proceed to analyze the issues as outlined above, I wish to begin by summarizing the issues that are not contested. It is common ground from the pleadings and evidence that the Appellant purchased 2 acres of land from the 1<sup>st</sup> Respondent on various dates in the year 2006 and 2007. The 3<sup>rd</sup> Respondent herein equally bought ½ and acre from the 1<sup>st</sup> Respondent sometime in January of 2006. That the purchased portions were to be excised from Land Parcel no. Ndivisi/Ndivisi/2224 which was registered in the name of Wanyonyi Wemoisa in trust for the 1<sup>st</sup> Respondent. The said Wanyonyi Wemoisa subdivided land Parcel no. Ndivisi/Ndivisi/2224 into two portions i.e Ndivisi/Ndivisi/2250 and 2251 each measuring 2 ¼ acres and 2 acres respectively. The resultant plots were properly demarcated with visible boundaries and land parcel no. Ndivisi/Ndivisi/2251 was registered in the name of the Appellant and a title thereof issued in his favour. The 1<sup>st</sup> Respondent was therefore to take up Land parcel no. Ndivisi/Ndivisi/2250 for himself and the 3<sup>rd</sup> Respondent who is also a purchaser.
16. The Appellants claim in this suit therefore is that the Respondents have encroached onto his land and constructed permanent structures denying him use of his land and causing him loss and damages.
17. The 1<sup>st</sup> Respondent contends that he is not in occupation of the Appellants land and that it is the Appellant who want the two to exchange their respective plots.
18. During cross-examination, the 3<sup>rd</sup> Respondent testified that he was allocated land parcel no. Ndivisi/Ndivisi/2969 but he is in occupation of land parcel no. Ndivisi/Ndivisi/2251 where he was shown by the 1<sup>st</sup> Respondent and that he had no objection to leave the said land if it was established that it belongs to the Appellant provided that he is given/shown his actual land.
19. The onus to prove the assertion as stated above was upon the Appellant. This principle is succinctly captured under Sections 107, 109 and 112 of the Evidence Act, CAP 80, Laws of Kenya. Section 107 provides as follows:
  - (1) 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.
  - (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
20. Sections 109 and 112 of the same Act states;
  109. 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.
  112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”
21. In discussing the standard of proof in civil liability claims, the Court of Appeal in Mumbi M’Nabea v David M Wachira [2016] eKLR stated as follows:
 

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M’mairanyi & Others v. Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280 where it was held that: Whereas under section 107 of the Evidence Act, (which deals



with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognizes that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

22. In my considered view and guided by the above provisions and caselaw, proof of encroachment can legally be done through an expert witness who can either be a surveyor or land Registrar or both. In this case, the onus was on the Appellant to prove to what extent i.e. as to what length or breath the Respondents had allegedly occupied his land. In my considered view, it was not enough to simply allege that the Respondents had occupied a portion of his land. It was incumbent upon him to call a surveyor or a Land Registrar to testify to that effect. This was not done and consequently, the Appellant failed to discharge his burden of proof. The learned magistrate took the liberty to conduct a site visit to establish the situation on the ground and she observed as can be seen in her judgment where she stated as follows; “clear boundaries were observed when the court visited the scene.” Further, it is absurd that the Appellant would refer to the trial courts fact finding mission ‘phony’ especially because the same was suggested by the Appellant himself in his oral testimony where he stated “I am sure they are living on my land even if the court goes there.” As a matter of fact, I find that the learned magistrate visited the disputed land after the Appellant failed to establish a clear picture of his complaint.
23. In view of the foregoing, it is my finding that the Appellant failed to prove his case on a balance of probabilities and as such, the trial court cannot be reasonably faulted for determining that the Appellant did not discharge the duty imposed on him by law to prove that the Respondents had actually encroached on his land.
24. The upshot of my finding is that this appeal is devoid of merit and the same is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 11<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. M/S Wanyama H/B Kassim for the Appellant
2. Respondent/Advocate-absent
3. Bett C/A.

