



**Nyabuti v Omwaka & another (Environment and Land Appeal
8 of 2019) [2025] KEELC 4195 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4195 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 8 OF 2019**

MD MWANGI, J

MAY 22, 2025

BETWEEN

PETER ATANDI NYABUTI APPELLANT

AND

PARTRICK WETINDI OMWAKA 1ST RESPONDENT

OLKEJUADO COUNTY COUNCIL 2ND RESPONDENT

(Being an appeal from the judgment of Hon. S. Shitubi, Chief Magistrate dated 21st February 2019, in Civil Suit No. 214 of 2011 before the Chief Magistrate's Court at Kajiado)

JUDGMENT

Background

1. This appeal is against the judgment of the Kajiado Chief Magistrate's Court (Hon. Shitubi, CM) delivered on 21st February 2019 in Civil Suit No. 214 of 2011. The appellant who was the plaintiff before the trial court in his memorandum of appeal dated 11th March 2019 has listed 27 grounds of appeal. The appellant ultimately prays that his appeal be allowed and the judgment and consequential orders of 21st February 2019 be set aside. He has further as listed in the memorandum of appeal.
2. The appellant's suit before the trial court was as pleaded in the further amended plaint amended on 12th April 2018, a copy of which is on page 144 of the record of appeal. The appellant's case before the trial court was that he was the proprietor of the entire plot of land known as Plot number 1XX4 "B"/ RESIDENTIAL NOONKOPIR T. CENTRE, having bought the same from one Penuel Nyangweso Nyamweya (the plot is hereinafter referred to as 'the suit property'). According to the appellant, the 2nd respondent, the county government of Kajiado, had subsequently transferred the suit property to him on 20th December 2005. Since then, the appellant alleged that he had been in quiet and peaceful possession of the suit property until sometime in November 2011 when, on a routine visit to the suit



property, he found out that the 1st respondent had collected construction material therein and even commenced construction of a structure on the suit property without his knowledge and consent.

3. The appellant asserted that the 1st respondent had unlawfully encroached into his property without his knowledge and or consent thereby denying him use of it and causing him suffering, loss and damage. The appellant therefore sought various orders, as here below;-
 - a. A permanent and mandatory injunction requiring the defendants by themselves, their servants, and or agents or otherwise howsoever, restraining them from remaining on, trespassing upon, erecting structures, wasting and or interfering with, transferring, disposing or in any way offering, surrendering the plot to any party except the plaintiff.
 - b. A declaration that the 2nd defendant did not have the capacity to allocate the plot to the 1st defendant and further that as at the year 2011, the plot was not available for allocation by the 2nd defendant to the 1st defendant.
 - c. An order directing the 2nd defendant to cancel any ownership documents issued to the 1st defendant as the same are illegal.
 - d. An order directing the defendants, their servants and or agents or otherwise howsoever to demolish the structures they had erected on the suit premises and vacate the suit premises immediately.
 - e. An eviction order be issued against the defendants, their servants and otherwise howsoever from the plot.
 - f. Costs of the suit and interest thereof.
 - g. Any other or further order that the Honorable Court may deem just and expedient.

Amended defence by the 1st respondent.

4. The 1st respondent's defence was the amended statement of defence amended on 31st August 2015. The 1st respondent denied the appellant's case in its entirety putting him to strict proof thereof. He particularly denied that the 1st respondent had been in quiet and peaceful possession of the suit property as alleged in the plaint. He further denied encroaching into the appellant's plot as alleged or at all.
5. The 1st respondent averred that he purchased his own plot known as Number 1XX3 from one KATHLEEN TRIPA, with the consent, approval and authority of the 2nd respondent and met all the conditions attendant to the allotment of the plot. He asserted that he had indeed constructed on his own plot and not the appellant's. He has been and still resides with his family on his own plot.
6. The 1st respondent further disclosed in his pleadings that he had had a dispute regarding his plot No. 1XX3 with one Njoroje Mwangi sometimes in 2011 and the dispute had been resolved by the 2nd respondent in his favour. He therefore prayed for the dismissal of the appellant's suit.
7. The 2nd respondent on his part filed a statement of defence dated 7th May 2014. It too denied the appellant's claim putting him to strict proof. At paragraph 8 of the statement of defence, the 2nd respondent averred that a site visit had been conducted on the disputed plot by its surveyor and the ownership of the plot had been established through a report prepared by the surveyor. It prayed for the dismissal of the appellant's suit with costs.



Statement of agreed issues.

8. The parties in the suit filed a statement of agreed issues for determination by the court which was dated 9th June 2014 and filed in court on the same date. They identified 11 issues as follows:-
 - i. Whether the plaintiff is the proprietor of the entire plot known as Plot No. 1XX4 “B”/ Residential Noonkopir T. Centre.
 - ii. Whether the said Plot No. 1XX4 “B”/Residential Noonkopir T. Centre was transferred to the plaintiff by the 2nd defendant on 20th December 2005.
 - iii. Whether in the beginning of November 2011 the 1st defendant had put construction material on the plot and commenced development by putting up structures on the plot and has been residing thereon.
 - iv. Whether the plaintiff has been in possession of the suit premises since 2005 or at all.
 - v. Whether the 2nd defendant is aware of the 1st defendant’s presence on the suit premises.
 - vi. Whether the 1st defendant unlawfully encroached into the plaintiff’s plot, commenced development without plaintiff’s knowledge and/or consent, and has continued to unlawfully interfere with the plaintiff’s possession.
 - vii. Whether the defendant will proceed to waste and/or dispose and interfere with the suit plot to the detriment of the plaintiff who is the lawful owner.
 - viii. Whether by reasons for the defendants’ actions the plaintiff cannot use or deal with the said parcel of land in anyway and has therefore suffered and continues to suffer loss and damage.
 - ix. Whether the defendants have unlawfully and wrongfully continued to waste and interfere with the plaintiff’s suit land thereby depriving him of his rightful use and development.
 - x. Whether the plaintiff stands to suffer irreparable loss and damages if the orders sought herein are not granted as the plaintiff will not be in a position to procure an alternative parcel of land.
 - xi. Who to bear the costs of this suit.
9. Both the appellant and the 1st respondent testified as the witnesses in their respective cases. The 2nd respondent on his part called one Mr. Charles Ameso Angira, who was the County Surveyor up to November 2015 as their witness in the case.

Judgment of the Court.

10. The trial court delivered its judgment on 21st February 2019. The court found in favour of the 1st respondent and dismissed the plaintiff’s suit but directed that the costs of the suit be paid by the 2nd defendant and the 1st defendant.

Directions on the hearing of the appeal.

11. The court’s directions on the hearing of this appeal were that the appeal be canvassed by way of written submissions. The appellant and the 1st respondent complied and filed their respective submissions. The 2nd respondent did not file submissions.
12. The court has had occasion to read the submissions, which form part of its record and consider them in writing this judgment.



Issues for determination.

13. This being a first appeal, the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent conclusion on whether or not to allow the appeal. A first appellate court is allowed to subject the whole of the evidence to fresh scrutiny and make conclusions about it.
14. Mativo J (as he then was) in the case of *Mursal & another -vs- Manese (suing as the legal administrator of Dalphine Kanini Manese)* (Civil Appeal No. E20 of 2021) {2022} KEHC 282 (KLR) (6TH April 2022) (Judgement), had this to say on the responsibilities of a first appellate court,

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as 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 firsthand”.
13. The Learned Judge emphasize on the critical role of a first appellate court further stating that;

“A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less is unjust. The 1st appeal has to be decided on facts as well as on law.

In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of Section 78 of the Civil procedure Act, a court of first appeal can appreciate the entire evidence and come to a different conclusion”.
15. Having carefully evaluated the pleadings and the proceedings before the trial court and the judgment thereof as well as the submissions by the parties before this court, two things catch my eye concerning the judgment of the trail court.
 - i. The Learned Trial Magistrate relied on the amended plaintiff filed on 18th August 2015, whereas the said amended plaintiff had been amended by the further amended plaintiff on 12th April 2018.
 - ii. Whereas the parties had filed a statement of agreed issues dated 9th June 2014, the court did not determine the framed issues.
16. I am obliged to emphatically state that cases are tried and determined on the basis of the pleadings and on the issues of fact or law framed by parties or the court on the basis of those pleadings. The Court of Appeal in *Anthony Francis Wareham t/a AF Wareham -vs- Kenya Post Office Savings Bank* (2004) eKLR, restated the above position, holding that,

“...we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or the court on the basis of those pleadings”.
17. The essence of the above position is that the moment a court departs from the pleadings, as the trail court did, by relying on the amended plaintiff of 18th August 2015, while there was a further amended plaintiff, amended of 12th April 2018, it took the wrong trajectory and obviously went on a frolic of its own.



18. The East African Court of Appeal in *Dhanji Ramji -vs- Malde Timber Company* (1970) EA 422, addressed itself on the effects of amendment of pleadings and stated as follows;

“While amendments of pleadings are conclusive as to the issues for determination, the original pleading may be looked at if it contains matters relevant to the issues. The new pleading is off course conclusive as to the issues for determination but it does not replace the old pleadings for all purposes ...it is clear that the court looks only to the pleadings as amended in deciding the issues. Whereas the previous pleadings remains on record, it cannot be the basis of the determination of the case.”

19. Secondly, I must point out that Order 21 rule 5 of the *Civil Procedure Rules*, is categorical that in suits in which issues have been framed, the court is required to state its finding or decision, with reasons therefor, upon each separate issue. In this case however, the trial court proceeded as if there were no framed issues and proceeded to frame its own issues and make a determination on them.

20. For the aforesaid reasons, the judgment of the trial court is a nullity having been premised on the wrong pleading. Reliance on the wrong pleading, which is the basis upon which the proceedings were based, means and necessarily implies that the conduct of the matter started and proceeded on the wrong footing.

21. For the aforesaid reasons, I allow the appeal by the appellant and hereby set aside the entire judgment of Hon. S. Shitubi, Chief Magistrate, delivered on 21st February 2019 in Kajiado CMCC 214 OF 2011. I direct a new trial before another judicial officer other than Hon. S. Shitubi, Chief Magistrate.

22. On the issue of costs, though the appellant’s appeal succeeds, the blame cannot be placed on the respondents for the botched trial. I therefore direct that each party bears its own costs.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 22ND DAY OF MAY 2025.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Nyakiangana for the appellant

Mr. Goa for the 1st Respondent

N/A by the 2nd Respondent

Court Assistant: Mpoye

