Dae v Mude (Environment and Land Appeal E001 of 2024)
[2025] KEELC 4163 (KLR) (19 May 2025) (Judgment)

Neutral citation: [2025] KEELC 4163 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E001 OF 2024

JO MBOYA, J

MAY 19, 2025

BETWEEN

AMINA UME DAE ..... APPELLANT

AND

ABDIA OSHE MUDE ..... RESPONDENT

JUDGMENT

1. The Respondent herein, [who was the Plaintiff in the subordinate court], filed the Plaint dated 5th June 2023 and wherein same [Respondent] sought the following reliefs:

    a. The declaration that the part marked "X" of plot No. 645 belongs to the plaintiff.

    b. permanent order of injunction prohibiting the defendants, either by herself, her family members [relatives], employees, agents or anyone else acting under the defendant's instructions from fencing, alienating, selling, tilling or developing the said part "X" of plot N. 645 of Manyatta location of Moyale subcounty

    c. costs of the suit.

    d. such further and consequential orders as this honourable court may lawfully grant.

2. The Appellant duly entered appearance and thereafter filed a statement of defence and counterclaim dated 9th June 2023. Vide the counterclaim under reference, the Appellant sought the following reliefs:

    a. A declaration that the suit land, especially the part marked "x" which is claimed to be part of plot 645 by the plaintiff, does not belong to the plaintiff herein.

    b. That the said suit land was fraudulently registered in the names of the plaintiff herein and thus cannot stand as a legality.

c. An order of cancellation and rectification of the register from the plaintiff's name to its original owner before the plaintiff tampered with the register.

d. The deceased's parcel of land, the subject suit property herein, has never undergone succession thus same has never been subdivided or shared to the plaintiff herein.

e. Dismissal of the plaintiff suit in its entirety.

f. Costs of the suit and the counterclaim

g. Any other relief that this honourable court may deem fit to grant.

3. The suit before the subordinate court was heard and disposed of vide judgment rendered on 7th February 2024, whereupon the learned magistrate found and held that the respondent [plaintiff] had proved her case on a balance of probabilities.

4. On the other hand, the learned trial magistrate found that the appellant had failed to prove her counterclaim. To this end, the learned trial magistrate allowed the respondents' suit and proceeded to issue an order of declaration as pertains to the disputed portion marked "X" and also granted an order of permanent injunction. On the contrary, the learned trial magistrate dismissed the counterclaim.

5. Aggrieved by the judgment and the consequential decree of the learned trial magistrate, the appellant approached this court vide memorandum of appeal dated 14th February 2024; and wherein the appellant has raised the following grounds of appeal;

i. The trial magistrate erred in fact and the law and misdirected himself by proceeding with the hearing and determination of the suit before establishing that the estate of Ume Dae Ume (deceased) was duly represented in the proceedings, thereby condemning the said estate unheard.

ii. The trial magistrate erred in law and fact by giving a decision adverse to the estate of Ume Dae Ume (deceased) without representation of the said estate in the proceedings, thereby disinheriting the beneficiaries of the said estate.

iii. The trial magistrate erred in law and fact by completely disregarding the evidence of the appellant and her witnesses to the effect that the part marked X was part of plot No. 218 and it has never been part of plot No. 645.

iv. The trial magistrate erred in fact and the law by holding that the part marked X was part of plot 645 as alleged by the respondent in the complete absence of evidence in support thereof.

v. The trial magistrate misdirected himself and erred in both facts and the law by holding that the appellant had encroached on the respondent's plot despite the respondent not adducing any evidence in support of the same.

vi. The trial magistrate erred in both facts and the law by swallowing line hook and sinker the drawings made by the respondent as conclusive evidence of the existence of a boundary between plot 218 and the portion marked "X".

vii. The trial magistrate erred in fact and the law by disregarding and ignoring the glaring inconsistencies in the pleadings and testimony of the respondent and her witnesses.

viii. The trial magistrate misdirected himself by basing his judgment on mere conjecture and assumptions instead of evaluating the evidence on record in totality.

ix. The judgment of the trial magistrate was against the weight of the evidence adduced by the parties, a miscarriage of justice and an affront to the administration of justice.

6. The appeal beforehand came up for directions on the 28th January 2025 whereupon the advocates for the parties confirmed that the record of appeal had been duly filed and served. Furthermore, the advocates agreed that the appeal be canvassed by way of written submissions to be filed and exchanged by the parties.

7. Arising from the foregoing, the court proceeded to and circumscribed the timelines for the filing and exchange of written submissions.

8. Suffice it to state that the appellant duly complied and filed written submissions dated 10th February, 2025 and wherein the appellant has highlighted four [4] salient issues, namely; that the respondent herein failed to prove her claim before the court on a balance of probability or at all; that the learned trial magistrate took into account and considered documents which had neither been tendered nor produced before the court in accordance with the law of evidence; that the learned magistrate proceeded to and issued orders against the appellant without taking into account that the orders in question affected and impacted upon the estate of Ume Dae Ume [deceased]; that the learned trial magistrate erred in dismissing the appellants counterclaim.

9. Regarding the first issue, learned counsel for the appellant has submitted that it is the respondent who had filed the suit before the subordinate court and thus same [respondent] was obligated to tender and produce before the trial court plausible, cogent and credible evidence to demonstrate that same [respondent] was the lawful owner of the suit property. Furthermore, learned counsel also submitted that it was the obligation of the respondent to demonstrate that the appellant had indeed trespassed and or encroached onto the disputed portion of the suit plot.

10. Nevertheless, learned counsel for the appellant submitted that the respondent herein failed to tender and produce any document to demonstrate her claim and or title to the suit plot. In this regard, it was posited that having failed to tender and produce any evidence as pertains to title of the suit plot as well as evidence of encroachment, the learned trial magistrate erred in finding and holding that the respondent had proved her case to the requisite standard.

11. In respect of the 2nd issue, learned counsel for the appellant has submitted that the learned trial magistrate erred in taking into account and considering documentary evidence which had neither been tendered and or produced by the respondent. In this regard, it was submitted that though the respondent had filed a list and bundle of documents containing [sic] a letter from the town administrator Moyale sub-county and a google map, same were never produced before the court.

12. Moreover, it was posited that the authors of the impugned document[s] were never called to produce the documents in question.

13. To the extent that the learned trial magistrate referenced and took into account extraneous documents, namely, documents which had not been produced, it has been submitted that the impugned judgment is therefore erroneous and has occasioned a miscarriage of justice.

14. Regarding the third issue, learned counsel for the appellant has submitted that the dispute before hand touched on and concerned a portion of land [plot] which had been gifted to Ume Dae Ume [deceased]. However, it was submitted that despite the fact that the dispute touched on and or concerned the estate of the deceased, the learned trial magistrate proceeded to and granted orders without taking into account that the estate of the deceased had not been duly represented in the dispute.

15. Furthermore, it was contended that the judgment and the consequential decree of the trial court had disinherited the beneficiaries of the estate of Ume Dae Ume [deceased], without having been afforded an opportunity to be heard.

16. Arising from the foregoing, it has been contended that the judgment and the consequential decree of the learned trial magistrate is therefore unlawful and illegal and thus same ought to be set aside.

17. In respect of the last issue, learned counsel for the appellant has submitted that the learned trial magistrate failed to take into account the evidence tendered by the appellant as pertains to the counterclaim. To this end, it was submitted that had the learned trial magistrate considered the evidence by the appellant and her witnesses, the court would no doubt have come to the conclusion that the counterclaim had been duly proved and established.

18. The respondent filed written submissions dated 9th February 2025 and wherein the respondent has highlighted three [3] salient issues, namely; whether it was necessary for the trial court to establish the locus standi of the appellant relating to an estate where she [appellant] is personally accused of destroying the respondents fence and grabbing her land; whether looking at the totality of the evidence, the trial court rightfully determined that the appellant encroached into plots number 645; and whether the judgment of the trial court occasioned a miscarriage of justice and was an affront to the administration of justice.

19. Regarding the first issue, learned counsel for the respondent has submitted that the dispute before the trial court touched on and concerned a claim of trespass that had been occasioned by the appellant herein. In particular, it was contended that it is the appellant who was accused of having encroached upon and or trespassed onto the portion marked "X" of plot No. 645. To this end, it was posited that the dispute before the trial court had nothing to do with the estate of Ume Dae Ume [deceased].

20. In the premises, learned counsel for the respondents has submitted that the appellant was not sued as the owner of the plot marked as DP, which was given to the appellant's husband [now deceased] or at all. In short, learned counsel submitted that the appellant herein is deliberately attempting to mislead the court as pertains to the true character of the cause of action.

21. In respect of the second issue, learned counsel for the respondent has submitted that the respondent tendered and produced plausible and credible evidence, including the letter dated 19th October 2020 and plot rent receipts dated 5th August 2020, which proved and established that the respondent was the lawful owner of plot number 645. In this regard, it was posited that the respondent duly discharged her obligation in accordance with the provisions of sections 107, 108 and 109 of the *Evidence Act* Cap 80 laws of Kenya.

22. Additionally, it was submitted that other than the documents referenced in the preceding paragraphs, the respondent also tendered and produced a Google map showing the portion marked "X" and the fence which was destroyed by the appellant in an endeavor to grab the disputed portion.

23. Arising from the foregoing, it was submitted that the respondent duly placed before the court evidence to demonstrate that same [respondent] is the registered owner of the suit plot and furthermore that the appellant herein had indeed trespassed onto the portion marked "X" on the Google map.

24. As pertains to the third issue, it has been submitted that the learned trial magistrate clearly appraised and considered all the issues that were tendered before the court as well as the evidence adduced by the parties. In particular, it was submitted that the appellants herein have mounted the instant appeal for the sake of it and not because the learned trial magistrate committed any error or mistake.

25. Moreover, it has been submitted that if the appellant is convinced that the learned trial magistrate omitted and or failed to consider key evidence tendered by the appellant, then it was incumbent upon the appellant to either file a Judicial review or an application for review in the manner prescribed vide the Civil Procedure Rules. Nevertheless, it was posited that the learned trial magistrate objectively evaluated and adjudicated upon all the substantive issues and thereafter rendered a decision which is backed by the facts and the law.

26. In a nutshell, learned counsel for the respondents has submitted that the judgment rendered by the trial court has neither occasioned a miscarriage of justice of nor violated the general administration of justice, either as contended by the appellant or at all.

27. Having reviewed the pleadings that were filed by the parties; the entire record of appeal; the evidence tendered and upon consideration of the written submissions filed by the parties, I come to the conclusion that the determination of the subject appeal turns on three [3] key issues, namely; whether the respondent herein duly proved her claim before the trial court or otherwise; whether the judgment by the trial court is wrought and replete with errors of commission and omission and thus same constitutes a miscarriage of justice; and whether the appellants counterclaim was proven or otherwise.

28. Before venturing to interrogate and address the pertinent issues that have been highlighted in the preceding paragraphs, it is imperative to state and observe that this being a first appeal this court is tasked with the mandate and jurisdiction to undertake exhaustive review, scrutiny, appraisal and analysis of the entirety of the evidence that was placed before the trial court and thereafter to arrive at an independent conclusion.

29. Suffice it to state that the court is not bound by the factual findings and conclusions that were arrived at by the trial court. For good measure, this court is at liberty to depart from the factual findings and conclusions arrived at by the trial court, where it is shown that the conclusions of the trial court were arrived at on no evidence; based on a misapprehension of the evidence tendered; perverse to the evidence on record; or better still where it is demonstrably shown that the trial court has committed an error of principle, which vitiates the judgment.

30. The jurisdictional remit of the first appellate court while entertaining and adjudicating upon an appeal [first Appeal] has been the subject of various court decisions. The Court of Appeal in the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) stated thus;

> 37. We have considered the appeal and this being a first appeal, we are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgement.
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> This position is anchored in section 78 of the *Civil Procedure Act*, which requires a first appellate court to re-evaluate, reassess and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior

Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows: "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

31. Bearing in mind the dicta captured and highlighted by the Court of Appeal in the decision [supra], I am now disposed to revert to and consider the thematic issues, which had been highlighted elsewhere herein before. Suffice it to state that I shall address the issues sequentially.

32. Regarding the first issue, namely; whether the respondent herein duly proved her claim before the trial court or otherwise, it is imperative to observe that it is the respondent who filed the primary suit before the subordinate court, claiming that same [respondent] is the registered owner of plot No. 645, Manyatta location of Moyale subcounty. In addition, it is the respondent who posited that the appellant herein encroached upon and or trespassed onto the portion marked "X" falling within plot No. 645 [the suit property].

33. To the extent that it is the respondent who approached the court and made the forgoing claims, it was incumbent upon the respondent to tender and place before the trial court plausible, cogent and credible evidence to prove not only her claim as the registered owner of the suit plot but also the aspect that the appellant had trespassed onto/encroached upon the disputed portion of the suit plot. For

coherence, the burden of proof laid on the shoulders of the respondents to prove their claims on a balance of probabilities. [See the provisions of sections 107, 108 and 109 of the *Evidence Act*, Cap 80, Laws of Kenya].

34. Additionally, the law as it pertains to the burden of proof is now settled. In this regard, it suffices to reference the decision of the court of appeal in the case of Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi (2014) eKLR, where the court stated as hereunder;

> It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

35. The Supreme Court on its part has also highlighted the incidence of burden and standard of proof. For coherence, the Supreme Court addressed the issue in the case of Gwer & 5 others v Kenya Medical Research Institute & 3 others (Petition 12 of 2019) [2020] KESC 66 (KLR) (Civ) (10 January 2020) (Judgment), where the court stated thus;

> 49. Section 108 of the *Evidence Act* provides that, "the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;" and section 109 of the Act declares that, "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."
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> 50. This Court in Raila Od*inga & others v. Independent Electoral & Boundaries Commission & others, Petition No. 5 of 2013*, restated the basic rule on the shifting of the evidential burden, in these terms:...a Petitioner should be under obligation to discharge the initial burden of proof before the Respondents are invited to bear the evidential burden...."
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> 51. In the foregoing context, it is clear to us that the petitioners, in the instant case, bore the overriding obligation to lay substantial material before the Court, in discharge of the evidential burden establishing their treatment at the hands of 1st respondent as unconstitutional.
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> Only with this threshold transcended, would the burden fall to 1st respondent to prove the contrary. In the light of the turn of events at both of the Superior Courts below, it is clear to us that, by no means, did the burden of proof shift to 1st respondent.

36. Did the respondent prove her case to the requisite standard? It is important to underscore that the respondent testified before the court and thereafter called one witness. For good measure, the respondent's case was premised on the evidence of two witnesses only.

37. Additionally, it is important to outline that even though the respondent had filed a list and bundle of documents, the documents at the foot on the list and bundle of documents were neither tendered nor produced before the court. Pertinently, the respondent herein merely testified before the court and same did not even reference her witness statement. Instructively, the witness statement which had also been filed by the respondent, was neither adopted nor constituted as her [respondent's] evidence in chief.

38. Having failed to tender and or produce the documents which had been filed before the court, there is no gainsaying that the documents under reference did not legally form part of the record of the court.

In this regard, same cannot be referenced in an endeavor to determine whether or not the respondent owned the suit plot or otherwise.

39. As it stands the only evidence that stands before the court was the seven [7] line testimony captured by the learned trial magistrate and wherein the respondent threw the omnibus allegations as pertains to ownership of the suit plot. However, there was no documentary evidence to underpin or substantiate the claim.

40. The other aspect that was captured at the foot of the plaint by the respondent related to the contention that the appellant had encroached upon, trespassed onto and thereafter grabbed the portion marked "X" on [sic] the Google map. In this respect, the respondent posited that the appellant herein has no basis to enter upon the disputed portion of the suit plot.

41. What I hear the respondent to have been stating is that the appellant had trespassed onto the disputed portion of the suit plot. Instructively, it is the claim pertaining to trespass that underpins the prayer for permanent injunction as against the appellant.

42. To start with, any person, the respondent not excepted, seeking to propagate a claim based on trespass is obligated to demonstrate and prove two critical ingredients, namely; title to or ownership of the suit property; and offensive entry onto or invasion of the disputed property by a third party without the permission and or consent of the claimant.

43. In the case of Municipal Council of Eldoret vs Titus Gatitu Njau (2020) eKLR, the Court of Appeal discussed the ingredients that belie trespass and stated as hereunder;

> 35. In M'Mukanya v M'Mbijiwe (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:
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> "trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153."
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> 36. Further, in Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428 states as follows:
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> "Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land." [Emphasis supplied].

44. What constitutes and or amounts to trespass was also highlighted and re-affirmed by the Court of Appeal in the case of Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment) where the court stated as hereunder;

> Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16

of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land. Justice Chemutut did not name Mr. Doshi as a defendant in the suit.

45. With the foregoing in mind, it is now apposite to consider whether the respondent proved the claim as pertains to trespass. Firstly, I have pointed out in the preceding paragraphs that the respondent did not tender and or produce any documentary evidence to underpin her claim of ownership of the suit plot. Absent documentary proof of ownership, the court cannot proceed on the basis of conjecture, presumption and or belief that the respondent is the owner of the suit plot.

46. Secondly, even if I was disposed to proceed on the basis of a hypothesis [which I am not keen to], it is still important to point out that mere ownership would not prove trespass. To this end, the person who claims to be the owner of the designated plot must, upon proving ownership, go further and place before the court evidence of offensive invasion or entry onto the disputed plot. Suffice it to state that trespass denotes injury to possessory rights over the disputed property.

47. Did the respondent place before the court evidence of trespass? The totality of the evidence that was placed before the court did not demonstrate trespass or at all. Notably, it behooved the respondent to place before the court a survey report demonstrating the extent, if any, of encroachment complained of. However, no survey report was tendered.

48. Furthermore, even though the respondent had testified that the appellant destroyed and removed the fence that was separating the appellants portion from the suit plot, no evidence was placed before the court. For good measure, no forest officers report or pictorial evidence was tendered.

49. I beg to repeat that it was incumbent upon the respondent to place before the trial court evidence to demonstrate trespass. Sadly, the respondent failed to do so. To this end, I am afraid that the learned trial magistrate arrived at and reached an erroneous conclusion in finding and holding that the respondent had proved her case to the requisite standard.

50. Worse still, it is not lost on me that the learned trial magistrate reached and arrived at the conclusion that the respondent had proved the case of trespass by referencing and taking into account [sic] the map, which had neither been tendered nor produced before the court. Such a finding is not only perverse to the evidence on record but also based on a misapprehension of the evidence.

51. Regarding the second issue, namely; whether the judgment by the trial court is wrought and replete with errors of commission and omission and thus same constitutes a miscarriage of justice, it is worthy to recall and reiterate that a court of law, the trial court not excepted is enjoined to determine and adjudicate upon disputes on the basis of the evidence tendered and placed before the court by the parties. Furthermore, there is no gainsaying that the evidence to be deployed by a court of law must be tendered and adduced in the manner prescribed by the *Evidence Act* and not otherwise.

52. Additionally, it is important to underscore that a court of law is not obliged to take into account and to consider any extraneous evidence or documents which were neither tendered nor produced by the parties. It is immaterial whether the document[s] sought to be referenced by the court is paramount and critical. For coherence, the court must be tied to the evidence tendered and above all the court must not enter into the arena of controversy. Simply put, the court must remain an impartial arbiter.

53. The scope of the jurisdiction of a court of law under the common law jurisprudence was highlighted and elaborated upon in the case of Stanley Mombo Amuti vs Ethics & Anti-Corruption Commission (2019) eKLR, where the Court of Appeal stated as hereunder;

83. In civil as in criminal proceedings, the plaintiff (prosecution) is solely responsible for deciding how to present its case and choosing which witnesses to call. In the instant case, the respondent alone bore the responsibility of deciding whether a person will be called as a witness in its case. (See Dabbah -v- Attorney-General for Palestine (1944) AC 156; Whitehorn -v-R (1983) 152 CLR 657). A court cannot ordinarily direct a party to call any witness. Save in exceptional circumstances, a trial court cannot call any witness. In the instant case, the appellant's contestation that the respondent should have called Mr. Samuel Gitonga, Evelyn Mwaka and Antony Nganga Mwaura as witnesses has no legal foundation. In law, the appellant cannot compel the respondent to call a witness to support or rebut the respondent's case; all that the respondent is obligated to do is call credible and material witnesses to prove its case to the required standard.

54. Did the trial court comply with and or abide by the established and trite position of the law, while crafting the impugned judgment? In an endeavor to answer the foregoing question, it is imperative to state that the learned trial magistrate referenced and took into account documentary evidence which had neither been tendered nor produced before the court.

55. Pertinently, while answering issue number one [1] which had been highlighted by the trial magistrate, same stated as hereunder;

> " On the first issue the plaintiff testified that she owns the plot in question which was earlier owned by her late husband. She testified that the said plot is number 645. She produced a rent payment receipt from the county government of Marsabit and a clearance letter dated 19th October 2020. The same indicates that the plot is registered in the name of the plaintiff".

56. While addressing issue number three [3] which had also been highlighted by the learned trial magistrate same stated as hereunder;

> " The plaintiff produced a site map showing drawings of her plot and that of the defendant. She testified that the defendant has encroached on the place marked "X" in the said map. From the map, it is clear that there are boundaries in the said plots if indeed the defendant has encroached on the part marked 'x', then that is not part of her plot. She told the court that the said portion is within her plot. This is not the truth from the drawings. Clearly that is an act of encroachment".

57. It is instructive to recall that even though the respondent had filed a list and bundle of documents, the documents thereunder were neither referenced nor produced by the respondent. Having not been tendered and produced before the court, the learned trial magistrate could not reference and or take same into account.

58. I am afraid that the impugned judgment by the learned trial magistrate references and captures documentary evidence that was never tendered. Quite clearly, the learned trial magistrate went on a personal adventure and on a frolic of his own. Such adventures are antithetical to the established rule of law.

59. Before concluding on this issue, it is instructive to reference the decision of the Court of Appeal in the case of Kenneth Nyaga Mwige vs Austin Kiguta & 2 others (2015) eKLR where the court stated as hereunder;

> 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed

and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record.

    If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification, and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

60. Suffice it to state that the mere filing of a document, which constitutes discovery in accordance with the provisions of Order 3 Rule 2; Order 7 Rule 5; and Order 11 of the Civil Procedure Rules 2010, does not constitute admissibility. Such documents if any, discovered by the parties must still be produced before the court in the conventional manner. If not produced in accordance with the provisions of sections 33, 35, 78 and 80 of the *Evidence Act*, same cannot be referenced and or taken into account by a court of law. [See the decision of the Supreme Court in the case of Kenya Railways Corporation

& 2 others v Okoiti & 3 others (Petition ... [2023] KESC 38 (KLR) (16 June 2023) (Judgment), at paragraph 80 thereof].

61. I am afraid that the judgment of the learned trial magistrate is wrought and replete with serious errors of commission and omission. For good measure, a basis has been established to warrant interference with the judgment of the trial court. [see the decision of the court of appeal in the case of Mwanasokoni vs Kenya Bus Service (1985) eKLR].

62. Regarding the third issue, namely; whether the counterclaim by the appellant was duly established and proved, it is worthy to recall that the appellant herein had contended that the suit plot was illegally transferred and registered in the name of the respondent. In this regard, the appellant therefore sought a declaration that the purported registration was fraudulent and thus warranting cancellation and rectification of sic the register of the suit property.

63. Despite contending that the suit plot was fraudulently registered in the name of the respondent and furthermore that the disputed portion marked "X" belongs to the estate of Ume Dae Ume [deceased], there is no gainsaying that the appellant did not plead fraud at the foot of the counterclaim. In addition, it is not lost on me that the appellant also did not supply the requisite particulars of fraud or at all.

64. Moreover, it is worthy to recall that the appellant testified as DW 1 also did not advert to and or tender any evidence to support the allegations of fraud or at all. Suffice it to state that it is the appellant who was seeking to accrue a positive finding of fraud as against the respondent. In this regard, the appellant was obligated to comply with the law as pertains to pleading and proving fraud.

65. Without belabouring the point, it is instructive to take cognizance of the decision in the case of Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment); where the Court of Appeal stated thus;

> Although fraud was not pleaded as against Mr. & Mrs. Walker in the body of the amended plaint, one of the reliefs that Justice Chemutut sought against them, and which was ultimately granted by the court, was a declaration that any title documents held by Mr. & Mrs. Walker "were obtained fraudulently, illegally and as such (are) null and void."
>
> 41. Apart from the omission to plead fraud, nor particulars of fraud against the named defendants, Mr. & Mrs. Walker, were provided. In the often-cited decision of this Court in the case of Vijay Morjaria v Nansingh Madhusingh Dabar & Another [2000] eKLR, Tunoi, JA. stated that: "It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts."
>
> 42. In the same vein, the Court in the case of Kinyanjui Kamau v George Kamau Njoroge [2015] eKLR reiterated that: "It is trite law that any allegations of fraud must be pleaded and strictly proved. See Ndolo v Ndolo [2008] 1 KLR (G&F) 742 wherein the Court stated that:"...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; but the burden of proof on the respondent was certainly not one beyond a reasonable doubt as in criminal cases..."

66. Other than the limb of the counterclaim that touched on fraud, the appellant had also highlighted the aspect that the portion of the suit property which belonged to the estate of Ume Dae Ume [deceased] had not been subjected to succession. In this respect, the appellant therefore contended that the suit property belongs to the estate of the deceased and must therefore await succession and sharing amongst the beneficiaries of the deceased.

67. What I discern from the counterclaim by the appellant and the testimony that was tendered on her behalf is that the suit plot or a portion thereof belongs to the deceased. For ease of appreciation, its suffices to highlight the following portion of the evidence of DW 1.

68. Same stated thus;

> " The plot is in the name of Ume Dae. The plaintiff does not have the authority to change the land. I pray that the case be dismissed.

69. Simply put, the appellant is positing that the land belongs to the deceased. If this be the position, then, it is apparent that the appellant had no capacity to commence and or maintain the counterclaim touching on the estate of Ume Dae Ume [deceased] without compliance with section 82 of the *Law of Succession Act* Cap 160 Laws of Kenya.

70. The necessity to procure and obtain grant of letters of administration prior to and before filing a suit on behalf of the estate of a deceased was aptly captured in the case of Rajesh Prajivan Chundasama vs Sailesh Prajivan Chundasama (2014) eKLR where the Court of Appeal stated as hereunder;

> As far as he was concerned, he moved to court by virtue of being a beneficiary for purposes of preserving the deceased's estate. That may well be the case, but in our view, the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or a full grant of letters of administration in cases of intestate succession. In Otieno v Ougo (supra) this Court, differently constituted, rendered itself thus:
>
> "... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception."

71. To my mind, the counterclaim by and on behalf of the appellant was not only premature but same was misconceived and legally untenable. In this regard, the decision of the trial magistrate dismissing the counterclaim is unassailable.

FINAL DISPOSITION:

72. Flowing from the analysis contained in the body of the judgment, it is apparent that the appeal beforehand is partially successful. For good measure, the judgment of the trial court is manifestly erroneous and thus same cannot be allowed to stand, save for the portion dismissing the appellant's counterclaim.

73. In the premises, the final orders of the court are as hereunder:

    I. The Appeal be and is hereby allowed.

    II. The Judgment of the trial court dated 7th February 2024 be and is hereby set aside save for the aspect dismissing the counterclaim.

III. The Judgment of the trial court is substituted with an order dismissing the respondent's suit.

IV. The Orders dismissing the appellant's counterclaim be and are hereby affirmed.

V. Each party shall bear own costs of the appeal.

VI. For completeness, the orders of the trial court on the question of costs are upheld. Simply put, each party shall bear own costs of the proceedings before the subordinate court.

74. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF MAY 2025.

OGUTTU MBOYA, FCIArb, CPM [MTI]

JUDGE.

In the presence of

Mutuma– Court Assistant

Mr. Hey for the Appellant

Mr. Behailu for the Respondent