



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina v Musyoki (Environment and Land Appeal E033 of 2022)  
[2025] KEELC 3810 (KLR) (15 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3810 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL E033 OF 2022**

**JO OLOLA, J  
MAY 15, 2025**

**BETWEEN**

**LUCY MUTHONI MAINA ..... APPELLANT**

**AND**

**JANEFAR MUMBUA MUSYOKI ..... RESPONDENT**

*(Appeal arising from the Judgment of the Honorable E. Kanyiri PM,  
delivered on 28th November, 2022 in Karatina ELC. Case No. 3 of 2022.)*

**JUDGMENT**

**Background**

1. This is an Appeal arising from the Judgment of the Honorable E. Kanyiri PM, delivered on 28<sup>th</sup> November, 2022 in Karatina ELC. Case No. 3 of 2022.
2. By a Plaint dated 16<sup>th</sup> February, 2022, Lucy Muthoni Maina (the Appellant herein) had sought the following:
  1. A declaration that the Defendant is a trespasser on the Plaintiff's land parcel (number) Ruguru/ Karuthi/2232;
  2. A permanent injunction restraining the Defendant from entering, trespassing, constructing and or in any other way interfering with the Plaintiff's ownership right in Ruguru/ Karuthi/2232;
  3. An Order that the Defendant demolish and/or remove all illegal structures erected on Ruguru/ Karuthi/2232 and in default she be evicted therefrom;
  4. General damages for trespass and occasioning loss, damage and wasting on Ruguru/ Karuthi/2232; and



5. Costs of this suit.
3. It was the Appellant's case that at all times material she was the legal owner and registered proprietor of the said parcel of land known as Ruguru/Karuthi/2232 measuring 0.10 Ha (the suit Property) while the Defendant was the owner of LR. No. Ruguru/Karuthi/2231 also measuring 0.10 Ha.
4. It was further the Appellant's case that sometime in February, 2022, the Respondent had without any right trespassed into the Appellant's parcel of land and deposited building materials therein and that despite being called and warned that she was dealing with the wrong parcel of land, the Respondent had since commenced construction on the suit property.
5. In her Statement of Defence dated 8<sup>th</sup> March, 2022, Janefar Mumbua Musyoki (the Respondent herein) stated that she was sold her piece of land LR. No. Ruguru/Karuthi/2231 by one Grace Njambi Muchemi in the year 2020 and that at the said time, the title deed therefore had not been processed.
6. The Respondent further asserted that she was subsequently issued with a title deed for her said parcel of land which is next to the Marua-Hiriga tarmac road.
7. Having heard the parties and by the Judgment delivered on 28<sup>th</sup> November, 2022 aforesaid, the Learned Trial Magistrate entered judgment against the Appellant and ordered as follows:
  - a. That the Defendant herein is the rightful owner of Ruguru/Karuthi/2232; and
  - b. That the Plaintiff's suit herein is dismissed with costs to the
  - c. Defendant.
8. Aggrieved by the said determination, the Appellant who was the Plaintiff in the Lower Court moved to this court vide a Memorandum of Appeal dated 30<sup>th</sup> November, 2022 and filed herein on 7<sup>th</sup> December, 2022 urging this Court to set aside the Judgment on some eight (8) grounds listed as follows:
  1. That the Learned Trial Magistrate erred in law and fact in failing to address her Judgment on the Pleadings as filed and thereby arrived at a wrong decision;  
That the Learned Trial Magistrate erred in law and fact in dismissing the Plaintiff's case on the basis that she had not proved her case on a balance of probabilities against the weight of evidence;
  3. The Learned Trial Magistrate erred in law and fact in reading into the intention of the original owner as against the legal documents the original owner had executed to transfer L.R No. Ruguru/Karuthi/2231 to the Defendant;
  4. The Learned Trial Magistrate erred in law and fact in establishing for the Defendant a hypothesis that "at the point of subdivision an error occurred as to No. of the said parcel of land" while the same had neither been pleaded, adduced or proved in evidence;
  5. That the Learned Trial Magistrate erred in law and fact in coming to the conclusion that the Defendant herein is the rightful owner of Ruguru/Karuthi/2232 which was not an issue for determination.;
  6. That the Learned Trial Magistrate erred in law and fact in making a declaration in favour of the Defendant yet the Defendant had not pleaded a counterclaim;
  7. That the Learned Trial Magistrate erred in law and fact in properly relying on section 26 of the [Land Registration Act](#) but applying it improperly against the Plaintiff the registered owner of Ruguru/Karuthi/2232; and



8. That the Learned Magistrate erred in law and fact in not making any analysis of the evidence tendered and failing to consider the Plaintiff's submissions and thereby occasioned a miscarriage of justice.
9. This being the first appellate court, the duty of this court is to re-evaluate the evidence which was adduced before the trial court and to arrive at its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [see *Selle & Another –vs- Associated Motor Boat Co. Ltd and Others* (1968) EA 123].
10. I have accordingly carefully perused and considered the Record of Appeal as well as the impugned Judgment. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties herein.
11. By her suit before the Lower Court the Appellant had sought a declaration that the Respondent was a trespasser on the Appellant's land parcel number Ruguru/Karuthi/2232. The Appellant further sought an order to compel the Respondent to demolish the structures she had erected on the said LR. No. Ruguru/Karuthi/2232 and that in default, the Respondent be evicted therefrom. In addition, the Appellant sought for general damages for trespass together with the costs of that suit.
12. Those prayers were premised on the Appellant's contention that she was the registered proprietor of the said parcel of land while the Respondent was the proprietor of an adjacent parcel of land known as Ruguru/Karuthi/2231. According to the Appellant, the Respondent had sometime in February, 2022 trespassed into the Appellant's parcel of land and deposited building materials therein. It was the Appellant's case that despite being informed that she was dealing with the wrong parcel of land, the Respondent had since commenced construction on the suit property.
13. The Respondent did not deny that her parcel of land was the one known as Ruguru/Karuthi/2231. It was her case that she had since been issued with a title deed for the suit property and that the same was next to the Marua-Hiriga Tarmac Road.
14. Having heard the dispute and in the Judgment under Appeal, the Learned Trial Magistrate dismissed the Appellant's claim and made a finding that the Respondent was the proprietor of the suit property.
15. The basis of the court's findings and conclusions can be discerned from page 3 of the Judgment (page 94 of the Record of Appeal) wherein the Learned Trial Magistrate finds as follows:-
 

“The Plaintiff stated that she bought the land from one Francis Muraguri and that the land which she bought was adjacent to the tarmac. The Defendant on the other hand called to her defence the original owner of the land and produced as sale agreement in which she bought land (sic). The sale agreement was done before the sub-divisions. In the agreement, it was clear that the parties intended that the defendant portion would at all time be on the tarmac road. The issue came about after the subdivision was done.”
16. After citing the provisions of Section 26 of the [Land Registration Act](#) regarding indefeasibility of title, the court concluded as follows:
 

“... From the evidence tendered it is clear that the intention of the original owner Grace Njambi Muchemi DW2 was to sell to the Defendant the parcel of land next to the road which was Ruguru/Karuthi/2232 but at the point of subdivision an error occurred as to the No. (sic) of the said parcel of land. The transaction between the defendant and DW2 was before the sub-division and sale of a portion of the original parcel of land to the Plaintiff herein. The Plaintiff has failed to prove her case on a balance of probabilities against the defendant.



I therefore find that

- a. That the Defendant herein is the rightful owner of Ruguru/Karuthi/2232; and
  - b. That the Plaintiff's suit herein is dismissed with costs to the Defendant.”
17. It was however difficult to find the basis upon which the court had come to those findings and conclusions. While it was indeed true that both LR. No. Ruguru/Karuthi/2231 and LR. No. Ruguru/Karuthi/2232 were the resultant subdivisions of L.R. No. Ruguru/Karuthi/922, there was no dispute that the Respondent held title for parcel No. 2231 while the Appellant held title for parcel No. 2232.
  18. The Appellant's case was that the Respondent had unlawfully and illegally trespassed into her parcel No. 2232 and commenced construction thereon. From a perusal of the Ruling appearing at Page 46-51 of the Record, it is evident that there was indeed construction that had been commenced by the Respondent on the said parcel of land and the same was stopped by a Ruling delivered in the said matter on 13<sup>th</sup> April, 2023.
  19. In her Statement of Defence, the Respondent did confirm that her parcel of land was No. 2231 although she insisted that it was adjacent or alongside the Marua-Hiriga tarmac road.
  20. At the trial, the Appellant produced certificates of official searches as well as the respective title deeds indicating that the Respondent was the proprietor of LR No. Ruguru/Karuthi/2231 while the Appellant was registered as the proprietor of LR. No. Ruguru/Karuthi/2232. In addition, the Appellant produced both the mutation form for the sub-division of the original parcel number Ruguru/Karuthi/922 as well as the RIM for the area (pages 17 and 18 of the Record). A perusal thereof reveals that it was LR. No. Ruguru/Karuthi/2232 which was adjacent to the Marua-Hiriga road.
  21. In her testimony before the court, the Respondent admitted that she was constructing on the land adjacent to the tarmac road. That was not the parcel of land whose title she held.
  22. As it were, there were no pleadings before the court that the documents that the parties held had any error. Grace Njambi Muchemi (DW2) who was the owner of the original LR. No. Ruguru/Karuthi/922 is the same one who executed the mutation forms (Pg 18 of the Record) and she did not testify or complain that the documents had any error or mistake.
  23. Arising from the foregoing, it was clear to me that the Learned Trial Magistrate had erred and completely misdirected herself when she dismissed the Appellant's case and came to the conclusion that the Respondent was the rightful owner of LR. No. Ruguru/Karuthi/2232.
  24. In the premises this Appeal succeeds and is hereby allowed with orders as follows:
    - i. The Judgment of the Lower Court as delivered on 28<sup>th</sup> November, 2022 is hereby set aside and substituted with an order allowing the Appellant's case as pleaded against the Respondents.
    - ii. The Appellant is hereby awarded General damages for trespass in the sum of Kshs. 300,000/=.
    - iii. The Appellant is hereby awarded the costs of this Appeal and the court below.
  25. Orders accordingly.

**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 15<sup>TH</sup> DAY OF MAY, 2025**

.....

**J.O. OLOLA**



## **JUDGE**

In the presence of:

Ms. Firdaus Court Assistant.

Mr. Maina Kiringiti Advocate for the Appellant

Ms. Mwikali Advocate for the Respondent

