



REPUBLIC OF KENYA



**KENYA LAW**  
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**Chege v Alifani (Civil Appeal E004 of 2025) [2025] KEELC 4746 (KLR)  
(Environment and Land) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4746 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VOI  
ENVIRONMENT AND LAND  
CIVIL APPEAL E004 OF 2025  
EK WABWOTO, J  
JUNE 26, 2025**

**BETWEEN**

**TABITHA NDUITA CHEGE ..... APPELLANT**

**AND**

**FATUMA MKIWA ALIFANI ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. A.M. Obura (Mrs), Chief Magistrate in Voi MCELC E017 of 2023 Fatuma Mkiwa Alifani vs Tabitha Nduta Chege)*

**JUDGMENT**

1. This is a first appeal from the Judgment of the lower court delivered by Hon. A. M. Obura (Mrs.) CM on 14<sup>th</sup> February 2025 where the Respondent's claim against the Appellant was allowed and judgment entered in favour of the Respondent as follows:-
  - a. A permanent injunction is hereby issued restraining the Defendant, her agents, servants and/or workers from trespassing, constructing or interfering with the suit property Kaloleni Majengo Phase 2 Upgrading Scheme Plot No. 11 in any manner.
  - b. The Defendant is hereby directed to remove the container, demolish the wall and any other building materials placed on the space lease and vacate the premises within the next thirty (30) days at her own cost.
  - c. Failing compliance, the Plaintiff shall be at liberty to remove the said structures and container at the Defendant's costs.
  - d. General damages for trespass in the sum of Kshs. 200,000/= (two hundred thousand shillings).
  - e. Costs of the suit awarded to Plaintiff.



2. The Appellant being aggrieved by the said judgment filed a Memorandum of Appeal dated 10<sup>th</sup> March 2025, raising the following grounds:-
  - i. The learned Magistrate erred in law and fact by holding that the lease between the Appellant and the Respondent was cancelled by the parties yet the Appellant never agreed on the cancellation of the same.
  - ii. The learned Magistrate erred in law and fact by making a finding that the Appellant trespassed on the Respondent's land yet the parties entered into a lease agreement.
  - iii. The learned Magistrate erred in law and in fact by holding that the Respondent had proved her case on a balance of probabilities.
  - iv. The learned Magistrate erred in law and in fact by making a decision which is not supported by the evidence on record.
  - v. The learned Magistrate erred in law and fact by not understanding the defence evidence.
  - vi. The learned Magistrate erred in law and fact by awarding the Respondent Kenya Shillings Two Hundred Thousand (Kshs. 200,000) as damages which amount is erroneous, excessive and not supported by any evidence of damage and loss by the Respondent.
  - vii. The learned Magistrate erred in law and fact by failing to make an objective and in depth analysis of the entire evidence on record before reaching her decision.
  - viii. The learned Magistrate erred in law and fact by failing to find that by the time the case was filed, the Appellant was in the process of removing the container which had been placed on the premises as a result of the lease agreement.
  - ix. The learned Magistrate erred in law and fact for not finding that the Respondent's claim was based on a boundary dispute between the Respondent and the Appellant's landlord and had nothing to do with the Appellant.
3. The Appellant thus prayed for:-
  - a. The appeal be allowed.
  - b. The Judgment delivered on 26<sup>th</sup> April 2023 and subsequent orders or decree be set aside.
  - c. The Respondent's suit before the trial court be dismissed with costs.
  - d. The Respondent be condemned to bear the costs of this appeal.

#### **Court's directions**

4. The appeal was contested by the Respondent and pursuant to the directions issued by this court the same was canvassed by way of written submissions. The Appellant filed written submission dated 30<sup>th</sup> May 2025 while the Respondent filed written submissions dated 2<sup>nd</sup> June 2025.

#### **The Appellant's submissions**

5. In respect to ground 1 of the appeal, the Appellant submitted that paragraph 21 of the Judgment states that there is no dispute that parties entered into a Lease Agreement. According to the Judgment, the lease was subsequently revoked. The Appellant did not sign the agreement terminating the lease. the revocation of the lease was unilateral. Counsel for the Respondent acted for both parties. whereas the



- Respondent proposed to give the Appellant one and a half months to vacate, the Appellant requested for six (6) months.
6. It was further submitted that the lease started on 1<sup>st</sup> January 2021. It was amended nine (9) months later on 4<sup>th</sup> September 2021. On 16<sup>th</sup> March 2023, over two (2) years later, counsel on record for the Respondent wrote to both parties calling for a meeting at his office. Counsel wrote another letter to the Appellant on 25<sup>th</sup> April 2023. The purported termination agreement is dated 26<sup>th</sup> April 2023 yet the letter dated 25<sup>th</sup> April 2023 had scheduled for a meeting on 2<sup>nd</sup> May 2023 at 9:00a.m. It was therefore contended that the decision to terminate had already been made.
  7. The Appellant contended that the lease itself provided at its paragraph six for an extensive mechanism of solving disputes and that this procedure was not followed. It was contended that there was nowhere in the proceedings where the Appellant agreed to the one-and-a-half-month period to vacate the premises. The lease was for a period of ten (10) years and the six (6) months proposed by the Appellant was reasonable.
  8. It was further contended that the Respondent opted to arbitrate but only decided to go by the one-and-a-half-month period proposed by the Respondent. No arbitration was done. It was therefore erroneous for the trial court to conclude that the lease was terminated by consent.
  9. It was argued that there was no evidence adduced before the trial court for it to conclusively find that the Appellant agreed to vacate after one and a half months.
  10. In respect to ground 2 of the appeal, it was submitted that there was no trespass to the land since the Appellant's entry to the land was by consent. There was a 10 years lease whose purported termination was one and half months from April 2023.
  11. The Appellant faulted the trial court for finding that the Appellant had trespassed onto the property. It was also submitted that the boundary was not known until the Surveyor visited the land and as such trespass was not proven.
  12. In respect to ground 3 and 4, it was submitted that the Respondent had not proved her case to the required standard, the termination of the lease was not called for. There was no evidence implicating the Appellant as a trespasser or someone who hindered the Respondent so much as to be condemned to pay damages since no damage was suffered.
  13. In respect to ground 6 of the Memorandum of Appeal, it was submitted that Learned Magistrate erred in awarding the Respondent Kshs. 200,000/= as damages which amount was excessive and not supported by any evidence of damage and loss by the Respondent.
  14. In respect to ground 7, 8 and 9, it was argued that a boundary dispute cannot amount to trespass and that the Appellant herein had maintained that once the boundary was established, she was willing to demolish the wall.
  15. The court was urged to allow the appeal with costs.

### **The Respondent's submissions**

16. The Respondent submitted as follows; on whether the trial Magistrate erred in both law and fact by holding that the lease between the Appellant and the Respondent was cancelled by the parties yet the Appellant never argued on its cancellation, it was argued that the Respondent tendered sufficient evidence including an agreement which revoked the lease that was duly executed by both parties.



17. In respect to trespass, it was argued that the trial court did not err in finding that the Appellant had trespassed into Plot No. 11. The Surveyor's report showed that there was a development extension of 0.007 Ha which had reduced the Respondent's property.
18. It was further submitted that the Respondent had proved her case to the required standard. The Respondent had produced evidence showing entitlement to the suit property and that indeed the Appellant had trespassed onto the same which was corroborated by the Surveyor's report and as such the trial Magistrate correctly found that the Respondent's case had been proved.
19. It was contended that the trial Magistrate did not err when she awarded the Appellant damages for trespass of Kshs. 200,000/=. The same was reasonable since the Appellant had erected a structure and the Respondent could not use the property exclusively. The case of Kenya Power & Lighting Company Limited =Versus= Fleetwood Enterprises Limited (2017) eKLR was cited in support.
20. The Respondent urged the court to dismiss the appeal with costs.

### **Analysis and Determination**

21. This being a first appeal, the power of this court is set out in Order 42 Rule 32 of the Civil Procedure Rules. Being steered by the principles enunciated in the well-cited case of *Selle v Associated Motor Boat Company Ltd* [1968] EA 123, this court will not interfere with the impugned judgment save this court satisfies itself the learned trial magistrate misdirected herself thus arrived at an erroneous decision, undoubtedly exercised her discretion wrongly and occasioned injustice by such erroneous exercise
22. The court has considered the entire record of appeal, the written submissions filed and authorities cited by the parties and has isolated the following issues for determination in which will upon their consideration will settle this appeal: -
  - i. Whether the actions of the Appellant amounted to trespass onto the suit property Kaloleni Majengo Phase 2 Upgrading Scheme Plot No. 11.
  - ii. Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought.

The court shall now proceed to address itself on the said issues sequentially.

### **Issue No. (i) Whether the Appellant had trespassed into the suit property**

23. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which 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.”

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.”

24. Section 3(1) of the *Trespass Act*, Cap 294 provides that:

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tilts or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

Additionally, Black’s Law Dictionary (11<sup>th</sup> Edition, page 1810) defines trespass to land as follows:

“An unlawful act committed against the person or property of another; especially, wrongful entry of another’s real property”

Manson CJ, Brennan and Toohey JJ, in *Plenty vs Dillon* (1991) 171 CLR 635 at 645:

“Every unauthorized entry upon property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right.”

25. The Appellant filed a Statement of Defence dated 12<sup>th</sup> November 2023 stating that the Respondent was aware of her entry to the land. She had requested for six months to remove the container which was declined and she was given 1 ½ months to vacate which period was very short considering that her mother was very sick. She also stated that the Respondent filed the suit in August 2023 before expiry of 6 months from the date of which the agreement was revoked.
26. During trial, the Appellant was the sole defence witness and she testified that she was willing to demolish the structure on the land once the exact boundary was identified. On cross-examination she stated that the container was removed from the suit property but could not recall the exact date however the same was removed within 6 months from when the agreement was terminated.
27. From the analysis of the evidence on record, the court directed a Surveyor to visit the site and furnish the court with a report. Pursuant to the said directions, a survey report dated 29<sup>th</sup> September 2024 was filed by Filbert Maighacho, the Voi Sub County Surveyor. The said report confirmed that there was a development extension of 0.007 Ha on the Respondent’s property Plot No. 11 and the same confirmed the Respondent’s testimony on that aspect.
28. From the evidence on record, it was also evident that the Appellant had a lease agreement dated 29<sup>th</sup> October 2020 which was to last for a period of 10 years from 1<sup>st</sup> January 2021. The evidence on record also confirmed that the terms of the lease agreement were breached by the Appellant who failed to pay the agreed rent and thus the Respondent revoked the same.
29. A perusal of the agreement dated 23<sup>rd</sup> April 2023 which was produced in evidence as P Exhibit 9 which had purported to revoke the initial lease dated 29<sup>th</sup> October 2020 was never signed by the Appellant and as such there was no agreement on the duration upon which the Appellant was expected to have vacated the property and in view of the said position the termination clause being Clause 5 (iii) of the lease agreement was to be applied.



30. Proof of trespass entails ownership and evidence of illegal entry without justification. Whoever desires a court to give a judgment as to a legal right or liability dependent on the existence of facts, which he who asserts, must prove those facts exist.
31. In view of the foregoing, it is the finding of this court that the Appellant's entry into the suit property was by the consent of the Respondent, the same having been through the lease agreement dated 20<sup>th</sup> October 2020 and further considering that the termination clause of the said agreement provided for 6 months duration, the conduct and actions of the Appellant could not have amounted to trespass on the said plot. This finding settles the appeal and there is no need to consider the other grounds raised by the Appellant.

**Issue No. (ii) Whether the trial court was justified based on the facts, evidence and the law in arriving at the decision to grant the Respondent the reliefs that were sought**

32. The Respondent had sought for several reliefs as was enumerated in her Complaint dated 19<sup>th</sup> August 2023 that was filed before the lower court. The judgment of the trial Magistrate was based on her finding that there were proof of trespass by the Respondent, however this court having arrived at its finding that the actions of the Appellant could not have amounted to trespass, it is evident that the Learned Magistrate erred in arriving at her decision which warrants the intervention of this court.
33. From the Record of Appeal, it is worthy to note that the Learned Magistrate on her own motion directed a survey to be undertaken and a report to be filed. From the record it is worth noting that the same was filed after both parties had closed their cases and the said Surveyor was never called to court to testify and neither was he cross-examined by any party to the said proceedings. While Sections 22(b) and 23 of the *Civil Procedure Act* and Section 173 of the *Evidence Act* give powers to a Judge or Magistrate to ask questions of witnesses, summon a witness or call for additional evidence to enable the said Magistrate or Judge make an informed decision, such powers do not take away the fundamental principle that the Judge or Magistrate is and must remain an impartial arbiter in civil proceedings which involve resolution of disputes between the parties. The court cannot go into a fishing expedition looking for evidence, the court should not be seen to be assisting either side in the dispute.
34. In view of the above analysis, it is the finding of this court that based on the evidence tendered before the trial court and considering that the Appellant's case had not been proven to the required standard, the Learned Magistrate erred in law and fact in arriving at her decision and granting the Respondent the reliefs sought in her complaint. As such the said decision ought to be set aside.
35. In respects to costs, costs are at a discretion of the court. As a general rule costs follow the event unless the Court for good reason orders otherwise. In the instant case having considered the fact that the Appellant is no longer in the suit property and the same reverted back to the Respondent, the appropriate order on costs for each party to bear own costs of the appeal and the costs of the suit before the lower court.

**Conclusion**

36. In conclusion, it is the finding of this court that the Appellant's appeal succeeds, the same is merited and this court proceeds to issue the following orders:-
  - i. The appeal is allowed.
  - ii. The Judgment of the trial court delivered on 14<sup>th</sup> February 2025 is hereby set aside in its entirety and substituted with an order dismissing the Respondent's suit.



- iii. Each party to bear own costs of the appeal and the costs of the suit before the lower court.  
Judgment accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT VOI THIS 26<sup>TH</sup> DAY OF JUNE 2025.**

**E. K. WABWOTO**

**JUDGE**

In the presence of:-

Dr. Said Chitembwe for Appellant.

Mr. Micar Mwazighe for Respondent.

Court Assistants: Mary Ngoira and Norah Chao.

