**Gakii v Wamai (Environment and Land Appeal E030 of 2024)**
**[2025] KEELC 4891 (KLR) (26 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4891 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ISIOLO**

**ENVIRONMENT AND LAND APPEAL E030 OF 2024**

**JO MBOYA, J**

**JUNE 26, 2025**

**BETWEEN**

**CHRISTINE SUSAN GAKII ..... APPELLANT**

**AND**

**KIRITO MIANO WAMAI ..... RESPONDENT**

## JUDGMENT

1. The Appellant herein [who was the Plaintiff in the subordinate Court] approached the court vide Plaint dated 29th July 2021 and wherein the appellant sought various reliefs. The reliefs sought at the foot of the Plaint are as here-under:-

    a. A permanent order of injunction restraining the defendant, whether by himself, his agents and or any other persons working under his instructions from entering and or interfering with the plaintiff's proprietary rights over plot number Chechelesi/366 situated at Chechelesi area within Isiolo county.

    b. Cost and interest of the suit.

    c. Any other better relief the Honourable court may deem fit and just to grant.

2. The Respondent [who was the defendant in the subordinate court] duly entered appearance and filed a statement of defence dated the 7th August 2021; and wherein the defendant denied the claims by the Plaintiff. Furthermore, the defendant contended that same is the lawful owner and or proprietor of plot number Chechelesi/255 measuring 50 Feet by 125 Feet situated within Isiolo County. Moreover, the respondent posited that same has not encroached upon and or trespassed onto the Appellant's property, namely, Chechelesi/366 or at all.

3. The suit beforehand was heard and disposed off vide judgement rendered on the 15th November 2024, where in the learned trial magistrate [Hon. M. A Odhiambo SRM] found and held that the Appellant

had failed to prove her case to the requisite standard. To this end, the learned trial magistrate proceeded to dismiss the Appellant's suit with costs to the Respondents.

4. Aggrieved by the Judgment and decree of the learned trial magistrate, the Appellant has now approached this court vide Memorandum of Appeal dated 9th December 2024, and wherein the Appellant has raised the following ground[s]:

   i. The learned Magistrate erred in law and fact in failing to consider reports filed by the county physical planner and the county surveyor who visited the suit land and considered a report filed by the surveyor who never visited land nor produced the said report in court.

   ii. The learned magistrate erred in law and fact in finding that the defendant was the one who was allocated the suit land before the plaintiff when indeed the plaintiff had produced minutes of the work town planning and market committee meeting allocating land to a one Kanyua Mbutura who sold the land to the plaintiff's late mother.

   iii. The learned magistrate erred in law and in fact in failing to consider the findings on the report filed by the surveyor and the physical planner.

   iv. The learned magistrate erred in law and in fact by failing to consider that the defendant only testified himself and called one witness who claimed to be his care taker and did not call any Land Official[s] to corroborate his evidence.

   v. The Learned magistrate erred in law and in fact by failing to consider the appellant's documentary evidence.

   vi. The Learned magistrate erred in law and in fact by considering the defendants PDP's when indeed the physical planner and the surveyor who visited the scene did a report stating that they were inconsistent with what was held in their respective offices.

   vii. The Honourable magistrate erred in law and fact in misleading herself that the respondent documents were authentic when indeed the Lands Department in their reports concluded that they were not authentic.

5. The appeal beforehand came up for directions on the 6th March 2025, whereupon the advocate for the appellant confirmed having filed and served the record of appeal. Moreover, it was posited that the record of appeal contained all the requisite pleadings; bundle of documents; proceedings of the trial court; Judgment; and the duly extracted decree of the court underpinning the appeal.

6. Additionally, learned counsel for the Appellant proposed to canvass [ventilate] the appeal by way of written submissions. For good measure, the proposal to have the appeal canvassed by way of written submissions was supported by learned counsel for the Respondent. To this end, the court proceeded to and issued directions to the effect that the appeal be canvassed by way of written submissions. Furthermore, the court also circumscribed the timelines of the filing and exchange of the written submissions.

7. The Appellant filed written submissions dated the 25th March 2025 and wherein the appellant highlighted three key issues, namely; whether the appellant established and demonstrated protectable interest in the suit property; whether the appellant established her claim of trespass against the respondent; and whether the appellant was entitled to the reliefs sought or otherwise.

8. The Respondent filed written submission dated 11th April 2025, and wherein same has canvassed the appeal on the basis of the various grounds that were captured at the foot of the memorandum of appeal. In particular, the respondent has argued grounds one and three of the memorandum of

appeal together; thereafter, consolidated grounds 2, 4, 5, 6 and 7 of the Memorandum of Appeal. Instructively, the respondent has posited that the appellant herein failed to establish and prove her claims to and in respect of the suit property. To this end, it was posited that the learned trial magistrate was right in finding and holding that the appellant had failed to prove her claim to the requisite standard of proof.

9. Having reviewed the record of appeal; having considered the evidence tendered before the trial court [both oral and documentary] and having taken into account the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeals turns on two key issues, namely; whether the appellant tendered and adduced plausible evidence before the trial court in proof of her claim to ownership of the suit property or otherwise; and whether the judgment of the trial court is wrought with errors of principle or otherwise.

10. Before venturing to analyse the thematic issues raised in the preceding paragraph, it is imperative to observe that the appeal beforehand is a first appeal. To this end, this court is vested with the requisite jurisdiction to undertake exhaustive review, scrutiny, re-evaluation and reanalysis of the entire evidence tendered [placed on record] before the trial court and thereafter to arrive at an independent conclusion albeit taking into account the totality of the evidence on record.

11. Furthermore, it is important to outline that even though this court is at liberty to arrive at an independent conclusion and to depart from the factual findings and conclusions of the trial court, it is important to underscore that this court can only depart from the factual findings and conclusions of the trial court where the findings of the trial court were arrived at on the basis of no evidence; perverse to the evidence on record; based on a misapprehension of the evidence; and where there is demonstrable error of principle which vitiates the conclusion [findings] of the trial court.

12. Additionally, it is instructive to reiterate that even though this court has the mandate to depart from the factual findings and conclusion of the trial court, this court is obligated to defer to the trial court taking into account that this court did not have the opportunity to hear and see the witnesses testify. Notably, this court as the first appellate court is therefore not in a position to assess the demeanour of the witness who testified.

13. The Jurisdictional remit of this court as the first appellate court while entertaining and adjudicating upon appeals has been the subject of various judicial pronouncements. Recently, 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) the Court of Appeal stated;

> " 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.
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> 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.
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> 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 judgment 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."

14. Bearing in mind the ratio decidendi espoused in the decision [supra], I am now disposed to revert to the subject matter and to discern whether the learned trial magistrate correctly appreciated the totality of the evidence tendered and thereafter applied same in an endeavour to determine the dispute between the parties beforehand. Suffice it to state that I shall now address the issues highlighted elsewhere herein before.

15. Regarding the first issue, namely; whether the learned trial magistrate correctly appreciated the totality of the evidence tendered by and on behalf of the appellant, it is imperative to recall that the appellant tendered evidence to the effect that the suit plot, namely; plot number Chechelesi/366 was hitherto allocated to one Lydiah Kanyua Mutura by the county council of Isiolo [now defunct]. To this end, the appellant tendered and produced a letter dated 7th May 1991 by the Town Clerk of the County Council of Isiolo.

16. Furthermore, the appellant tendered and produced before the court copies of minutes of the county council of Isiolo [now defunct] dated 13th August 1997 and 20th September 1997, respectively; showing that the suit plot was subsequently transferred to one Rose Peninah Werimba who thereafter transferred the suit plot to the appellant Christine Susan Gakii. [See minute number 15/ 20025 and the schedule attached thereto].

17. Additionally, the appellant tendered and produced before the court a copy of the letter dated 16th November 2009, namely; the transfer of the suit plot from Rose Peninah Werimba to the appellant. Instructively, the letter under reference highlighted minute number WTPM 15 of 2005 as the basis of the transfer of the suit property to the appellant.

18. On the other hand, it is also imperative to recall that when the dispute herein was filed before the court, the court made an order for visitation to the locus in quo [scene] in an endeavour to discern whether the suit plot [Chechelesi/366] and Chechelesi/255 [the latter being claimed by the respondent] are separate and distinct or sit on the same ground/ location.

19. Arising from the order pertaining to the visitation to the locus on quo, the court proceeded to and visited the locus on quo on the 15th March 2022; in the presence of the parties; the advocates for the parties and two experts [the County Physical Planner and District Surveyor] respectively. Suffice it to posit that while at the locus in quo it was established that the ground location being claimed by the two parties was one and the same.

20. First forward the subject matter proceeded to hearing and the appellant called various witnesses including Tule Tepo [PW4], who produced minute number 23 of 1991[exhibit 4] and the other minutes showing the manner in which the suit property devolved from Lydiah Mutura Kanyua to Rose Peninah Werimba and ultimately to Christine Gakii [the appellant].

21. Additionally, the appellant herein also called Cheruiyot Kimutai. Same testified as PW5. The said witness averred that same is the County Physical Planning Officer Isiolo County. Thereafter, the witness [PW5] tendered and produced assorted documents, including the Part Development plan.

22. While under cross-examination, the witness testified that the Part Development Plan [PDP] for the appellant was duly approved on the 11th May 2018. Furthermore, the witness averred that the Part Development Plan for the appellant corresponded with the records obtained at the County Physical Planning Department.

23. On the other hand, its worthy to recall that upon being shown the Part Development Plan by the respondent [DMFI6], the witness stated as hereunder,

> 'We revisited ISL/117/97/202. Same was not consistent with our records.'

24. It is also worthy to underscore that the appellant also called one Hussein Wagache. Same testified as PW6. It was the testimony of the said witness that same is a land surveyor based at Isiolo. Furthermore, the witness testified that same visited the locus in quo alongside the county Physical planner and the court. Thereafter, the witness averred that same prepared a report which has since been produced before the court. Additionally, the witness stated that the Plaintiff [read, the Appellant] had authentic documents.

25. While under cross-examination by learned counsel for the respondent, the witness averred that same had occasion to look at the Part Development Plan for the respondent. The witness averred that the same [Part Development Plan] was not approved. Furthermore, the witness state that same came to the conclusion that the respondent's documents were not authentic.

26. Upon the close of the Appellant's case, the respondent herein testified before the court and produced various documents. However, there is no gainsaying that the respondent did not call any witness either from the County Government of Isiolo or from the Department of Lands to authenticate his documentation.

27. Furthermore, it is not lost on the court a that the respondent herein did not challenge and or controvert the evidence of PW4, PW5 and PW6, respectively. To this end, there is no gainsaying that the evidence tendered by the said witnesses remained uncontroverted. Further and in any event, it suffices to observe that the said witnesses [PW4, PW5 and PW6] posited that the respondents' documents were not authentic.

28. The foregoing represents the totality of the evidence that was tendered and adduced before the trial court. To this end, the trial court was therefore called upon to review the said evidence and thereafter to discern who between the appellant and the respondent had placed before the court credible evidence demonstrating the chain/ process culminating into [sic] their ownership documents. [See Munyua Maina vs Hiram Gathiha Maina 2013 eKLR].

29. Recently, the need to tender and place before the court plausible evidence demonstrating the process attendant to the acquisition of title to land was elaborated upon in the case of Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371 (KLR) (31 March 2023) (Judgment) where the Court of Appeal stated as follows regarding a claim over the existence of two titles in respect of the same parcel land:

> " The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important. Root of title is the deed to which title to a property is ultimately traced to prove that the owner has a good title. Accordingly, when there are competing interests, as in this case, the parties are required to give evidence of title, starting with a "good root of title." A good root of title and an unbroken chain of ownership are required. To be a good root of title, a document must satisfy each of the following requirements:
>
> (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question;
>
> (b) it must contain a recognizable description of the property;

(c) it must not contain anything that casts any doubt on the title."

30. Flowing from the apt and succinct exposition of the law in the decision [supra] and taking into account the totality of the evidence that was placed before the court, I encounter no difficulty in finding and holding that the appellant indeed placed before the court plausible, cogent and credible evidence demonstrating the root of her title[claim] to the suit property.

31. I am afraid that the learned trial magistrate did not pay keen attention to the contents of the documentary evidence that was adduced by the appellant. For good measure, had the learned trial magistrate reviewed the various minutes that were tendered by PW4, same would no doubt have come to the conclusion that the suit property was duly allocated to Lydiah Kanyua Mutura on 23rd March 1991, long before the respondent could lay a claim thereto.

32. Turning on to the second issue, namely; whether the Judgment of the learned trial court is wrought with errors of principles, it is worthy to recall that the learned trial magistrate[sic] came to the conclusion that the respondent herein was allocated plot number Chechelesi/255 in 1997 and thus the respondent's documentation predated [preceded] the appellant's documentation.

33. Nevertheless, there is no gainsaying that the appellant's claim to the suit property traces its roots [origin] to the initial allocation to Lydiah Kanyua Mutura, which allocation took place in 1991. To this end, it cannot be correct for the Learned Trial Magistrate to hold that the respondent's [sic] documentation[s] relative to the suit ground preceded the appellants documents.

34. Secondly, even though the learned trial magistrate found and held that the respondent's documents demonstrated a clear, undisputed chain of ownership affirming the respondent as the rightful owner of the disputed property, there is no gainsaying that PW4, PW5 and PW6 clearly posited that the respondent's documents were not authentic. On the contrary, the Respondent did not call any Witness from the County Government of Isiolo, or the Department of Land to authenticate his [sic] Documents.

35. To my mind, the finding and holding by the learned trial magistrate concerning the validity of the respondent's documents was arrived at on the basis of no evidence and on misapprehension of the evidence on record.

36. Thirdly, it is also worthy to recall that the learned trial magistrate invoked and deployed the equitable doctrine of first-in time and thereafter ventured forward to hold that the respondent's Part Development Plan[PDP] was first in time in comparison to the appellants' Part Development Plan.

37. However, what the learned trial magistrate did not appreciate is that before invoking the equitable doctrine of first in time, it must be proven that the documentation being deployed were procured procedurally; legally and in accordance with the law. Sadly, the Part Development Plan being propagated by the respondent was found to be un- authentic.

38. Additionally, evidence abound that during the visitation to the locus in quo, it was found that the shape of the property captured at the foot of the respondent's Part Development Plan did not accord with the disputed ground. Furthermore, it is also worth recalling that PW5 clearly stated that the Part Development Plan was not consistent with the records obtaining at the County Physical Department.

39. I am afraid that the ratio decidendi in the case of Gituany Investment Limited vs Taj Mall Limited and 3 others 2006 eKLR, which was deployed and applied by the learned trial magistrate, was clearly inapplicable to the facts of the subject matter. Further and in any event, it is common ground that Equity follows and compliments the law, but cannot override the law. In this regard, the equitable

doctrine cannot be deployed to sanitize the illegality underpinning the respondent's documentations. [See *Karanja & 3 others (As Legal Representative of the Estate of the Late Walter Karanja Muigai) v Kirundi & another (Civil Appeal 172 of 2010*) [2016] KECA 292 (KLR) (29 July 2016) (Judgment)]

40. Finally, there is one more issue that merits consideration. The issue herein touches on and concerns the aspect where the learned trial magistrate referenced the report by one Mr. Peter Wachira, who is said to have prepared a report and which report [sic] confirms that the two plots were separate and distinct. In addition, the learned trial magistrate thereafter held that upon examination of the various reports on record, namely; the report of PW5 and PW6 on one hand and the report of Peter Wachira on the other hand, same found the Expert[s] report to be unreliable.

41. Two critical issues arise from the statement of the learned trial magistrate. Firstly, it is important to observe that during the visitation to the locus in quo Peter Wachira [County surveyor, Isiolo] was not the surveyor who visited the site. On the contrary, the surveyor who visited the site was Hussein Wagache [PW6]. To this end, Peter Wachira could not purport to generate a survey report or at all.

42. Secondly, it is not lost on me that the respondent did not call any other witness other than himself. Having not call any other witness, there is no way that the report by Peter Wachira could have been tendered and produced before the court. Quite clearly, the said report by Peter Wachira, which underpins the finding of the trial magistrate that the Experts' report[s] were unreliable, was illegally smuggled onto the court report.

43. Before concluding on this issue, it is important to observe that even though a court of law is not bound by the expert reports[evidence] but a court of law cannot casually disregard and or ignore expert evidence with abandon. For good measure, a court of law is enjoined to provide plausible basis for departing from the expert evidence and more so where the expert evidence is consistent with the testimonies on record. [See Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited "Kenyac") & another (Appeal 80 of 2017) [2022] KECA 870 (KLR) (28 April 2022) (Judgment) and Attorney General v Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (3 December 2021) (Judgment)].

44. Flowing from the foregoing and bearing in mind the principles enunciated in Mwanasokoni vs Kenya Bus Services Limited 1985 eKLR, I come to the conclusion that the Judgment of the learned trial magistrate is wrought and replete with errors of principle. In this regard, the Judgment under reference invites the intervention of the court.

**Final Disposition:**

45. Having analysed the two [2] thematic issues that were highlighted in the body of the Judgment, it must have become apparent that the appeal before hand is meritorious. To this end, the appeal is successful.

46. Consequently, and in the premises, the final orders that commend themselves to the court are as hereunder:-

    i. The Appeal be and is hereby allowed.

    ii. The Judgment and decree of the subordinate court [Hon. M.A Odhiambo SRM] dated 15th November 2024, be and is hereby set aside

    iii. In lieu thereof, an order be and is hereby made allowing the appellant's suit in terms of prayer [a] of the Plaint dated 29th July 2021.

    iv. Costs of the Appeal be and are hereby awarded to the appellant.

v. That Cost of the proceedings before the subordinate court be and are hereby awarded to the Appellant.

vi. Cost in terms of clause [iv] and [v] shall be agreed upon and in default same shall be taxed by the Deputy Registrar in the conventional manner.

47. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 26TH DAY OF JUNE 2025**

**OGUTTU MBOYA, FCIArb; CPM [MTI-EA].**

**JUDGE**

In the presence of:

Mr Mutuma/Ms Mukami – Court Assistant

Ms. Odoyo holding brief for Mr. Kiogora Mugambi for the Appellant

Mr. Muchiri for the Respondent.