



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge v Mwangangi & 2 others (Environment and Land Appeal  
E011 of 2023) [2025] KEELC 4662 (KLR) (24 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4662 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E011 OF 2023**

**AY KOROSS, J**

**JUNE 24, 2025**

**BETWEEN**

**JULIUS BUBA NJOROGE ..... APPELLANT**

**AND**

**EDWARD NDUNDA MWANGANGI ..... 1<sup>ST</sup> RESPONDENT**

**JAMES MUTURIA KABIRA ..... 2<sup>ND</sup> RESPONDENT**

**NKATHA KABIRA ..... 3<sup>RD</sup> RESPONDENT**

*(Appeal from the judgment of Hon. E.W. Wambugu, PM, delivered on  
27/02/2023 in Kithimani Magistrate’s Court ELC Case No. 3 of 2019  
(Julius Buba Njoroge vs. Edward Ndunda Mwangangi & 2 Others)*

**JUDGMENT**

**Background of the appeal**

1. The background of this appeal is that the appellant instituted suit against the respondents by way of an amended plaint dated 12/02/2019 over land parcel no. Masinga/Kangode/2279 (appellant’s land) that is registered in his name.
2. It was his case that he acquired this land for valuable consideration from the 1<sup>st</sup> respondent’s brother, one Dickson Muthini Mwangangi. This notwithstanding, the 1<sup>st</sup> respondent, who was the registered owner of Masiga/Kangode 3378 (now 3686, 3687 & 3688) hereinafter referred to as “respondents’ land”, subdivided Masiga/Kangode 3378, creating Masiga/Kangode 3686, 3687 & 3688 and sold Masiga/Kangode 3686 and 3688 to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents.



3. According to him, this subdivision was improper as what the 1<sup>st</sup> respondent subdivided was actually the appellant's land. To him, these acts amounted to trespass. Consequently, he sought the following reliefs before the trial court: -
  - a. A permanent injunction restraining the respondents jointly and severally, their agents, servants and/or employees from working on or trespassing over the appellant's land.
  - b. An order of eviction to remove the respondents jointly and severally from the appellant's land.
  - c. Mesne profits from 2018.
  - d. Costs of the suit.
4. In opposing the claims made against him, the 1<sup>st</sup> respondent filed a defence dated 01/04/2019 in which he denied the allegations and urged the appellant to prove that the respondents' land stood on the appellant's land.
5. He further maintained he had never occupied the appellant's land or trespassed on it, and suffice it to say, it was the appellant who had trespassed on the respondents' land and that the surveyors had shown the correctness of the mapping of the 2 parcels of land on the ground.
6. As for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, a joint defence was filed dated 15/01/2020 in which they denied the allegations lodged against them and maintained that they were innocent purchasers for value.
7. Afterwards, the matter was heard, parties called their respective witnesses and produced several documents. In the appellant's case, he was the sole witness. As for the respondents, their witnesses consisted of those of the 1<sup>st</sup> respondent, Jackson Mwangangi Mutunga, Kitheka Mwangangi, Sebastian Muia Mangee and Patrick Wambua Muthama.
8. After hearing the parties, the matter was reserved for judgment and in the impugned judgment that the learned trial magistrate rendered, she framed 2 issues for determination, which were whether the appellant had proved his case, and whether the appellant was entitled to the orders sought. On analysis of the evidence that was presented to her, she found them in the negative and dismissed the appellant's case.

### **Appeal to this court**

9. This decision did not sit well with the appellant and aggrieved, and in exercise of his right to appeal, the appellant invoked this court's jurisdiction by filing a memorandum of appeal dated 23/03/2023 and filed it on 24/03/2023. He has raised the following grounds and has faulted the learned trial magistrate for: -
  - a. Failing to appreciate documentary evidence from the office of the land registrar.
  - b. Relying wholly on the oral evidence of the respondents that contradicts expert evidence.
  - c. Disregarding the lands office's registration and the Registry Index Map particulars as regards the parcels of land in dispute.
  - d. Disregarding the evidence of the appellant in totality.



10. The appellant thus prays that his appeal be allowed by setting aside the judgment of the trial court and substituting it with a judgment being entered in his favour as prayed for in the amended plaint, and that the costs of the appeal be awarded to him.
11. As directed by the court, the appeal was canvassed by well-articulated written submissions that were received from Ms. L. Maina Irungu & Co. Advocates law firm on record for the appellant, the 1<sup>st</sup> respondent and Ms. C.W. Githae & Co. Advocates law firm on record for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, and they were respectively dated 24/02/2025, 28/02/2025 and 11/03/2025.

### **Issues for Determination, Analysis, and Determination**

12. Being a 1<sup>st</sup> 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.
13. In consequence, this court has carefully considered the records, parties' rival submissions, provisions of law and authorities relied upon, and it arises that the crux of the issue for determination and as summarized in the appellant's submissions is whether the learned trial magistrate misapprehended the evidence that was before her thus arrived at an erroneous conclusion.
14. Since the appellant has questioned the appreciation of the evidence by the learned trial magistrate in her consideration of the evidence that was before her, it is necessary to look at the [Evidence Act](#) and the prevailing jurisprudence on it.
15. On matters of evidence, it is settled law that he who alleges must prove and on evidentiary burdens, courts are usually guided by Sections 107-109 of the [Evidence Act](#). The Supreme Court of Kenya decision of *Gichuru v Package Insurance Brokers Ltd* [2021] KESC 12 (KLR) explicated on these Sections 108 and 109 of the [Evidence Act](#) as follows: -

“Section 108 of the [Evidence Act](#) provided that the burden of proof in a suit or procedure lay on the person who would fail if no evidence at all were given on either side. Section 109 of the Act declared that, the burden of proof as to any particular fact lay on the person who wished the court to believe in its existence, unless it was provided by any law that the proof of that fact would lie on any particular person. The petitioners bore the overriding obligation to lay substantial material before the court, in discharge of the evidential burden.”
16. As regards the legal burden of proof and how it shifts during trial, the authors of *Halsbury's Laws of England*, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14 stated: -

“The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”



17. In this case, the appellant's amended pleadings pleaded that the ground situation demonstrated that the respondents occupied the appellant's land. Since it was the appellant who was affirming this position, the burden of proof always lay with him to prove so.
18. This court has considered the evidence as presented before the trial court and finds that the learned trial magistrate did not err in finding that the appellant did not prove his case to the required standards. This is so as the expert report by the sub-county surveyor, which was not dislodged, explained that there was an error in the mapping and recommended a swap between the respondents' land and the appellant's land.
19. This report was arrived at after several engagements with neighbours, the appellant, the 1<sup>st</sup> respondent and the 1<sup>st</sup> respondent's father, Jackson Mwangangi Mutunga, who was the initial owner of the mother title that created the appellant's and respondents' parcels. On taking note of the error as evidenced from the report, the county surveyor sought to amend the Registry Index Map (RIM) to reflect the ground situation, but the respondents and appellant declined to execute the official mutation form. Shortly thereafter, the appellant rushed to court claiming trespass.
20. The evidence before the trial court was consistent that there was an error in the RIM. As a matter of fact, the appellant testified that when he was purchasing his land, he found the 1<sup>st</sup> respondent in occupation thereof, which confirms the existence of an error well before his purchase, and his claim of trespass was bound to fail.
21. It is worth noting that the government surveyors had the authority to correct the error by amending the RIM by dint of Sections 16 and 17 of the Land Registration Act, and instead of moving to court, the appellant should have waited for the surveyors and land registrar to complete the process of rectifying the error instead of hastily going to court. It is observed that in the appellant's submission, he seeks to introduce a new issue that the surveyor did not adhere to the legal procedures. Nevertheless, it is trite law that parties are bound by their grounds of appeal and can only introduce new material on appeal with leave of the court. In these circumstances, this new issue will not be entertained by this court.
22. In consequence and for the above reasons and findings, this court will not disturb the decision of the trial magistrate. It hereby dismisses the appeal, and since it is trite law that costs follow the event, costs are awarded to the respondents.

Judgment accordingly.

**DELIVERED AND DATED AT MACHAKOS THIS 24<sup>TH</sup> DAY OF JUNE, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**24.06.2025**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Mr. Irungu for appellant.

Mr. Mwangangi 1<sup>st</sup> respondent acting in person.

Mr. Ngechu for 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

Ms Kanja- Court Assistant.

