**Abdulrahim (Suing on Behalf of the Estate of Habiba Sheikh Abdirahim - Deceased) v Ali & another (Environment and Land Appeal 4 of 2024) [2025] KEELC 6588 (KLR) (18 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6588 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND APPEAL 4 OF 2024**

**JO MBOYA, J**

**SEPTEMBER 18, 2025**

**BETWEEN**

**MUNTAHA SHEIKH ABDULRAHIM (SUING ON BEHALF OF THE ESTATE OF HABIBA SHEIKH ABDIRAHIM - DECEASED) ........................... APPELLANT**

**AND**

**ABDULLAHI ADAN ALI ............................................................. 1ST RESPONDENT**

**ADAN HASSAN ALIAS ADAN SHEIKH ................................. 2ND RESPONDENT**

**JUDGMENT**

1. The Appellant herein filed the Plaint dated 20th April 2021; and wherein same sought various reliefs. The reliefs sought at the foot of the Plaint are as hereunder:

   i. A declaration that the estate of Habiba Sheikh Abdirahim is the indefeasible owner and registered proprietor of Plot No. 2067 Gurmesa Area.

   ii. A declaration that the Plaintiff is being deprived of her right to Plot No. 2067 Gurmesa protected by Article 40 of *the Constitution* by the Defendants.

   iii. An order that the Defendants immediately demolish any of the structures in particular the fence on the property known as Plot 2067 and remove all debris or structures on the suit property and in default the Deputy County Commissioner Moyale Subcounty be at liberty to demolish the same under the supervision of the OCS Moyale Central Division.

   iv. An order of permanent injunction restraining the Defendants and their agents, servants, or their employees from entering upon or trespassing on or otherwise interfering with the suit property.

v. An order of mandatory injunction directing the Defendants to vacate and deliver vacant possession of Plot No. 2067 Gurmesa to the Plaintiff and remove all the building structures and restore the suit property to its original condition.

vi. General damages for trespass.

vii. Cost of the suit

2. The Respondents herein [who were the Defendants] duly entered appearance and thereafter filed a Statement of Defence and Counterclaim dated 1st September 2021. Vide the counterclaim, the Respondents sought the following reliefs;

i. A declaration that Plot No. 5105 Gurmesa Area belongs to the 1st Defendant.

ii. Cost of the Suit.

3. The suit in the subordinate court was heard and disposed of vide Judgement delivered on 21st December 2023; and wherein the learned trial magistrate [Hon. M.S Kimani, PM] found and held that the Appellant [who was the Plaintiff] had failed to prove her case to the requisite standard. To this end, the learned trial magistrate proceeded to and dismissed the Appellant's suit. On the contrary, the learned trial magistrate found and held that the 1st Respondent [who was the 1st Defendant] had duly proved his counterclaim. In this regard, the learned trial magistrate allowed the counterclaim and declared the 1st Respondent as the lawful owner of Plot No. 5015 located in Gurmesa Area.

4. It is the said judgment which has aggrieved the Appellant. To this end, the Appellant approached this court vide Memorandum of Appearance filed in court on 18th January 2024; and wherein the Appellant has highlighted the following grounds:

i. That the learned trial Magistrate erred in law and facts, when he failed to consider the evidence adduced by the appellant illustrating, he was the legal representative of Habiba Sheikh Abdirahim (Deceased) who was the registered owner of a piece of land known as Plot No. 2067.

ii. That the learned Magistrate erred in law and facts, by failing to find in favor of the appellant that all the piece of land known as Plot No. 2067 belonged to the estate of Habiba Sheikh Abdirahim.

iii. That the learned Magistrate erred in law and facts, by failing to consider the testimonies of the witnesses presented by the Appellate thereof occasioning a miscarriage of justice.

iv. That the learned Magistrate erred in law and facts, by failing to find that the parcel of land claimed by the Respondents was a totally different from the subject suit land to Plot No. 2067 as such the Respondents had no claim whatsoever over the appellant's parcel of land Plot No. 2067.

v. That the learned Magistrate erred in law and facts so misdirected himself on matters of law and fact as to occasion a miscarriage of justice against the Appellant.

vi. That in light of the foregoing, the learned Magistrate erred in law and facts and failed to do justice before him in the case at hand.

5. The subject appeal came up for directions on 3rd April 2025; whereupon the advocate for the Appellant confirmed that same had duly filed and served the Record of Appeal. Furthermore, the learned counsel for Appellant sought to have the appeal canvassed and disposed of by way of written submissions.

6. Suffice it to state that the learned counsel for the Appellant confirmed the filing and serving of the Record of Appeal. In addition, learned counsel also intimated that same is amenable to the filing and exchange of written submissions.

7. The court thereafter issued directions pertaining to the filing and exchange of written submissions. Moreover, the court circumscribed the timelines for the filing and exchange of written submissions.

8. Nevertheless, before learned counsel for the Appellant could file and serve written submissions, same reverted to court with an application dated 28th May 2025; seeking to cease to acting. Instructively, the application under reference was heard and disposed of on 16th June 2025.

9. Fast forward, the Appellant herein thereafter proceeded to act in person. Furthermore, the Appellant intimated to the court that same would not be filing any written submissions. On the contrary, the Appellants stated that same would be adopting the submissions that were filed in the subordinate court.

10. However, upon reviewing the proceedings before the subordinate court and in particular the judgement, it became apparent that the Appellant herein did not file any written submissions before the subordinate court. For coherence, paragraph 25 of the judgement is instructive.

11. Same states thus:

> " The Plaintiff did not file any submissions."

12. The Respondents filed written submissions dated 9th July 2025; and wherein same have raised and canvased two [2] key issues. The issues highlighted by the Respondents are thus; whether the appellant produced sufficient evidence to be able to differentiate Plot Number 2067 from plot number 5015; and whether the Respondents proved ownership and actual possession of the suit property; and whether the appeal ought be allowed.

13. Regarding the first issue, learned counsel for Respondents submitted that though the Appellant laid a claim to Plot No. 2067 Gurmesa Area, same [Appellant] did not tender or produce any credible evidence to demonstrate ownership of the said plot. Furthermore, learned counsel contended that the Land Transfer Agreement dated 25th June 1998; and which was being relied upon by the Appellant does not advert to Plot No. 2067.

14. Additionally, learned counsel for the Respondents submitted that the said land transfer agreement also does not stipulate the acreage/ measurement of the un-numbered plot. If anything, learned counsel for the Respondents has submitted that what is shown on the face of the land transfer agreement is 60 by 100 [without disclosing whether the measurements are in feet, metres, or otherwise].

15. Flowing from the foregoing, learned counsel for the Respondents has contended that the Appellant failed to discharge the burden of proof as pertains to ownership and entitlement to Plot Number 2067 Gurmesa Area.

16. Turning to the second issue, learned counsel for the Respondents has submitted that the Respondents herein and in particular, the 1st Respondent tendered and produced before the court cogent evidence demonstrating acquisition of Plot No. 5015 Gurmesa Area. Moreover, counsel also submitted that the 1st Respondent duly entered upon and took possession of Plot Number 5015 Gurmesa Area. In addition, it was posited that the 1st Respondent has since proceeded to and developed the said property.

17. It was the further submission by learned counsel for the Respondents that the fact that the 1st Respondent has developed the suit proceeded was conceded by the Appellant herein. To this end, learned counsel has referenced page 5 of the further record of appeal.

18. According to counsel for the Respondents, the 1st Respondent produced credible evidence and indeed demonstrated ownership of Plot 5015. In this regard, learned counsel has invited the court to find and hold that the judgement of the subordinate court [Principal Magistrate] is well-grounded and thus ought to be affirmed.

19. Having reviewed the record of appeal, the evidence tendered by the parties and their respective witnesses [both oral and documentary] and upon taking into account the written submissions by the Respondents, I come to the conclusion that the determination of the subject appeal turns on two [2] key issues, namely; whether the Appellant tendered and produced plausible evidence before the trial court as pertains to ownership of Plot No. 2067 Gurmesa Area or otherwise; and whether the 1st Respondent tendered evidence in proof of ownership of Plot No. 5015 Gurmesa Area or otherwise.

20. Before venturing to address the thematic issues, which have been identified and highlighted in the preceding paragraph, it is imperative to underscore that what is before me is a first appeal. In this regard, it suffices to highlight that this court is vested with the jurisdiction to undertake exhaustive scrutiny, appraisal, review, and evaluation of the entire evidence that was tendered before the trial court and thereafter to determine whether the factual findings and conclusions by the trial court accord with the evidence or otherwise.

21. In addition, it is instructive to observe that this court is at liberty to form and arrive at an independent conclusion. Moreover, the court is also at liberty to depart from the findings and conclusions of the trial court. Nevertheless, it is paramount to highlight that even though this court is at liberty to arrive at an independent conclusion, the liberty is however, circumscribed by certain factors. Simply put, the liberty is not at large and can only be deployed where it is shown that the trial court acted on no evidence; the findings are perverse to the evidence on record; the findings are premised on misapprehension of the evidence on record; or where it is demonstrably shown that there is an error of principle which vitiates the conclusions arrived at by the court.

22. The jurisdictional remit of the first appellate court has been considered in various decisions. Most recently, the parameters underpinning the scope of the first appellate court's jurisdiction were expounded 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) where the court held as hereunder;

> "
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> " 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.
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> 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. 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." [see also Kenya Ports Authority vs Kuston [Kenya] Limited (2009) eKLR; Gitobu Imanyara vs The Honourable Attorney General (2016) eKLR; and Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment)].

23. With the foregoing in mind, I am now well disposed to revert to the issues and to interrogate same. I shall commence with the first issue, namely; whether the Appellant tendered and produced plausible evidence before the trial court as pertains to ownership of Plot No. 2067 Gurmesa Area or otherwise.

24. The Appellant herein [who was the Plaintiff in the subordinate court] contended that Plot No. 2067 belonged to and was registered in the name of Habiba Sheikh Abdirahim [now deceased]. Furthermore, the appellant contended that the said plot was gifted to the deceased by one Halima Sheikh Abdow. To this end, the Appellant referenced and tendered before the court a copy of the Memorandum of Transfer.

25. On the other hand, the Appellant also contended that upon the execution of the Memorandum of Transfer, same was lodged with county council of Moyale for purposes of registration. Nevertheless, it is instructive to note that the Memorandum of Transfer which was relied upon by the Appellant did not highlight the details of the plot under reference. For good measure the segment relating to the Plot is blank.

26. Additionally, it is also worth to recall that the Memorandum of Transfer [transfer of land] also did not reveal the Plot number from which the portion which was [sic] being transferred to the deceased was being exercised from.

27. Additionally, it is worthy to recall that the Appellant herein conceded that the issue pertaining to ownership of Plot number 2067 Gurmesa Area vis a vis Plot Number 5015 had been raised by her cousin with the County Council. However, the witness posited that same was/is not aware of the outcome of the dispute which was raised by her cousin.

28. It is imperative to highlight and underscore that the Appellant bore the burden of proving that Plot Number 2067 Gurmesa Area lawfully belonged to and was registered in the name of Habiba Sheik Abdirahim [deceased]. Besides, the Appellant was also obliged to demonstrate that the plot occupied by the 1st Respondent was one and the same with Plot Number 2067 Gurmesa Area. [see section 107 and 108 of the *Evidence Act* Chapter 80 Laws of Kenya].

29. The legal position that the burden of proof lays on the claimant and in this case the Appellant has been the subject of considerable judicial pronouncements. In the case of James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 the Court of Appeal stated thus;

> " 17. On matters evidence, Madan, JA (as he then was) in CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 stated:
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> > "…Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven…."
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> 18. The *Evidence Act* is clear enough upon whom the burden of proof lies. Section 107 provides as follows:
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> > "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 facts, it is said that the burden of proof lies on that person."

Section 109 of the same Act further provides:

> "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 law that the proof of that fact lie on any particular person."

19. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof."

30. The Supreme Court of Kenya [the apex court] has also weighed in on the legal principle underpinning the burden of proof. 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 Supreme Court stated as hereunder;

> " 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 Odinga & 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. 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."

31. The Appellant herein was obliged to prove her claim. Unfortunately, the Appellant failed to establish and prove the various facets of her claim. In this regard, the contention by the Appellant that the learned trial magistrate failed to return a finding in her favor is not only misconceived, but based on a misapprehension of the evidence that was placed before the court.

32. Just like the trial magistrate, I conclude that the Appellant did not demonstrate and prove that Plot Number 2067 belonged to Habiba Sheikh Abdirahim [deceased].

33. Regarding the second issue, it is important to recall that the 1st Respondent contended that same was allocated Plot Number 5015 Gurmesa Area. Furthermore, the 1st Respondent tendered assorted documents in proof of his claim to Plot Number 5015. In addition, the 1st Respondent also tendered evidence that same took possession of the said plot, developed same and has remained in possession of the said plot.

34. Other than the foregoing, the 1st Respondent also tendered evidence that the Appellant's cousin, namely; Safia Isa had also lodged a dispute with the county council of Moyale [now defunct] contending that the 1st Respondent had illegally entered onto Plot Number 2067. However, evidence was tendered that the dispute which was raised by the Appellant's cousin was dismissed.

35. In addition, the 1st Respondent also called various witnesses who confirmed that the plot being claimed by the Appellant is not one and the same with Plot Number 5015 Gurmesa Area. In particular, the Respondents called the area chief of Gurmesa location who testified as DW3. Instructively DW3 clarified that Plot Number 5015 belonging to the 1st Respondent is located in Gurmesa II whereas Plot Number 2067 [which is claimed by the Appellant] is located in Gurmesa III.

36. From the totality of the evidence that was tendered by and on behalf of the 1st Respondent and which evidence was not controverted, it is apparent that the 1st Respondent proved his claim as pertains to Plot 5015.

37. I beg to highlight that just as the Appellant, the 1st Respondent was also under statutory obligation to prove his claim. Nevertheless, there is no gainsaying that the 1st Respondent unlike the Appellant, discharged the burden of proof.

38. In the premises, it is my finding and holding that the learned trial magistrate reached and arrived at the correct conclusion in finding that the 1st Respondent was the lawful proprietor of Plot 5015 Gurmesa Area.

39. Before concluding on this issue, there is one startling aspect of the Judgement of the learned trial magistrate that requires mention and a short discussion. The aspect relates to the observation by the learned trial magistrate that the 1st Defendant [1st Respondent] had also acquired the suit land by way of adverse possession. [See paragraph 49 of the Judgement].

40. Two things do arise. Firstly, the Appellant's claim before the trial court did not advert to adverse possession. On the contrary the 1st Respondent's case was predicated on the fact that Plot Number 5015 Gurmesa Area was allocated unto him; duly registered in his name; and thereafter same entered upon and developed the plot. There was no claim pertaining to adverse possession.

41. I beg to state that the doctrine of departure, whose essential facet relates to parties being bound by their pleadings equally binds judges and magistrates. To this end, a court is not at liberty to advert to and determine an issue that was never placed before it by the Parties. [See Odd Jobs Vs. Mubia [1970]. E.A. 476; IEBC vs Stephen Mutinda Mule and Others (2014) eKLR; Dakianga Distributors Limited vs Kenya Seed Company Limited (2015) eKLR; and Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Election Petition 1 of 2017) [2017] KESC 31 (KLR) (Election Petitions) (28 August 2017) (Ruling)].

42. The second aspect relates to the question of jurisdiction of the subordinate court to address and deal with the claim pertaining to adverse possession. It is common ground that the subordinate courts are not seized of the requisite jurisdiction to proclaim adverse possession. [See Sugawara v Kiruti (Sued in her capacity as the administratrix of the Estate of Mutarakwa Kiruti Lepaso alias Mutaragwa Kiruti Lepaso alias Mutaragwa Kiroti Leposo and in her own Capacity) & 3 others (Civil Appeal E141 of 2022) [2024] KECA 1417 (KLR) (11 October 2024) (Judgment)].

43. Flowing from the foregoing observation, I am afraid that the aspect of the Judgement touching on and concerning adverse possession was/is misconceived. In this regard, the said aspect of the Judgement merits variation.

**Final Disposition.**

44. Flowing from the discussion enumerated in the body of the Judgement, it is evident that the appeal beforehand is devoid and bereft of merit[s]. To this end, the appeal courts dismissal.

45. In the upshot, the final orders that commend themselves to the court are as hereunder:

    i. The Appeal be and is hereby dismissed.

    ii. The Judgement of the trial court delivered on 21st December 2023; be and is hereby affirmed, save for the limb that adverted to adverse possession.

    iii. Cost of the Appeal be and are hereby awarded to the Respondent.

    iv. The cost in terms of [Clause iii] shall be agreed upon and in default be taxed by the Deputy Registrar of the Court.

46. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 18TH DAY OF SEPTEMBER 2025.**

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

**JUDGE**

In the presence of:

Hussein/Mukami – Court Assistant

Mr. Owade for the Respondents

Muntaha Sheikh- the Appellant present in Person