**Gitonga v Rama (Environment and Land Appeal E017 of 2024)**
**[2025] KEELC 6225 (KLR) (25 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6225 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND APPEAL E017 OF 2024**

**JO MBOYA, J**

**SEPTEMBER 25, 2025**

**BETWEEN**

**APHAXARD GITONGA ..... APPELLANT**

**AND**

**KHADIJA OMAR RAMA ..... RESPONDENT**

***(Being an appeal of the judgment and decree of the Honorable M.A.Odhiambo (SRM) delivered on 30th August 2024 in Isiolo CMC ELC NO. 32 OF 2019)***

**JUDGMENT**

## Introduction and Background

1. Vide a Plaint dated 12th November 2019 and lodged in court on even date, the appellant herein sued the respondent over and in respect of Plot No. K/Juu/732 [hereinafter referred to as the suit property] that measured approximately 75 feet by 130 feet. It was further pleaded by the appellant that same purchased the property from one Fridah Ntinyari at Kshs. 50,000/= only sometimes on the 8th June 2012.

2. According to the plaint, the appellant contended that same has been paying rates to the relevant authority and on the 16th October 2019, the appellant while preparing to deposit building materials on the suit property was surprised to learn that the defendant and her agents had commenced fencing the frontage of the suit property which action prompted the appellant to lodge a complaint at the Isiolo Police Station vide O.B. No. 4/16/10/2019.

3. The appellant's case was that since lodging the complaint with the police did not yield any meaningful steps, same visited the office of the Surveyor who advised the appellant to lodge the suit at the trial court. For clarity, the appellant sought for inter alia orders of permanent injunction restraining the defendant and/or her agents from entering, trespassing, constructing and/or in any way interfering with the suit property.

4. Along with the plaint, the appellant filed the witnesses' statements; and list of documents which contained seven (7) documents in total. On the other hand, the respondent upon being served with the summons to enter appearance and the plaint, same lodged her statement of defence dated 9th December 2020 whereby same majorly contended that she was not in occupation of the suit property but same was in possession and occupation of Plot No. K/Juu/989 measuring 50 feet by 100 feet.

5. For coherence, the respondent contended that same had purchased the said property from one Safia Ahmed Adan who was the original owner and that the perimeter fence being alluded to by the appellant was actually on Plot No. K/Juu/989. The respondent was of the view that same is not interested on the suit property as what she was occupying was a totally distinct and separate parcel of land hence, she prayed that the suit be dismissed with costs. The respondent lodged witness statement and list of documents both dated 27th October 2023 and a further additional list of documents dated 17th April 2024.

6. The suit before the trial magistrate came up for hearing on the 15th April 2024 whereby the Appellant called PW1, PW2 and PW3. The Appellant also produced the documents enlisted in the list of documents dated 12th November 2019 as P EXH 1-7 respectively. Thereafter the witnesses therein were cross examined and reexamined and the appellant closed his case.

7. The hearing of the defence case was slated on the 10th June 2024 whereby the respondent herein was the only witness that adduced evidence. Moreover, the respondent produced the documents listed in the list of documents dated 27th October 2023 as D EXH 1-5. From the records, it appeared that the additional document contained in the list of documents dated 17th April 2024; was not produced. Be that as it may, the respondent was cross examined and re-examined; and same thereafter after closed her case.

8. Subsequently, the parties herein prepared and lodged their respective written submissions and the trial magistrate delivered her judgment on the 30th August 2024. For coherence, it was found by the trial court that in the absence of an expert report from the Department of Survey and Physical Planning to establish the ground position of the suit property and Plot No. K/Juu/989, it was difficult for the court to determine whether the disputed land was the suit property or Plot No. K/Juu/989 hence the appellant did not prove his case on balance of probabilities and the suit was dismissed with costs to the respondent.

9. Aggrieved with the said decision, the appellant lodged the instant appeal vide the memorandum of appeal dated 12th September 2024 and same enlisted four (4) grounds of appeal. By and large, the grounds of appeal majorly revolved as to whether the appellant herein had proved his case on balance of probabilities.

10. On the 5th June 2025, parties herein appeared before me for directions on the main appeal whereby I directed that the appeal herein be admitted and that same be canvassed by way of written submissions. On the 30th July 2025, parties herein attended court and confirmed that same had lodged in court their respective submissions however, as at the time of crafting the judgment, I only had the benefit of perusing the submissions lodged by the appellant.

**Parties' Submissions:**

**a. Appellant's Submissions:**

11. The Appellant filed written submissions dated the 16th July 2025, and in respect of which same [Appellant] has argued the grounds of appeal by synchronising the grounds therein into four issues. In this regard, the court shall proceed to highlight the submissions on behalf of the Appellant.

12. Firstly, the appellant submits that the issue of ground location was not in dispute as regards the suit property and Plot No. K/Juu/989 hence the learned trial magistrate erred when same anchored her judgment on failure by the plaintiff to prove by way of a report that the two parcels of land were not the same. According to the appellant, the respondent vide paragraph 4 of the statement of defence had confirmed that the suit property and Plot No. K/Juu/989 were separate and distinct. The appellant was of the view that the admissions therein was enough evidence hence the same sorted the issue.

13. Secondly, the appellant faulted the trial magistrate for misdirecting herself on the principle set in the case of Mbiti Kiebia & Another vs Isaya Theuri M'lintari & Another [2014] eKLR. According to the appellant, his title to the suit property was not in dispute as the respondent did not claim it hence the trial court arrived at a wrong decision for wrongly applying the case law in the suit before her.

14. Thirdly, the appellant further faulted the trial court for finding that there was need to produce an expert report confirming the ground position of the two parcels of land as this would have proved trespass. The appellant submitted that D EXH 1 was enough proof that the suit property was in existence.

15. Finally, the appellant submitted that the evidence adduced during the appellant's case was water tight and enough to warrant a favorable judgment in favor of the appellant. That failure by the respondent to call the original owner of Plot No. K/Juu/989 was fatal hence the suit ought to have been resolved in favor of the appellant. Arising from the foregoing, learned counsel for the Appellant has therefore contended that the judgement by the learned trial magistrate is therefore erroneous and thus ought to be set aside. Furthermore, learned counsel for the Appellant has implored the court to proceed and allow the appeal.

**Jurisdictional Posture:**

16. The appeal beforehand is a first appeal from the decision of the court of first instance. By virtue of being a first appeal, this honorable court is vested with the requisite jurisdiction to review, re-evaluate and re-analyze the findings of the court of first instance and thereafter to arrive at independent conclusions, taking into account the evidence on record and the applicable laws.

17. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyze the findings and observations of the trial court, this court is however called upon to exercise necessary caution and circumspection. In addition, the court is called upon to defer to the findings of the trial court unless, the findings of the trial court are informed by extraneous factors or better still, are perverse to the evidence on record.

18. The scope and jurisdictional remit of this court whilst entertaining a first appeal has been elaborated upon and underscored in various decisions. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, the principle was enunciated thus:

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the

evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

19. Likewise, the extent and scope of the Jurisdiction of the first appellate court was also elaborated upon in the case of Abok James Odera T/A A.J Odera & Associates versus John Patrick Machira T/A Machira & Co. Advocates [2013] eKLR, where the court held thus;

> We also wish to be guided by the reasoning of this court in the case of Mwana Sokoni versus Kenya Business Limited (1985) KLR 931 page 934,934 thus:-
>
> > Although this court on appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first appeal if this should become necessary. As was said by the house of Lords in Sottos Shipping versus Sauviet Sohold, the Times, March 16,1983.
> >
> > > " It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said"
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> > Again, in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429:
> >
> > > " It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses"

20. Guided by the ratio decidendi in the decision [supra], this court is now well positioned to interrogate the judgement rendered by the trial magistrate and to discern whether the magistrate took into account the relevant facts and the law or otherwise.

**Issues for Determination:**

21. Having reviewed the pleadings filed; the contents of the Memorandum of appeal dated 12th September 2024 and having taken into account the proceedings of the trial court and finally upon consideration of the written submissions filed by the appellant, the following issues do crystallize [emerge] and are thus worthy of determination;

    i. Whether the issue of registration and/or ownership of the suit property by the appellant was in dispute?

    ii. Whether the appellant proved his case on a balance of probability?

**Analysis And Determination:**

**Issue Number 1**

**Whether the issue of registration and/or ownership of the suit property by the appellant was in dispute?**

22. The appellant lodged the suit at the trial court complaining about a trespass on the part of the respondent. According to the appellant, same had purchased the suit property from one Fridah Ntinyari also PW2. PW2 confirmed that she sold land to the appellant on the 8th June 2012.

23. On the other hand, the respondent upon being served with the plaint, same at paragraph 4 of the Statement of defense pleaded that she was not on the suit property but on Plot No. K/Juu/989 measuring 50ft by 100ft which the appellant had been erroneously staking a claim on despite clarification from the County Government of Isiolo that plot Nos. 732 and 989 are separate and distinct. At paragraph 5 of the statement of defense, the respondent pleaded that she has lawfully put a perimeter fence on her plot measuring 50ft by 100ft on plot 989 Kambi Juu and not the appellant's land.

24. D EXH 1 was the letter dated 22nd October 2019 which confirmed that the two subject properties are separate and distinct with each having own registered owners as per the records at the County Government of Isiolo. The document ascertains that there are two parcels of land and it identifies the owners of the said parcels of land.

25. Coming back to the reliance on the case of Mbiti Kiebia & Another vs Isaya Theuri M'lintari & Another [2014] eKLR which the trial court relied on, I have had the opportunity to read and appreciate the said case which found its way to the Supreme Court and I wish to state that the case at the court of appeal was addressing an issue of trust. The appellate court also emphasized on proof of a claim on trust and the legal burden of a party claiming trust. At paragraph 28 thereof, the appellate court stated,'...the legal burden to prove the existence of the trust rests on the respondents...'

26. While the element of burden of proof on a party that asserts was addressed in the said case and that in so far as the burden of proof rests on the party who alleges, the learned trial magistrate was correct in applying the case law to that extent. However, noting that the title of the appellant was not being impeached, the element of challenging of the instrument of title by the appellant did not apply in the instant case. Perhaps the question that requires to be answered is whether the misapplication of the said authority and/or case law is enough to upset the judgment of the trial court. This will be addressed in the next issue.

**Issue Number 2**

**Whether the appellant proved his case on a balance of probability?**

27. The suit before the trial court was purely on tort of trespass whereby it was alleged by the appellant that the respondent had trespassed on the suit property. Trespass has been defined in the court of appeal case of Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] eKLR as,

> " ... an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass..."

28. The appellant in order to establish that same was the owner of the suit property, same produced D EXH 1-5. According to the appellant, same purchased the suit property in the year 2012 and it was only in the year 2019, 7 years later that he made a decision to occupy it when according to his evidence, he found the respondent putting up a fence. It is not clear why the appellant decided to distant himself from the suit property for approximately 7 years. As earlier observed and/or held, the title of the suit property was not in dispute. What was in dispute was whether the respondent had trespassed on the suit property by putting up a perimeter wall without the permission of the appellant.

29. The evidence produced in court established that there were two parcels of land. The suit property in the name of the appellant and Plot No. K/Juu/989 in the name of Safia Ahmed Adan who sold a portion of the said property to the respondent. The respondent through her pleading confirmed that same is putting up a fence on Plot No. K/Juu/989 and not the suit property as alleged. According to the evidence adduced, she was in her rightful parcel of land upon paying the consideration. She further stated that the issue of the suit property and Plot No. K/Juu/989 had been clarified by the CEC Lands and Physical planning- County Government of Isiolo whereby D EXH 1 confirmed that these two parcels of land were distinct and separate. The rest of the documents produced by the respondent were proof of payment of land rates being paid by the original owner of the said parcel of land.

30. The appellant called two witnesses who confirmed that the suit property was sold to the appellant by the vendor and owner of plot 1571/Bula Pesa and the portion being sold was 75 feet by 130 feet. The sale agreement was produced as P EXH 1. Something does not add up with regards to this sale agreement. Firstly, the property being sold is a portion of a land that is located at Bula Pesa and not KWA Juu. So that it is difficult to discern whether the suit property as Plot K/Juu/732 was a subdivision of Plot Bula Pesa/1571.

31. Secondly, the rest of the documents produced by the appellant, that is P EXH 2 which is a plot registration receipt shows that the plot in question was the suit property and the registered owner is the appellant. P EXH 3 and 4 are the land rates receipts showing that it is the appellant paying the rates in respect of the suit property. Now P EXH 5 is a map with just a stamp showing some handwritten wordings identifying Plot 1571 and nothing much. It is not dated neither was the author called upon to clarify the intention of the said map or plan. It clearly lacked any probative value as its origin and/or authenticity was not established during trial. P EXH 6 was an OB extract lacking the name of the reportee. It fails to demonstrate that the appellant was the one who lodged a complaint with the police. It is not signed and dated hence its origin cannot be ascertained. The last document produced by the appellant was P EXH 7 also the demand letter dated 8th November 2019.

32. The respondent on the other hand only had one defence, that the property she is occupying was Plot No. K/Juu/989 and not the suit property. She produced documents to demonstrated that the owner of the property was one Saphia Ahmed Adam who sold a portion of the said property measuring 50feet by 100 feet to her. D EXH 4 was the application for part development plan/registration dated 9th July 2015 just before a portion of the said property was sold to the respondent. The said document confirms that the suit property is on the ground and describes that same is fenced with euphorbia and barbed wire and that the applicant therein could be registered as the owner . D EXH 5 are the documents from Isiolo County Government whereby the owner had applied for subdivision and the property is situated at Kambi Juu.

33. In the year 2016, the owner of Plot No. K/Juu/989 sold a portion of the same to the respondent herein. The sale agreement was D EXH 2 and duly witnessed. PW1, also the appellant herein adopted his statement as evidence in chief. At paragraph 8 thereof, he testified that,'...on the same date, I sought recourse in the office of the surveyor where I was advised to file a case in court...'

34. It is critical to note that the surveyor who interacted with the appellant and perhaps reviewed the complaint of trespass was not called as a witness in court. At this juncture, it is imperative to state that it was the duty of the appellant to prove his case on balance of probabilities. The legal burden of proving that indeed the respondent had trespassed on the suit property rested on the appellant.

35. In Malindi CACA No. 103 of 2016 Jamal Salim vs Yusuf Abdulahi Abdi & Another the Court of Appeal when dealing with an issue of trespass held that,

> "...The next issue that falls for consideration is whether trespass was proved. Having considered the evidence on record and taking note of the lack of clarity as to the actual position of the plots in issue, we believe that the tort of trespass as against the appellant had not been proved. We say so, because from the totality of the evidence it is uncertain whether Plot Nos. 39 & 40 had been consolidated to give rise to Plot 84 or whether the three plots were distinct or whether the construction of the said petrol station was on the respondents' plots.
>
> We, unlike, the learned Judge find that the letter dated 24th March, 2009 which alluded to the fact that the Minjila Section had been re-planned, did not establish that there was a consolidation of the respondents plots or that the alleged consolidation gave rise to Plot 84. In the end, we find that the respondents had not established their claim.
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> In Re B(children) (FC) UKHL 35 Lord Hoffman observed that: "...If a legal rule requires a fact to be proved (a 'fact in issue'), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule than one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened..."

36. The trial court held at paragraph 11 of the judgment that,'...it is clear that the plaintiff needed to do more than present his title documents. Given that the defendant produced evidence indicating that the land might be Plot No. 989, the plaintiff had an obligation to provide clear and convincing evidence to establish that the land on the ground is indeed pot No. 732...' At paragraph 13 the trial court held,'...the plaintiff failed to produce a report from the department of survey and physical planning to conclusively establish the ground position of the plots. Without expert evidence, the court cannot determine whether the disputed land is Plot No. 732 or Plot No. 989...'

37. I concur with the finding of the magistrate as there were two parties confirming that the ground occupation is where same are rightfully theirs. The appellant confirmed that he lodged a complaint with the Surveyor. Same was duty bound to produce evidence in court to demonstrate that where the respondent alleged to have been fencing was actually the suit property and not plot 989. All the appellant concentrated on was calling witnesses that confirmed his ownership of the suit property and not trespass by the respondent. The burden of proof shifted on him when the respondent stated that same was on her rightful portion that she bought. It was immaterial as to whether the respondent was the registered owner of Plot 989 or not as her title and/or interest on the said parcel of land was not the subject of the suit. The dispute was that of trespass on the suit property.

38. It was thus not clarified by the appellant vide evidence that that two parcels of land were not on the same ground position and that where the respondent was putting a fence was actually on the suit property. Besides, it was not also established the nexus between plot 1571 and the suit property. These were

issues that could have been ascertained by the very Surveyor whom the appellant confirmed to have consulted. The reason why the appellant visited the survey office was to establish if indeed there was trespass by the respondent after the police according to the appellant failed to assist him.

39. For clarity, in addressing the standard of proof in civil cases, the appellate court in the case of James Muniu Mucheru V National Bank of Kenya Limited [2019] Eklr, held that, '...indeed it is settled law that in civil cases the standard of proof is on a balance of probability. This is in effect to say that the courts will make a finding based on which party's version of the story is more believable...' On the other hand, Section 107 of the *Evidence Act* places the burden of proving the alleged by the person alleging. Having reconsidered the evidence adduced by parties in the trial court, it is my finding that the burden was not discharged by the appellant herein.

40. The dispute before the trial court was not one challenging the registration of the appellant as the owner of the suit property but was of tort of trespass. PW2 and PW3's testimonies were not helpful to the appellant's case. They merely confirmed that the suit property was sold to the appellant and that there was a map which map I have pointed out that same was not genuine and/or authentic. The appellant had the option of having an expert called in as a witness to confirm that indeed there was trespass on the part of the respondent. The alluded 'map' by PW1, PW2 and PW3 did not prove trespass but merely pointed out parcel number 1571 which I have stated in the preceding paragraphs that I found it difficult to discern if the suit property was a subsequent subdivision of the said land noting that it is also in a different location, namely; BULA PESA.

41. From the evidence presented to the trial court, it was difficult to ascertain whether the respondent was erecting the fence on the suit property or plot 989. A compiled report by the government surveyor or a licensed private surveyor would have clarified and confirmed whether there was trespass or not on the suit property. Unfortunately, this was not the case hence the decision of the trial court was sound and/or proper based on the evidence placed before the trial court.

42. In a nutshell, and having taken into account the principles enunciated in the decisions in Mwanasokoni vs Kenya Bus Service Ltd (1985) eKLR and Jabane vs Olenja (1986) eKLR, I come to the same conclusion as the learned trial magistrate. For good measure, the finding and conclusions by the learned trial magistrate that the appellant did not prove his case were well-grounded.

**Final Disposition:**

43. Flowing from the discussion [details contained in the body of the Judgment], I come to the conclusion that the appeal beforehand is devoid of merits and same courts dismissal.

44. Consequently, and in the premises, the final orders that commend themselves to this court are as hereunder;

    i. The Appeal herein fails and same is hereby dismissed.

    ii. The Judgment of the learned magistrate rendered on the 30th August 2024 be and is hereby affirmed.

    iii. The respondent be and is hereby awarded cost of the Appeal

    iv. The Respondent is also awarded costs of the suit vide Isiolo CMC ELC NPO. 32 of 2019

45. It is so ordered.

**DATED, SIGNED AND DELIVERED AT ISIOLO THIS 25TH DAY OF SEPTEMBER 2025**

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

**JUDGE**

In the presence of:

C/A: Hussein

Mr. Kiogora Ng'ang'a for the Respondent

No appearance for the Appellant