REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MERU

ELC APPEAL NO. E081 OF **2024**

JOHN KINYUA GITARI……………………………………………..APPELLANT

VERSUS

DUNCAN MWEND……………..…………………………1ST RESPONDENT

MWORIA DANIEL……………………………………….2ND RESPONDENT

PHILIP KIOME……………………………………………3RD RESPONDENT

DENNIS MWIRIGI GIKUNDA…………………………..4TH RESPONDENT

MUTHOMI KITHINJI…………………….……………5TH RESPONDENT

[Being an appeal from the judgment of Hon. S. K N'getich SPM rendered on the 27th November 2024 in Nkubu PMC ELC No. E017 of 2020]

JUDGMENT

1. The Appellant herein [*who was the Plaintiff in the subordinate court*] filed the Plaint dated **27th October 2020;** and wherein same sought the following reliefs

    a) An order of permanent injunction restraining the Defendants and their agents from trespassing, encroaching and interfering with the Plaintiff's peaceful occupation/possession of L.R No. Nkuene/Kathera/262.

b) Costs of the suit.

2. The Respondents [*who were the Defendants in the subordinate court*] duly entered appearance and filed and statement of defence dated the 2nd December 2020; and wherein the Respondents denied the claims at the foot of the Plaint. Furthermore, the Respondents herein contended that the Appellant had encroached upon and blocked a public road of access and illegally planted posts on the public road of access. To this end, it was posited that the disputed portion which is alluded to does not fall on the Appellant's land or at all.

3. The suit in the subordinate court was heard and disposed of *vide* judgment rendered on the 27th November 2024, whereupon the learned trial magistrate [Hon. S.K N'getich -SPM] found and held that the Appellant had failed to prove his case to the requisite standard. To this end, the learned Senior Principal Magistrate proceeded to dismiss the Appellant's suit with costs.

4. It is the said judgment and the consequential decree which has aggrieved the Appellant and thus provoking the subject appeal. The memorandum of appeal dated the 9th December 2024 has highlighted the following grounds of appeal;

    i. The Honourable Magistrate erred in law and in facts in failing to issue an order of injunction against the respondent when there sufficient evidence and facts to support issuance of one.

ii. ***The Learned Magistrate showed open biasness in favour of the respondents although the respondents were the culprit herein.***

iii. ***The Learned decided the whole suit against the weight of evidence and the law.***

5. The subject appeal came up for directions on the 23rd July 2025; whereupon the court gave directions pertaining to the hearing and disposal of the appeal. In particular, the court directed that the appeal shall be canvassed by way of written submissions to be filed and exchanged by the parties. Furthermore, the court also circumscribed the timelines for the filing and exchange of the written submissions.

6. The Appellant filed written submissions dated the 6th August 2025; and wherein same has canvassed three [3] key issues for consideration by the court. The issues highlighted by the Appellant are *namely*; the learned trial magistrate failed to apprehend the facts of the case and thus erred in law in failing to grant the order of permanent injunction; the learned magistrate showed/exhibited open bias against the Appellant; and the decision of the learned trial magistrate is contrary to the weight of the evidence on record.

7. Regarding the first issue, learned counsel for the Appellant has submitted that the Appellant and his witness[es] tendered clear, cogent, concrete and plausible evidence to demonstrate that the Respondent encroached onto a portion of the suit property.

8. Moreover, it has been submitted that the Appellant also tendered evidence to show that same was the lawful owner of the suit property and thus entitled to exclusive possession and use.

9. Nevertheless, it has been submitted that despite the clear evidence on record, the learned trial magistrate declined to grant an order of permanent injunction in favour of the Appellant and thus deprived the Appellant of the protection under the law.

10. Turning to the second issue, learned counsel for the Appellant has submitted that the learned trial magistrate showed/exhibited open bias against the Appellant. In particular, it has been submitted that the learned trail magistrate adopted a skewed and slanted approach and thus failed to hold that the case against the Respondents was proved.

11. Further, and in any event, it has been submitted that the learned magistrate failed to appreciate that the Respondents did not adduce any evidence to rebut the evidence tendered on behalf of the Appellant.

12. Regarding the third issue, learned counsel for the Appellant has submitted that the learned trial magistrate dismissed the Appellant's suit even though the evidence tendered by the Appellant was never controverted. To this end, it has been submitted that the learned trial magistrate misapprehended the Appellant's case and thus the impugned judgment is contrary to the weight of the evidence on record.

13. Flowing from the foregoing submissions, learned counsel for the Appellant has invited the court to find and hold that the appeal before hand is meritorious. In this regard, the court has been implored to set aside the judgment of the trial court and thereafter to grant the relies at the foot of the plaint dated the 27th October 2020.

14. The Respondents filed written submissions dated the 18th September 2025; and wherein same has highlighted/canvassed three[3] issues for determination by the court. The issues highlighted by the Respondents are *namely*; the learned trial magistrate properly apprehended the Appellant's case and applied the correct principle[s] in declining to grant an order of permanent injunction; the learned magistrate did not exhibit/show any bias against the Appellant; and the trial court properly evaluated the evidence and hence the judgment under reference is sound.

15. Regarding the first issue, learned counsel for the Respondents has submitted that it is the Appellant who contended that the Respondents had trespassed onto the suit property. To this end, it was submitted that it was therefore incumbent upon the Appellant to tender/adduce plausible; cogent and credible evidence to establish the trespass.

16. Nevertheless, it has been submitted the Appellant herein failed to tender any credible evidence to demonstrate trespass. In particular, it was submitted that the Appellant did not tender any survey report to demonstrate that the disputed portion fell within or formed part of the Appellant's land or at all.

17. In the absence of a survey report, it was contended that the Appellant's plea of trespass fell by the wayside.

18. As pertains to the second issue, it has been submitted that the allegation that the learned trial magistrate was biased against the Appellant is misconceived and hence legally untenable.

19. Moreover, it has been submitted that the allegation[s] of bias have not been particularized and proven in accordance with the law. In addition, it has been contended that if the Appellant was convinced that the learned trial magistrate was biased [which is denied] same ought to have filed an application for disqualification/recusal of the trial magistrate; which was not the case.

20. Furthermore, it has been submitted that accusations of lack of impartiality and biasness ought not to be taken lightly. Moreover, it has been submitted that if the court were to take such allegations lightly then same would create a dangerous precedent where disgruntled parties like the Appellant herein would flourish.

21. Moreover, it has been submitted that where the plea of bias/lack of impartiality are raised, same ought to be proven to the requisite standards. In any event, counsel has submitted that the standard to be deployed is the objective one, namely; the standard of a reasonable person knowledgeable of the facts of the matter in question; and not otherwise.

22. To buttress the foregoing submissions, learned counsel for the Respondents has cited and referenced the decision of the Court of Appeal in the case of ***Philip K Tunoi & Another vs Judicial Service Commission & Another [2016] KECA 715; and Tailor vs Lawrence [2003] QB 528,*** respectively.

23. Turning to the third issue, learned counsel for the Respondent has submitted that the learned trial magistrate correctly evaluated the evidence tendered by and on behalf of the Appellant before coming to the conclusion that the Appellant had not proved his case.

24. To this end, it has been submitted that the judgment of the trial court is informed by the totality of the evidence on record. In this regard, it has been contended that the contention that the judgment is contrary to the weight of the evidence on record is misleading, misconceived and untenable.

25. Arising from the foregoing, learned counsel for the Respondents has submitted that the appeal beforehand is bereft of merits and thus same ought to be dismissed. Moreover, learned counsel for the Respondents has implored the court to uphold the decision of the learned trial magistrate.

26. Having reviewed the record of appeal; the Pleadings of the parties; the evidence tendered [*both oral and documentary*] and upon consideration of the written submissions filed by and on behalf of the parties, I come to the conclusion that the determination of the instant appeal turns on one salutary issue, *namely;* whether the Appellant proved the plea of trespass to the requisite standard or otherwise.

27. Before venturing forward to analyse the issue[s] that have been highlighted, it is imperative to observe that the Appeal beforehand is a first appeal from the decision of the court of first instance, *namely*, the Subordinate Court. By virtue of being a first appeal, this honourable 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 pleadings filed, evidence on record and the applicable laws**. *[See the provisions of Section 78 of the Civil Procedure Act, Chapter 21, Laws of Kenya].***

28. Nevertheless, it is imperative to underscore that even though this court is clothed with jurisdiction to review, re-evaluate and re-analyse 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.

29. 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 Court of Appeal for Eastern Africa [EACA] elaborated on the applicable principle[s] and stated 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..."***

30. Likewise, the extent and scope of the Jurisdictional remit 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 of Appeal 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"***

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"***

31. Without endeavouring to exhaust the case law that elaborates on the scope and extent of jurisdiction of the first appellate court, it is apposite to take cognizance of the holding of the Court of Appeal in the case of ***Gitobu Imanyara & 2 others v Attorney General [2016] eKLR***, where the court held as hereunder;

> ***As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the predecessor of this Court said in Peters –vs- Sunday Post Ltd [1958] EA 424. In its own words: -***
>
> > ***"Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ...".***

32. Duly guided by the principles espoused in the various decisions cited in the preceding paragraphs, I am now well disposed to revert to the instant matter and to discern whether the findings and conclusions arrived at by the trial court accord with the totally of the evidence on record. Furthermore, I will also be able to ascertain whether the conclusions are founded on the relevant legal principles or otherwise.

33. Back to the issue under consideration. It is the Appellant who had approached the court contending that the Respondent herein had trespassed onto a portion of the suit property and uprooted fencing posts on the boundary of the suit property. Furthermore, the Appellant contended that the Respondents' actions were undertaken with an intention of trespassing onto the suit property.

34. Suffice it to state that the contention by the Appellant namely; uprooting of the fencing posts and intention to trespass onto the suit property, were denied by the Respondents. In addition, the Respondents posited that the Appellant had actually blocked a public road of access and which same [Appellant] was claiming to form part of the suit property.

35. Having made the assertions that the Respondents had uprooted fencing post and trespassed onto the suit property, it was incumbent upon the Appellant to tender evidence and proved that indeed the fencing post had been uprooted.

36. Nevertheless, it is common ground that the Appellant herein did not tender any evidence of fencing posts [if at all] any was uprooted. For coherence, proof of the fencing posts, would have required inter-alia, the production of the uprooted posts [if any] before the Court; production of

photographs of [sic] the posts; or better still, evidence of a complaint made to the police [if any].

37. Additionally, it is the Appellant who had contended that the Respondent had trespassed onto a portion of the suit property. To this end, it behooved the Appellant to tender evidence to demonstrate firstly; that the portion of land under dispute fell within the suit property; and secondly, that there was actual trespass onto the suit property. [**See the provisions of Section 3 of the Trespass Act, Chapter 294, Laws of Kenya**].

38. It is important to underscore that trespass denotes offensive entry onto a portion of land belonging to a third party. Consequently, proof of trespass would entail demonstration that the land in question or the portion thereof which is under dispute actually belonged to the claimant. Such proof, would require adduction/production of a copy of certificate of title/lease [if any] and a survey report confirming that the disputed portion falls within the claimant's land.

39. Be that as it may, it is not lost on me that despite the Appellant contending that there was trespass onto a portion of the suit property, same however, failed to tender and/or produce before the trial court any survey report to authenticate his [Appellant's] claim. Absent a survey report, it was not possible for the trial court to discern whether the disputed portion formed part of the public road access which is claimed to have been blocked; or formed part of the Appellant's land.

40. To my mind, the Appellant bore the burden of persuading the trial court that there was indeed trespass. Sadly, the Appellant failed to discharge the

burden of proof that laid on his shoulders. Such failure was detrimental to the Appellant's case. [See ***Daniel Toroitich Arap Moi vs Mwangi Stephen Mureithi [2014]eKLR; Agness Nyambura Munga vs Lita Violet Shephard [2018]eKLR; Mucheru vs National Bank of Kenya Ltd [2019]eKLR and Dr. Samson Gwer & 5 Others vs KEMRI [2020]eKLR***, respectively; where the burden of proof was highlighted and expounded].

41. Other than the foregoing, it is also worth to recall that the disputed portion of land was indeed visited by the county surveyor during the proceedings before the trial court. In addition, the county surveyor appears to have filed a report before the court. Nevertheless, the Appellant herein seems not to have agreed with the contents of the report.

42. For ease of reference, it is imperative to take cognizance of the evidence of the Appellant [PW1] whilst under cross-examination by learned counsel for the Respondents.

43. Same stated thus;

> ***"It is not true that the government surveyor came on the 27th October 2023. He came on 31st October 2023. The chief was there. I was present. The Defendants were also present. I don't know the Defendants' clan members. The surveyor made a false report. I never uprooted the beacon".***

44. PW2 on his part stated as hereunder whilst under cross-examination by learned counsel for the Respondents.

> ***"The road passes near the Plaintiff's land. The Plaintiff has not encroached on the road. I know that the surveyor came to measure. I was present. He came on the 31st, but I don't recall the month".***

45. What is apparent is that the dispute beforehand concerned encroachment onto the public road of access. The Appellant denies such encroachment. However, the survey report seems to underscore encroachment onto the public road of access. No wonder the Appellant avers that the surveyor made a false report.

46. Whatever the sentiments, beliefs and position held by the Appellant, it is imperative to reiterate that the burden of proof laid on the Appellant. Same ought to have proved such trespass. Unfortunately, the Appellant failed to discharge the burden of proof. Such failure was fatal.

47. Finally, it is important to highlight that judgments of the court are not based on sympathy or empathy. Judgments are based on the credibility; weight and probative value of the evidence. [**See the decision of the Court of Appeal in the case of County Government of Bungoma and 2 Others versus JOO and 2 Others [2024]KECA 1377].**

48. Moreover, judgments are also not based on who came to court first. To this end, the contention by the Appellant that his suit was dismissed, yet the Respondents were the culprits, does not hold sway. Such contentions; which seem to invoke emotion[s] and not reason, don't suffice before a Court of Law.

49. Flowing from the foregoing; and having taken into account the guiding principle[s] espoused in the decisions in ***Mwanasokoni vs Kenya Bus Service Ltd [1985]eKLR; and Jabane vs Olenja [1986]eKLR***, I come to the conclusion that the decision of the learned senior principal magistrate was solid; sound and well grounded.

50. Simply put, I come to the same conclusion as the trial court, namely; the Appellant did not prove his claim.

FINAL DISPOSITION.

51. Having analysed the issues that were highlighted in the body of the Judgment; and upon taking into account the totality of the evidence, I come to the conclusion that the subject appeal is meritless.

52. In the premises, and for the reason[s] alluded to; the final orders that commend themselves to the court are as hereunder;

i. The Appeal be and is hereby dismissed.

ii. The Judgment of the trial court; and the consequential decree arising therefrom be and is hereby affirmed.

iii. Costs of the Appeal be and are hereby awarded to the Respondents.

iv. The Costs in terms of clause [iii] above shall be agreed upon; and in default be taxed in the conventional manner.

53.It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF OCTOBER 2025.

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

JUDGE.

<u>In the presence of:</u>

C/A Hussein/Mukami

Mr. L. Kimathi Kihara for the Appellant

Mr. John Muthomi for the Respondents