



**Gerad v Njenga (Environment and Land Appeal 2 of 2022)  
[2025] KEELC 6730 (KLR) (2 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6730 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL 2 OF 2022  
LC KOMINGOI, J  
OCTOBER 2, 2025**

**BETWEEN**

**SULDANA HABAT GERAD ..... APPELLANT**

**AND**

**MONICAH NDUTA NJENGA ..... RESPONDENT**

*(Being an Appeal from the Judgement of Hon. P. Achieng' (SPM) in  
Ngong ELC Case No. 120 of 2018 delivered on 15th September 2022)*

**JUDGMENT**

1. In her Judgement dated 15<sup>th</sup> September 2022 in Ngong' ELC Case No. 120 of 2018, Hon. P. Achieng' (SPM) held:
  - a. A declaration is hereby made that the Plaintiff is the rightful owner of the disputed land herein known as Plot No. 413/Business-Olekasasi Trading Centre or 725/Business-Olekasasi Trading Centre which is one and the same;
  - b. A permanent injunction is hereby issued restraining the Defendant or her servants and/or agents from trespassing onto the said parcel of land;
  - c. The Defendant is ordered to vacate the said parcel of land within 3 months from the date of the Judgment and to pull down all structures 3 thereon at own cost;
  - d. The defendant shall bear the Plaintiff's costs of the suit.
2. Aggrieved, the Appellant in the Memorandum of Appeal dated 6<sup>th</sup> October 2022 appealed against the whole decision on the grounds that:



1. The learned trial Magistrate erred both in law and in fact in failing to appreciate that the Defendant was in possession of her own plot which, by description and location was distinct from the Plaintiff's.
  2. The learned trial Magistrate erred both in law and fact in finding and holding that the Plaintiff (sic) had proved her case on a balance of probabilities when, she had not.
  3. The learned trial Magistrate erred in law and fact in applying the first in time principle when, on the facts it did not apply as the properties in issue were distinct.
  4. The learned trial Magistrate erred both in law and fact in holding that the plots, as described in the respective papers held by the adversaries, were one and the same on the ground when there was no expert or other evidence of the fact.
  5. The learned trial Magistrate erred in law and fact when she failed to appreciate, consider and uphold the Defendant's defence to the effect that she was in occupation of her own plot.
  6. The learned trial Magistrate erred both in law and in fact in misinforming herself on the contents of the report presented to the Court by the County surveyor.
  7. The learned trial Magistrate erred both in law and fact in failing to note that no survey to map out the distinct locations of the subject plots had been undertaken leaving the Plaintiff's case unproven.
3. The Appellant therefore sought that the Appeal be allowed with costs, the Lower Court's judgement be vacated and the suit at the Lower Court be dismissed with costs.
  4. This Appeal was canvassed by way of written submissions.

### **Submissions of the Appellant**

5. The following were outlined as the issues for determination;
6. Whether the Trial Court failed to appreciate that the Appellant was in possession of her own plot which, by description and location, was distinct from the Respondent's. Counsel submitted that the Appellant had proved that he was the rightful owner of plot 725/Business-Olekasasi Trading Centre now Plot B38 as validated, having acquired it through allocation from the defunct Olkejuado County Council. The three Survey Reports filed in this case dated 27<sup>th</sup> April 2021, 23<sup>rd</sup> November 2021 and 7<sup>th</sup> August 2024 confirm this as well. He complied with all the conditions set out in the Letter of Allotment dated 20<sup>th</sup> February 2006 and developed it within two years as required. The Learned Magistrate therefore erred in her finding since the Appellant discharged the evidential burden that was placed on her as held in *Kurshed Begum Mirza v Jackson Kaibunga* [2017] KECA 244 (KLR) by proving that he owned a distinct and separate parcel from the one allegedly owned by the Respondent. Once the Appellant proved that he was the rightful owner of the parcel known as 725/Business-Olekasasi Trading Centre (now Plot No. B38), the evidential burden shifted to the Respondent to prove that the Respondent's alleged Plot No. 413/Business Olekasasi Trading Centre was actually one and the same as Plot No. 725/Business-Olekasasi Trading Centre. If successful in proving this, the Respondent was then to prove that the Appellant had trespassed onto the said parcel and put up illegal structures. None of these things were proved and neither was the Appellant's case rebutted. The Respondent's suit should have thus been dismissed.
7. Whether the Trial Court erred in law and in fact in finding and holding that the Respondent had proved her case on a balance of probabilities when, on the facts, she had not. Counsel submitted



that the Learned Magistrate had no basis upon which to find and hold that Plot No. 413/Business-Olekasasi Trading Centre (the Respondent's alleged parcel) and Plot No. 725/Business-Olekasasi Trading Centre (the Appellant's parcel) were one and the same parcel and as such hold that the Appellant had committed trespass.

8. Whether the reliefs sought are merited in light of the County Surveyor's Report dated 7<sup>th</sup> August 2024. It was submitted that from the Report, the Appellant's case was merited, and that is that he is the rightful owner of her property which he has been in possession thereof at all material times. Reference was made to *Njoroge v Mugobelo & 2 others* [2023] KEELC 827 (KLR) where Angote, J held that a claim for trespass could only succeed if the Plaintiff proved that their property was indeed the one trespassed upon. As such, the Appeal should be allowed as prayed and the security of Kshs. 300,000 deposited by the Appellant be released.

### **Submissions of the Respondent**

9. Counsel submitted that the trial magistrate considered the said reports dated 27<sup>th</sup> April 2021 and 23<sup>rd</sup> November 2021 and agreed that according to the reports, the parties were claiming the same plot though using two different letters of allotment. The court held that the person entitled to the plot is the Respondent, as her allotment was first in time and the Respondent was the rightful owner.
10. On whether the trial magistrate failed to appreciate that the Appellant was in possession of her own plot, it was submitted that the Respondent sued the Appellant for trespassing and encroaching on her plot known as 413/Business-Olekasasi trading centre. The Respondent constructed a fence and placed building materials on the Respondent's plot, destroyed the fence and damaged building materials on site. The Appellant then started to construct an illegal structure on site which occasioned loss and damage to the Respondent. The Appellant denied the allegations and testified that she owns a separate plot known as 725/Business-Ole Kasasi trading centre which was a false narrative to mislead the trial court. Counsel submitted that the Surveyor's report dated 23<sup>rd</sup> November 2021 concluded that "the two parties were using different letters of allotment to claim ownership of one plot..." As such, the trial Magistrate was right in applying the first in time principle citing *Wangombe v Ndungu* [2023] KEELC 18096 (KLR).
11. On whether the Appeal was merited, it was submitted that having demonstrated that the plots were one and the same, the appeal should be dismissed with costs to the Respondent.

### **Analysis and Determination.**

12. I have considered the grounds of Appeal, the Records of Appeal, the written submissions and the authorities cited. Though the Appeal is mounted on seven (7) grounds the same can be summarized as follows:
  - i. Whether the Learned Trial Magistrate erred in law and infact in failing to app appreciate that the Defendant was in possession of her own plot which, by description and location was distinct from the Plaintiff's.
  - ii. Whether the learned trial Magistrate erred both in law and fact in holding that the plots, as described in the respective papers held by the adversaries, were one and the same on the ground when there was no expert or other evidence of the fact.
  - iii. Whether the learned trial Magistrate erred both in law and fact in finding and holding that the Plaintiff had proved her case on a balance of probabilities when, she had not.
  - iv. Who should bear costs of the Appeal?



13. This being a first Appeal, this Court has a duty to analyse and re-assess the evidence on record and reach its own conclusions as held in *Richard Wefwafwa Songoi v Ben Munyifwa Songoi* [2020] KECA 942 (KLR) thus;

“In *Selle v Associated Motor Boat Co.*, [1968] EA 123, it was expressed thus:

“An appeal to this Court from a trial by the High 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. In particular, this Court is not bound necessarily to follow the trial judge’s findings of fact ...”

14. Through the Plaint dated 5<sup>th</sup> December 2007 the Plaintiff, who is the Respondent herein, claimed that she is the registered owner of parcel 413 Business Olekasasi Trading Centre having being allotted the same by the defunct Olkejuado County Council. Sometime in May 2007, the Defendant (Respondent herein) trespassed on it, destroyed the fence and poured building materials on it. She therefore sought for: a permanent injunction restraining the Appellant from trespassing on plot No. 413 Business Olekasasi Trading centre, an eviction order and pulling down any structures, general damages plus costs of the suit.
15. She produced letter of transfer of plot No. 413 Business Olekasasi Trading Centre dated 22<sup>nd</sup> July 2002 from one Daniel Tipatet and Stephen K. Rimei to herself, certificate of official search dated 4<sup>th</sup> June 2007 confirming that she was the registered owner of the said plot, rent payment receipts between 2005 and 2007. A letter dated 20<sup>th</sup> September 2007 from the Clerk Olkejuado County Council addressed to the Appellant stating that she had encroached on plot 413 which was allocated to its initial owner in the 1990s before it was transferred to the Respondent on 22<sup>nd</sup> July 2002
16. The Appellant in her statement of defence dated 9<sup>th</sup> May 2012 contested the claim stating that she was the registered owner of plot No. 725 Business Olekasasi and had not trespassed on the Respondent’s plot. She thus sought for dismissal of the suit with costs.
17. To support her case, she produced a letter of allotment dated 20<sup>th</sup> February 2006 for Plot No. 725/ Business Olekasasi Trading Centre, survey receipt dated 30<sup>th</sup> October 2006 and acknowledgement receipts for rent payment between 2007-2011 from County Council of Olkejuado.
18. There is a surveyor’s report dated 27<sup>th</sup> April 2021 which shows that plot No. 725 (now B38) was validated on 25<sup>th</sup> October 2016 and had permanent developments on it. Another survey report dated 23<sup>rd</sup> November 2021 also confirmed that the plot No. B38 was fully developed. However, this report indicates that plot No. B38 was formerly plot No. 103 whose validation was done on 25<sup>th</sup> October 2018 but the Defendant had a Letter of Allotment for plot No. 725. The report concluded that the two plot numbers did not match the number on the old development plan, and that the parties were using two different letters of allotment to claim ownership of one plot. The Court notes that, there is a difference between the plot numbers with this report showing that plot No. B38 was formerly plot No. 103. There is no evidence tendered to show that Plot No. B38 was formerly plot No. 103.
19. From the foregoing, the Learned Trial Magistrate found that the issue for determination was who was the rightful owner of the plot. She found that Olkejuado County Council as the allotting authority was best placed to clarify the rightful owner of the plot and it had indicated that plot 413 Business Olekasasi Trading centre was allotted first before plot No. 725. If the two plots were one and the same



- on the ground, it meant that once plot 413 was allotted, the land was no longer available for allotment. She thus found that the Plaintiff was the rightful owner of the land in dispute.
20. Following an application by the Appellant, this Court allowed production of the site visit report dated 7<sup>th</sup> August 2024.
  21. The report found that the disputed plot is fully developed by the Appellant with an approval dated 28<sup>th</sup> March 2018. It should be noted that in 2018 when the alleged approval was given, this dispute was already in court.
  22. The report goes on to state that, the old maps neither have plot No. 413 or 725 on them. If these plots were not on the old map, how were they allotted and validated? How comes in 2007, a letter from the same office showed that plot No. 413 was allotted as first in time?
  23. The report further found, a validation exercise was carried out in 2016 and the plot validated as B38 with permanent development. The question is, if the approval was issued in 2018, and the validation exercise conducted on 2016 found that the plot had permanent structures on it, was the property developed without approval?
  24. The report goes on to find that “the maps have no specific number written on it for both Applicant and the Respondent as the number written on the old plan is 103. The County undertook two validation exercises in 2007 and 2016 which were disputed prompting the Applicant to do a permanent development approved by the council. Again, if the validation exercise was disputed, on what grounds did the Council grant authority to develop the plot? And on what grounds, did the Appellant deem it fit to fully develop a disputed parcel of land?
  25. With these questions and glaring discrepancies, this Court is not convinced of the authenticity and legitimacy if these findings. Going back to the documents produced in 2007, the Clerk to Olkejuado County Council in the letter dated 20<sup>th</sup> September 2007 indicated that as per their records, plot No. 413 was allotted to the previous owner in the 1990s before it was allotted to Monicah Nduta on 22<sup>nd</sup> July 2002.
  26. If there were records of plot No. 413 in 2007, what transpired in the later years for the records to disappear? Since the later reports indicate that these plots are not in the old maps? If the records were available in 2007 but somehow disappeared thereafter, the only conclusion is that they were made to disappear. Further it is on record that parties were stopped from undertaking any developments on the property, but despite there being valid court orders, the Appellant went on to develop the plot with approval from the County Council. This was in flagrant disobedience of a court order. In my view the fact that the plot is developed does not guarantee ownership.
  27. This Court thus finds that the Learned Trial Magistrate did not in err in finding that the Respondent’s allotment letter was the first in time and she was therefore entitled to be declared the owner of the plot.
  28. I am satisfied that the Learned Trial Magistrate considered all the evidence and arguments of the parties, and applied the relevant law properly before reaching her conclusion. I find no basis to interfere with the decision of the Learned Trial Magistrate.
  29. In conclusion I find no merit in this Appeal and the same is dismissed with costs to the Respondent.
  30. In essence the Judgement delivered on 15<sup>th</sup> September 2022 in Ngong SPM ELC NO. 120 OF 2018 is upheld except for the period in which the Appellant granted to vacate the said plot. The Appellant is now directed to vacate the suit plot within four (4) months from the date of this Judgement and to pull down the structures at her own cost.



31. In default the Respondent do pull down the structures at the Appellant's expenses.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF OCTOBER 2025.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

Ms. Asasha for Mr. Bake for the Appellant.

Mr. Oonge for the Respondent.

Court Assistant – Peter.

