Kinyua & another (Suing as Legal Representative of the Estate of George Mbogori) v Kananu (Environment and Land Appeal E058 of 2024) [2025] KEELC 6825 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6825 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E058 OF 2024

JO MBOYA, J

OCTOBER 9, 2025

BETWEEN

RIUNGU KINYUA ..... 1ST APPELLANT

ROSE KARIMI MBOGORI ..... 2ND APPELLANT

SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF GEORGE MBOGORI

AND

MARTHA KANANU ..... RESPONDENT

(Being an appeal from the judgment/decree of the chief magistrates' court at Meru by Hon. J.M Njoroge – CM dated 17.7.2024 in Meru ELC No. E003 of 2021)

JUDGMENT

1. The Appellants herein [who were the Plaintiffs in the subordinate court] filed Plaint dated 7th January 2021; and wherein same sought various reliefs. The reliefs sought at the foot of the Plaint are as hereunder;

    a. An order of eviction to issue against the defendant, her servants, employees, agents or anybody else acting under her name to stop her from trespassing onto, occupying, cultivating and or constructing on parcel of land No. Nyaki/Kithoka/692.

    b. An order of permanent injunction restraining the defendant whether by herself, her servants, agents or any persons whomsoever from trespassing onto, cultivating, constructing, occupying, utilizing, leasing, selling or otherwise howsoever interfering with the plaintiff's access, possession, utilization and enjoyment of parcel of land number Nyaki/Kithoka/692.

c. General damages for trespass to land and or illegal occupation of the plaintiff's land parcel No. Nyaki/Kithoka/692.

d. Mesne profits

e. Costs and interests of this suit

f. Any other relief this court may deem necessary to grant.

2. The Respondent herein duly entered appearance, file statement of defence and also filed a Notice of preliminary objection wherein the respondent challenged the jurisdiction of the court to entertain and adjudicate upon the subject matter. In particular, the respondent contended that the dispute beforehand touched on and concerned the boundary and hence the court was divested of jurisdiction.

3. The preliminary objection that was filed by the respondent was heard and disposed of. Subsequently, the matter proceeded for hearing culminating into the Judgment delivered on 17th July 2024. For good measure, the learned chief magistrate found and held that the appellants herein had failed to prove their claim on a balance of probabilities. To this end, the learned chief magistrate dismissed the appellant's suit with costs to the respondent.

4. It is the said judgment, namely; the judgment delivered on 17th July 2024; which aggrieved the appellants and thus provoked the subject appeal. The appellants have filed the memorandum of appeal dated 14th August 2024 and wherein same have highlighted the following grounds;

i. That the learned trial magistrate erred inf act and law in finding that there was no evidence to show that the defendant or the owners of the abutting parcels were given notice or invited to attend and participate in the re-surveying process.

ii. That the learned trial magistrate erred in law in his interpretation and application of the law regarding the appellant's suit.

iii. That the learned magistrate erred in law and fact in finding that it is the defendant who failed to participate and incur a facilitation fee for the survey.

iv. The learned trial magistrate erred in fact and law in failing to consider and/or disregarding the appellants evidence, submission and case law cited and in particular, the fact that the respondent had only recently illegally entered into the appellants land and Ms. Geoland surveyors Limited's report produced in court showing that the respondent had trespassed into the appellants land parcel No. Nyaki/Kithoka/692 by 0.86 acres.

v. The learned trial magistrate was biased in favour of the respondent against the appellants, full of errors against the weight of evidence and a travesty of justice.

5. The subject appeal came up for direction on 9th July 2025; whereupon the advocate for the appellant confirmed that same had filed and served the record of appeal. Furthermore, learned counsel for the appellants posited that the record of appeal was complete; and in this regard, counsel sought for directions pertaining to the hearing and disposal of the appeal.

6. With the concurrence of learned counsel for the respondent, the court proceeded to and gave directions in line with the provisions of Order 42 Rule 13 of the Civil Procedure Rules. In particular, the court directed that the appeal be canvassed before one Judge sitting at Meru for one day. In addition, it was directed that the parties do file and exchange written submissions within the prescribed timelines.

7. The appellant filed written submissions dated 4th August 2025, and wherein the appellant has highlighted three [3] key issues for consideration. The issues highlighted by the appellant are namely; whether the learned trial magistrate erred in finding and holding that the respondent herein were neither invited nor notified of the intended survey exercise; the learned trial magistrate erred in misinterpreting and misapplying the legal principles governing the appellant's suit; and the learned chief magistrate was biased and arrived at a decision contrary to the weight of evidence on record.

8. Regarding the first issue, learned counsel for the appellants has submitted that the appellants herein duly issued and notified the respondents of the intended survey exercise, but the respondent failed and or neglected to attend and participate in the exercise. Furthermore, it was submitted that the respondent herein exhibited a conduct which was not cooperative and thus her failure to attend and participate in the survey exercise.

9. Be that as it may, it has been submitted that the learned trial magistrate erred in law in finding and holding that the respondent was neither notified nor informed of the intended survey exercise. To this end, it has been submitted that the finding by the learned trial magistrate that the respondent was neither informed nor notified of the intended survey exercises was contrary to the evidence on record.

10. Regarding the second issue, learned counsel for the appellant has submitted that the appellant tendered and placed before the court plausible, cogent and credible evidence to demonstrate that the respondent herein had trespassed onto the suit property. In particular, learned counsel for the appellant has invoked and referenced the survey report, which was tendered before the court. In addition, it has been submitted that the contents of the survey report which was tendered before the court, clearly show that the respondent had trespassed onto the suit property.

11. Furthermore, it was submitted that the learned trial magistrate ignored and disregarded the said survey report and as a result thereof, same reached/arrived at an erroneous conclusion. Besides, it was contended that the report in question being an expert report, ought to have been given due attention and highest regard.

12. Learned counsel for the appellants has contended that the totality of the evidence before the trial court clearly showed that there was trespass. To this end, learned counsel has cited and referenced the provisions of section 3 of the Tresspass Act Cap 294 Laws of Kenya; and the decision in Park Towers Ltd vs John Mithamo Njika & 7 others [2014] eKLR.

13. Turning to the third issue, learned counsel for the appellant has submitted that the manner in which the learned chief magistrate dealt with the subject matter and disregarded the appellant's evidence demonstrates clear bias and lack of impartiality. To this end, it has been submitted that the judgment under reference is tainted with error[s] and misdirection[s] and thus same ought to be set aside and or quashed.

14. To buttress the submissions that the learned chief magistrate was biased, learned counsel for the appellant has cited and referenced the decision[s] in Republic vs Independent Electoral & Boundaries Commission and another Ex parte Coalition for Reforms and Democracy [CORD] [2017] KEHC 8519 and Jasbir Singh Rai & 3 others vs Tahlochan Singh Rai & others [2013] eKLR, respectively.

15. Flowing from the foregoing, learned counsel for the appellants has contended that the appeal beforehand is meritorious. To this end, the court has been invited to allow the appeal and to grant the reliefs that were sought at the foot of the Plaint dated 7th January 2021.

16. The respondent filed written submissions dated 9th September 2025; and wherein same has raised two [2] key issues, namely; whether the trial court erred in dismissing the appellant's claim for trespass on

the suit property; and whether the trial court misapplied the burden of proof and other relevant legal principles or otherwise.

17. Regarding the first issue, learned counsel for the respondent has submitted that it is the appellant who had contended that the respondent had encroached upon and or trespassed onto the suit property and hence same was obligated to place before the court credible evidence to demonstrate such trespass. However, it was submitted that the appellants herein failed to place before the court any evidence to prove trespass. In any event, it was submitted that the appellants procured an order for visitation of the suit property by the land registrar and the county surveyor, Meru County, but failed to facilitate the visitation.

18. Arising from the failure by the appellants to facilitate the visitation to the locus in quo, it was contended that the appellants herein therefore failed to procure credible evidence which would have authenticated trespass or otherwise.

19. Turning to the second issue, learned counsel for the respondent has submitted that the respondent herein placed before the court evidence to show that same has been in occupation, possession and in use of the portion of land which is now complained of. Furthermore, it was submitted that the respondent had been using the disputed portion during the lifetime of one George Mbogori [now deceased] who was the father of the appellants herein. In any event, it was submitted that the father of the appellants herein neither raised any complaint nor contest.

20. Additionally, it was submitted that the respondent herein has also buried her relatives on the disputed portion and the graves of the relatives are discernible. Further, and in any event, it was submitted that the father of the appellant attended various ceremonies relating to the burial of the deceased relatives of the respondent, but did not raise any protest.

21. Other that the foregoing, it was also submitted that the disputed portion is duly developed by the respondent. Moreover, it was submitted that the disputed portion fell within L.R No. Nyaki/Kithoka/690 [now subdivided].

22. Finally, learned counsel for the respondent has submitted that the learned chief magistrate properly appraised the evidence tendered and thereafter arrived at the correct conclusion. Moreover, it was submitted that the burden of proof laid on the shoulders of the appellants and not otherwise.

23. Premised on the foregoing, learned counsel for the respondent has submitted that the appellant's appeal is devoid of merit[s] and thus same ought to be dismissed. In this regard, the court has been invited to dismiss the appeal.

24. Having reviewed the record of appeal, the evidence tendered, [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, I come to the conclusion that the determination of the subject appeal turns on two [2] key issues namely; whether the appellants placed before the subordinate court plausible and compelling evidence to prove trespass or otherwise; and whether the learned chief magistrate properly evaluated the evidence tendered by the appellants or otherwise.

25. Before venturing to interrogate and address the issues highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a first appeal. To this end, it suffices to underscore that this court is seized of the jurisdiction to review/re-evaluate/scrutinise the evidence on record and to ascertain whether the factual and legal conclusions arrived at accord with the evidence and the law. Furthermore, it is instructive to observe that this court is at liberty to arrive at an independent conclusion and, where appropriate, to depart from the conclusions and or findings of the trial court.

26. Nevertheless, it is important to underscore that even though the court is seized of the jurisdiction to depart from the factual and legal conclusions arrived at by the trial court, such departure can only be undertaken where it is shown that the findings/conclusions were arrived at on the basis of no evidence; were perverse to the evidence on record; were based on misapprehension of the evidence on record; or where it is shown that the trial court committed an error of principle which vitiates the findings under reference. Simply put, the first appellate court cannot depart from the findings and conclusions of the trial court at will.

27. The jurisdictional remit of the 1st appellate court has been the subject of various pronouncements by the Court of Appeal. 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] the court stated thus;

> " 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. 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:
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> "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 circumstance 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...
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> 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 judgment 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."

28. Back to the issues for determination. I beg to address the issues sequentially. In this regard, I shall first engage with the issue as to whether the appellants placed before the court plausible evidence to prove trespass or otherwise.

29. It is common ground that the appellants bore the burden of proving the claim of trespass. It is important to highlight that the appellants had contended that the respondent herein illegally destroyed the existing boundary fence; and thereafter trespassed onto a portion of the suit property. Furthermore, the appellants had contended that the acts of trespass complained of transpired/ occured in August 2020.

30. Despite the contention by the appellants, it is important to highlight that both appellants, who testified as PW 1 and PW2 respectively, conceded that the acts complained off took place many years ago. Moreover, PW 1 admitted and acknowledged that the respondent has constructed on the disputed portion. In addition, it was conceded that the actions in question date back to 30 years ago; and same took place during the lifetime of the appellants father [now deceased] who was the previous registered owner.

31. To be able to appreciate the evidence of PW 1, it is imperative to reproduce the salient aspects of his testimony during cross-examination. Same testified thus;

> " Martha has constructed there. And there are people who have been buried there. When she buried and planted trees I was not there. I was in Nairobi at that time. The grave was placed

there over 30 years ago. The 30 years ago upon burial my father was the owner of the land. He never raised any complaint"

32. The 2nd appellant testified as PW 2. Same is on record confirming that her father [now deceased] who was the previous registered owner, never brought a case against the respondent herein. In addition, PW 2 also conceded that when the respondent was buried on the disputed portion more than 30 years ago, her father was alive. In addition, the witness admitted that her father did not take any action and or lay a claim to the disputed portion.

33. From the testimony of PW 2 and PW 3, it is evident that the acts complained of did not accrue in 2020 in the manner contended. Moreover, it is not lost on me that the appellants herein did not place before the court any evidence of a boundary fence that had been destroyed by the respondent.

34. On the other hand, it is also important to recall and reiterate that the appellants herein procured and obtained an order for the visitation of the locus in quo by the county land registrar and county surveyor, Meru County. [See the order issued on 26th January 2022]. Nevertheless, there is no gainsaying that the appellants herein failed to actualize the order of the court. Furthermore, evidence abound that the appellants failed to meet the facilitation fees and thus the intended visitation aborted.

35. I beg to underscore that the determination of the exact position of the boundary between the suit property and L.R Nyaki/Kithoka/690 [now subdivided] is a matter that falls under the jurisdiction/ mandate of the land registrar. To this end, a report by the land registrar would have gone a long way in authenticating the boundary position, and by extension, encroachment [if any].

36. Nevertheless, to the extent that the appellants did not pursue the question of visitation of the locus in quo by the land registrar, there is no gainsaying that the appellants shot themselves in the leg. Quite clearly, the appellants failed to place before the chief magistrate credible evidence to prove trespass.

37. Before departing from this issue, it is also important to underscore that the survey report which was relied upon by the appellants, was procured by the appellants themselves, albeit without notice to and or involvement of the respondent. For good measure, even though the appellants contended that the respondent was duly notified of the intended survey exercise, no evidence was placed before the court. Instructively, neither PW 1 nor PW 2 tendered any evidence of a notice [if any] that was served.

38. Other than the foregoing, it is also important to highlight that the survey report that was being relied upon by the appellants to underpin [sic] trespass also appears to be a document that was made by a person whose qualification is not evident on the face of the document. It is important to state that whosoever prepares an expert document is obligated to speak to and or authenticate his or her qualifications. Absent such qualifications, the document, like the one beforehand, attracts/accrues no probative value. [See the decision in the case of Kenneth Nyaga Mwige vs Austin Kiguta [2015] eKLR].

39. Finally, it is also important to highlight that the survey report, which the appellants had sought to rely on in an endeavor to demonstrate trespass, was not signed by [sic] the maker. In my humble view, the survey report under reference was not owned and hence same cannot be deployed as a basis to prove trespass.

40. In view of the foregoing, I come to the inescapable conclusion that the learned chief magistrate properly found and held that the appellants had not proved trespass. For good measure, it was incumbent upon the appellants to prove the assertions at the foot of the claim. [See the decision in the case of Daniel Toroitich Arap Moi versus Mwangi Stephen Mureithi [2014] eklr; Mucheru versus National Bank of Kenya Limited [2019]eklr; Agnes Nyambura Munga versus Lita Violet Shaepad [2018]eklr]

41. Turning to the second issue, namely; whether the learned trial magistrate properly apprehended the burden and standard of proof and correctly applied the same. To this end, I beg to state that the learned chief magistrate was alive to the burden of proof and clearly highlighted the provisions of Section 109 of the *Evidence Act*. In particular, the learned chief magistrate held that the burden of proof lay on the appellants to demonstrate that the respondent had trespassed onto the suit property.

42. To my mind, the learned chief magistrate properly apprehended the incidence of burden and standard of proof. Same thereafter properly applied the legal principle and came to the correct conclusions.

43. Flowing from the foregoing, I am afraid that the appellants herein have neither established nor demonstrated any misdirection[s] on the part of the learned chief magistrate. On the contrary, and having taken into account the guiding principles enunciated in the case of Mwanasokoni vs Kenya Bus Services Ltd [1985] eKLR and Jabane vs Olenja [1986] eKLR, I come to the inevitable conclusion that the appeal beforehand is bereft of merit[s].

Final Disposition.

44. For the reasons that I have highlighted in the body of the Judgment, it is apparent that the appeal beforehand is bereft of merit[s]. Moreover, the appellants have neither demonstrated nor established any scintilla of misdirection or at all.

45. In the upshot, and for the foregoing reason[s]; the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby dismissed.

    ii. That the Judgment of the learned Chief Magistrate dated 17th July 2025; and the consequential decree be and are hereby affirmed.

    iii. Costs of the appeal be and are hereby awarded to the respondent.

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

46. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU ON THE 9TH DAY OF OCTOBER 2025

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

JUDGE

In the presence of:

Hussein -Court Assistance

Ms. Kerubo holding brief for Mr. Kiautha Arithi for the appellants

Mr. Kabba; and Ms Mbogo holding brief for Mr. Maranya for the respondents