



**Makoma v Kinyua (Environment and Land Appeal E009 of 2024)
[2025] KEELC 6980 (KLR) (14 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6980 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL E009 OF 2024**

AY KOROSS, J

OCTOBER 14, 2025

BETWEEN

JOYCE KALEKYE MAKOMA APPELLANT

AND

PATRICK M KINYUA RESPONDENT

(Appeal from the judgment of Hon. E. Kimaiyo Suter, PM, delivered on 29/02/2024 in Mavoko CM's Court ELC Case No. E089 of 2021 (Joyce Kalekye Makoma versus Patrick M. Kinyua))

JUDGMENT

Background of the appeal

1. To provide context for the appeal, it is essential to outline the subject matter of the dispute that was before the trial court and is now before this court. In the lower court, the appellant filed a suit against the respondent through a plaint dated 2/11/2021.
2. It was her case that at all material times, she was the registered owner of property known as plot no. 80B ("plot 80B") situated within Mlolongo Mavoko Sub-County, Machakos County. She also stated that the respondent was the owner of the property known as plot no. 80 ("plot 80") also situated within Mlolongo, Mavoko Sub-County, Machakos County.
3. She informed the court that on diverse dates unknown to her but during the period between 2018 and 2021, the respondent, in connivance and with the assistance of persons known to her and without authority, consent or otherwise from her, wrongfully entered plot 80B, took possession thereof and commenced construction and has thereby trespassed and is still trespassing thereon. According to her, these acts had caused her untold suffering and damages, and she prayed for judgment against the respondent for: -



- a. A declaration that the appellant is the owner and entitled to possession of plot 80B situated at Mlolongo within Mavoko sub-county, Machakos.
 - b. That the appellant is the owner and entitled to possession of plot 80B situated at Mlolongo within Mavoko Sub-County, Machakos County.
 - c. A permanent injunction to restrain the respondent, his agents, servants, workmen or otherwise, whoever from trespassing, interfering with, alienating, disposing or in any way whatsoever dealing with the property known as plot 80B Mlolongo situated within Mavoko Sub-county, Machakos County.
 - d. General damages for trespass.
 - e. Aggravated damages
4. In opposition, the respondent entered an appearance and filed a defence dated 24/03/2022, where he denied the allegations levelled against him and argued he was the owner of plot 80 and that plot 80B was non-existent. In consequence, he prayed for the suit against him to be dismissed with costs.
 5. Afterwards, the matter was heard. In the appellant's case, she was the sole witness whilst the respondent's evidence was composed of himself, James Karuiki and Antony Maingi Wambua, who was called as the respondent's independent witness. Subsequently, in the impugned judgment, the learned trial magistrate framed one main issue for determination, which was whether the appellant had proved the existence of plot 80B. On this, she found the appellant had failed to prove her case on a balance of probability and dismissed her case with costs to the respondent.

Appeal to this court and the hearing

6. Dissatisfied, the appellant appealed to this court and filed a memorandum appeal dated 19/03/2024 and filed on the same day, where she questioned the impugned judgment on 6 grounds, where she maintained that the learned trial magistrate erred in law and fact in: -
 - a. Deciding the case against the weight of the evidence on record.
 - b. Failing to refer to crucial documents tendered by the appellant.
 - c. Failing to make a proper point for determination in her judgment.
 - d. Failing to consider material facts and considering irrelevant matters.
 - e. Not considering the appellant's submissions.
 - f. Misdirecting herself on the issues for determination before her.
7. Accordingly, the appellant implored this court to allow the appeal, set aside the impugned judgment, enter a judgment in her favour and grant her the costs of the appeal and the lower court suit.
8. As directed by the court, the appeal was canvassed by the appellants' submissions that were filed by the law firm of Ms. Nzilani Muteti Advocates, dated 19/06/2025, which abandoned ground (e) of the appeal. Despite directions from the court, at the time of penning this decision, Mr. Muia, counsel for the respondent, had not filed his written submissions, and if at all, counsel files them, this court will consider them as having been filed out of time. It is therefore unfortunate that the court did not benefit from Mr. Muia's arguments.



Issues for determination, Analysis and Determination

9. As held in *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR, as a 1st appellate court, this court is not necessarily bound to accept the findings of fact by the lower court but it conducts a retrial and its guiding principles are inter alia reconsider the evidence, evaluate it and draw its independent conclusions and bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.
10. Regarding the matter at hand, this court has anxiously considered the record, the impugned judgment, and the appellant's counsel's submissions and it is the considered view of this court that the residual grounds of appeal can adequately be determined by addressing the singular issue of whether the learned trial magistrate erred in law and fact in finding that plot 80B is non-existent on the ground.
11. Concerning this issue, the law on unregistered and unsurveyed land, unlike registered and surveyed land, is slightly unclear. Therefore, proof of ownership or location is found in documentary evidence, which leads to the root of ownership and location of the subject properties. In such circumstances as the case herein, courts usually benefit from the evidence of the authors of various documents who have bestowed ownership to various parties and that of survey experts.
12. In such instances and anchored on settled law on burden of proof, the onus lay with the contender in this case, the appellant, to demonstrate by an unbroken chain of documents and expert report that indeed she was the owner of plot 80B and that it lay where the respondent's plot 80 stood. Accordingly, there is no doubt that such proof will be on a balance of probabilities, but the court must be left in no doubt that the holder of the documents proved she was entitled to the subject property.
13. On considering the produced documents, the trial court concluded that though plot 80B existed on paper, the appellant failed to prove it existed on the ground. Hence, since the existence of plot 80B on paper is not in dispute, as an appellate court, this court will reconsider and reassess the evidence on its physical location.
14. In this case, one of the documents that the appellant produced was a notice from Mavoko Town Administrator dated 4/11/2013 to her as a developer of plot 80B, where she was directed to stop further development on it, seek guidance from the then council on how to regularise her development and remove the offending developments. Of significance in this notice, amongst others, she was found guilty of constructing on a disputed public/private land.
15. From her testimony, she stated that on receipt of the notice, she removed her temporary structure. Although she stated that she had another structure therein that she lived in that was demolished by the respondent in 2018, just as the learned trial magistrate, this court concludes that the existence of any structure by the appellant other than the one she allegedly demolished in 2013 was unsubstantiated by any iota of evidence. In other words, she has not been in occupation of the alleged 80B since 2013. This court must hasten to add that this document, which gave her notice, was not sufficient to show the physical location of plot 80B.
16. It appears she never made a follow-up on the notice, which would have probably resolved her challenges. Instead, she went quiet for 8 years, only to be jolted from her slumber in 2021 when she sought the services of the county surveyor on 3/09/2021, who, in the absence of the respondent, stated in his report that the 2 plots fell on the same parcel and each one of them should get ½ a portion. He also noted that the respondent had put up a storey building on it.
17. On considering this report, the learned trial magistrate found it was unreliable as the process was flawed for reasons that the respondent was not involved, the allottee did not take part in it, and it did not



disclose measurements or maps that were relied upon to arrive at the recommendations. On scrutiny of this report, this court wholly agrees with this analysis by the learned trial magistrate and must quickly add that since the respondent is in possession, he was protected by law and in arriving at this, this court associates itself with the decision of *Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others* [2015] KECA 457 (KLR) which held:-

“It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in *Ghana of Wuta-Ofei -v- Danquah* [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.”

18. Furthermore, it must also add that this court is uncertain if an allotment letter was ever issued to the appellant, as none was produced; moreover, if such an allotment was issued, it was disputed by the allottee in 2013.
19. As observed by this court from the records, the appellant was able to demonstrate a history of plot 80 sufficiently, as an allotment was issued to him by Mavoko Town Council on 28/10/1992 with certain conditions thereof. It appears he complied with the terms as the council wrote a letter dated 29/08/1996 confirming the plot belonged to him and the title documents were pending processing by the then commissioner of lands.
20. Additionally, the map from Mavoko Municipal Council shows that plot 80 is adjacent to plot no. 79, and a road separates it from plot 81, and plot 80B is nowhere around it. This evidence was corroborated by the unshaken testimony of Antony Maingi Wambua, who is a physical planner from the office of the allottee, who testified as follows: -

“In the plans for Mlolongo phase 1 and phase 2- I can identify plot. no. 80 but I cannot see plot no. 80B in our plan...In our plans plot 80 does not share any bonding (sic) with plot 80B...plot no. 80B does not exist.”

21. Therefore, for the above reasons, this court concludes that the learned trial magistrate did not err in her conclusions and findings, and this court will therefore not disturb the lower court judgment. This court finds and holds that this appeal is devoid of merit. It is hereby dismissed, and this court upholds the orders issued in the judgment rendered on 29/02/2024. Since it is trite law that costs follow the event, and being the appeal was unsuccessful, this court awards costs to the respondent.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 14TH DAY OF OCTOBER, 2025.

HON. A. Y. KOROSS

JUDGE

14. 10.2025

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Josephine Court Assistant.

Mr. Muia for respondent.



Mr. Nzuko for the appellant.

