



**REPUBLIC OF KENYA**

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

**ELC LAND APPEAL CASE NO. E043 OF 2024**

**COSMAS MBAE M'NGATUNYI.....**

**APPELLANT**

**=VERSUS=**

**JOSECK  
MANYARA.....RESPONDENT**

**GATOBU**

***(An appeal against the Judgment of the Senior Principal Magistrate Court at Githongo [Hon. T. A Sitati] dated 31/5/2024, rendered in Githongo SPMC E & L Case No. E002 of 2021)***

**JUDGMENT**

**Introduction**

1. This appeal challenges the judgment of the Senior Principal Magistrate Court at Githongo [Hon T. A Sitati] rendered on 31/5/2024 in ***Githongo SPMC E & L Case No. E002 of 2021***. One of the key questions that fell for determination by the trial court was whether the respondent proved that the appellant had trespassed onto land parcel numbers **Kiamuri "A"/3121** and **Kiamuri "A"/3122**. Invariably, this is one of the key questions that fall for determination in this first appeal. Before I analyse and dispose the issues that fall for

determination, I will briefly outline the background to the appeal; the grounds of appeal; and the parties' respective submissions in the appeal. For convenience, the parcels that are the subject matters of the appeal will be identified by their parcel numbers only, without capturing section/ block numbers.

### **Background**

- 2.** Through a plaint dated 18/11/2021 and amended on 16/8/2022, the respondent sued the appellant in **Githongo SPMC E & L Case No. 2 of 2021** seeking: (i) a permanent injunction restraining the appellant against entering onto, putting structures on, cultivating, planting on, harvesting or interfering with land parcel numbers Kiamuri "A"/3121 and Kiamuri "A"/3122; (ii) an order decreeing eviction/removal of any structures on the suit land; (iii) general damages for trespass; (iv) mesne profits at the rate of Kshs 50,000 per annum; and (v) costs of the suit and interest.
- 3.** The case of the respondent was that, he was the registered proprietor of the two parcels of land and he had been enjoying quiet possession and occupation of the parcels. On 15/7/2020, 30/10/2021 and 11/11/2021, the appellant trespassed on the two parcels and committed acts of waste on them. He itemized various particulars of trespass, adding that the appellant had forcefully remained on the suit land and had denied him access and user of the suit land, thereby occasioning to him loss at the rate of Kshs 50,000 per annum.
- 4.** The appellant filed a statement of defence dated 16/12/2023, in which he contested the respondent's claim and averred

that he had been in open, quiet and notorious possession of the two parcels of land since the year 2002. He added that **Githongo SPMC Criminal Case No. E075/2020**, in which he was the accused person and the respondent was a complainant, had been determined in his favour and that the trial court in the said criminal case had held that he was the owner of the two parcels. The appellant contended that there was no way he could have trespassed on his own property.

5. The appellant averred that he purchased the suit land in 2002 and had been in quiet possession of the land since then. He termed as fraudulent, the alleged purchase of the suit land by the respondent in 2019, adding that the registration of the respondent as proprietor of the two parcels was “marred by fraud to avoid” his “claim by adverse possession having purchased” the suit land in the year 2000 [sic]”. He itemized various particulars of fraud. He urged the court to dismiss the respondent’s suit with costs.
6. During trial, the respondent testified as **PW1** and led evidence by three others witnesses. The appellant testified as **DW1** and, similarly, led evidence by three other witnesses. Upon concluding trial and upon receiving submissions, the trial court rendered the impugned judgement in which it reached a finding that the appellant’s action of entering onto and occupying the suit land was unlawful, illegal and amounted to trespass. The trial court further found that the respondent had proved that he was entitled to damages at the rate of Kshs 50,000 per annum from 15/7/2020.

7. The trial court entered judgment in favour of the respondent in the following verbatim terms:

- (i) An order of permanent injunction restraining the defendant, his agents, servants or anyone acting on his behalf from entering into, putting up any structures, cultivating, planting, harvesting or in any other manner howsoever interfering with land parcel numbers KIAMURI "A"/3121 and KIAMURI "A"/3122.**
- (ii) An order of eviction/removal of any structures on the suit land is issued and shall be executed subject to compliance with Sections to 152A to 152H of the Land Act 280 Laws of Kenya.**
- (iii) General damages for trespass Kshs 150,000.**
- (iv) Mesne profits at the rate of Kshs 50,000 per annum starting from 15th July, 2020 till the date the trespasser is evicted.**
- (v) Costs of the suit and interests at 14% from the date of filing the suit till payment in full.**

### **Appeal**

8. Aggrieved by the findings and decree of the trial court, the appellant brought this appeal, advancing the following five (5) grounds of appeal;

- 1. That the Learned Senior Principal Magistrate erred in law and in facts in ignoring and or misinterpreting the appellant's evidence on the fraudulent and illegal subdivision and registration of L.R No. Kiamuri "A"/1887 resulting to L.R No. Kiamuri "A"/3121 and L.R No. Klamuri "A"/3122.**

2. *That the Learned Senior Principal Magistrate erred in law and in facts by disregarding the appellant's claim that he was entitled to the suit property by operation of law of adverse possession and thus was led by extraneous matters to arrive to a wrong decision.*
3. *That the Learned Senior Principal Magistrate erred in law and facts in rejecting the appellant's evidence which was a good basis to rectify the register to reflect the appellant's as the proprietor of L.R No. Kiamuri "A"/3121 and L.R No. Kiamuri "A"/3122.*
4. *That the Learned Senior Principal Magistrate erred in law and in facts in failing to find that the respondent acted without any lawful justification and unconstitutionally in interfering with the appellant's occupation of the suit land.*
5. *That the Learned Chief Magistrate's judgement and decree were against the weight of evidence tendered and the law.*

#### **Appellant's Submissions**

9. The appellant filed written submissions dated 30/5/2025 through **M/s Gikunda Anampiu & Co Advocates**. Counsel submitted that, in his evidence, the appellant testified that in 2002 he bought two acres from one **Duncan Kagwaru** and one **Douglas**, which were to be excised from parcel number **Kiamuri "A"/1887**. Counsel added that the appellant's evidence was corroborated by his two witnesses [sic]. Counsel argued that the respondent illegally subdivided parcel number **Kiamuri "A"/1887** into parcel numbers **Kiamuri "A"/3121 and 3122** and illegally caused them to be

registered in his name instead of transferring the two acres to the appellant.

- 10.** Making reference to the parcel register, counsel submitted that parcel number **Kiamuri "A"/1887** originally belonged to one **Kagwaru Kairu** from whom the appellant purchased the 2 acres. Counsel added that the arraignment and prosecution of the appellant was a bid "to sanitize his ownership, occupation and development of the suit land" but it failed. Counsel argued that the trial court should have considered the evidence of the appellant and should have concluded that there was fraud orchestrated by the respondent in acquiring title to the suit land.
- 11.** Counsel for the appellant faulted the trial court for failing to find that the appellant had acquired ownership of the suit land through adverse possession, adding that the appellant had been in quiet and peaceful occupation of the suit land for a period of over 12 years. Citing case law, counsel argued that the appellant proved crystallization of his title under the doctrine of adverse possession.
- 12.** Counsel faulted the trial court for not accepting the appellant's evidence as sufficient to warrant a rectification of the land register under **Section 80** of the **Land Registration Act**. Citing **Section 26** of the Land Registration Act, counsel argued that the law protects innocent proprietors whose properties are fraudulently registered in the names of other people. Counsel argued that the sub division of the original parcel to create the two parcels and the registration of the two parcels in the name of the respondent was fraudulent.

- 13.** Lastly, counsel for the appellant submitted that, throughout his evidence, the appellant was crystal clear on how he acquired the suit land and how he had developed the suit land. Counsel faulted the trial court for ignoring the appellant's evidence.

### **Respondent's Submissions**

- 14.** The respondent opposed the appeal through written submissions dated 7/7/2025, filed by **M/s Mithega & Kariuki Advocates**. Counsel for the respondent identified the following as the five issues that fell for determination in the appeal: (i) Whether the appeal was proper; (ii) Whether the respondent proved his claim of the alleged illegal subdivisions of land parcel number Kiamuri 'A'/1887; (iii) Whether the appellant proved his claim of adverse possession; (iv) Whether the respondent proved his claim of trespass; and (v) Costs of the appeal.
- 15.** On the competency of the appeal, counsel submitted that the memorandum of appeal did not bear any prayer sought by the appellant. Counsel invited the court to find that the appeal was unmerited on the above ground. Counsel argued that in the absence of any prayer, there was no basis for interfering with the judgment of the trial court.
- 16.** On whether the respondent proved his claim, counsel submitted that the appellant failed to demonstrate that parcel number 1887 was illegally subdivided into parcel numbers 3121 and 3122. Counsel argued that the respondent produced an extract of the parcel register which indicated that **Duncan Mwebia Kagwaru** was the first registered owner of

the suit land and that the suit land was subdivided on 7/2/2020 into five parcels, 3121 to 3125.

- 17.** Counsel argued that **Duncan Mwebia Kagwaru** testified as **PW2** and confirmed that the suit parcels were not created from land parcel number Kiamuri “A”/1887. Counsel contended that the appellant produced the green card for parcel number **Kiamuri ‘A’/1887**, which demonstrated that the suit land was subdivided on 10/3/2020 and the resultant subdivision titles ran from 3100 to 3104. Counsel submitted that from the appellant’s evidence and from defence exhibit 1, it was clear that the appellant’s allegation that land parcel number **Kiamuri “A”/1887** was subdivided to create the suit parcels was untrue and contrary to the weight of evidence adduced.
- 18.** On whether the appellant proved his claim relating to adverse possession, counsel argued that the appellant failed to properly plead and prove the claim of adverse possession. Counsel contended that the allegation that the appellant bought the suit land from the late Kagwaru Kairu was false because Kiamuri “A”/1887 was a different parcel from the suit parcels and from their parent parcel, Kiamuri “A”/1797. Counsel argued that the suit parcels were not created out of parcel number Kiamuri “A”/1887.
- 19.** Counsel submitted that it was not clear whether the appellant bought 2 acres as he stated or 1 acre or half an acre as claimed in the letter dated 18/9/2019. Counsel argued that it was not clear whether the alleged purchase by the appellant took place in 2002, as him and his witnesses alleged or in

1995 as indicated in the letter dated 18/9/2019. Counsel added that, the appellant alleged that he bought land from the late Kagwaru Kairu in 2002, adding that the appellant was bound by the framework in **Section 3 (a) and (b)** of the Law of Contract Act, which was not complied with since there was no written contract.

- 20.** On whether the respondent proved his claim of trespass, counsel submitted that the respondent proved that he was the owner of parcel numbers **Kiamuri 'A'/3121 and 3122**, having purchased them from **Duncan Mwebia Kagwaru** [who was the owner of the parent parcel, **Kiamuri A'/1791**] vide sale agreements dated 8/7/2019 and 24/2/2020. Counsel added that the process leading to the issuance of the title deeds to the two parcels was above board, adding that the requisite procedure was followed. Counsel contended that the title deeds to the suit parcels were prima facie proof that the respondent was the legal owner of the suit parcels. Counsel relied on **Sections 24(a) and 26** of the **Land Registration Act 2012**.
- 21.** Counsel contended that there was no evidence challenging the respondent's title hence he was the absolute and indefeasible owner of the two parcels and he was entitled to enjoy the rights of ownership to the exclusion of all others. Counsel relied on the case of **Mohamed Riaz Shoukat & another v Yasin Abubakar Argwings Kodhek & 3 Others (2017) eKLR**. Counsel argued that the appellant trespassed on the respondent's land on diverse dates and had since refused to vacate the suit parcels.

## **Analysis and Determination**

- 22.** The court has read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions in the appeal. The court has also considered the relevant legal frameworks and jurisprudence. The following are the key issues that fall for determination in the appeal: (i) Whether failure to plead the relief sought in the memorandum of appeal is fatal to the appeal; (ii) Whether the appellant proved fraud in the registration of the respondent as proprietor of parcel numbers Kiamuri "A"/3121 and 3122; (iii) Whether the appellant proved the defence of adverse possession; (iv) Whether the respondent proved trespass by the appellant on parcel numbers Kiamuri "A"/3121 and 3122; (v) What order should be made with regard to costs of the appeal.
- 23.** Is failure to plead the relief sought in this appeal fatal to the appeal? This appeal was initiated through a memorandum of appeal dated 21/6/2024, filed by **M/s Gikunda Anampiu & Co Advocates**. The court has carefully read and considered the memorandum of appeal. In the opening part of the memorandum of appeal, the appellant stated as follows:
- "THE APPELLANT COSMAS MBAE having been aggrieved and dissatisfied by the Judgment and Decree of the Senior Principal Magistrate's Court at Githongo (Hon. T. A. Sitati -SPM) dated and delivered on 31st May, 2024 in GITHONGO ELC NO. 2 OF 2021 prefer this appeal in this court and set the following grounds of appeal."***
- 24.** What follows the above text are the five (5) grounds of appeal. After the five grounds of appeal there is the date and

the signature of the advocate. The memorandum of appeal does not contain the relief(s) which the appellant seeks from this court. Put differently, there are no prayers in the memorandum of appeal.

25. The respondent urged this court to dismiss the appeal for lack of merit because the memorandum of appeal does not bear the relief(s) which the appellant seeks from this court. The appellant filed written submissions but did not address the issue. The court has considered the issue.
26. A memorandum of appeal is a pleading in the appellate court. The two essential elements of a pleading are: (i) clarity; and (ii) specificity. One of the primary purposes of a pleading is to provide the opposing party with clear notice of the claim made and the relief sought by the claimant. A pleading that does not contain the relief sought prejudices the respondent because the respondent is not fully informed of the case that he is facing.
27. Not too long ago, the **Supreme Court of Kenya** outlined the following law on the centrality of pleadings in Kenya's civil legal system in ***Raila Amollo Odinga & another v IEBC & 2 others (2017) eKLR:***  
***“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to***

***be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings.”***

**28.** In ***David Sironga Ole Tukai v Francis Arap Muge & 2 others [2014] eKLR***, the court stated as follows:

***“It is well established in our jurisdiction that the court will not grant a remedy which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleading, each party is left to formulate its own case in its own way.”***

**29.** In ***Mithamo & another v Mithamo [2024] KECA 1864 (KLR)*** the Court of Appeal stated as follows:

***“We take the view that parties should specifically state their claim by properly pleading the facts relied upon and the relief sought, as the pleadings are the primary documents that guide the court and the parties concerning the claim and the contesting positions of the parties.”***

**30.** In the present appeal, the pleading [memorandum of appeal] on which the appeal is anchored does not have any relief. The court does not know what it is that is sought in the appeal. The court has no jurisdiction to grant a relief that has not been sought in the appeal; meaning that at the end of the exercise of evaluating evidence in this appeal, the court will

not grant any relief because none was sought. Were the court to consider substantive issues in the appeal, it will be an exercise in futility. Consequently, the court finds that failure to plead any relief in the memorandum of appeal renders the appeal fatally defective and incompetent.

- 31.** The result is that the appeal stands to be struck out in limine without venturing to consider the other substantive issues in the appeal or to re-evaluate evidence in exercise of the function of a first appellate court. In tandem with the principle in Section 27 of the Civil Procedure Act, the appellant shall bear costs of the appeal.

**DATED, SIGNED AND DELIVERED AT MERU THIS 7TH DAY OF OCTOBER, 2025**

**B M EBOSO [MR]**

**ELC JUDGE**