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Roba v Boru (Environment and Land Appeal E007 of 2025) [2025] KEELC 6826 (KLR) (9 October 2025) (Judgment)

Neutral citation: [2025] KEELC 6826 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E007 OF 2025

JO MBOYA, J

OCTOBER 9, 2025

BETWEEN

HUSSEIN GOLICHA ROBA .... APPELLANT

AND

MOHAMMED BIDU BORU .... RESPONDENT

(Being an appeal against the entire Judgment and decree of Hon. Chief Magistrate L. Mutai delivered on 31st January 2025 and in the Chief Magistrate's court at Isiolo in ELC case No. 28 of 2019)

JUDGMENT

1. The Respondent herein [who was the Plaintiff in the subordinate court] approached the court vide Plaint dated 11th October 2019; and wherein the Respondent sought various reliefs. The reliefs sought at the foot of the Plaint were as hereunder;

    a. A permanent order of injunction restraining the defendant, whether by himself, his agents and or any other person working under his instructions from entering, approached the barbed wire fence and or in any other way interfering with the plaintiff's proprietary rights over the plot known as plot No. C/1836 situated at Chechelesi area of Isiolo.

    b. Costs and interests of the suit.

    c. Any other better relief the Hon. Court may deem fit and just to grant.

2. The Appellant [who was the Defendant in the subordinate court] duly entered an appearance and thereafter filed a statement of defence dated 2nd November 2019; and wherein the appellant denied the claims on behalf of the respondent. Furthermore, the appellant contended that the property which is being claimed by the respondent, falls within plot No. 906 belonging to the appellant. In addition, the appellant contended that the respondent's claim herein was misconceived and thus legally untenable.

3. The suit in the subordinate court was heard and disposed of vide judgment delivered on 31st January 2025. The trial court found and held that the respondent had established/proved his claim on a balance of probabilities. To this end, the trial court allowed the claim and granted inter alia an order of permanent injunction against the appellant.

4. It is the said judgment and the consequential decree which has aggrieved the appellant. The appellant has therefore approached this court vide memorandum of appeal dated 27th February 2025.

5. The Memorandum of Appeal has highlighted the following grounds;

   i. That the learned magistrate erred in law in finding against the weight of evidence adduced that the respondent proved his case on the balance of probability.

   ii. That the learned magistrate erred in law and fact by finding the expert opinion and findings were credible despite clear contradictions in his evidence and report on the subject matter.

   iii. That the learned magistrate erred in law and fact by failing to consider the respondent had not adduced any evidence to support his claims of balloting of the suit property or his ownership.

   iv. That the learned magistrate erred in law by failing to consider the fact that the appellant is the legal bona-fide owner in occupation and possession of plot NO. Chechelesi/906.

   v. That the learned magistrate erred in law and fact by failing to consider the testimonies of the appellant and his witness to wit DW 2 presented before the Honourable court.

   vi. That the learned magistrate so misdirected herself on matters of law and fact as to occasion a miscarriage of justice against the appellant.

6. The appeal beforehand came up for directions on 3rd July 2025; whereupon the advocate[s] for the parties confirmed that the record of appeal had been duly filed. Furthermore, it was confirmed that the record of appeal was complete. In addition, the advocate[s] for the parties sought directions to canvass and dispose off the appeal by way of written submissions.

7. Flowing from the foregoing, the court proceeded to and issued directions. The directions included the disposal of the appeal by way of written submissions. Moreover, the court also circumscribed the timelines for the filing and exchange of written submissions.

8. The appellant filed written submissions dated 5th August 2025; and wherein the appellant has highlighted three [3] key issues for consideration. The issues highlighted by the appellant are, namely; whether the respondent tendered and produced credible evidence to prove ownership of the suit property or otherwise; whether the learned trial magistrate properly appraised the expert opinion/ evidence and thereafter arrived at the correct conclusion; and whether the appellant proved his title to or ownership of plot No. 906 or otherwise.

9. Regarding the first issue, learned counsel for the appellant has submitted that the respondent herein failed to tender and or produce any plausible, cogent, concrete or credible evidence to demonstrate that same was duly allocated plot No. C/1836. In addition, it was submitted that the respondent did not produce any evidence of allotment of the suit property or at all. Moreover, learned counsel submitted that the letter dated [sic] 18th May 2005, which the respondent had sought to rely on, as proof of allotment, was neither produced nor tendered before the court.

10. Additionally, learned counsel for the appellant has submitted that the learned trial magistrate referenced and relied on the letter of allotment/balloting dated [sic] 18th May 2005, yet the said document was merely marked for identification. To this end, learned counsel has posited that the

reliance on the said document constitutes a grave misdirection on the part of the learned trial magistrate.

11. On the other hand, it has also been contended that the respondent himself conceded that same did not have any document to prove ownership of the suit property. Nevertheless, learned counsel for the appellant has submitted that despite the explicit admission by the respondent, the learned trial magistrate still arrived at a contrary position.

12. Simply put, it was contended that the finding and holding that the respondent had established ownership of the suit property was arrived at in vacuum.

13. Secondly, learned counsel for the appellant has submitted that the learned trial magistrate adopted and relied on the evidence of the county physical planner [PW 3] without taking into account the material contradictions obtaining in the evidence of the said witness vis-à-vis the evidence of the respondent. In particular, it was submitted that the observations by the county physical planner contradicted the evidence of the appellant.

14. Thirdly, learned counsel for the appellant has submitted that the learned trial magistrate failed to properly evaluate and appreciate the totality of the evidence that was tendered by the appellant. Moreover, it was submitted that the learned trial magistrate adopted a slanted and skewed approach and thus misapprehended the import of the documents tendered by the appellant.

15. Furthermore, learned counsel for the appellant has submitted that the documents that were tendered by and on behalf of the appellant clearly proved and demonstrated that the appellant purchased the suit property and same was thereafter successfully transferred to and registered in his [appellant's] name.

16. Premised on the foregoing, learned counsel for the appellant has submitted that the appeal beforehand is meritorious and thus same ought to be allowed. Instructively, learned counsel for the appellant has invited the court to allow the appeal and to set aside the judgment and the consequential decree of the subordinate court.

17. The respondent filed written submissions dated 8th September 2025; and wherein the respondent has highlighted two [2] issues, namely; whether or not the respondent proved his case on a balance of probabilities, and who pays the costs of this appeal.

18. Regarding the first issue, learned counsel for the respondent has submitted that the respondent herein tendered and produced plausible and concrete evidence demonstrating balloting, allotment, and occupation of the suit property. In particular, learned counsel submitted that other than being allotted the suit property, evidence abounds that the respondent duly entered upon and took possession of the suit property. Moreover, it was submitted that the occupation of the suit property by the respondent was confirmed vide the existence of a semi-permanent structure sitting on the suit property.

19. It was the further submissions by learned counsel for the respondent that, unlike the respondent, the appellant herein did not tender and or produce any credible document to underpin his claim to the suit property. Furthermore, it was submitted that the advisory plan number ISL/117/2018/114; which was tendered by the appellant, was neither approved nor certified. In this regard, it was posited that the advisory plan, which underpins the appellant's claim, is incomplete and thus invalid.

20. Additionally, learned counsel for the respondent has also submitted that the findings and conclusions of the learned trial magistrate, namely; that the respondent had proved his claim to the suit property, is also buttressed by the witness who came from the County Government of Isiolo. Moreover, learned counsel for the respondent has referenced the report filed by the county physical planning officer- Isiolo County.

21. Based on the foregoing, learned counsel for the respondent has maintained that the impugned judgment was arrived at on the basis of clear, concrete and credible evidence tendered on behalf of the respondent. To this end, the court has been invited to dismiss the appeal; and to affirm the judgment of the subordinate court.

22. 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 respondent tendered plausible and concrete evidence in proof of his claim of ownership to the suit property otherwise; and whether the learned trial magistrate correctly appreciated the import and tenor of the documents tendered by the respondent or otherwise.

23. 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 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.

24. 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.

25. 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:

> "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…
>
> 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."

26. Back to the issues which were highlighted elsewhere herein for consideration. I beg to start with the 1st issue, namely; whether the respondent tendered plausible and concrete evidence to vindicate his claim of ownership in respect of the suit property. It is common ground that the burden of proof laid on the respondent. Furthermore, the respondent is the one who approached the court, contending that same is the registered owner of the suit plot. To this end, it was therefore incumbent upon the respondent to place before the court credible and concrete evidence confirming/authenticating ownership.

27. Did the respondent prove ownership of the suit property? The respondent's case was to the effect that same previously owned a plot within the area currently occupied by Isiolo International Airport. Furthermore, the respondent posited that because of the airport, same [respondent] was relocated by the county council of Isiolo and subject to balloting same was allocated the suit property. In addition, the respondent posited that upon balloting same was issued with a document/notification showing allotment of the suit property.

28. The learned trial magistrate reviewed the documentation tendered and produced by the respondent; and came to the conclusion that the respondent had duly proved his case. The question that does arise is whether the conclusion by the learned trial magistrate was based on the evidence tendered or otherwise.

29. To start with, it is the respondent who had testified that same ballotted and was thereafter issued with a letter of allotment arising from the ballot. In this regard, there is no gainsaying that the respondent was therefore obliged to tender and produce inter alia evidence of balloting; evidence of allotment of the suit plot; and evidence of compliance [if at all] with the conditions attendant to the allotment.

30. In the course of his evidence, the respondent referenced several documents inter alia a notification of resettlement of those affected by the expansion of Isiolo Airstrip. For good measure, the notification was marked as MFI 2. Nevertheless, it is apparent from the record that the said document was never produced. In this regard, the document in question remained marked for identification and thus could not be deployed/relied upon in determining whether the respondent balloted; or was allocated the suit plot.

31. Notwithstanding the fact that the said document was never tendered and or produced as an exhibit, the learned chief magistrate referenced same and relied on the document in her judgment. In fact, it is the said document which the learned chief magistrate utilized in finding and holding that the respondent had proved his case. Sadly, the reliance on the said document constitutes a grave error and misdirection in the eyes of the law.

32. I hasten to state that a court of law, the learned chief magistrate not excepted, cannot reference and base judgment on a document which has not been tendered and admitted as an exhibit. Such a document does not form part of the record of the court and thus does not constitute evidence for consideration. For good measure, what constitutes evidence for purposes of consideration by the court is underlined by the provisions of section 3 of the *Evidence Act*.

33. The foregoing position, namely; that a document marked for identification cannot be referenced in the making of a judgment, was expounded by the Court of Appeal in the case of Kenneth Nyaga Mwige vs Austin Kiguta (2015) eKLR.

34. For coherence, the court stated thus;

> 18. The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be

confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record.

19. The marking of a document is only for purposes of identification and is not proof of the contents of the document. The reason for marking is that while reading the record, the parties and the court should be able to identify and know which was the document before the witness. The marking of a document for identification has no relation to its proof; a document is not proved merely because it has been marked for identification.

20. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit and lay foundation for its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to have the document produced as an exhibit and be part of the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence and not formally produced and proved, the document would only be hearsay, untested and an unauthenticated account.

21. In Des Raj Sharma -v- Reginam (1953) 19 EACA 310, it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of Michael Hausa -v- The State (1994) 7-8 SCNJ 144, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.

22. Guided by the decisions cited above, a document marked for identification only becomes part of the evidence on record when formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be said to be accepting admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it is of very little, if any, evidential value.

35. Other than the letter dated 24th May 2005,[which references balloting on the 18th day of May, 2005] which the learned chief magistrate invoked and deployed in finding that the respondent had proved his case, it is also worthy to recall that the learned chief magistrate also referenced the report dated 23rd October 2024. The said report had been prepared by the county physical planner who thereafter testified as PW 3. Nevertheless, what is apparent from the record of the court is that though the report in question had been filed before the court and was referenced by the physical planner [PW 3], the report in question was neither tendered nor produced before the court.

36. Yet again, it is important to highlight that the invocation and reliance on the said document [which had merely been marked for identification] constitute[s] another misdirection.

37. It is also important to underscore that the learned chief magistrate was equally obliged to review the evidence and to evaluate same for purposes of ascertaining consistency, coherence and credibility. However, in respect of the instant matter, evidence abound that the respondent did not tender any document showing ownership.

38. For ease of reference, it suffices to reproduce the testimony of the respondent [PW 1] when under cross-examination. Same stated thus;

> " I have no document to prove that I owned the suitland.

39. Despite the foregoing concession, the learned chief magistrate still found and held that the respondent had proved his case on a balance of probabilities. I am afraid that the concession under reference negated the respondent's claim of ownership.

40. Additionally, I wish to highlight that the report dated 23rd October 2024 which was relied upon by the learned chief magistrate also contained contradictory evidence. Instructively, had the learned chief magistrate internalized the report [which was never produced] same would have come to the contrary position.

41. Other than the foregoing, it is not lost on me that the respondent had also posited that same is the registered owner of the suit property. However, there is no gainsaying that there is no document speaking to and or confirming ownership that was tendered. Suffice it to state that a part development plan by and of itself cannot be stated to constitute an ownership document.

42. Notably, a part development plan [PDP] is a planning tool and its significance lies in confirmation that the plot/land which is the subject of the intended alienation is available. Moreover, there is no gainsaying that a part development plan does not contain the name of the intended allottee.

43. Other than the part development plan, the other documents which were tendered by the respondent were the demand for rates [payment requests] which were however mischaracterized by the learned chief magistrate as receipts for payment of rates. The said payment requests [which essentially are invoices] do not confirm ownership. Quite clearly, the learned chief magistrate misapprehended the import of the said document[s].

44. From the foregoing analysis, it is common ground that the respondent who was chargeable with the burden of proof, failed to discharge the burden. Pertinently, the respondent was called upon to place before the trial court plausible, concrete and compelling evidence. It is only then that the appellant herein would have been called upon to offer rebuttal evidence. [See the holding in Mucheru vs National Bank of Kenya Ltd (2019) eKLR; Daniel Toroitich Arap Moi vs Mwangi Stephen Murithi (2014) eKLR, Agnes Nyambura Munga vs Lita Violet Shepad [2018] eKLR and Dr. Samson Gwer & 5 others vs KEMRI (2020) eKLR].

45. Turning to the second issue, namely; whether the learned chief magistrate apprehended the import and tenor of the documents tendered before her. In this respect, I beg to re-visit the document dated 24th May 2005; and which was referenced by the learned chief magistrate. Other than the fact that the document dated 24th May 2005 [which references on balloting on 18th May 2005] was not produced, it is apparent that the copy that was filed by the respondent did not contain the signature page. I beg to state that I have reviewed both the document in the body of the record of appeal and the one that

was filed alongside the plaint. The two sets do not have the signature page. In this regard, the question is whether such a document [for whatever its worth] can be relied upon.

46. It is important to point out that any document, whether same is a letter, memorandum and or a report, must be signed by the author. It is the signature affixed to such a document that gives the document ownership and validity. Absent execution/signature, such a document is invalid in the eyes of the law; and same carries zero weight.

47. To my mind, the learned trial magistrate did not properly address her judicial mind to the import and tenor of the various documents. For good measure, had the learned chief magistrate paid keen attention to the documents under reference, same would not have returned the finding at the foot of the impugned judgment.

48. In my humble, albeit considered view, the Judgment by the learned chief magistrate is coloured with mis-directions; errors; and misapprehensions. The net effect is that the impugned judgment is not legally tenable. For good measure, where a court proceeds on the basis of misapprehension; such misapprehension[s] invalidates the Judgment. [See China Wu Yi Ltd vs Edaman Property Ltd (2021) Eklr; Jabane versus Olenja [1986]eklr]

Final Disposition.

49. Having analyzed the issues that were highlighted in the body of the Judgment, it must have become evident that the impugned Judgment is fraught with errors of commission and omission. Moreover, the Judgment in question reeks of grave misdirection[s] and thus same lends itself to the intervention of this court.

50. In the end, and as a result of the reasons adverted to herein before, the final orders that commend themselves to the court are as hereunder;

    i. The Appeal be and is hereby allowed.

    ii. The Judgment of the learned chief magistrate dated 31st January 2025 and the consequential decree arising therefrom be and is hereby set aside.

    iii. In lieu thereof, the respondents' suit vide Plaint dated 11th October 2019; be and is hereby dismissed.

    iv. Costs of the Appeal be and are hereby awarded to the appellant.

    v. Costs in the subordinate court are also awarded to the Appellant.

    vi. Costs herein shall be agreed upon and in default same shall be taxed/assessed in the conventional manner.

51. It is so ordered.

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

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

JUDGE

In the presence of:

Hussein -Court Assistance

Ms. Gikundi for the Respondent.

Mr. Mwirigi Mbaya for the appellant.