**Kosiom v Matura (Environment and Land Appeal E005 of 2024)**
**[2025] KEELC 5698 (KLR) (31 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5698 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND APPEAL E005 OF 2024**

**LC KOMINGOI, J**

**JULY 31, 2025**

**BETWEEN**

**BEATRICE TUMUTI KOSIOM ..... APPELLANT**

**AND**

**SOLOMON KUNTAI OLE MATURA ..... RESPONDENT**

***(Being an Appeal from the Judgement of Hon. P. Achieng' (SPM) delivered on 15th February 2024 in Ngong' ELC Case No. E069 of 2021; Solomon Kuntai Ole Matura Vs. Beatrice Kosiom Tumuti)***

## JUDGMENT

1. In her Judgement dated 15th February 2024, Hon. P. Achieng' SPM found that the Plaintiff (the Respondent herein) had proved his case on a balance of probabilities and dismissed the Defendant's counterclaim.

2. Aggrieved by the said decision, the Appellant filed the Memorandum of Appeal dated 22nd February 2024 against the entire judgement on the grounds that:

    1. The Learned Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence before it and arriving at the decision unsupported by and or manifestly against the weight of the evidence and the law.

    2. The Learned Magistrate erred in law and in fact in disregarding the totality of the Appellant's pleadings, affidavit, submissions, cited authorities and as a result, arrived at a materially unsupported finding of fact and law.

    3. The Learned Magistrate erred in law and in fact by ignoring the crucial evidence of a forensic document examiner and went further to discredit the same when no contrary evidence was tendered to discredit the same.

4. The Learned Magistrate erred in law and in fact by relying on sale agreements and documents which had been discredited and confirmed as fraud by a qualified forensic document examiner.

5. The learned Magistrate erred in law and in fact by finding that there was consideration of Kshs 99,000/- paid for the subject suit land whereas there was glaring evidence to the contrary.

6. The Learned Magistrate erred in law and in fact in relying on unsubstantiated and contradicting evidence offered by the respondent and his witnesses.

7. The Learned Magistrate erred in law and in fact in failing to find that there was not sufficient cause brought forth by the Respondent to warrant the court to exercise its discretion in his favour or at all.

8. The Learned Magistrate erred in law and in fact in failing to scrutinize/ evaluate the evidence tendered in support of the Appellants case and misapprehended the facts before her by failing to correctly relate them to arrive at a just judgment

9. The Learned Magistrate erred in law and in fact in failing to appreciate that the burden of proof squarely lay on the respondent.

3. The Appellant seeks that the Appeal be allowed with costs and the Judgement and decree issued at the Lower Court be set aside.

4. This Appeal was canvassed by way of written submissions.

**Submissions of the Appellant**

5. Counsel submitted as per Section 78 of the *Civil Procedure Act*, the role of the Appellate court was to re-evaluate, re-assess and re-analyse the case and draw its own conclusions as held in Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123 and Ephantus Mwangi & Another Vs. Duncan Wambugu [1984] eKLR.

6. On whether there was a legally enforceable sale agreement between the Appellant and the Respondent, counsel submitted that there was no valid sale agreement between herself and the respondent for the sale of 9 acres of land. This is because the alleged sale agreement was done without her knowledge and her signature was forged, which amounts to a vitiating factor in contract. Additionally, there was no proof of the claim by the Respondent that the whole purchase price was paid. As such, the requirements for a valid sale agreement as elucidated in Section 3(3) *Law of Contract Act* and Section 38 *Land Act* were not met. Counsel submitted that the tenets of offer, acceptance and consideration as outlined in William Muthee Muthami versus Bank of Baroda (2014) eKLR were not present. Counsel also argued that the Respondent moved court to claim breach of contract for an agreement allegedly entered in 2001 which was 20 years later. This was barred by the statute of limitation both under an action for breach of contract and action for recovery of land. Therefore, the trial court erred in finding that there was a valid contract.

7. On whether the Respondent has trespassed on the Appellant's Parcel of Land, counsel submitted that since the appellant and the Respondent were good friends and village mates, she showed the Respondent a small portion of less than an acre where the Respondent could use to dump his building materials to be used once the relevant agreement has been written, signed and payments made. But, the Respondent embarked on constructing a house without the express authority of the appellant and refused to remove his illegal structures from the Appellant's parcel of land which was an act of trespass as defined under Section 3 (1) of the *Trespass Act*. And that once trespass had been established, there was no need to proof damages for the court to award general damages as held in Duncan Nderitu

Ndegwa v. KP& LC Limited & Another (2013) eKLR and Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR.

8. Therefore, this Appeal is merited and ought to be allowed as prayed.

**Submissions of the Respondent**

9. Counsel for the Respondent submitted that there was a written sale agreement dated 1st May 2001, where the Appellant agreed to sell 9 acres of land to the Respondent from her share of the mother parcel Kajiado/Ewaso-Kedong/1679, which she co-owned with Suruni Siampala. The Appellant was responsible for initiating the subdivision, securing the Land Control Board consent, and transferring the title for the 9 acres to the Respondent. The Respondent paid the full purchase price of Kshs. 90,000 and was to pay an additional Kshs. 9,000 for survey expenses. The Appellant handed over a copy of the title deed and gave the Respondent possession of the 9 acres, where the Respondent constructed his permanent matrimonial home and has remained in occupation since.

10. In 2012, the mother parcel was formally subdivided, with the Appellant obtaining 12.11 hectares under parcel Kajiado/Ewaso-Kedong/3928, from which the Respondent's nine acres would be hived off. However, after the subdivision, the Appellant became evasive, refusing to effect the transfer. Instead, she indicated that she would only transfer three acres and subsequently trespassed onto the land, beginning her own construction on the parcel.

11. The Respondent, supported by witnesses, produced the sale agreements, acknowledgements of payment, the mother title deed, and photographs of his home as evidence in the lower court. The Appellant, in her defence, produced a document examiner's report that only questioned her signature but did not evaluate those of the witnesses. Notably, the expert conceded that signatures may vary for various reasons.

12. Counsel submitted that it was undisputed that the Respondent has occupied and developed the land since 2001. The Appellant presented no evidence or witnesses to contest the Respondent's occupation or claim of ownership, nor did she file any trespass claim from 2001 until the Respondent sued in 2021. The Respondent asserts that the Appellant is acting dishonestly, driven by a desire to recover land she sold cheaply in 2001, given the current land value appreciation. As such, the Appellant was acting in bad faith, and the Appeal ought to be dismissed with costs.

**Analysis and Determination**

13. The Appellant has lodged this Appeal citing Nine (9) grounds of Appeal that can be compressed as follows:

    i. Whether the Learned Trial Magistrate erred in law and in fact by finding that there was consideration of Kshs.99,000/= paid for the subject suit land whereas there was glaring evidence to the contrary.

    ii. Whether the Learned Magistrate erred in law and in fact by ignoring the crucial evidence of a forensic document examiner and went further to discredit the same when no contrary evidence was tendered to discredit the same.

    iii. Whether the Appeal is merited and if so who should bear costs.

14. This being a first Appeal, the Court must conduct a fresh and independent evaluation of the entire evidence adduced before the trial court while bearing in mind that it did not hear or observe the witnesses. See Ndatho & 7 others v Nkabu & another [2025] KECA 944 (KLR) where it was stated;

> "It is now well-settled law that the first appellate court must re-evaluate the evidence in the trial court, both on points of law and facts, and come up with its own findings and conclusions..."

15. The Respondent filed a Plaint dated 14th December 2021 at the Lower Court claiming that sometime on 1st May 2011, he and the Appellant entered into a sale agreement for the purchase of Nine (9) acres of the Appellant's parcel known as Kajiado/Ewaso Kedong/1679 held jointly by her and Suruni Siampala. The Respondent claims that he paid the purchase price of Kshs. 90,000 and the Appellant was to get the necessary approvals to subdivide parcel; Kajiado/Ewaso Kedong/1679, excise Nine (9) acres thereof and transfer it to him. He claimed that the Appellant gave him full possession of the Nine (9) acres where he put up a home and had been residing thereon.

16. It was the Respondent's case that sometime in the year 2012 the Appellant and the joint owner subdivided Kajiado/Ewaso Kedong/1679 and each got 12.11 hectares with the Appellant's title being Kajiado/Ewaso Kedong/3928. When the Respondent asked that the Nine (9) acres he had purchased be transferred to him, the Appellant became evasive stating that she could only transfer Three (3) acres to him. She went ahead and trespassed on the Nine (9) acres, and started putting up her own construction in total disregard of the sale agreement.

17. He therefore sought a declaration that he was entitled to get Nine (9) acres out of Kajiado/Ewaso Kedong/3928 or any resultant subdivisions and that the Appellant should be ordered to effect the said transfer. He also sought that the Appellant be restrained from interfering with his possession as well as an order of eviction and demolition of any structures she had constructed thereon together with costs.

18. The Appellant in her defence and counterclaim dated 17th January 2022, claimed that the alleged sale agreement was a forgery and was executed fraudulently without her or her husband's knowledge. She also denied that she received payment from the Respondent or that she gave him a copy of the title deed for Kajiado/Ewaso Kedong/1679.

19. She stated that the Respondent had indeed approached them for purchase of Three (3) acres from Kajiado/Ewaso Kedong/1679 but no agreement was executed. It is her case that she showed the Respondent a small portion of less than an acre where he would dump his building materials. Instead, the Respondent began to undertake construction and had refused to vacate or remove the structures. She therefore sought that the Respondent be evicted from her land, mesne profits, general damages for deprivation of use, as well as costs of the suit.

20. To support his case, the Respondent produced sale agreement dated 1st May 2001 which shows that the Appellant had agreed to sell Nine (9) acres out of Kajiado/Ewaso Kedong/1679 for Kshs. 99,000 with Kshs. 9,000 being survey fees. At the time of execution of this agreement, she acknowledged having received Kshs. 60,000 and the remaining Kshs. 30,000 was to be paid later. This agreement bears the names of the parties in this Appeal together with their signatures and is attested by three witnesses. There was an acknowledgement dated 31st July 2001 where the Appellant acknowledged receipt of Kshs. 15,000 from the Respondent. This acknowledgement is signed and witnessed. There is a similar acknowledgment dated 30th August 2001 for another Kshs. 15,000.

21. The Appellant produced a forensic report which showed that the signatures on the sale agreement and acknowledgement were different from her known signatures. The document examiner testifying

as DW1 indicated that it was possible for signatures not to be the same, although there were natural verification characteristics that would be noted.

22. From the foregoing, while the Appellant denied getting into an agreement with the Respondent for the sale of Nine (9) acres of her land, she acknowledged that the Respondent approached her for the sale of Three (3) acres but that no agreement was reached.

23. She went on to state that as good neighbours, she gave the Respondent a small portion of her land where he could pour his construction materials but he went ahead and constructed his house on the property without her consent. According to her defence and testimony, this was sometimes in 2001, which is about 20 years before the suit was filed at the Lower Court.

24. The question is: if indeed the Respondent was occupying the Appellant's property unlawfully for over two decades without her consent or authority, why did the Appellant not take any legal steps to assert her proprietary rights or to evict the alleged trespasser? It is inconceivable that a landowner would stand by, without objection, while an alleged trespasser not only occupies but also develops permanent structures on the land, including establishing a home, without any protest, action for eviction, or claim for trespass. Such prolonged inaction by the Appellant raises serious doubt as to the credibility of her claim and suggests acquiescence or, at the very least, complicity in allowing the Respondent's continued occupation and development of the land.

25. In view of the foregoing, this Court is not persuaded by the Appellant's assertion that the Respondent was a mere trespasser or that no agreement existed between the parties. The Respondent's prolonged, uninterrupted occupation of the suit property, coupled with his permanent developments thereon and the Appellant's inaction over an extended period, negates the claim of trespass. It further lends credence to the existence of a contractual arrangement or some form of mutual understanding between the parties, as alleged by the Respondent.

26. In her judgement, Hon. P. Achieng' SPM found thus;

> " ...although the defendant disputes having entered into the agreement with the Plaintiff, it is inconceivable how she could have allowed the Plaintiff to take possession of a portion of her land which he has constructed a permanent house, without him having paid consideration. At no point did she make a complaint regarding his occupation of the land. The plaintiff's claim that he purchased the land from the Defendant is supported by witnesses..."

27. Even assuming that no formal agreement existed between the parties, this Court would be justified in finding that the Appellant acquiesced to the Respondent's occupation and use of the suit property. Her prolonged inaction, despite the Respondent's continuous possession and permanent developments over an extended period, amounts to implied consent or at the very least, a waiver of her right to object. The Court of Appeal in Yusuf Mohammed Jiwa t/a Jiwa Properties & another v Mwangi & 2 others [2024] KECA 38 (KLR) outlined the doctrine of acquiescence as:

> " Explaining acquiescence in the English case of Duke of Amherst vs. Earl of Leeds 41 ER 886, 888 [1846], the court stated that:
>
> > "A party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence."
> >
> > ...

> "... Doctrine of acquiescence is an equitable doctrine which applies when a party having a right stands by and sees another dealing in a manner inconsistent with that right, while the act is in progress and after violation is completed, which conduct reflects his assent or accord. He cannot afterwards complain..."

28. The Appellant also argued that the Learned Trial Magistrate erred in ignoring crucial evidence by the forensic document examiner and discredited the same when no contrary evidence had been tendered.

29. The Learned Trial Magistrate in her Judgement held as follows regarding the document examiner's report:

> " In regard to the document examiner, he only examined the signature of the defendant and not any other signature. There are witnesses who signed the agreements produced by the Plaintiff, and their signatures were not subjected to examination as well, for a balanced report to be prepared. The court is therefore not persuaded by the evidence of DW1 to find that the defendant did not sign the agreements relating to the transaction, also bearing in mind the burden of proof in civil cases. The defendant's word of mouth that the Plaintiff asked for 3 acres of land and that she never received any payment from the Plaintiff cannot be taken as the truth. I therefore find that the plaintiff and the defendant entered into an agreement for the purchase of 9 acres of land as evidenced in the sale agreement produced."

30. A forensic document examination report is an expert opinion and, while it may aid the court in its determination, it is not binding on the court. The court retains the discretion to accept or reject such expert evidence, wholly or in part, depending on the totality of the evidence presented. The court is entitled to deviate from the expert's findings where it is not satisfied with them. Odunga J. (as he then was) in the case of Bernard Philip Mutiso v Tabitha Mutiso [2022] eKLR held:

> " In Parvin Singh Dhalay vs. Republic [1997] eKLR; [1995-1998] 1 EA 29, it was held that:
>
> > "It is now trite law that while the courts must give proper respect to the opinions of experts, such opinions are not, as it were, binding on the courts and the courts must accept them. Such evidence must be considered along with all other available evidence and if there is proper and cogent basis for rejecting the expert opinion, a court would be perfectly entitled to do so. We will repeat what this Court said in the case of Elizabeth Kamene Ndolo vs. George Matata Ndolo, Civil Appeal No. 128 of 1995. There the Court said with regard to the evidence of experts:-
> >
> > > "The evidence of PW1 and the report of Munga were, we agree, entitled to proper and careful consideration, the evidence being that of experts but as has been repeatedly held the evidence of experts must be considered along with all other available evidence and it is still the duty of the trial court to decide whether or not it believes the expert and give reasons for its decision. A court cannot simply say:- "Because this is the evidence of an expert, I believe it..."

31. I find that the Learned Trial Magistrate had all the rights to deviate from the findings of the forensic document examiner and she did so with valid reasons.

32. From the foregoing, I therefore find that this Appeal is not merited and the same is dismissed with costs to the Respondent.

33. In essence the Judgement dated 15th February 2024 is hereby upheld.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 31ST DAY OF JULY 2025.**

**L.KOMINGOI**

**JUDGE.**

In the Presence of:

Ms. Kirunja for Mr. E.K. Njagi for the Appellant.

Mr. Taliti for the Respondent.

Court Assistant – Mutisya.