Kilonzo v China Wu Yi Company Limited (Environment and Land Appeal E019 of 2022) [2025] KEELC 7351 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7351 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL E019 OF 2022

NA MATHEKA, J

OCTOBER 28, 2025

BETWEEN

PETER MUSAU KILONZO ..... APPELLANT

AND

CHINA WU YI COMPANY LIMITED ..... RESPONDENT

JUDGMENT

1. The Appellant being dissatisfied with the Judgment of the Principal Magistrate at Machakos Honourable M.A. Otindo delivered on 11th May, 2022 in *Machakos CMCC No. 52 of 2018* appeals to this Honourable Court on the following grounds;

    1. The learned trial Magistrate erred in law and in fact by failing to consider the evidence of the Appellant and therefore making a decision that is both illegal and unfair to the Appellant.

    2. The learned trial Magistrate erred in law and fact by disregarding in totality the evidence, submissions and authorities tendered on behalf of the Appellant and therefore arrived at the wrong decision.

    3. The learned trial Magistrate erred in law and fact by making a finding that the Appellant had not proved his claim against the Respondent.

    4. The learned Magistrate erred in law and fact by failing to make a finding that the evidence presented by the Appellant could not sustain the pleaded claim.

    5. The learned Magistrate erred in law and fact by wholly disregarding submissions tendered by the Appellant before arriving at her decision.

    6. The learned Magistrate erred in law and in fact in making out a decision that was extremely harsh to the Appellant without having due regard to intervening factors and the circumstance of the matter before him.

2. It is therefore proposed to ask this Honourable Court to make orders that;

   a. The court does allow the Appeal, set aside the Judgment of trial.

   b. The court do award the Appellant costs of this Appeal and costs in the trial court.

3. This court has considered the evidence and the submissions therein. This is the first appeal, the primary role of the court is to re-evaluate, re-assess and re-analyze the evidence on record and decide as to whether the conclusion reached by the learned magistrate was sound, and give reasons either way. This duty was emphasized by the Court of Appeal in *Mbogo and another v Shah* (1968) EA 93 where it was held that;

> " I think it is well settled that this court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matter on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. It is for the company to satisfy this court that the judge was wrong and this, in my view it has failed to do."

4. In the trial court the Plaintiff/Appellant stated that the suit land is jointly registered in his name alongside his deceased brother as per the official search PEx1. The same was subdivided between the two by an agreement dated 26th December 1991. PW2 the surveyor produced a report dated 7th December 2020. He identified the agreed boundary and stated that out of the dumped rocks dumped on the suit property 46% had been dumped on the side of the Plaintiff's property. The minutes of the village elders on the subdivision were also produced.

5. The Respondent submitted that it is not disputed that the suit property is owned jointly between the Plaintiff and his late brother on a 50/50 basis. That the Defendant was invited to fill the gulley that was dangerous by the co administrators of the co owner of the suit land. That there is no surveyed boundary between the two portions occupied by the brothers. DW1 and DW2 confirmed that they entered into an agreement with the Defendant to fill the gulley on their side of the land and that it is not on the Plaintiff's side. That the land was apportioned by the elders and that the surveyors report is not correct.

   Section 26 of the *Land Registration Act* provides that a certificate of tile is conclusive proof of ownership unless inter alia fraud is proven. The burden of proving that the title of the plaintiffs is not valid lies on the burden as provided by section 107 of the *Evidence Act*;

> " (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

6. It is not disputed that the Plaintiff is the registered joint owner of the suit property PEx1. It is not in dispute that the suit property was subdivided by the elders and the survey report is clear that 46% of the rocks were dumped on the Plaintiff's side of the property without his consent and or approval. The Defendant has not provided any evidence or report to the contrary. I find that the Defendant trespasses onto the Plaintiff's land. Even if the land was not subdivided the Defendants would have had to acquire the consent of both the registered owners and not just the beneficiaries of the Plaintiff's deceased brother.

7. On the issue of trespass, the Court of Appeal was of this opinion in *Jamal Salim v Yusuf Abdulahi Abdi & another* (2018) eKLR and stated that;

> " In the text *Clerk & Lindsell on Torts, Sweet & Maxwell*, 18th Edition, at page 923, trespass to land is defined as follows:- "Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.
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> At page 927 of the same text discusses who may sue for trespass and it states as follows:- "Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner."
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> It is therefore not necessary for one to establish ownership of land to sustain a claim for trespass. It is enough that the person suing is in possession."

8. It has not been disputed that the Defendant dumped rocks on the suit property. The Plaintiff averred that the Defendant has unlawfully encroached on his portion of the suit property defacing and devaluing the same. They also completely destroying trees therein and the total damage was valued at Kshs. 640,000/=. In *Philip Ayaya Aluchio v Crispinus Ngayo* (2014) eKLR the court held that;

> " The defendant has constructed on the plaintiff's land. This in itself is damage and wastage of the plaintiff's land. The plaintiff is entitled to general damages for trespass. The issue which arises is as to what is the measure of such damage?. It has been held that the measure of damages for trespass is the difference in the value of the plaintiff's property immediately before and immediately after the trespass or the cost of restoration, whichever is less. See *Hostler v GreenPark Development Co.* 986 S. W 2d 500 (No. ct App. 1999).
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> The plaintiff herein did not adduce any evidence as to the state of his property before and after the trespass. It therefore becomes difficult to assess general damages for trespass. There was no evidence adduced on the nature of house which the defendant has constructed on the suit land. The court is at a disadvantaged position in reaching at a cost which might be reasonable for restoration of the property to its former state. However, as I have found that the plaintiff is entitled to general damages for trespass, I will award a nominal sum of Kshs. 100,000/= as general damages for trespass. This cost will go towards restoration of the suit land to its former state."

9. Similarly, in this case, the Plaintiff has not adduced evidence as to the status of their suit land before and after the trespass, he is only entitled to general damages for trespass and the court will award a nominal sum of Kshs 150,000/= as damages, bearing in mind it was 46% of the rocks had been dumped on his land. On the prayer for loss of user and value of destroyed tress the same was not proved and will not be awarded. No valuation report was produced to confirm the same. I find that learned trial Magistrate erred in law and in fact in finding that the Plaintiff had not proved his case. I find that the Plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A permanent order of injunction restraining the Defendant whether by his employees and/ agents from dumping stones, erecting structures, remaining and continuing in occupation of the Plaintiffs' portion of the suit property.

2. Vacant possession of the said portion.

3. Kshs. 150,000/= General damages for trespass.

4. Costs of the suit in the Lower Court and this Appeal.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF OCTOBER 2025.

N.A. MATHEKA

JUDGE