Manyara v Mwiti & another (Environment and Land Appeal E001 of 2024) [2025] KEELC 7402 (KLR) (30 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7402 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ENVIRONMENT AND LAND APPEAL E001 OF 2024

JO MBOYA, J

OCTOBER 30, 2025

BETWEEN

JOSEPH KIMATHI MANYARA ..... APPELLANT

AND

GODFREY MWITI ..... 1ST RESPONDENT

TACHE BORU ..... 2ND RESPONDENT

JUDGMENT

1. The subject appeal arises from the Judgment of the learned trial magistrate [Hon. E. Tsimonjero-SRM] delivered on the 4.12.2023 and the consequential decree arising therefrom. The learned trial magistrate found and held that the appellant [who was the plaintiff in the lower court] failed to prove his case to re requisite standard. To this end, the learned magistrate dismissed the appellant's suit with costs to the respondent.

2. It is the said Judgment and the consequential decree which has aggrieved the appellant and thus provoked the subject appeal.

3. The Memorandum of appeal dated 4.1.2024 has highlighted the following grounds:

    a. The Honorable magistrate erred both in law and in fact by misapprehending the evidence on record arriving at a decision that is against the weight of the evidence.

    b. The honorable trial magistrate erred both in law and in fact by failing to find that the appellant had proved his case to the required standard.

    c. The honorable trial magistrate by entering judgment in favor of the respondent, relied upon extraneous factors.

d. The honorable trial magistrate having found as he did that there was a possibility of both parties claiming the same locus in quo ought to in the proper dispensation of justice sought a report from the experts i.e, the county physical planner and all county surveyors.

e. The honorable trial magistrate erred in law by relying upon a report by the dispute resolution committee without calling the makers.

f. That the judgment on record is untenable.

4. The subject appeal came up for directions on the 28.7.2025; whereupon learned counsel for the appellant intimated to the Court that same had filed and served the record of appeal. In addition, learned counsel for the appellant also posited that the record of appeal was complete. In this regard, learned counsel sought for directions as pertains to the hearing and disposal of the appeal. Moreover, counsel proposed to canvass the appeal by way of written submissions.

5. With the concurrence of the learned counsel for the respondent, the court proceeded to and issued directions pertaining to the hearing of the appeal. In particular, the court directed that the appeal be canvassed and disposed of vide written submissions. Furthermore, the court also circumscribed the timelines for filing and exchange of written submissions.

6. The appellant filed written submissions dated 1.9.2025; and wherein same has highlighted three [3] key issues. Firstly, learned counsel for the appellant has submitted that the learned trial magistrate misapprehended the totality of the evidence tendered by and on behalf of the appellant and thereby arrived at an erroneous conclusion. In particular, it was submitted that the learned trial magistrate failed to appreciate that the appellant had placed before the court evidence showing ownership of plot 242 Kambi ya Juu.

7. Secondly, it has been submitted that the learned trial magistrate found and held that the First respondent had proven/established his rights to and in respect of plot 241, yet the first respondent did not demonstrate how plot No 227 mutated into Plot No 241.

8. Thirdly, learned counsel for the appellant has submitted that the learned trial magistrate failed to appreciate that the dispute before the Court could probably be a result of double allocation. In this regard, it has been contended that the learned trial magistrate, therefore, ought to have called for expert evidence to enable same to determine whether the disputed plot was one and the same or otherwise. Nevertheless, it has been submitted that the learned trial magistrate erred in law in not summoning a surveyor.

9. Premised on the foregoing, learned counsel for the appellant has therefore contended that the appeal before hand is merited. To this end, counsel has invited the court to allow the Appeal; set aside the impugned judgment; and to decree that the suit be heard de novo.

10. The Respondent filed written submissions and wherein same has highlighted and canvassed one issue. Learned counsel for the respondent has submitted that the appellant herein failed to tender and adduce credible evidence before the trial court to demonstrate trespass to and encroachment onto plot No 242 Kambi Ya Juu. Moreover, it has been submitted that the appellant bore the burden of proving that the respondent had trespassed onto the suit property. However, it was posited that the appellant failed to discharge the burden in accordance with the law.

11. Furthermore, it has been submitted that the 1st respondent tendered and adduced evidence before the trial court showing that same is the lawful owner of plot No 241 Kambi ya juu. In any event, it was

contended that the appellant's father [now deceased] had a dispute with the 1st respondent and which dispute was resolved by the dispute resolution committee- Isiolo county council.

12. Flowing from the foregoing, learned counsel for the respondent has therefore submitted that the learned trial magistrate correctly appraised, analyzed and evaluated the totality of the evidence on record and thereafter arrived at the correct conclusion. Moreover, it has been submitted that the judgment of the learned trial magistrate accords with the weight of the evidence on record.

13. Having reviewed the record of appeal, the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by/ on behalf of the parties, I come to the conclusion that the determination of the subject appeal turns on one key issue, namely; whether the appellant established and proved his claim before the trial court to the requisite standard or otherwise.

14. Before venturing to address and determine the singular issue which has been isolated for determination in terms of the presiding paragraph, it is imperative to observe that what is before me is a first appeal. To this end, it is incumbent upon me to re-evaluate; re-appraise, review and scrutinize the findings and conclusion arrived at by the trial court and to discern whether the findings accord with the evidence on record or otherwise. Moreover, there is no gainsaying that this court has the mandate to arrive at its own independent conclusion and even to depart from the findings and conclusion of the trial court. [See section 78 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya]

15. Nevertheless, it is instructive to underscore that even though this court is seized of the authority to depart from the findings and conclusion of the trial court, it suffices to state that such departure can only be undertaken where it is proven/established that the conclusions of the trial court are based on no evidence; based on misapprehension of the evidence on record; are perverse to the evidence on record or where it is demonstrably shown that there is an error of principle which vitiates the finding/ conclusion arrived at. Absent proof of the said element, the 1st appellate court is called upon to defer to the factual finding and conclusion of the trial court.

16. The jurisdictional remit of the first appellate court has been the subject of various court decisions. In the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR), the court of appeal stated as hereunder

> '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 circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage [which is denied to the courts of appea]) 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 judgement 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."

17. Back to the issue for determination. It is the appellant who approached the subordinate court, contending that same is the sole, lawful and registered owner of plot known as plot 242 Kambi ya Juu. Furthermore, the appellant contended that despite being the owner of the said plot, the respondent herein had entered upon and trespassed onto the suit plot on 10.6.2019. In addition, the appellant contended that the respondents thereafter forcefully trespassed onto the suit plot and commenced to erect a fence thereon, albeit without lawful authority.

18. Having made the foregoing claim, it was incumbent upon the appellant to tender and adduce plausible, cogent, credible, and concrete evidence to establish ownership of the suit plot as well as trespass thereon. Suffice it to state that the appellant was obligated to prove his claim to ownership of the suit plot.

19. I have reviewed the evidence that was tendered by the appellant as pertains to ownership of the suit plot. It suffices to observe that whereas the appellant may very well be the owner of the suit plot but the critical issue for determination is whether the appellant proved trespass or encroachment by the respondent to warrant the issuance of the orders of permanent injunction.

20. I say that the appellant may be very well be the owner of the suit plot because the 1st respondent and his witnesses conceded that plot No 241 belonging to the 1st respondent boarders the plot of Julius Peter Manyara [now deceased] and who was substituted by the appellant herein. The same position was also reiterated by DW2 and DW3.

21. As pertains to proof of trespass, it was incumbent upon the appellant to call an expert, namely; a surveyor, to demonstrate the extent of the suit plot and prove whether there was encroachment onto the suit plot. Instructively, a surveyor's report would have delineated the ground location of the suit plot vis-à-vis plot No. 241 Kambu ya Juu, which belongs to the 1st respondent. Additionally, the surveyor's report would have established whether or not the owner of plot 241 has trespassed and,[if so], to what extent.

22. The appellant failed to procure and bring forth such crucial evidence. The failure to bring forth the evidence of a surveyor [which would have demonstrated encroachment] was fatal. To this end, I agree with the learned trial magistrate that the appellant did not discharge the burden of proof, namely; the burden of proving trespass/ encroachment onto the suit property.

23. Moreover, there is evidence that the dispute between Julius Peter Manyara [Now deceased] and the 1st respondent had been the subject of determination by the dispute resolution committee-Isiolo county council and wherein it was established that the disputed ground constitutes plot No 241 Kambi ya Juu.

24. The contents of the said report were neither controverted or impeached. To my mind, the contents of the report negate the appellant's claim to the disputed ground/ plot.

25. Based on the foregoing, there is no gainsaying that the learned trial magistrate properly reviewed the evidence and thereafter reached/ arrived at the correct conclusion. Suffice it to state that I have also come to the same conclusion as the learned trial magistrate, to wit, that the appellant did not prove his case.

26. Before conclusion on this matter, it is imperative to take cognizance of the holding in the case of Kenya Power & Lighting Company Ltd v Ringera & 2 others [2022] KECA 104 (KLR where the Court of Appeal stated thus

> .....the correct approach the trial court ought to have taken to vindicate the respondents as against the alleged appellant's trespass on their respective suit properties and which this Court should employ in addressing these issues in these consolidated appeals is that taken by this Court in the case of M'Mukanya vs. M'Mbijiwe [1984] KLR 761 in which this Court citing with approval the case of Municipal Council of Eldoret vs. Titus Gatitu Njau [2020] eKLR expressed itself, inter alia, that:
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> "Trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership."....

27. Flowing from the foregoing and having taken into account the principles espoused in the case of Mwanasokoni vs Kenya Bus Service Limited 1985 eKLR; and Jabane vs Olenja 1986 eKLR, respectively, I come to the conclusion that the subject appeal is meritless.

Final Disposition.

28. For the reasons highlighted in the body of the Judgment, I come to the inevitable conclusion that the subject appeal is meritless; and calls for dismissal.

29. In the upshot, the final orders that commend themselves to the court are as hereunder.

    a. The Appeal be and is hereby dismissed.

    b. The Judgment of the Learned trial magistrate rendered on 4.12.2023 and the consequential decree be and are hereby affirmed.

    c. Cost of the Appeal be and is hereby awarded to the respondent.

    d. The Cost in terms of [iii] shall be agreed upon and, in default to be taxed in the conventional manner.

30. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 30TH DAY OF OCTOBER 2025.

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

JUDGE

In the presence of-:

Hussein/ Mukami- court assistant

Mr. Mokua Obiria- for the Appellant

Mr. Caleb Mwiti- for the Respondents