Mahungu & another v Wabiru & another (Environment and Land Appeal 12 of 2023) [2025] KEELC 7405 (KLR) (28 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7405 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ENVIRONMENT AND LAND APPEAL 12 OF 2023

LG KIMANI, J

OCTOBER 28, 2025

BETWEEN

HARRISON KIMITI MAHUNGU ..... 1ST APPELLANT

BILHA WATHITHA KIRUMA ..... 2ND APPELLANT

AND

SAMUEL KANYORO WABIRU ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NYERI ..... 2ND RESPONDENT

(Being an appeal from the entire judgment of Hon. D.K. Matutu, Senior Principal Magistrate Mukurweini in ELC Case No. 6 of 2018 delivered on 16th May 2023.)

JUDGMENT

1. This is an appeal from the entire judgment of Hon. D.K. Matutu, Senior Principal Magistrate Mukurweini in ELC Case No. 6 of 2018 delivered on 16th May 2023. The Appellants filed the Memorandum of Appeal dated 14th June 2023, setting out the following grounds:

    1. The Learned Trial Magistrate erred in law and fact in ignoring the overwhelming evidence adduced by the appellants to the effect that the excision of plot number 100 from plot number 4 Kiahungu Market was unprocedural and illegal.

    2. The Learned Trial Magistrate erred in law and fact in ruling that the appellants could not challenge an illegality committed before they bought the plot.

    3. The Learned Trial Magistrate erred in law and fact in requiring the appellants to prove the size of plot no.4, which is equivalent to the adjacent plots.

4. The Learned Trial Magistrate erred in setting a bad precedent that anybody can illegally enter into somebody's land and excise a portion of it without following the legal procedure and without any fear of repercussions.

2. The Appellants pray for the following orders:

   a. That the appeal be allowed and the judgment against the appellant be set aside.

   b. That the Honourable Court do enter judgment against the Respondent as prayed in the plaint.

   c. Costs to the appellants.

Summary of the suit and evidence before the trial Court

3. The suit before the trial court was instituted through the plaint dated 26th October 2015. The Plaintiffs averred that they were the owners of Plot number 4 at Kiahungu Trading Centre, which measures twenty-two (22) feet by fifty-eight (58) feet. Around 2011, the 1st Defendant encroached onto the said plot and started constructing a building.

4. After conducting a search at the 2nd Defendant's office, to their surprise, they found that part of their plot was illegally and without their consent carved out and a new number 100 was created and allotted to the 1st Defendant. The Plaintiffs protested to the 2nd Defendant against this illegality, but this did not elicit any response, and neither did protests to the 1st Defendant.

5. The Plaintiffs averred that the excision of plot number 4, the process of giving it a new number and allocating it to the 1st Defendant without their consent is illegal, unprocedural and a violation of their fundamental rights to own property. They further claimed that the excision was obtained through collusion and conspiracy between officials of the predecessor of the 2nd Defendant and the 1st Defendant. The plaintiffs prayed for;

   i. A declaration that the process of carving out plot No.100 from Plot No.4 Kiahungu Trading Centre is illegal, the same to be cancelled, and plot number 4 to be restored to its original size.

   ii. The 1st Defendant to be ordered to demolish any structure that he has erected thereon and remove any buildings from the plot.

6. The 1st defendant filed his statement of defence dated 2nd December 2015, in which he denied the plaintiff's allegations, stating that he is the owner of Plot 100 Kiahungu Market after having been allotted the same by the 2nd Defendant. The plot was surveyed on the ground, and the 1st Defendant developed the plot with no complaints.

7. The 1st Defendant denied any illegality in the allotment of Plot No.100 Kiahungu Market, and stated that the allocation was done lawfully in accordance with the laid down procedures.

8. The 2nd Defendant filed a statement of defence dated 11th May 2016, denying knowledge of the contents of the Plaint and stating that if there has been an issue of encroachment, then it amounts to trespass and the Plaintiff is entitled to remedies against the 1st Defendant and not them.

9. Further, the 2nd Defendant stated that if any illegal excision and/or surveying is conducted, the same is attributable to the 1st Defendant.

The hearing of the suit

10. The hearing of the suit began on 16th April 2019, when the 1st Plaintiff testified also on behalf of the 2nd Plaintiff, who is his wife and co-owner of Plot No. 4 Kiahungu Market. He claimed that they bought the plot on 28th December 2009 Gibson Warima Muringo, Mary Wangui Githinji and Elishiba Wangui Githinji. The three sellers were heirs to the original owner, their father. The plot was valued at Ksh.1.2 million, which they paid and thereafter went to the County Council offices to have the transfer updated. The Plaintiff produced in evidence the documents on the list of documents dated 26th October, 2015 and 21st December 2015. He stated that they have been paying rates for the plot.

11. When the Plaintiffs thought of developing the plot, they noticed that someone was developing a part of it. They reported the matter to the chief, and the person stopped temporarily, but later on continued with the construction. The 1st Plaintiff wrote to the County Government of Nyeri but received no response. It was then that he engaged an advocate to write a demand letter. The 1st Defendant responded to the said demand letter but still continued constructing. When he saw the plans for the 1st Defendant, he stated that he noted they were not approved by County Government and that there are no beacons separating plot 100 and plot no.4.

12. On cross-examination, the 1st Plaintiff stated that before he entered into an agreement for sale, he conducted a search of the plot and found that it was owned by Gibson Warima Muringo, Mary Wangui Githinji and Elishiba Wangui Gachinga. He also acknowledged that the agreement for sale did not show the measurements of the plot; they got the measurements of the plot from the people at the county council, who were sent to show them the plot on the ground.

13. The trial Court conducted a site visit on the disputed plots on 29th March 2022. The Plaintiff stated that his plot had been chopped off about 10-12 feet and that the defendant had blocked access to the west. The Plaintiff closed his case.

14. The 1st Defendant testified and adopted his witness statement dated 2nd December 2015. He averred that he is the legal owner of Plot No.100 Kiahungu Market, and he has enjoyed peaceable and uninterrupted user and exclusive possession of the plot since the year 2010. He has paid and continues to pay annual plot rent and property rates to the County Government.

15. On cross-examination, the 1st Defendant stated that the plot was approved and beacons were placed. He received word from the chief to stop the works in 2011. He did not have an allocation letter or a receipt for the development plan.

16. Counsel for the 2nd Defendant did not offer any witness, and this marked the close of the trial.

17. The trial court delivered its judgment on the 16th of May 2023, finding that the Plaintiffs failed to prove the case against the defendants on a balance of probabilities, and dismissed the suit with costs to the defendants. The Court noted that the Plaintiffs did not show the size of their plot, and comparison of sizes with adjoining plots was not proof of encroachment. The court further found that there was no proof of collusion between the 1st Defendant and officials of the 2nd Defendant's predecessor. Aggrieved with this decision, the Plaintiffs filed this appeal.

Appellants' Submissions

18. Counsel for the Appellants submitted that Plot 100, being a higher number, could not be found at the location where plots 1, 2, 3, and 4 were located. Counsel submitted that plot number 100 was excised from Plot No. 4, and it did not matter when this was done. He claimed that the size of plot 4 was

known since all the old plots were the same size. It was submitted that the 1st Respondent first occupied Plot no.4 as a hawker along with others.

19. The Appellants submit that if the City Council decided to re-plan the area to create more public land, it had to follow a given procedure. Their submission is that the Learned Magistrate erred in concluding that since the County Council confirmed that the 1st Respondent's general kiosk was converted into a permanent plot, the Appellant's contention that it was part of their land fell flat on its face.

20. Counsel for the Appellant further submitted that the Learned Trial Magistrate erred in law in concluding that the appellant's contention that the 1st Respondent must prove how he acquired the plot amounted to shifting the burden of proof to him. They highlighted that as the owners of Plot No.4, they were never called to be informed that their plot was in the process of being reduced in size.

21. They submitted that the trial court erred in stating that the appellants did not produce a map, referring to Page 21 of the Record of Appeal, in which they produced a plan which did not show the existence of Plot Number 100.

22. They further stated that the Appellants submitted was that collusion was proven by showing that a plot was created from the blues on already allocated land, and no further proof was required.

23. They concluded that the learned trial Magistrate erred in condoning illegal allocation of land and that even if they are public land, they should not be taken away from one person to another without notifying him, as it was done illegally and unprocedurally.

1st Respondent's Submissions

24. Counsel for the 1st Respondent submitted on grounds 1 and 3 as one ground of the Memorandum of Appeal. He submitted that paragraph 3 of the agreement for sale produced in court stated that "the plot is sold as it is and the purchasers have been shown its location and dimensions". Counsel questioned the reason for the Plaintiff's failure to join the persons who sold the plot to them in the suit. They claimed that the 2nd Defendant approved the conversion of the 1st Defendant's general kiosk, which was allocated in 1985 to a permanent plot in 2006.

25. Counsel stated that the Court, upon visiting the site, observed that the 1st Respondent has developed the site and that beacons marked the boundaries of Plot No.100 and Plot No. 4, with each plot having access to the road in different phases.

26. They submit that Plot 100 was in existence when the Appellants bought Plot 4, which was initially a General Kiosk that was converted to a permanent plot in 2006 and that the size of Plot 4 was not known.

27. On grounds 2 and 4, they submit that he who alleges must prove as provided by Section 107 of the *Evidence Act* and that if the construction was illegal, it would have been stopped by the County Government.

The 2nd Respondent's Submissions

28. Counsel for the 2nd Respondent submitted that the Appellants failed on a balance of probabilities to prove that the 1st Respondent's Plot No. 100 was illegally and unprocedurally excised from their plot, as the Appellants were not aware of the original size of their land.

29. Their submission is that plot 100 was demonstrated to have been allocated to the 1st Respondent and that the Appellant did not prove illegal excision of the same from his land. Counsel further submitted that the Appellants failed to discharge the burden of proof under Sections 107-109 of the *Evidence Act*.

Analysis and Determination

30. The role of an appellate court on a first appeal was stated in the case of Gitobu Imanyara & 2 others v Attorney General [2016] e KLR, where the Court of Appeal noted that;

> " An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

31. The Appellants set out four grounds of appeal in the Memorandum of Appeal, which in the Court's view can be summarised into one issue for determination hereunder:

Whether the Trial Magistrate disregarded the Appellants' evidence of the illegal excision of Plot no. 100 from Plot no. 4, Kiahungu market and thus made a wrong finding.

32. The Appellant's suit before the Trial Court was that the 1st Respondent's Plot number 100 Kiahungu Market in Mukurweini was illegally, unprocedurally and through collusion between the 1st Defendant and officials of the 2nd Defendant's predecessor, excised from his Plot no.4 Kiahungu market.

33. The Appellants exhibited several documents to prove their ownership of plot number 4. They produced the search certificate dated 15th October, 2015, an agreement for sale dated 28th December 2009, an extract of minutes of the Town Planning and Markets Committee held on 30th December 2009 indicating approved transfer to the appellants and a letter from the County Council of Nyeri dated 14th May 2012 addressed to the Appellants confirming that transfer of plot number 4 was discussed and approved vide Min. No. 49/201 (63) of Works, Town Planning and Markets Committee.

34. On the other hand, the 1st Respondent exhibited a letter from the County Council of Nyeri dated 24th December 2009 addressed to him informing him that the Council vide minute 40/2006 of Town Planning and Market Committee approved conversion of his general kiosk allocated to him under min 67/95 of full Council to a permanent plot and the plot was given a number 100. The 1st Respondent also exhibited a building plan and receipt for payment of plan approval fees, a business permit, as well as receipts for the payment of ground rent.

35. It is noted that the Appellant exhibited a search certificate issued by the County Government of Nyeri dated 15th October 2015 for plot number 100, confirming that it was owned by the 1st Respondent and receipts for payment of rates by the 1st Respondent.

36. The Court notes that none of the documents exhibited by the Appellant and the 1st Respondent mention the sizes of either Plot Number 4 or Plot Number 100. The Appellant stated in his testimony that his plot's size is 58 feet by 22 feet. However, the agreement for sale between the Appellants and the vendors, dated 28th December 2009, while not mentioning the size of the plot, stated "The plot is sold as it is and the purchasers have been shown its location and dimensions".

37. The Appellant, in his evidence, confirmed that he carried out a search of the plot at the offices of the County Council and confirmed ownership before purchase. The Appellant does not seem to have, at the same time, sought confirmation from the County Council of Nyeri, of the size of the plot he was

buying, before purchasing it. Due diligence would have required that the Appellants make the said confirmation. Indeed, when the Appellant was recalled to give evidence on 29th November 2022, he stated that he was shown the beacons by the heirs, meaning the vendors, who he recognised were two ladies and a gentleman. It is noteworthy that the Appellant did not produce a beacon certificate issued either to him or to the original owner of the plot.

38. The 1st Respondent's documents of ownership show that the County Council of Nyeri confirmed that the Council, vide minute 40/2006 of Town Planning and Market Committee, approved conversion of his general kiosk allocated to him under min 67/95 of the full Council to a permanent plot and the plot was given the number 100. This, therefore, meant that the 1st Defendant had been given the general kiosk in 1995, and the same was converted to a permanent plot in 2006. This was long before the Appellants purchased plot number 4.

39. In the Court's view, if the Appellant was shown by the vendors the dimensions of his plot to include the portion where plot number 100 is located, then it can only be taken that the location shown was erroneous and/or misleading since the portion held by the 1st Respondent had already been allocated.

40. Further to this, the Appellants did not show the documents of ownership held by the vendors before they sold the plot to them, nor whether they showed any of the plot dimensions. In the Court's view, the assertion by the Appellant that the plots adjacent to plot number 4, being plots 1,2 and 3, are the same size as they claim their plot ought to be, is not satisfactory evidence of the size of their plot. In any event, the Appellants did not show what the sizes of the said plots are.

41. When initially cross-examined by Mr Macharia Advocate on 16th April 2019, the 1st Appellant stated that he got the plot measurements "from the people who were sent from the County Council to show us the plot on the ground". He further stated on re-examination that "The County Council officers measured the plot when they came to place the beacons and they said it was 50 X 22 ft"

42. On the question of plot allocations within urban areas, when the County Government allots land to an individual, such allocation must be accompanied by a Part Development Plan, which aids in the surveying process and eventually the issuing of a certificate of lease and which shows the size of the plot of land allocated. This was elaborated in the case of Nelson Kazungu Chai & 9 Others vs. Pwani University [2014] eKLR as follows:

> "...It is trite law that under the repealed Government Lands Act, a Part Development Plan must be drawn and approved by the Commissioner of Lands or the Minister for Lands before any unalienated Government land could be allocated. After a Part Development Plan (PDP) has been drawn, a letter of allotment based on the approved PDP is then issued to the allotees. Petition No. 8 (E010) of 2021 37 131. It is only after the issuance of the letter of allotment and the compliance with the terms therein that a cadastral survey can be conducted for the purpose of issuance of a certificate of lease. This procedural requirement was confirmed by the surveyor, PW3."

43. Similarly, this was restated in African Line Transport Co. Ltd v The Hon. Attorney General, Mombasa, HCCC No. 276 of 2003 [2007] eKLR where it was found that:

> "Secondly, all the defence witnesses were unanimous that in the normal course of events, planning comes first, then surveying follows. A letter of allotment is invariably accompanied by a PDP with a definite number. These are then taken to the Department of Survey, who undertake the surveying. Once the surveying is complete, it is then referred to the Director

of Survey for authentication and approval. Thereafter, a Land Reference Number is issued in respect of the plot."

44. The Plaintiffs produced a copy of a map but did not call any witness for example a surveyor to testify as to the authenticity or the dimensions of the plots of land therein, or to confirm whether there is an updated map. Unfortunately, the County Government of Nyeri did not call any witnesses or file any documents.

45. The Plaintiff argues that they did not need to do anything more to prove that there was collusion by the 1st Defendant and the 2nd Defendant in creating a plot by excising the land. This is far from the truth, as the Kenyan position in the law of evidence is that he who wishes the court to believe a fact must be the one to prove it.

46. Sections 107 and 108 of the *Evidence Act* Cap 80 provide that:-

> " 107.
>
> (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.
>
> 1. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> 108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

47. All parties before the trial court had the burden to prove the existence of the facts which they alleged were true, with the Plaintiffs having the burden of proving their case on a balance of probabilities to be successful, which they failed to do in the court's opinion.

48. In Mbuthia Macharia v Annah Mutua Ndwiga & another Civil Appeal No. 297 of 2015 {2017} e KLR, the Court of Appeal, when dealing with the issue of burden of proof, observed:

> " The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the Appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

49. From the foregoing, it is the Court's opinion that the Appellants failed to prove their case before the trial court, and there is no reason for this Court to interfere with the trial court's finding in this appeal.

50. The final order of this court is that the Appeal lacks merit and it is hereby dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 28TH DAY OF OCTOBER 2025

HON. LADY JUSTICE L.G. KIMANI

JUDGE

In the Presence of:-

Ms. Kendi - Court Assistant

Mrs. Maina holding brief for Kebuka for the Appellant

Kiminda for the 1st Respondent

Macharia for the 2nd Respondent