



Wangong’u (Suing as the personal representative of the Estate of Wangong’u Kamau (Deceased)) v Gikeri (Environment and Land Appeal E043 of 2024) [2025] KEELC 7206 (KLR) (22 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7206 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E043 OF 2024**

**JM ONYANGO, J
OCTOBER 22, 2025**

BETWEEN

**NANCY WAIRIMU WANGONG’U APPELLANT
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
WANGONG’U KAMAU (DECEASED)**

AND

JULIUS KAIYARE GIKERI RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate’s Court at Kikuyu in MCELCC Case No. 28 of 2020 delivered by Hon. C Mburu, Chief Magistrate on 12th April 2024)

JUDGMENT

1. The Respondent (Plaintiff in the lower court) filed suit against Wangong’u Kamau (deceased) through a Complaint dated 26.5.2020. The Respondent’s case was that Land Parcel No. Karai/Karai/563, which was ancestral land, was subdivided, and he was allocated parcel Karai/Karai/7711 measuring 0.050 hectares. Before the subdivision, the family engaged Thagishu Associates, a firm of surveyors, to carry out the subdivision and ascertain the boundaries. According to the Respondent, the boundaries were properly established, and beacons were placed in 2018.
2. It was the Respondent’s position that upon the subdivision, it was confirmed that the deceased had encroached onto the Respondent’s parcel of land. Despite the Respondent requesting the deceased to vacate and even offering assistance to facilitate his relocation, the Appellant refused to move out. The Respondent further explained that attempts to resolve the dispute amicably through the Chief’s Office and the Assistant County Commissioner’s Office were unsuccessful.
3. Through the Complaint, he sought an order evicting the deceased from Land Parcel Number Karai/Karai/7711, damages for trespass, costs of the suit, plus interest.



4. Wangong’u Kamau (deceased), who was acting in person, entered appearance and filed a Defence dated 13/10/2020. His case was that he, along with other residents, had been squatters occupying an open space in Karai Location under the authority of the County Government of Kiambu. On 17.4.2007, a Sub-County meeting resolved to regularize and formalize the occupation of the said land due to double allocation issues. Following that resolution, he made official payment for his occupation to the County Government, as evidenced by a receipt in the name of his wife, Nancy Wairimu Wangong’u.
5. He averred that he took possession of the allocated area, constructed a semi-permanent house, and has lived there since. According to him, there is an access road separating his area of occupation (part of the County Government land) from the Respondent’s parcel of land, which lies on the opposite side of the road. The County Government later brought in a grader tractor that demarcated the boundary between the squatters’ settlement and the adjoining private parcels.
6. The deceased alleged that the Respondent encroached onto the access road and a portion of his occupied area, fenced it off, and claimed it as part of her property, prompting the present dispute. He reported the issue to the Kikuyu Sub-County Surveyor, who issued summons for a boundary alignment exercise. However, when the Government Surveyor, Mr. Mungai, arrived to execute his duty, the Respondent objected and requested to bring a private surveyor. Before the realignment could proceed, the Respondent filed the suit at the lower court.
7. The deceased’s position was that the Respondent sued the wrong party, since the County Government of Kiambu is the registered owner and proper authority over the land in question. He maintained that his occupation was lawful and with the County Government’s permission.
8. The suit proceeded for hearing, and a judgment was entered in favour of the Respondent on 12.4.2024. The trial court found that the Respondent had proved ownership of land parcel Karai/Karai/7711 by producing a valid title deed issued on 6.5.2019 and a certificate of official search dated 15.5.2020, both confirming his registration as the absolute proprietor. The trial court stated that under Section 26(1) of the *Land Registration Act*, such title is prima facie evidence of absolute and indefeasible ownership, subject only to exceptions such as fraud, misrepresentation, or illegal acquisition. The court determined that no evidence was presented by the deceased to challenge the validity of the Respondent’s title.
9. The trial court noted that the deceased admitted to having no ownership documents and acknowledged that he was prepared to vacate the land if ordered to do so. The court therefore found that his continued occupation of the suit property amounted to trespass, which infringed upon the Respondent’s right to exclusive possession and enjoyment of the land as guaranteed under Sections 24 and 25 of the *Land Registration Act*. The court stated that the deceased’s claim that the land had been allocated to him by the County Government was unsupported by credible evidence, as the minutes he produced made no reference to his name or to any formal allocation.
10. Consequently, the trial court held that the Respondent had established his case on a balance of probabilities and was entitled to the reliefs sought. The Defendant was ordered to vacate the suit property within ninety (90) days of service of the order and to remove all structures, crops, and materials at his own cost. The Respondent was awarded Kshs. 50,000 as nominal damages for trespass, together with costs of the suit and interest at court rates.
11. Being aggrieved by the said judgment, the Appellant filed the instant appeal citing the following grounds of appeal.
 - i. That the learned magistrate erred in law and in fact in finding that the Appellant had encroached on the Respondent’s Land Karai/Karai/7711.



- ii. That the learned magistrate erred in fact and law in finding that the Respondent herein had proved his case against the Appellant on a balance of probabilities and in holding that the Appellant should vacate the suit property.
 - iii. That the learned magistrate erred in law and fact in finding that the Appellant was not the registered owner of the land he was occupying.
 - iv. That the learned magistrate erred in law and fact by misconstruing a boundary issue to mean that the Appellant had no rightful ownership of the land he was occupying.
 - v. That the learned magistrate erred in fact and in law by ignoring the evidence of the Appellant who stated that the boundary issue between him and the Respondent could only be resolved by the office of the Land Registrar together with the County Surveyor.
 - vi. That the learned magistrate erred in fact by failing to consider the evidence of the Appellant that the land he was occupying was allocated to him by the County Government of Kiambu and they were awaiting the title documents to be issued.
 - vii. That the learned magistrate erred in law and fact in finding that the Appellant had trespassed on Karai/Karai/7711 yet there was no government surveyors report showing that part of the Appellant's house was on Respondent's Land.
 - viii. That the learned magistrate erred in law and fact by failing to understand that the issues before her was not about the ownership of Karai Karai/7711, but it was a boundary issue that only a government surveyor could resolve.
 - ix. That the learned magistrate erred in law and fact by stating that since the Appellant did not produce the title documents on the land he was occupying he should vacate from the same.
 - x. That the learned magistrate erred in law and fact by ordering the Appellant to pay Kshs 50,000 as damages for trespass without any evidence before her showing that the Appellant had trespassed on Respondent's Land.
12. The court directed that the Appeal be canvassed through written submissions, and both parties duly complied.

Appellant's Submissions

13. The Appellant's written submissions dated 27.9.24 were filed through the firm of Muthoni Mbithi & Company Advocates. Learned counsel for the Appellant identified 2 issues for determination:
- i. Whether the learned trial magistrate erred and misdirected herself in law by proceeding with a case whereof she had no jurisdiction under the provisions of the [Land Registration Act](#) 2012, Section 18 and therefore acted ultra vires.
 - ii. Whether the findings of the learned trial magistrate were against the weight of the evidence as adduced.
14. On whether the learned trial magistrate erred by proceeding with a case where she had no jurisdiction, counsel contended that the trial court acted ultra vires, as only the Land Registrar has the statutory mandate to determine boundary disputes.
15. Counsel stated that the Appellant is a beneficial owner of land parcel Nachu/Ndacha/1762, which he has occupied since 2007, having been allocated the same by the County Government of Kiambu through the Ruhari Self-Help Group, of which he is a member. She pointed out that the title to



the parcel was issued on 19th April 2024 to the trustees of the group after the trial court had already delivered its judgment, and that the County Surveyor has not yet marked the boundaries of the said parcel.

16. She maintained that the dispute between the parties relates to the boundary between their respective parcels, and that trespass could not be proved in the absence of a clearly established common boundary. The trial court, she argued, erred by relying solely on a survey report prepared by the Respondent's surveyor without referring the matter to the Land Registrar.
17. Relying on the decision in *Ndegwa & another vs Gichuki* [2024]eKLR, counsel emphasized that where boundaries are unfixed, the court must first refer the matter to the Land Registrar for determination. She noted that no evidence was presented to show that the boundaries between the parcels had been fixed or recorded in the land register, and therefore, the trial court lacked jurisdiction to entertain the suit.
18. Counsel further referred to the case of *Munyali vs Musyoka* [2022] eKLR, where the court held that unless boundaries are noted in the register as fixed, any survey or map merely indicates approximate positions. She urged this court to adopt a similar reasoning, allow the appeal, and remit the matter to the Land Registrar for determination of the boundary issue.
19. She reiterated that Section 18(2) of the *Land Registration Act* expressly prohibits courts from entertaining proceedings relating to boundary disputes unless the boundaries have been determined under that section. Accordingly, she submitted that the trial magistrate's decision was made without jurisdiction and is therefore void.
20. On the second issue, counsel argued that the trial court's findings were against the weight of the evidence. She noted that the Appellant had informed the court that he was residing within the Nachu/Ndacha area allocated by the County Government, and that the boundary between his parcel and the Respondent's Karai/Karai/7711 land had not yet been marked. He added that despite the foregoing, the magistrate ordered him to vacate, disregarding the absence of a title deed and the pending demarcation process by the County Surveyor and Land Registrar.
21. Finally, counsel submitted that since the Respondent had not demonstrated that the boundary in question was ever fixed, and no report from the County Surveyor was produced before the court, the decision reached was contrary to the weight of the evidence. She therefore prayed that the appeal be allowed, the trial court's judgment be set aside, and costs be awarded to the Appellant.

Respondent's Submissions

22. The Respondent filed written submissions dated 4.10.2024 and Supplementary Submissions dated 6.3.2025 through the firm of M/s J. Mbugua Mburu & Associates. In his submissions dated 4.10.2024, learned counsel for the Respondent submitted that the appeal is without merit and ought to be dismissed with costs. He began by outlining the factual background of the case, noting that the Respondent is the legal, registered, and equitable owner of Land Parcel No. Karai/Karai/7711, a fact not in dispute between the parties. He emphasized that the Respondent's claim before the trial court was one of trespass and not a boundary dispute, as alleged by the Appellant, and that the pleadings were clear and unambiguous on this point.
23. Counsel pointed out that the Appellant had no title or legal claim to Land Parcel No. Karai/Karai/7711. In response to the Appellant's contention that he was a beneficial owner of Land Parcel No. Nachu/Ndacha/1762, she argued that the alleged allocation by the County Government of Kiambu could not have occurred in 2007, as the County Government came into existence only in



2013. He further submitted that the Appellant's membership in the Ruhari Self-Help Group was not proven before the lower court, and that no evidence was tendered to establish any connection between the Appellant and the parcel known as Nachu/Ndacha/1762.
24. Counsel maintained that the title to Land Parcel No. Nachu/Ndacha/1762 was improperly introduced in the appeal and was not part of the record before the trial court. She cited the decision in *Nayau Mansukhlal Salva vs Hanikssa Nayau Salva* [2019]eKLR, where Justice Asenath Ongeru reiterated that appellate courts are reluctant to admit new evidence on appeal unless exceptional circumstances exist. The Appellant, he noted, neither sought nor obtained leave of the court to adduce such new evidence. Consequently, he argued that any documents or claims relating to Land Parcel No. Nachu/Ndacha/1762 be disregarded and struck out from the record.
 25. He further submitted that the evidence adduced in the primary suit, including photographs and the mutation form, clearly demonstrated that the Appellant had encroached upon the Respondent's land and erected a structure thereon. This evidence, counsel stated, was never controverted during trial.
 26. Counsel recalled that although the case before the trial court was for trespass, the magistrate, Hon. Z. W. Gichana, had on 25.11.2020 directed the Kiambu County Surveyor to visit the disputed parcels and prepare a report, with the parties sharing the survey costs. However, when the matter came up again on 2.6.2021, the Appellant declined to pay the surveyor's fees. As a result, the court allowed the case to proceed to hearing. Counsel argued that the Appellant, having been afforded the opportunity to have the County Surveyor inspect the land and having failed to cooperate, could not now turn around and complain on appeal.
 27. He added that the boundaries for Land Parcel Number Karai/Karai/7711 were clearly demarcated in the approved mutation form and authenticated by the Land Registrar, as evidenced by the issuance of the title deed. Accordingly, there was no existing or unresolved boundary dispute.
 28. Finally, counsel submitted that the trial court's findings were supported by the evidence on record, while the Appellant had failed to demonstrate any legal or factual basis for interference by this appellate court. She therefore urged the court to find the appeal devoid of merit and to dismiss it with costs to the Respondent.
 29. In the Supplementary Affidavit, counsel addressed the Appellant's Application to adduce additional evidence. He explained that the Appellant had approached the court through an Application dated 31st October 2024, seeking leave to introduce a title document for land parcel Nachu/Ndacha/1762. Counsel contended that the Appellant's request arose after she had irregularly included the said document in the record of appeal without prior leave of the court. Counsel added that in the spirit of expeditious resolution and to avoid unnecessary delay, the Respondent consented to the admission of the additional evidence limited solely to that title document.
 30. The Respondent's counsel drew the court's attention to the guiding principles on the admission of additional evidence as set out by the Supreme Court in *Mohammed Abdi Mohamud vs Ahmed Abdullahi Mohammed & Others*[2018] eKLR, where the court held that such evidence must be directly relevant, credible, and capable of influencing the outcome of the case. Further, it must be shown that the evidence could not have been obtained with reasonable diligence at the time of the trial and should not be used merely to fill gaps or strengthen a weak case.
 31. Applying the above principles, counsel submitted that the title document sought to be relied upon by the Appellant failed to meet the threshold established in the *Mohammed Abdi Mohamud* case. He noted that the title to Nachu/Ndacha/1762 was issued on 19.4.2024 in the names of Stephen Kinyanjui Mburu, John Mbugua Kamau, Salome Nyambura Kiingati, and Fredrick Mburu, trustees



- of Ruhari Self-Help Group. Counsel contended that the Appellant, however, had not provided any proof of membership to that Ruhari Self-Help Group, such as a membership card or number and therefore had not established a nexus to the said parcel or to the trustees Ruhari Self-Help Group.
32. He further argued that the introduction of the Ruhari Self-Help Group at the appellate stage amounted to raising a new issue that was never pleaded or litigated before the trial court. Counsel observed that, whereas the Appellant had claimed before the lower court to have occupied the land since 2012 or 2013, she now alleged that the members of the self-help group had been in possession since 2007, a contradiction that remained unsupported by evidence.
 33. Counsel also pointed out that no Registry Index Map (RIM) had been produced by the Appellant to show the proximity or any shared boundary between Land Parcel No. Nachu/Ndacha/1762 and Land Parcel No. Karai/Karai/7711. In his view, the purported title document adds no probative value to the appeal and does not assist the court in determining the real issues in dispute.
 34. In conclusion, he submitted that the additional evidence was irrelevant, introduced late, and incapable of altering the outcome of the case. He therefore urged the court to dismiss the appeal with costs to the Respondent.

Analysis and Determination

35. This being a first appeal, it is essential to reaffirm the parties' right to a full and independent re-evaluation of the entire record. The jurisdiction of this court, sitting as the first appellate authority demands a fresh and thorough scrutiny of the evidence, guided by the law, culminating in a reasoned and coherent decision.
36. The principles governing this court's role are well articulated in *Selle and Another vs Associated Motor Boat Co. Ltd and Another* (1968) EA 123, where the Court held that a first appeal bears the character of a retrial. It imposes upon the appellate court a solemn duty to re-examine the evidence, draw its own conclusions, and support those conclusions with clear and persuasive reasoning. This obligation is to be discharged carefully, with due regard to the fact that the trial court had the distinct advantage of observing the witnesses as they testified and assessing their credibility.
37. Having considered the Memorandum of Appeal, the Record of Appeal and rival submissions, the following issues arise for determination.
 - i. Whether the suit relates to trespass or a boundary dispute.
 - ii. Whether the Respondent proved her case against the Appellant
 - iii. Whether the appeal should be allowed.
38. With regard to the first issue, the Respondent pleaded that the Appellant had encroached into the Respondent's land parcel number Karai/Karai/7711 which was hived off from land parcel number Karai/Karai 563 and constructed his home on part thereof. The Respondent therefore sought an order of eviction and general damages for trespass. At the Appellant's request, the court directed that a surveyor visits the suit property to determine the boundaries and establish whether there was any encroachment and file his report in court. However, the Appellant refused to pay the surveyor's fees and the court directed that the case proceeds for hearing.
39. During the hearing the Respondent was able to prove that he was the registered owner of the suit property. He produced a title deed in his name and a survey report with a sketch diagram to show that the land had been surveyed and the boundary between the suit property and Nachu area had been fixed.



40. On the hand, the Appellant alleged to be in occupation of a neighbouring parcel of land which had been allocated to him by the County Government of Kiambu. However, he had nothing to show for it as no title had been issued in respect of the said parcel by the time the case was heard. Although the Appellant later adduced additional evidence by way of a title deed for land parcel number Nachu/Ndacha/1762 during this appeal pursuant to the leave of the court, the said title does not bear his name.
41. A boundary dispute presupposes that there are two or more owners of land who share a common boundary and one has encroached into the other's land. However, in the instant case the Appellant was unable to demonstrate that he owns any land that shares a common boundary with the Respondent. He was also unable to prove that he was a member of Ruhari Self-Help Group who are the owners of the land parcel No. Karai/Karai/1762. Respondent was required to prove that the Appellant had trespassed onto his land. His contention that the Respondent's claim is a boundary dispute that ought to be resolved by the Land Registrar in accordance with sections 18 and 19 of the Land Registration Act is therefore misplaced.
42. Moving on to the second issue, the Respondent was required to prove that the Appellant had trespassed onto his land. In the Clerk & Lindell on Torts (17th Edition) para 17-01 Trespass is defined as:
- “ An unjustifiable entry by one person upon the land in possession of another. Removing any part of the soil of land also constitutes trespass”
43. In the instant case, the Respondent was able to demonstrate that the Appellant had constructed his house on a portion of his land without his consent. This evidence was not controverted by the Appellant. Instead, the Appellant alleged to be in occupation of a parcel of land whose title she did not have. Her claim that she had been allocated the land by the County Government of Kiambu was not supported by any document. The title that she subsequently produced on appeal does not come to her aid as it is not registered in her name. It is therefore my finding that the trial magistrate took into account all the evidence on record and arrived at the correct finding that the Appellant had trespassed on the Respondent's land.
44. In view of the foregoing, the Appellant has not demonstrated any justifiable reason to warrant this court's interference with the decision of the lower court. Consequently, the appeal lacks merit and it is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 22ND DAY OF OCTOBER, 2025

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J. M ONYANGO

JUDGE

In the presence of:

1. Ms Muthoni for the Appellant
2. Mr Mburu for the Respondent

Court Assistant: Hinga.

