Waqo v Chure (Environment and Land Case E026 of 2024)
[2025] KEELC 7426 (KLR) (30 October 2025) (Judgment)

Neutral citation: [2025] KEELC 7426 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND CASE E026 OF 2024

JO MBOYA, J

OCTOBER 30, 2025

BETWEEN

ROB HIRBO WAQO ..... APPELLANT

AND

ALI WAQO CHURE ..... RESPONDENT

(Being an appeal against the Judgment of ELC court at Moyale in ELC case No. E001 of 2024 by Hon. W.K Cheruiyot-Principal Magistrate delivered on 25th October 2024)

JUDGMENT

1. The subject appeal arises from the Judgment delivered on 15th October 2025; and the consequential decree arising therefrom and wherein the learned trial magistrate [Hon. W.K Cheruyoit-PM] found and held that the appellant had failed to prove his case to the requisite standard. To this end, the appellant's case was dismissed.

2. On the contrary, the learned trial magistrate entered Judgment in favour of the respondent on the basis of the counterclaim dated 25th January 2024.

3. It is the said judgment and the consequential decree which has aggrieved the appellant and thereby provoked the subject appeal. The memorandum of appeal dated sic 5th October 2024; has highlighted the following grounds of appeal:

    i. That the learned trial magistrate erred in law and in fact in failing to give due consideration to the evidence and submissions presented by the appellants.

    ii. That the learned trial magistrate erred in law and in fact in delivering a judgment that was against the weight of the evidence adduced.

iii. That the learned trial magistrate erred in law and in fact in misinterpreting and/or misapplying the legal principles applicable to the appellant's case.

iv. That the learned trial magistrate erred in law and in fact in making findings that were not supported by the evidence on record.

v. That the learned trial magistrate erred in law and in fact in failing to take into account relevant considerations while arriving at the judgment.

vi. That the learned trial magistrate erred in law and in fact in failing to properly evaluate the evidence and thus arrived at an erroneous conclusion.

4. The subject appeal came up for directions on 24th July 2025; and whereupon learned counsel for the appellant confirmed having filed and served the record of appeal. In addition, it was averred that the record of appeal was/is complete and thus the appeal is ready for hearing. Moreover, the advocate for the appellant sought directions as pertains to the hearing and disposal of the appeal.

5. With the concurrence of learned counsel for the respondents, the court proceeded to and directed that the appeal be canvassed by way of written submissions to be filed and exchanged by the parties. Furthermore, the court also circumscribed the timelines for the filing and exchange of the written submissions.

6. The appellant filed written submissions dated 29th September 2025; and wherein same has highlighted two [2] key issues. Firstly, learned counsel for the appellant has submitted that the learned trial magistrate erred in law in finding and holding that the appellant had not established/proved his case to the requisite standard. In particular, it was submitted that the appellant tendered and adduced plausible and credible evidence confirming that the respondent had entered upon and trespassed onto the suit property.

7. Moreover, it was submitted that the evidence tendered by the appellant was neither controverted nor challenged. To this end, it was posited that the learned trial magistrate ought to have found in favour of the appellant.

8. Secondly, learned counsel for the appellant has submitted that the learned trial magistrate failed to appreciate the import and tenor of the law of trespass. In this regard, it was submitted that having found and held that the appellant was the owner of plot No. 278B- Hellu, it was incumbent upon the court to interrogate whether the respondent had trespassed onto the suit property. Further, and in addition, it was submitted that the appellant duly established the case as pertains to trespass.

9. To buttress the foregoing submissions, learned counsel for the appellant has cited and referenced the decision in the case of Kenya Power & Lighting Company vs Ringera & others (2022) KECA 104, wherein the Court of Appeal highlighted the ingredients underpinning a claim for trespass.

10. Premised on the foregoing, learned counsel for the appellant has submitted that the appeal beforehand is meritorious and thus same ought to be allowed. In particular, the court has been invited to allow the appeal; set aside the impugned judgment; and enter judgment in favour of the appellant in accordance with the Plaint filed in the Subordinate Court.

11. The respondent filed written submissions dated 18th September 2025; and wherein same has highlighted two [2] key issues. Firstly, learned counsel for the respondent has submitted that the respondent tendered and adduced plausible, cogent; and concrete evidence to demonstrate that same is the lawful owner of plot No. 556 Hellu situated within Moyale Town,-Marsabit County.

12. Additionally, it was submitted that the respondent duly tendered and produced evidence to demonstrate the process attendant to the acquisition of the said property. Furthermore, it was submitted that the evidence pertaining to the acquisition of the suit property was corroborated by the various witnesses who testified on behalf of the respondent. Besides, learned counsel has also referenced the payment receipts pertaining to land rates and contended that same [receipts] constitute further evidence of ownership.

13. Secondly, learned counsel for the respondent has submitted that the appellant neither tendered nor adduced any credible evidence to show that the respondent had trespassed onto or encroached upon the appellant's plot. On the contrary, it was submitted that the appellant's claims were unsubstantiated. In addition, it was also submitted that the land/plot which the appellant previously owned in the neighborhood of the respondent's plot was sold and disposed of by the appellant.

14. In this regard, it was posited that the appellant herein did not prove and or establish his case to the requisite standard. To this end, Learned Counsel for the Respondent has referenced the provision[s] of section 107; and 109 of the *Evidence Act*, Chapter 80, Laws of Kenya.

15. Flowing from the foregoing, learned counsel for the respondent has submitted that the impugned judgment and the consequential decree are based on the evidence on record and hence the same ought to be affirmed. On the contrary, it was posited that the appeal beforehand is bereft of merits and thus same courts dismissal.

16. 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 salutary issue, namely; whether the appellant proved/established his claim before the subordinate court or otherwise.

17. Before venturing to interrogate and address the issues highlighted in the preceding paragraph, it is imperative to highlight that what is before me is a first appeal. To this end, it suffices to underscore that this court is seized of the jurisdiction to review/re-evaluate/scrutinize the evidence on record and to ascertain whether the factual and legal conclusions arrived at accord with the evidence and the law. Furthermore, it is instructive to observe that this court is at liberty to arrive at an independent conclusion and, where appropriate, to depart from the conclusions and or findings of the trial court.

18. Nevertheless, it is important to underscore that even though the court is seized of the jurisdiction to depart from the factual and legal conclusions arrived at by the trial court, such departure can only be undertaken where it is shown that the findings/conclusions were arrived at on the basis of no evidence; were perverse to the evidence on record; were based on misapprehension of the evidence on record; or where it is shown that the trial court committed an error of principle which vitiates the findings under reference. Simply put, the first appellate court cannot depart from the findings and conclusions of the trial court at will.

19. The jurisdictional remit of the 1st appellate court has been the subject of various pronouncements by the Court of Appeal. In the case of Kenya Urban Roads Authority & another v Belgo Holdings Limited (Civil Appeal E011 of 2021) [2025] KECA 764 (KLR) (9 May 2025) (Judgment) the court stated thus;

> 37. 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 circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) 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 judgment 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."

20. Back to the issue for determination. It is the appellant who approached the subordinate court contending inter alia that same is the lawful owner of plot number 278B Hellu within Moyale Town

– Marsabit County. In addition, the appellant contended that the respondent herein had trespassed onto and or encroached upon the suit property and thus interfered with his [appellant's] possessory rights thereto.

21. Having raised the foregoing complaints, it was incumbent upon the appellant to tender and adduce plausible; cogent; concrete and credible evidence to demonstrate the various elements underpinning his claims. Firstly, it behooved the appellant to tender and produce evidence to establish that same was indeed the owner of the suit plot. To this end, it is imperative to take cognizance of the evidence that was tendered by the appellant.

22. The appellant testified thus;

> " We have a land dispute. The said land is mine. I asked for allocation of the land from the chief because I was alone with the children after my wife left. I was given the land on 14th July 2023 by the chief".

23. From the appellant's testimony what becomes apparent is that same contends to have been given/ allocated the land on 14th July 2023. However, the receipts which were tendered by the appellant show that the rates were allegedly being paid for the said plot from 18th December 2020. [See exhibit P 1 & P2, respectively].

24. The question that does arise is whether the appellant herein could have been paying rates for the suit plot long before same was allocated unto him. To my mind, there is a disconnect between the receipts being referenced and the testimony by the appellant.

25. Furthermore, what is also apparent from the receipts which were tendered by the appellant is that plot number 278B is said to be located at Manyatta Burji and not Hellu. In addition, the letter from the town administrator, Moyale sub-county also speaks to the same fact, namely; plot number 278B Manyatta Burji.

26. The appellant herein did not tender or adduce any evidence to demonstrate that Manyatta Burji wherein his plot is said to be located, is one and the same as Hellu. Nevertheless, evidence abound that Manyatta Burji is a different area separate and distinct from Hellu market. [See the evidence of PW 2 who testified that Manyatta Burji is a different location].

27. There is doubt as to whether plot number 278B is located at Hellu or Manyatta Burji. However, the totality of the evidence that was tendered by the appellant himself shows that plot number 278B does not exist in Hellu. On the contrary, the said plot [if at all] exists at Manyatta Burji].

28. Additionally, there is evidence by the respondent and his witnesses; that though the appellant previously owned a plot in the neighbour-hood of plot no. 556 belonging to the respondent, the appellant proceeded to and sold his plot to Abdulla Abdullah. [See the evidence of DW 2]. For good measure, the evidence to the effect that the appellants sold his plot, which was situated in Hellu was not controverted.

29. From the totality of the evidence on record, I come to the conclusion that the appellant herein did not prove and or establish ownership of plot No. 278B Hellu. On the contrary, the evidence on record demonstrates that the said plot is located elsewhere. To this end, I do not agree with the finding and conclusion of the learned trial magistrate that the appellant proved that same is the lawful owner of plot 278B Hellu.

30. Simply put, the said conclusion is not based on any evidence; or better still, same is based on misapprehension of the evidence on record.

31. Turning to the critical aspect, namely; whether the appellant demonstrated trespass as against the respondents to warrant the grant of the orders of permanent injunction or otherwise. To start with, trespass denotes offensive actions which interfere with the lawful rights and interests of the owner of the designated property. In this respect, before a claimant can sustain a claim based on trespass, it behooves the claimant to prove title to; or entitlement to the designated property.

32. Additionally, the claimant must also demonstrate that there has been interference with his/her possessory rights to the designated property. Put differently, a claimant must demonstrate a violation of his right to possession by the trespasser.

33. What constitutes trespass was expounded/ highlighted by the Court of Appeal in the case of Doshi v Chemutut & 7 others (Civil Appeal E020 of 2023) [2025] KECA 776 (KLR) (9 May 2025) (Judgment) where the court stated as hereunder;

> Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land. Justice Chemutut did not name Mr. Doshi as a defendant in the suit.

34. I have already found and held that the appellant did not establish ownership of plot no. 278B Hellu. Absent proof of title to or right of immediate and exclusive possession of the suit property, the claim/ plea of trespass dissipates.

35. Other than the foregoing, there is also the question as to whether there was proof of encroachment onto [sic] plot 278B or otherwise. It is the appellant who had raised the plea of trespass. In this regard, it behooved the appellant to place before the trial court a survey report denoting the extent of the suit property and the encroachment [if any]. Absent a survey report, it was difficult nay impossible, to authenticate trespass.

36. To my mind, the appellant did not establish or prove the key ingredients/elements underpinning a claim of trespass. It suffices to underscore that the burden of proof laid on the shoulders of the appellant and not otherwise. In this regard, where the appellant fails to tender evidence to prove his case, the trial court was/is at liberty to dismiss the claim.

37. Before concluding on this issue, it is imperative to reference the holding of the Court of Appeal in the case of James Muniu Mucheru v National Bank of Kenya Limited [2019] KECA 1058 where the Court stated thus;

> 17. On matters evidence, Madan, JA (as he then was) in CMC Aviation Ltd v. Crusair Ltd (No1) [1987] KLR 103 stated: "...Proof is the foundation of evidence. As stated in the definition of "evidence" in section 3 of the *Evidence Act*, evidence denotes the means by which an alleged matter of fact, the truth of which is submitted for investigation, is proved or disproved. Averments are matters the truth of which is submitted for investigation. Until their truth has been established or otherwise they remain unproven...."
>
> 18. The *Evidence Act* is clear enough upon whom the burden of proof lies. Section 107 provides as follows:

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 facts, it is said that the burden of proof lies on that person."

Section 109 of the same Act further provides:

"The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by law that the proof of that fact lie on any particular person."

19. In Karugi & Another v Kabiya & 3 Others [1987] KLR 347, this Court held that the burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof."

38. Flowing from the foregoing; and taking into account the principles espoused in the case of Peters vs Sunday Post Ltd (1958) E.A, Mwanasokoni vs Kenya Bus Services (1985) eKLR and Jabane vs Olenja (1986) eKLR, respectively; I come to the conclusion that the impugned judgment accord with the evidence on record.

39. Pertinently, I have no basis to interfere with the final findings and conclusions arrived at by the learned trial magistrate, save for the limited aspect pointed out elsewhere herein before.

Final Disposition.

40. Having analysed the salutary/ singular issue which was highlighted in the body of the Judgment, it is apparent that the subject appeal is bereft of merits.

41. Same courts dismissal.

42. In the end, and for the reasons alluded to; the final orders that commend themselves to the court are as hereunder;

i. The Appeal be and is hereby dismissed.

ii. The Judgment delivered on 25th October 2024; and the consequential decree arising therefrom be and are hereby affirmed.

iii. Costs of the appeal be and are hereby awarded to the respondent.

iv. Costs in terms of clause [iii] shall be agreed upon; and in default be taxed in the conventional manner.

43. It is so ordered.

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

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

JUDGE

In the presence of:

Hussein – Court Assistant

Mr. Caleb Mwiti for the Appellant

Miss Odoyo for the Respondent