



REPUBLIC OF KENYA



**Otuni & another v Kashu (Environment and Land Appeal E005 of 2024)
[2025] KEELC 7615 (KLR) (6 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E005 OF 2024
LN GACHERU, J
NOVEMBER 6, 2025**

BETWEEN

MARANGA OLE OTUNI 1ST APPELLANT

SANTAU ENOLE WOTUNI 2ND APPELLANT

AND

LWETU OLE KASHU RESPONDENT

*(Being an Appeal against the Judgment and orders of Hon. H.M. Nyaberi
(Chief Magistrate) made on the 21st May 2024 in Narok CM ELC NO.10
of 2019: Maranga Ole Otuni and Santau Ole Wotuni vs Lwetu Ole Kashu)*

JUDGMENT

1. The Appellants herein were the Plaintiffs at Narok CMELC No. 10 of 2019, wherein they sued the Respondent herein (Lwetu Ole Kashu), as the Defendant thereon for the following Orders;
 - i. A declaration that land parcel No. Narok/ Topoti/1164 belongs to the Plaintiffs, and the Defendant has no claim whatsoever over the said parcel of land;
 - ii. An eviction order do issue against the Defendant, himself, his agents or any person or persons claiming under him from Land parcel No. Narok/ Topoti/ 1164;
 - iii. For permanent injunction to restrain the defendant by himself, his servants, agents or any person claiming under him from entering upon, or in any other way interfering with land parcel No Narok/ Topoti/ 1164, and
 - iv. For costs of the suit.
2. The Respondent herein as the Defendant in the above stated suit contested the said suit, and averred that he had not encroached into the Plaintiffs(Appellants)Land Parcel No. Cis Mara/Topoti/ 1164,



- and had not taken possession of the said land. He claimed that it is the Plaintiffs(Appellants) who had meddled with his peaceful and quiet enjoyment of his land by claiming a share of his land.
3. The Respondent (Defendant thereon) had contended that he has always been in occupation of his parcel of land Cis Mara /Topoti/ 174, wherein he has established his home and the Plaintiffs have no claim against him. He also contended that the Plaintiffs failed to avail ground report by the Land Registrar of the boundaries of his land as required under Sections 18 and 19 of the [Land Registration Act](#).
 4. The Respondent as the Defendant thereon, had urged the court to dismiss the Plaintiffs suit with costs.
 5. The matter before the trial court proceeded for hearing by way of viva voce evidence, wherein the Plaintiffs called one witness, Maranga Ole Otuni, the 1st Appellant herein. The Respondent Lwetu Ole Kashu, as a Defendant thereon gave evidence for himself and called one witness, John Ole Kashu, who is a son to the Respondent, and who testified that his father's land was land parcel No. 174, and that the Plaintiffs land faces Topoti side, whereas the Defendant's land faces Narienda side.
 6. After the inter- parties hearing and filing of respective written submissions, the trial court delivered its Judgment on 21st May 2024, and dismissed the Plaintiffs case with costs for failing to proof the said case on the required standard of balance of probabilities.
 7. Aggrieved by the Judgement of the trial court, the Appellants (As plaintiffs) filed this Appeal vide a Memo of Appeal dated 10th June 2024, wherein they sought for setting aside of the entire Judgment of the trial court, and that Judgment be entered in favour of the Plaintiffs (Appellants herein) and the Respondents be ordered to pay costs of this Appeal.
 8. The Appeal is supported by the following grounds;
 - i. That the learned magistrate erred in fact in not appreciating the fact that the Appellants plot Number Narok Cis Mara/Topoti/1164, does not share a boundary with the Defendant's plot and hence the Respondents
 - ii. That the learned magistrate erred in fact in not making a finding that the report by the Lands Registrar Narok supported the allegation of trespass on the Appellants land by the Defendant.
 - iii. That learned magistrate erred in law in failing to call for more evidence to enable him establish the truth of the Appellants allegation of trespass over his land particularly considering that the parties are not neighbours.
 - iv. That the learned Magistrate erred in law in not making a finding that, the report by the District Surveyor cleared indicated that the Respondent was trespasser on the Appellants' land, and though the Respondent was directly mentioned, he was one of the trespassers, and it was the duty of the Respondent to proof otherwise.
 9. The Appellants also filed a Supplementary Grounds of Appeal dated 14th May 2025, and averred that the trial magistrate erred in fact in making a finding that the issue of the Plaintiffs Plot No. Cis/ Mara/ Topoti/ 1164, not sharing a common boundary with the Defendant/ Respondent land Parcel No. Cis /Mara/ Topoti/174, due to the access road between which came up for hearing should have called for more evidence, but the trial court went ahead to dismiss the Plaintiffs' suit without the benefit of additional and necessary evidence, which the court should have demanded from the relevant government departments.
 10. The brief facts of the Plaintiffs/ Appellants case is that the 1st Appellant is the owner of land Parcel No. Cis Mara/Topoti/ 1164, wherein he is a title holder, which Certificate of title he produced as exhibit



1. However, the Defendant(Respondent)encroached onto his parcel of land and constructed a house thereon, and he produced a photograph of the house allegedly built by the Defendant/ Respondent on the said land. Though they have tried to resolve the matter amicably, it did not bear any fruits, and thus he prayed for eviction of the Defendant from his suit land. The Appellant testified that the Land Registrar and Surveyor had visited the suit land in 2018, and had ruled that he was the owner of the suit land, and the parcels of land owned by the Plaintiffs and Defendant are far from each other, and Defendant does not live on the suit land.
11. Further, the Appellants as Plaintiffs had claimed that the 1st Plaintiff acquired his land in 1973 and he has been on the suit land since then, and the Defendant has now occupied that land, thus the reasons he is seeking for Defendant's eviction.
12. Briefly, the Respondent's case is that he was allocated land Parcel No. Cis/ Mara/ Topoti/ 174, and he produced his Certificate of title as DEXH1. He claimed that he has been on his land for 40 years, and even while the process of adjudication was going on, he was still on the suit land.
13. He claimed that his land and that of the Plaintiff border each other, and there is a community boundary, but the two parcels of land have different title deeds. It was his allegations that he has never received any complaint from any Government officials that he has encroached on anyone's land. He denied that there is any ground report by the Surveyor, and even if it is there, he was never involved, and he never saw any surveyor going to the ground to align the boundary. It was his evidence that each party has its own parcel of land, and he denied having encroached or trespassed on the Plaintiffs parcel of land.
14. After the Appeal was admitted, the court directed the same to be canvassed by way of written submissions. In compliance thereto, the Appellants filed their written submissions through J. Martim & Co Advocates, dated 25th May 2025, and urged the court to allow the instant Appeal entirely.
15. The Appellants relied on Sections 1A & 1B of the [Civil Procedure Act](#), on the Overriding Objectives of the Act which state; -
- 1A. Objective of Act
- “(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- 1B. Duty of Court
- For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;
- (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology.”
16. The Appellants further relied on Order 42 Rule 26 of the Civil Procedure Rules, which state;
- Power to order new trial [Order 42, rule 26]



“If upon the hearing of an appeal it shall appear to the court to which the appeal is preferred that a new trial ought to be had, it shall be lawful for the said court, if it shall think fit, to order that the judgment and decree shall be set aside, and that a new trial shall be had.”

17. The Appellants urged the court to allow their Appeal as prayed.
18. The Respondent on his part filed his written submissions dated 13th June 2025, through S. Mogere & Co Advocates, and submitted on various issues.
19. On ground 1 of the Memo of Appeal, the Respondent submitted that though the 1st Appellant had testified that the Respondent had trespassed on his parcel of land, he also produced a Report from the Land Registrar and Surveyor who conducted the ground visit on 3rd July 2018, to ascertain the boundary and area ascertainment of several parcels of land, but the said Ground Report did not capture Cis Mara/ Topoti/ 174. Therefore, the court had no obligation to call for a Report to include the Respondent's land.
20. For this submission, the Respondent relied on Order 3 and 4 of the Civil Procedure Rules, and on the cases Ahmed Abdullahi Abdile vs Abdile Nur Abdi (2019) eklr and Murithi & Another vs Kigi (ELC Case No. E014OF 2022) (2023) KLR, where the court dealt with the issue of burden of proof, which burden of proof lies on the party alleging. He submitted that the court had no duty to procure evidence on behalf of the Appellants.
21. On ground 2, the Respondent submitted that the Appellants were the ones who asserted and had a duty to prove their case. He relied on the case of Evans Nyakwama vs Cleophas Bwana Ongaro (2015) eklr, and Sections 107, 108 and 109 of the *Evidence Act*. It was his further submissions that since the Appellants did not discharge their onerous duty of proving their case on the required standards, then ground No 2 should fail entirely.
22. Further, the Respondent submitted that since the Appellants did not convince the court on any of its grounds of Appeal, together with the Supplementary grounds, then the instant Appeal should fail.
23. On the issue of who should bear costs of the Appeal, the Respondent relied on Section 27 of the *Civil Procedure Act*, and on the case of R vs Rosemary Wairimu Munene Exparte Applicant v Ihururu Dairy Farmers Co-op Society Ltd , where the court held that the issue of costs is the discretion of the court, and that costs follow the event. Therefore, since the Appellants Appeal has no merit, then the instant Appeal should be dismissed with costs to the Respondent.
24. The above are the grounds for the Appeal, the argument for, and against the said Appeal which this court has carefully considered and renders itself as follows:-
25. This being a first Appeal, the Court will be guided by Sections 65 of the *Civil Procedure Act*, wherein the court is called upon to consider both the facts and the law. Further, Section 78 of the same Act entitles the court to reconsider, re-analyze, re-assess and re-examine the evidence adduced before the trial court, and then come up with its own independent conclusion, while taking into account that it did not see and assess the demeanor of the witness as did the trial court. See the case of Selle vs Associated Motor Boat Co Ltd (1968) EA 123, where the Court held;

“An appeal to this Court from a trial by the High Court is by way of a 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 allowance in this respect.”

26. Therefore, this court will give deference to the findings of the trial court, and will not just overturn the said decision, just because it has been moved in an Appeal. See the case of Mbogo vs Shah (1968) EA 93, where the court held; -

“ [A] Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

27. From the available evidence and the rival written submissions, the court finds that the issues for determination are;
- i. Whether the Instant Appeal is merited;
 - ii. Who should pay costs of the Appeal.

I. Whether the instant Appeal is merited?

28. From the Appellants' pleadings as contained in the Record of Appeal, it is evident that they have alleged that they are the registered owners of land Parcel No. Cis Mara/ Topoti/ 1164, wherein the Defendant(Respondent) forcefully and without any colour of right hived off a portion of their land, assumed ownership of the said portion of land, and did put up a structure thereon, and has continued to put up other structures, without authority of the Appellants or in disregard of ownership of the said suit land by the Appellants.
29. The Appellants had further alleged that efforts to have the Defendant(Respondent) vacate the suit land was met with resistance, and thus the prayer for eviction of the Respondent(Defendant) from the suit land.
30. The Respondent totally denied the Plaintiffs/Appellants claim, and averred that he occupies his own parcel of land being Cis Mara / Topoti/174, which parcel of land he has occupied for the last 40 years. Both the Appellants and Respondent produced their respective Certificates of titles. It is not in doubt that the parties own their distinct parcels of land, as is evident from their Certificates of titles.
31. Since the Respondent denied the allegations made in the Complaint, parties had a duty to call evidence before the trial court and prove their respective positions, on the required standard.
32. The Appellants are the ones who had alleged, and as usual and as correctly pointed out by the trial court, the burden of proof lied upon them. See Sections 107, 108 and 109 of the Evidence Act. in the case of Kirugi & Another v Kabiya & 3 Others [1987] KLR 347 the Court held;
- “ The burden was always on the plaintiff to prove his case on the balance of probabilities even if the case was heard on formal proof. The standard of proof is not lessened because the case is heard by way of formal proof.”
33. In his evidence, PW1 argued that the area Chief had tried to arbitrate the matter to no avail, and thus the reasons for filing the suit before the trial court. The Appellants also produced a ground visit report prepared by the Land Registrar, and the said Report contained all the parcels of land which had disputes, but land Parcel No. 174, owned by the Respondent was not among them.



34. The burden of proof being on the Appellants, they had a duty to call sufficient evidence to support their claim. The Appellants had alleged that the Respondent trespassed on their parcel of land, being land Parcel No. Cis Mara/ Topoti/ 1164. The Appellants produced photographs of a parcel of land, which photographs showed some structures thereon. However, there was no evidence to connect these photographs with the Appellants land, and occupation of the said land by the Respondents.
35. For trespass or encroachment to be proved, the Appellants ought to have called evidence of the Land Registrar and/ or Surveyor, who would have visited the ground to ascertain that indeed the Appellants parcel of land had been encroached by the Respondent.
36. For one to prove trespass or encroachment to land, the one alleging must call evidence to prove the alleged trespasser entered unto the said land without consent: That the trespasser entered or remained unto the said land without the permission of the owner. See the case of *Duncan Nderitu Ndegwa v Kenya Pipeline Company Limited & Another* [2013] eKLR, where the court held;
- “To prove trespass, the plaintiff must demonstrate that the defendant without lawful justification entered upon land in the possession of the plaintiff, or remained upon such land, or placed or projected any material object upon it.”
37. Further, the person alleging must prove there was lack of permission to enter unto the said land, and that he did not give the trespasser consent to be on the suit land. See Section 3(1) of the *Trespass Act* Cap 294;
3. Trespass upon private land
- “(1) Any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”
38. However, the Defendant can raise a Defence of "license" (permission) from the owner, and therefore, it is important for the person alleging to show that no such permission was granted. See the case of *Gakuria & Another vs Mwangi & 4 others* (2025) KEELC1014(KLR)
39. Further, the person alleging, being the Appellants herein had a duty to provide evidence of entry, and in such evidence, the Plaintiffs needed to prove that the trespasser(Respondent) physically entered or remained on the suit property.
40. It was not just enough for the Appellants to allege trespass or encroachment, avail photographs, but not avail sufficient evidence to prove such entry on the suit land, and also tie the photographs to the Plaintiffs/ Appellants allegations. The Appellants as Plaintiffs before the trial court did not avail sufficient evidence.
41. For the Appellants to prove their allegations, they ought to have called independent witness/es to add credence to their allegations that indeed their parcel of land had been encroached and/or trespassed upon by the Respondent. Without such sufficient evidence, the claim by the Appellants remained mere allegations, which allegations are not sufficient to prove their case on the required standard of balance of probabilities.
42. Again, the Appellants had alleged that the matter had ben arbitrated by the chief of the area to no avail, and thus the filing of the suit. However, the said chief was not called as a witness, and the there was no way the trial court could have found and held that even after arbitration by the chief of the area, the Respondent continued with the trespass.



43. In Kenya Power & Lighting Co. Ltd -vs- Ringera & Others (Civil Appeal E247 and E248 of 2020 (Consolidated) [2022] KECA 104 [KLR] (4th February 2022 (Judgment), the court observed that trespass, as corrected, submitted by the Appellant is governed by Section 5(1) of the *Trespass Act*, where a person who enters into or upon property in the possession or occupation of another with an intention to commit an offense or intimidate, insult or annoy any person lawfully in possession or occupation of such property, commits a tort of trespass.
44. Further, in the case of M'Mukanya -vs- M'Mbijiwe [1984] eKLR, the Court held that 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.
45. Applying the foregoing case law to the instant Appeal, the court will proceed to determine whether the Appellants did proof on the required standard that indeed the Respondent trespassed on their parcel of land, constructed structures thereon, and has remained on the said parcel of land without permission or consent of the Appellants.
46. After careful consideration of the available evidence before the trial court, this court in its appellate jurisdiction comes to an independent conclusion that indeed the Appellants failed to prove their case on the required standard of balance of probabilities. The trial court rightly found as it did, and did not err, both in law and facts, since the available evidence was not sufficient to prove a case of trespass on the required standard. See the case of Ochako Obincho vs Zachary Oyoti Nyamongo (2018) eKLR, where the court cited Clark & Lindsell on Torts, 18th Edition page 923, and held that the onus was on the plaintiff to prove that he was the owner of the suit property, and that the Defendant had invaded and occupied the said land without any justifiable cause.
47. Having found that that the trial court did not err at all in arriving at its decision as it did, then this court finds and holds that the instant Appeal is not merited, and consequently, the court finds no reasons to fault the Judgment of the trial court/ and or upset the same. For these reasons, the court dismisses the instant Appeal entirely.

II. who should bear costs of the Appeal?

48. Ordinary, costs are awarded at the discretion of the court. See Section 27 of the *Civil Procedure Act*. However, costs follow the events and are awarded to the successful litigant, unless there is a special circumstance that would warrant the court to depart from that principle. This court finds none herein, and consequently, the Respondent being the successful litigant is awarded costs of this Appeal.
49. The upshot of the foregoing and the final analysis, is that this court finds and holds the instant Appeal not merited, and consequently, the said Appeal is dismissed entirely with costs to the Respondent.
Appeal dismissed accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAROK, THIS 6TH DAY OF NOVEMBER 2025

L. GACHERU

JUDGE

Delivered online in the presence of.

Elijah Meyoki - Court Assistant.

Mr. Naimondu holding brief for Ms. Maritim - Appellants



N/A - Respondent

