



**Tasur v Olooninia & 2 others (Environment and Land Appeal
E015 of 2024) [2025] KEELC 7903 (KLR) (13 November 2025) (Judgment)**

Neutral citation: [2025] KEELC 7903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E015 OF 2024
MN MWANYALE, J
NOVEMBER 13, 2025**

BETWEEN

OLODARU OLE TASUR APPELLANT

AND

JULIANA OLOONINIA 1ST RESPONDENT

CAREN OLOONINIA 2ND RESPONDENT

OLE NKOORE SHARKEKI 3RD RESPONDENT

JUDGMENT

1. The Appeal herein relates to the judgment of Hon. W.C. Waswa (SRM) delivered on 30.05.2024 in Kilgoris CMELC No. 063 2023.
2. The Memorandum of Appeal penned 10 grounds of Appeal and prayed for orders that;
 - a. The Appeal be allowed with costs.
 - b. The judgment of the Senior Resident Magistrate be reversed.
 - c. The Appellant's claim as set out in the Plaint be allowed with costs.
3. The grounds of Appeal are as follows; -
 - a. That the Learned Magistrate erred in entering judgment against the Appellant in favour of the Respondent and dismissing the Appellant's suit.
 - b. That the Learned Magistrate erred in holding and finding that the Appellant did not present sufficient evidence in support of his case.
 - c. That the Learned Magistrate failed to consider the fact that the appellant is the registered proprietor of the suit property.



- d. That the Learned Magistrate failed to consider the fact that the appellant became the owner of the land after purchasing it and having paid the full purchase price he became the owner of the land.
 - e. That the Learned Magistrate failed to consider that the Defendants have denied the appellant access to his land and they have since occupied the whole land to the detriment of the appellant.
 - f. That the Learned Magistrate did not make an order for the surveyors to make a ground visit report on ownership and occupation.
 - g. That the Learned Magistrate did not consider the evidence presented by the Appellant at trial.
 - h. That the Learned Magistrate failed to cumulatively and or exhaustively evaluate the entire evidence on record and hence failed to capture and decipher the salient issues and or features of the suit before him and thus arrived at an erroneous conclusion; contrary to an in contradiction of the evidence adduced.
 - i. That the Learned Magistrate erred by stating that it cannot help a litigant to gather evidence yet the Appellant had presented sufficient evidence on his own.
 - j. That the Learned Magistrate further erred by stating that the appellant did not avail any report from a land surveyor yet the court did not order the land surveyor to make such a report.
4. On the basis of the aforementioned grounds, the Appellant sought for the orders set out at paragraph 2 of the judgment.
 5. Upon directions being issued, and admission of the Appeal, parties were directed to file and serve, and or exchange written submissions; which the court summarizes as follows; -

Appellant's submissions

6. The Appellant submits that he is the registered owner of Transmara Kimintet 'D' 459, having produced a copy of the title and certificate of official search hence by virtue of provisions of section 26(1) of the *kenya act 2012 3 Land Registration Act*, he is the prima facie owner with absolute and indefeasible ownership. The Appellant submits that the Respondents are the owners of adjacent parcels but were occupying the whole of the Appellants parcel. The Appellant submits placing reliance on the decision of *Wreck Motors Enterprises Vs. Commissioner of Lands and Others (1997) eKLR* on the proposition that a title deed was sufficient proof of ownership.
7. The Appellant submits that lack of Land Registrar's report was not fatal to the case, as the Appellants evidence was sufficient and unrebutted; hence the court was biased; and denied the Appellant of his right to own and enjoy property under Article 40 of *kenya act 2010 constitution the Constitution of Kenya 2010*.
8. The Appellant thus urged the court to review and evaluate the evidence and arrive its own determination, and allow the appeal.

Respondents Submissions

9. The Respondent submitted on three issues for determination.
10. It is the Respondents submission that the Appellant bore a duty to prove the exact location of parcel Transmara Kimintet "D"459 on the ground.
11. That the Respondents had encroached onto it and that such occupation was unlawful.



12. The Respondent submits that the Appellant as P.W.1 admitted that the land registrar did not establish the boundaries, neither was an encroachment and or ground site report, photographs or summons produced. No surveyor or the alleged vendor testified; on the extent of the trespass; hence the Appellant did not discharge the burden of proof as required under sections 107-109 of the *akn ke act 1963 46 Evidence Act*.
13. Respondent placed reliance in the decision in the cases of Anthony Francis Wareham Vs. Kenya Post Office Savings Bank 2004 (eKLR) which held that pleadings and evidence must align, unsupported allegation cannot sustain a claim, as well as Seferio Ogola Wandwa Vs. Chairman BOM Nambale Urban Secondary School 2022 (eKLR) where eviction was declined where no proof of encroachment beyond registered acreage was adduced.
14. The Respondent submits that after trial had been conducted the Appellant tried to introduce a Land Registrar's report which was properly declined by the court. Thus, the court did not make any error in fact and in law, and the Appeal ought to be dismissed, as it is devoid of merit.

Issues of Determination

15. Having analyzed the Record of Appeal, the rival submissions and considered the law the court frames the following as issues for determination:
 - i. Whether or not the Appeal is merited, and in deciding this issue, the court shall consider whether the Appellant as Plaintiff proved trespass and encroachment on the part of the Respondents and Defendants over Transmara Kimintent 'D' 459, and whether he proved his case before the trial court?
 - ii. What orders ought to issue.
 - iii. Who bears the cost of the Appeal.

Analysis and Determination

16. As both the Appellant and Respondent have rightly submitted, the duties of this court as a first Appellate court as stated in *Selle & Another Vs. Associated Motor Boat Limited & 3 Others* which duties were held to be as follows; -

“An appeal to this court from a trial by the High Court is by way of retrial by and the principles upon which this court is such an appeal are well settle. 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.....”

17. In determining the first issue the court has analyzed the Appellants case as plaintiff before the trial court, paragraph 3 of his plaint appearing at page 13 of the record of Appeal the Appellant pleaded being the registered owner of Transmara Kimintent 'D' 459, and that Defendants together with others illegally entered into the suit property and began farming activities on the suit land and he sought a permanent injunction, against them, as well as Declaration that he was entitled to mesne profits, general damages for trespass, and further sought for eviction of the Defendants from the said suit property.
18. From the above the Appellant's cause of action before the trial court was premised on trespass of the Defendants on his suit property.



19. In their statement of defence, the Defendants denied any of the alleged actions pleaded in the plaint, and raised a jurisdictional issue that the suit involved a boundary dispute, and under section 18(2) of the *akn ke act 2012 3 Land Registration Act*, was to be determined by Land Registrar.
20. The Appellant as Plaintiff testimony appears at pages 47 of the record of Appeal which reveals that the Appellant adopted his witness statement and produced in evidence;
 - a. An Agreement for sale dated 21.09.2022 – P.Exhibit No. 1
 - b. Official search – P.Exhibit No. 2
 - c. Copy of title deed, and stated that the defendants were on his land.
21. On cross-examination, the plaintiff stated that his parcel of land was Transmara Kimintet ‘D’ 459, while the Defendants had their own parcel of land. he conceded that he had no land registrar’s report to prove that the defendants were occupying his land and no report to show that the defendants had refused to solve the matter. He had not filed a boundary dispute report.
22. With the above testimony the plaintiff closed his case.
23. D.W.1 who was the 2nd defendant testified, his testimony appearing at pages 48-49 of the record of Appeal. The gist of her testimony being that she stays in her property together with her co-wife, and have stayed thereon since 1996 to date, the land was well fenced. She produced a copy of the adjudication record, D.Exhibit No. 1, mutation form – D.Exhibit No. 2, official search – D.Exhibit No. 3, a release dated 15.07.2019 – D.Exhibit No. 4, indicating that they had leased to the 3rd defendant to graze cows. She denied occupying the plaintiffs land; and in cross-examination she denied staying on the plaintiffs land, she insisted that she had a title for 460 where she lived and plaintiff was claiming 459. Her property was about 77 acres which they had leased 44 to the 3rd Defendant.
24. DW1 testified as the sole witness and upon the closure of her case, Mr. Moranga learned counsel for the Plaintiff applied for a ground visit, which was strenuously opposed by the Defence, in view of the fact that both parties closed their case and court directed filing of submissions and reserved the issue of the ground visit in the judgement.
25. In the impugned judgement the learned trial Magistrate correctly summarized the plaintiff’s case at paragraph 3 to 7 thereof, and the Defence case at paragraph 8 to 14 thereof.
26. In summarizing his the learned findings trial Magistrate quoted the definition of Trespass from the *akn ke act 1962 48 Trespass Act Cap 403* as well as from Blacks law Dictionary and found that the Plaintiff filed in his duty to prosecute his case, as he did not produce any report from a Land surveyor, Land registrar or even photograph to prove the trespass and its extent. Thus the plaintiff had failed in his evidential burden to prove his case on a balance of probability, and dismissed the case, provoking this appeal.
27. In the ground of the appeal the Appellant faults the trial court for not making an order for a ground visit, and that the Appellants evidence was not taken to account.
28. But did the Appellant prove this case?
29. The Appellant produced a copy of title and search as well as an Agreement for purchase of Transmara Kimintet “D” 159.
30. This evidence generally pointed to the issue of ownership and proprietary interest by the Appellant as Plaintiff. The Appellants claim as plaintiff was that the Defendant had trespassed and or encroached on



his property, in order to prove the encroachment, the Appellant had to go beyond the tile documents and prove by way of land Registrar's register surveyors ground report, the extent of the encroachment by the Defendants.

31. The Appellant had to prove the exact ground location of his property, which could only be established by the Map sheet as well as a confirmation by the Land Registrar and or the surveyor a role reserved to them to fix boundaries under section 18 of the *akn ke act 2012 3 Land Registration Act*. In absence of these documents and evidence, the Appellant could not and did not discharge the evidential burden under section 107- 109 of the *akn ke act 1963 46 evidence Act*. A finding that the trial court correctly reached.
32. The request for a site visit report after closure of the respective parties case, was made by the plaintiff's counsel on realization that they had not presented sufficient evidence.
33. At page 50 of the record of Appeal, after the respective closure of the case, I quote verbatim what transpired.

“ Mr. Shira Advocate; I close my case; I close my case

Mr. Moranga advocate; I pray for a ground visit

Mr. Shira advocate; I oppose because the plaintiff and defendants have closed their case. This shall bring new issues. We ought to have dealt with the ground visit at the pre-trial stage. A ground visit shall interfere contents, and it shall mean that the case shall be reopened. Let's file submissions on all issues.

Mr. Moranga advocate: Our case is about parcel No. 459, the defendants have referred to another land parcel No..... the ground visit shall resolve the dispute at hand. The pleadings are not enough to resolve the issues at hand. I pray that there be a ground visit”

34. In determining this issue, the court at paragraph 33 of its judgment observed as follows

“ 33. This court must not assist a litigant to gather evidence.

In Vincent Mosei Vs. Charles Somoke Onsase and Another (2019) eKLR where the court held as follows:

“The instant application by the Defendant which the plaintiff opposes, in my view amounts to an attempt on the part of the Defendants to seek assistance of the court in gathering evidence. If the application was not opposed by the plaintiff and or both parties had consented to an order of inspection of the suit premises by the valuer and or land surveyor, the court would have had no difficulty making it but, in the circumstances, and having regard to the stage of the proceedings, the court would exercise its discretion in disallowing the Defendant application...”

35. Thus, the Learned Magistrate did not err in disallowing the application that was not made at the interlocutory stage but after both parties had closed their cases. Had the application been made before testimony of the parties, the trial court would not have been justified to disallow the same.
36. At the close of the plaintiff's case, the plaintiff Advocates realized that their pleadings and evidence were inadequate hence their application to remedy the case their case, and the learned Magistrate cannot be



faulted for, disallowing the same as parties are bound by their pleadings and ought to adduce evidence in support of their cases.

37. In a nut shell, thus court finds that the Appellant as Plaintiff before the trial court did not prove his case on a balance of probabilities and that his Appeal herein is thus not merited.
38. The grounds of Appeal as framed do not succeed and as the Appeal fails, the same is dismissed with costs to the Respondent in this Appeal as well as costs of the suit; before the lower court.

DATED AT KILGORIS THIS 13TH DAY OF NOVEMBER, 2025.

HON. M.N MWANYALE

JUDGE

In the presence of

CA – Emmanuel Sylvia Sandra

Mr. Shira for Respondent

N A for Ms. Pion for Appellant

