

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI
ELCA NO. E095 OF 2025

KENNEDY WAWERU NJUGUNA	-	1ST APPELLANT
AGNES WAIRIMU GITAU	-	2ND APPELLANT
VS -		
SIMON MUGO NJUGUNA	-	1ST RESPONDENT
EMBAKASI RANCHING CO. LTD	-	2ND
RESPONDENT		

JUDGEMENT

1. The Appellants instituted proceedings in the Magistrates Court under MCELC/E124 of 2024, with the Plaint filed on 29/3/2023. They sought to be adjudged as bona fide owners of **Parcel No. -136/3681** (the suit property) and a permanent injunction to prevent the 1st Respondent from dealing with or interfering in any way with the suit property. The Appellants also requested costs of the suit. The 1st Respondent filed a Defence, whereas the 2nd Respondent did not respond to the suit.
2. From the record of appeal and the proceedings in the trial court, the hearing of the suit commenced on 13/9/2023 before Hon. Lucy M. Njora, with the 1st Appellant testifying for the Appellants and closing their case. The defence hearing was scheduled for 24/9/2024. On that date, when the 1st Respondent took the stand, he adopted his witness statement dated 28/8/2023 as his evidence-in-chief. He also sought to introduce the 10 documents listed on his List of documents dated 28/8/2023 as exhibits in support of his case.
3. For purposes of clarity, the documents listed thereon are;
 - a. Copy of Non-Member Share Certificate No. 024349 for Plot No. V. 7048.

- b. Copy of Beacon Certificate dated 8/12/2011.
 - c. Letter from 2nd Defendant dated 2/9/2020.
 - d. Copies of Photographs.
 - e. Copy of Allocation map.
 - f. Copy of Parcel/Title amendment Letter dated 28/8/2020.
 - g. Copy of Receipt of Kshs. 3,100/= to Ngata Kamau & Co. Advocates.
 - h. Copy of Pink Form dated 19/2/ 2020.
 - i. Copy of Letter dated 27/2/2023.
 - j. Copy of Ruai OB 34/24/01/2022.
4. However, Counsel for the Appellants objected to the production of documents Nos. 3, 4, 5, 3,4,5,6, and 9, requesting the makers of these documents to produce them. In response, Counsel for the 1st Respondent informed the court that the makers are available and will produce the documents. The learned Magistrate, in her wisdom, directed that documents 1,2,7, and 8 be marked as Defence Exhibits (DEX 1,2,7, 8 & 10). Documents 3,4,5,6, and 9, on the other hand, were marked for identification (DMFI 3,4,5,6 & 9). The order was subsequently extracted on 13/3/2025.
5. Aggrieved by the said decision, the Appellants lodged this appeal vide the Memorandum of Appeal dated 19/11/2024. The grounds of appeal are that;
- a. The trial court erred in law and fact in admitting into evidence the 1st Defendant's Exhibit 3 (letter from the 2nd Defendant dated 2/9/2020) and Exhibit 5 (Copy of allocation map), contrary to the provisions of the Evidence Act (Cap. 80) Laws of Kenya.
 - b. The trial magistrate occasioned a travesty of justice by misapprehending the law and facts placed before her.
 - c. Other grounds as may be argued with leave of this Honourable Court.
6. The Appellants therefore pray that the appeal be allowed and for orders that;

- a. The finding of the Trial Magistrate on admitting in to evidence the 1st Defendant's Exhibit 3 (letter from the 2nd Defendant dated 2/9/2020) and Exhibit 5 (Copy of allocation map), contrary to the provisions of the Evidence Act (Cap. 80) Laws of Kenya be set aside, be reviewed and/or revised.
 - b. This Honorable Court do make such further orders as it may deem fit.
 - c. This Appeal be allowed with costs to the Appellants.
7. The appeal was admitted, and by consent of the parties, it was canvassed through written submissions. Both parties complied. The Appellants' submissions are dated 8/7/2025 and are wrongly titled as Respondent's submissions. The 1st Respondent's submissions are dated 15/9/2025.

The Appellants' submissions

8. The Appellants argue that the primary issue for determination is whether the trial court erred in law, fact, or in misapplying its discretion by admitting into evidence the 1st Respondent's/ Defendant Exhibit 3 (Letter from the 2nd Respondent/Defendant dated 2/9/2020) and Exhibit 5 (copy of the untitled allocation map). They contend that the Trial Court erred both in law and fact by admitting DEX 3 and DEX 5 without calling the authors to testify. Since the case involves a fraudulent transfer of ownership of immovable property, a higher standard of proof, beyond a mere balance of probabilities, is required to establish such a claim. It is further submitted that DEX 3 and DEX 5 did not meet this necessary threshold. Furthermore, counsel for the 1st Respondent confirmed that the makers were available and would be called to produce the documents; therefore, they ought to have been called to testify.
9. The Appellants argue that there is no evidence showing that the author of DEX 3 was available, deceased, or otherwise exempt under Section 35 of the Evidence Act. They also assert that DW 3 did not prove his qualifications as a surveyor as required under Section 48 of the Evidence Act. Furthermore, DEX 3 was in fact authored by the Chairlady of the

2nd Respondent/Defendant, as is evident on its face; she is not a neutral third party but a co-litigant with an interest in the outcome.

10. Regarding DEX 5, an untitled, unauthenticated copy of a purported allocation map that lacks any clear markings indicating its origin and does not specify the geographical location of the plots it claims to demarcate on the face of the document. It is also noted that DEX 5 does not have any official markings, such as a letterhead or stamp, to confirm that it was issued by the 2nd Defendant. Although DW 3 claims authorship of DEX 5 and it contains what appears to be some writings and a signature, the admission of this map contradicts the best evidence rule regarding the admissibility of documentary evidence.
11. The Appellants submitted that neither document bears the official stamp from the 2nd Respondent nor are they certified copies or contain makers' testimonies. They claim the trial court undermined the right to a fair trial under Article 50 of the Constitution. The Appellants urged the court to set aside the trial court's order and instead have the 1st Defendant's exhibits struck out in the lower court.

The 1st Respondent's submissions

12. The 1st Respondent, in opposing the appeal, submits that the main issue for determination is whether the Trial Magistrate erred in law and fact by admitting the 1st Respondent's Exhibits 3 and 5. The 1st Respondent argues that the documents subject to this appeal were produced by the Surveyor, John Muhia Kanotha, which include an allocation map and a letter written by an official of the 2nd Respondent dated 2/9/2020. The 1st Respondent maintains that the allocation map was produced by the surveyor who created it. The surveyor confirmed that he surveyed the land and prepared the allocation map, which he signed and appended his name to. The fact that there is no title on the map is not a valid reason to question its validity. The issue of the map's authenticity, or lack thereof, is something that the Appellant should have addressed.

13. Regarding the issue of qualification, the 1st Respondent argues that the Appellants should have cross-examined the surveyor on it. The Appellants are therefore barred from raising it as an issue on appeal.
14. Regarding DEX 5, the Letter written by the Chairlady of the 2nd Defendant, the 1st Respondent submits that the document was produced by the surveyor in his capacity as an employee of the 2nd Defendant and relating to the allocation map. The Letter is a form of correspondence, authored on behalf of the company, and is therefore not a personal letter. As such, the Letter forms part of the records of the 2nd Respondent. Since the surveyor is an employee of the 2nd Respondent, he was authorised to produce it. The Letter is part of the company's correspondence, and Section 35 of the Evidence Act allows the production of statements contained in documents maintained in the normal course of business without calling the maker, provided the maker had a duty to record the information.
15. The 1st Respondent argues that the issues raised by the Appellant could have been addressed through submissions rather than an appeal. They assert that the appeal is an abuse of the court process and a tactic to delay the determination of the suit, thereby contravening the provisions of Article 159 (2) of the Constitution. It is contended that the appeal lacks merit and should be dismissed with costs, with the matter referred back to the trial court for determination.
16. The 2nd Respondent did not file any submissions.

Analysis and determination

17. I have considered the Appeal, the record of appeal and the rival submissions, I am of the considered view that the only issue for determination is; whether the appeal is merited
18. Since this is a first appeal, the court has a duty to re-examine and evaluate the evidence and draw its own conclusions. However, it must also bear in mind that a trial court, unlike the appellate court, had the

advantage of observing witness demeanour and hearing their evidence firsthand.

19. The duty of the first appellate court was set out in the locus classicus case of **Selle and another -vs- Associated Motor Board Company and Others [1968] EA 123**, where the court in their usual gusto, held as follows;-

“.. this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of re-trial and the Court of Appeal is not bound to follow the trial Court’s finding of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of demeanour of a witness is inconsistent with the evidence generally.”

20. The Court must keep in mind that it neither saw nor heard the witnesses. It is the trial court that has observed their demeanour and assessed their truthfulness. However, documents still speak for themselves. The observation of documents is identical to that of the lower court, as parties cannot interpret matters outside those documents. In the case of **Peters v. Sunday Post Limited [1958] EA 424**, the court therein stated as follows:

“It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion...”

21. I have perused the Order related to this appeal. The order was issued on 24/9/2024 and retrieved on 13/3/2025. The Learned Magistrate, in her wisdom, directed that documents 1,2,7, and 8 be marked as Defence Exhibits (DEX 1, 2, 1,2,7, 8, and 10). Documents 3, 4, 5, 6, and 9, on the other hand, were marked for identification (DMFI 3, 4, 5, 6, and 9).

22. Although the Appellant objects to the production of Document Number 3 (Letter from 2nd Defendant dated 2/9/2020) and Document

Number 5 (Copy of Allocation map), these were only marked for identification and not as exhibits. Both the Appellant and 1st Respondent are mistaken.

23. The simple act of marking a document for identification does not remove the necessity for formal proof. How does a document become part of the evidence in a case? Any document filed or marked for identification by either party goes through three stages before it is either proved or disproved. First, when the document is filed, it does not yet become part of the judicial record despite being on file. Second, when the document is tendered or produced as an exhibit by either party and the court admits it into evidence, it becomes part of the judicial record and qualifies as evidence; however, simply admitting it does not mean it is proved. Admission of a document as evidence should not be mistaken for proof of its contents. Third, the document is considered proved or disproved when the court exercises its judicial discretion to evaluate the relevance and truth of its contents—this occurs at the final hearing. When the court examines a document for admissibility, it concentrates solely on the document itself. But when forming a judicial opinion on whether a document has been proved or not, the court takes into account all facts and evidence on record, not just the document.
24. The marking of a document is solely for identification purposes and does not serve as proof of its contents. The reason for marking is to enable the parties and the court, while reviewing the record, to identify and recognise which document was before the witness. Marking a document for identification does not establish its proof; a document is not considered proved simply because it has been marked for identification.
25. Once a document has been marked for identification, it must be proved. A witness must produce the document and tender it in evidence as an exhibit, establishing its authenticity and relevance to the facts of the case. Once this foundation is laid, the witness must move the court to

have the document formally admitted as an exhibit and included in the court record. If the document is not marked as an exhibit, it is not part of the record. If admitted into evidence but not formally produced and proved, the document would be hearsay, an untested, and unauthenticated account.

26. In **Des Raj Sharma -vs- Reginam (1953) 19 EACA 310**, cited in **the case of Equity Bank (K) Limited v Wambua & 2 others (Civil Appeal E246 of 2023) [2025] KEHC 2555 (KLR)** it was held that there is a distinction between exhibits and articles marked for identification; and that the term “exhibit” should be confined to articles which have been formally proved and admitted in evidence. In the Nigerian case of **Michael Hausa -vs- The state (1994) 7-8 SCNJ 144**, it was held that if a document is not admitted in evidence but is marked for identification only, then it is not part of the evidence that is properly before the trial judge and the judge cannot use the document as evidence.
27. Guided by the decision cited above, a document marked for identification only becomes part of the evidence on record when it is formally produced as an exhibit by a witness. In not objecting to the marking of a document for identification, a party cannot be deemed to be accepting the admissibility and proof of the contents of the document. Admissibility and proof of a document are to be determined at the time of production of the document as an exhibit and not at the point of marking it for identification. Until a document marked for identification is formally produced, it has very little, if any, evidential value.
28. In the instant appeal, the impugned documents have yet to be produced as exhibits. They were only marked for identification as DMFI 3 and DMFI 5. The documents did not become exhibits before the trial court; they have simply been marked for identification and currently hold no evidential weight.

29. I am persuaded by the dicta in the **Nigerian case of Michael Hausa -vs- The state (1994) 7-8-SCNJ 144** that a document marked for identification is not part of the evidence that a trial court can use in making its decision. In the instant case, the trial court has yet to make its determination, so it cannot be faulted for relying on documents marked for identification and not produced as exhibits.

30. Even if the Trial Court had admitted the documents, would this court fault her? The Appellant and the 1st Respondent extensively discussed the admissibility of documentary evidence provided under Section 35 of the Evidence Act. Section 35 of the Evidence Act addresses the admissibility of documentary evidence concerning facts in issue. It states as follows;

- 1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - a. if the maker of the statement either— (i) Had personal knowledge of the matters dealt with by the statement; or (ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
 - b. If the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or

expense which in the circumstances of the case appears to the court unreasonable.

2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) of this section shall be admissible or may, without any such order having been made, admit such a statement in evidence—(a) notwithstanding that the maker of the statement is available but is not called as a witness;(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

31. It is trite that a document will be admissible if the person who made it is dead, cannot be found, has become incapable of giving evidence, their attendance cannot be secured, or even if it can be secured but doing so would cause expense and delay which the court considers unreasonable.

32. In the present case, the Appellant's objection to the 1st Respondent's documents is that the Witness who sought to introduce them is not the creator of the documents in question, and no basis has been established for the latter's witness—who is not the maker—to produce the document, contrary to Section 35 of the Evidence Act. Under section 35 (2) of the Evidence Act, when the court is satisfied that, considering all the circumstances of the case, requiring the maker to produce a document would cause undue delay or expense, documentary evidence

may be admitted even if the maker is not the person presenting the document.

33. A witness should produce documents of which they have personal knowledge or, in circumstances where the witness, while performing a duty, recorded information in the document supplied by a person with knowledge of it. Therefore, there should be some reasonable connection between the witness and the document sought to be produced. When there is a dispute over whether the document was truly authored by the person stated and regarding its authenticity, even if the witness claims to be the recipient or addressee, fairness demands that the maker of the document produce it, provided that such production does not cause unreasonable delay or expense. Fairness and procedural justice should guide the admission of documents to prevent one party from being prejudiced by the opposing party's production of such documents.

34. In the instant appeal, the 1st Respondent stated that the makers of the documents could be called upon to produce them. Perhaps, that is why the documents marked for identification are not marked as exhibits.

35. Rule 28 (g) of the Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts (Gazette Notice No. 5178) provide for directions to be given at a pretrial conference as follows:

28. In addition to the matters contained in Order 11, Rule 3 of the Civil Procedure Rules,

2010, the following are the orders/directions that may be issued by a Judge during a

pre-trial conference:

(g) Taking of all objections to the production of specific documents, where notice

has been issued to the other party, thereafter, objections on the production of

any document shall not be entertained at the main hearing;

36. Order 11 of the Civil Procedure Rules was enacted to streamline case management through pretrial conferences, aiming to prevent delays in hearings and document production. Effective case management requires parties to exchange documents and agree on those needed by the makers and those objected to, in preparation for a smooth hearing. This process should be conducted during the pretrial conference, and objections should not be considered at the main hearing, as outlined in paragraph 28(g) of the Practice Directions. Parties should take pretrial conferences seriously and strive to resolve all issues beforehand. See the case of **Virginia Kathambi Maingi v Nicholas Mwatika & 2 others [2021] KEELC 57 (KLR)**.

37. In the case of **Methuselar Keyah Lubembe vs Albina Kipkemoi [2019] eKLR**, the court stated as follows, in paragraphs 8 and 9:

“ 9 ... case conference under Order 11 is a good tool for managing court files and

demands time from the Judicial Officer in conduct as well as the parties or advocates

to understand the file sufficiently well so that every effort and endeavor is made to

save every minute by agreeing on basic and mundane issues like the number or

witnesses to be called, the need for cross examination of witnesses, any questions

regarding admissibility of a document and how to have the filed documents

produced. This is important so that prospects of objection upon objections which

many times derail progress are avoided. It is also at the period of the case

conference that parties make disclosures and discoveries towards achieving fair trial

devoid of ambush. “When done correctly the prospects of subsequent interlocutory

applications like for amendments can wholly be arrested and dealt with before hand.

It is at process that all players in Civil Litigation have no otherwise but to internalize

and approach with seriousness deserved because when properly undertaken a very

huge step is taken towards expeditious disposal of the matter”

38. Parties should always adhere to the provisions of Order 11 on pretrial conferences to facilitate the hearing of cases. Courts have in the past dismissed such objections for not complying with pretrial conferences, as seen in the case of **Virginia Kathambi Maingi v Nicholas Mwatika & 2 others (Supra)**, where the court held as follows:

“The 1st Defendant’s counsel having failed to raise her objections on the production of the Plaintiff’s exhibits numbers 15, 16, 17, and 18, during the pretrial conference is estopped from raising the objections at the hearing of this suit. Her argument that disallowing her objections will amount to sacrificing justice at the alter of expediency does not arise; because the provisions of the Constitution, the Environment and Land Court Act, the Civil Procedure Act and the Rules thereunder together with this court’s Practice Directions have inbuilt mechanisms to ensure justice, fairness, expediency, affordability and proportionality are achieved all in one package.

17. In the premises, I find that the 1st Defendant’s objection to the production of the

plaintiffs’ exhibits 15, 16, 17 and 18 lacks merit and I proceed to dismiss the same

with costs to the Plaintiff.”

39. For the aforesaid reasons, the court has no basis to fault the trial court for marking the impugned documents for identification rather than as exhibits.
40. It should also be noted that the authenticity of a document can only be proven at trial after it has been admitted during cross-examination. The mere admission of a document is therefore not an end in itself.
41. **Final orders for disposal**
- a. In conclusion, I find the appeal is unmerited.
 - b. It is dismissed with costs awarded to the 1st Respondent.
42. It is so ordered

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 25TH DAY
OF NOVEMBER 2025 VIA MICROSOFT TEAMS.**

J. G. KEMEI
JUDGE

Delivered Online in the presence of:

1. Mr Kariah for the Appellants
2. Ms Maina HB for Mr Thuku for the 1st Respondent
3. N/A for the 2nd Respondent
4. CA- Ms Yvette Njoroge