



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC LAND APPEAL NO. E035 OF 2024**

**MBAI KIMEU ..... 1<sup>ST</sup>**

**APPELLANT**

**KILONZO KIMEU ..... 2<sup>ND</sup>**

**APPELANT**

**MATHEKA KIMEU ..... 3<sup>RD</sup>**

**APPELANT**

**VIRGINIA MULU ..... 4<sup>TH</sup> APPELANT**

**VERSUS**

**REGINA MUKUI KIIO .....**

**RESPONDENT**

**JUDGMENT**

**[Appeal from the judgment of Hon. Daffline Nyaboke Sure PM, delivered on 24/06/2024 in Kangundo Magistrates' Court ELC Case No. 50 of 2019 (Regina Mukui Kii v Mbai Kimeu, Kilonzo Kimeu, Matheka Kimeu and Virginia Mulu)]**

**Background of the appeal**

1. To establish the basis for the appeal, the respondent filed her plaint in the trial court dated 22/08/2018, in which she sued the appellants for illegal occupation and use of the **Matungulu/Kyaume/2100 (“suit property”)**, claiming legal ownership through a title deed of the suit property issued on 5/11/2012. The appellants are her relatives and are either her brothers-in-law or their children. In her claim, she sought the following orders against them:
  - a) ***An order evicting the appellants from the property known as Matungulu/Kyaume/2100.***
  - b) ***A permanent injunction restraining the appellants from interfering with the property known as Matungulu/Kyaume/2100.***
  - c) ***Costs of the suit.***
  - d) ***Any other relief that this Honourable court may deem fit to grant.***

2. The appellants challenged her claim and filed a statement of defence dated 31/12/2018, in which they denied the allegations made against them and put the plaintiff to strict proof. Additionally, they stated that they were legally in occupation and maintained that the suit property was a subdivision of a parcel of land they referred to as “original land”.
3. According to them, the “original land” belonged to **Kathikwa Muinde (“Muinde”)** and, upon its subdivision, the respondent’s deceased husband and the defendants, along with their families, were settled on specific parcels where they still reside. However, they further asserted that the appellants and their families were settled on the suit property, while the respondent and her deceased husband had been settled and/or allocated a different parcel of land, which they have occupied to this day. They also claimed that the respondent, through a corrupt scheme, obtained a title deed for the suit property without disclosing the interests of the appellants. They accordingly urged the trial court to dismiss the respondent’s suit with costs.
4. Subsequently, the matter was heard, with the parties calling their respective witnesses. As for the appellants, only the 1<sup>st</sup> to 3<sup>rd</sup> appellants testified, and they relied on their written and oral testimonies, whereas in the respondent’s case, she was the

sole witness and relied on her written statement, oral testimony, and produced documents. After hearing the parties, the matter was reserved for judgment. In the impugned judgment, the learned trial magistrate found the respondent's suit merited, allowed the reliefs sought. Costs were awarded to the respondent.

### **Appeal to this court, the hearing and preliminary issues**

5. Dissatisfied, the appellants appealed to this court and filed a memorandum of appeal dated 18/07/2024, which was also filed on 18/07/2024. They questioned the impugned judgment on eight grounds, but later, in their submissions dated 10/04/2025 filed by their law firm on record, **M/s. Nzuki Nzioka & Co. Advocates**, they abandoned some grounds and consolidated others into a single ground **that the honourable trial magistrate failed to consider the weight of evidence adduced during the trial.**
6. Accordingly, the appellants urged this court to allow the appeal, set aside the judgment and decree of the subordinate court, and substitute them with a judgment and order dismissing the respondent's entire suit with costs. Lastly, the costs of this appeal be borne by the respondent.

7. As directed by the court, the appeal was considered through the appellants' previously referenced submissions. The respondent also submitted her arguments via the law firm of **Ms Paul Mawili & Co. Advocates**, dated 22/04/2025. However, before proceeding further, it is necessary to address the preliminary issue of the alleged introduction of a new ground of appeal in the appellants' submissions, which also formed a significant part of their arguments, namely the issue of customary trust. Moreover, the case law they relied upon related to this new point.
8. In regard to this new ground of appeal, the respondent's counsel argued that during appeals, parties are not allowed to introduce new matters, including customary trusts as an overriding interest in the suit property. Although the court concurs with counsel and even though the term "customary trust" was not explicitly mentioned in the defence, this court finds that the issue had been raised before the trial court by the parties and was a matter for determination, particularly in assessing whether the appellants were lawfully occupying the suit property or if they were trespassers. This is evidenced by *paragraphs 4, 7, 9, and 10* of the statement of defence. Guidance on this is derived from the well-cited Court of Appeal decision in **Kenya Hotels Limited v Oriental Commercial Bank Limited [2018] KECA 692 (KLR)**, which stated:

***“Due to these fundamental concerns, the Courts has developed fairly elaborate principles that guide it in determining whether or not to allow a new point on appeal. In Openda v. Ahn, (supra) this Court identified some of the principles to include that all grounds of appeal must arise from issues that were sufficiently pleaded, canvassed, raised or succinctly made issues at the trial; that the point sought to be introduced must be consistent with the applicant’s case as conducted in the trial court, not changing it into a totally different case; the matter must have be properly pleaded and the facts in support of the new point must have come out in the trial court; a new point which has not been pleaded or canvassed in the trial court should not be allowed to be taken on appeal, unless the evidence establishes beyond reasonable doubt that the facts before the trial court, if fully investigated, would support the point; where the question is one of law turning on the construction of a document, the new point may be allowed but only if the facts when fully investigated support the new plea.*”**

### **Issues for determination, Analysis and Determination**

9. As this is a first appeal and as submitted by the appellant, **Section 78** of the **Civil Procedure Act** empowers this court to make a final decision on a case; to remand a case; to frame issues and refer them for trial; to take additional evidence or require the evidence to be taken; or to order a new trial. Thus, it is called upon to re-evaluate and reconsider the entirety of evidence presented before the trial court and to draw its own conclusions. This role of an appellate court was well stated in **Selle & Another v Association Motor Boat Co. Ltd & others (1968) EA 123**, as follows: -

***“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 it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound to follow the trial judge’s findings of fact if it appears that either he clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with***

***the evidence on the case generally. (Abdul Hameed Saif -Vs- Ali Mohamed Sholani (1955) 22 EACA 270)."***

This decision of **Selle (Supra)** has been cited in several court cases, including **Timsales Ltd V Wilson Libuywa [2008] Kehc 460 (KLR)**.

10. Hence, having disposed of the preliminary issue, it is the considered opinion of this court that the collapsed grounds of the appeal can be effectively evaluated by examining the singular issue of **whether the learned trial magistrate erred in law and fact in concluding that the respondent proved her.**
11. Accordingly, having considered the case before the trial court, it emerges that the respondent's case was relatively straightforward as she pleaded trespass to land and presented a copy of the title deed of the suit property to demonstrate she was the registered owner.
12. The appellants contested this title deed simply by claiming it was obtained through a corrupt scheme, without specifying this allegation of corruption or even filing a counterclaim; therefore, in this court's humble opinion, the only claim that was before the trial court was that of trespass. **See Order 2 Rule 10 (1)**

**(a) of the Civil Procedure Act.** Accordingly, the pertinent question is, what constitutes trespass? Were the appellants trespassers? In answer to the latter question, the learned trial magistrate found in the affirmative, a finding which is now confronted before this court.

13. In the text of **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923**, trespass to land is defined as follows: -

***“Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another.***

**Page 927** of the same text discourses as to who may sue for trespass, and it states as follows: -

***“Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner.”***

14. In the book of **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19<sup>th</sup> Edition, page 428**, trespass is discussed as follows:

***“Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”***

15. The common theme in the definition of trespass by these distinguished scholars is that ownership is not necessary to make such a claim. In this case, the respondent is the registered owner of the suit property, and therefore, her claim for trespass was properly before the trial court.

16. The appellants are her close relatives, either as her brothers-in-law or their children. The appellants argued that the suit property was a subdivision of the “original land”; it later became clear that the “original land” referred to was actually **Matungulu/Kyaume/364 (“364”)**, but they did not produce green cards, a mutation form, or a registry index map (“RIM”) to support these claims. They also did not tender any evidence showing that the respondent or her husband were ever the registered owners of **Matungulu/Kyaume/374** as contended.
17. From the title deed of the suit property and the adduced evidence, particularly the judgment of the Minister of 29/11/1985, it is evident that the suit property was created through the **Land Adjudication Act**, which was designed to verify and document rights and interests in community land and or customary land. The process involves a lengthy public procedure that includes demarcating, surveying, and recording land before its formal registration in accordance with the adjudication register. Such registrations entail the issuance of title documents under **Sections 6** of the **Land Act**, the **Land Registration Act**, and the **Registered Land Act (repealed)**.
18. During this lengthy process of adjudication, the **Land Adjudication Act** allows parties to raise their grievances at various stages. Usually, this process starts with the land adjudication committee. If they are dissatisfied, they can

escalate the matter to the arbitration board. If they still feel aggrieved, they can approach the land adjudication officer before making a final appeal to the minister. **Refer to Sections 20, 21, 22, 26, and 29 (1) and (2) of the Land Adjudication Act.** Only in exceptional cases, such as those outlined in **Section 30**, may a party bring the issue before the court.

19. In the present case, the appellants stated before the trial court that Muinde had three sons: Kimeu Muindi, Kiio Muindi (the respondent's husband), and Kituu Muindi. They also said that she gifted 364 to Kituu Muindi and Kimeu Muindi, who jointly owned this particular land. They claimed that these two brothers divided the land into two equal parts, each taking one half, and that both planted sisal to mark the boundaries of their respective halves. Additionally, they stated that the respondent's husband was gifted another parcel of land. It appears that they were claiming that the suit property and 364 were the same parcel of land.

20. However, as well reasoned by the learned trial magistrate, this line of defence or evidence could not see the light of day, as the issue of the suit property had already been litigated and decided by the Minister in **Minister's Land Appeal Case No. 193 of 1981 Kimeu Muindi and Kithuu Muindi v. Mrs**

**Mukui Kiio and Bernard Mutuku Nzimba** within the legal framework of the **Land Adjudication Act**.

21. The subject matter in that dispute was the suit property, and on hearing the appellants in that case, who are either the appellants herein or their children are the appellants, the appeal was dismissed on 29/11/1985, and the district surveyor was directed to inspect the suit property. Therefore, it was not permissible for these appellants to re-litigate on this issue of lawful occupation of the suit property and to buttress this, this court relies on the decision of **Dume Deri Mumbo & 19 others (suing on their behalf and on behalf of Wandarari Clan v Cabinet Secretary of Lands, Housing & Urban Development & 6 others [2016] eKLR** which held: -

***“...although a litigant can file a suit in a matter where the adjudication register, pursuant to the provisions of the Land Adjudication Act, has been closed and a title deed issued,.. Consequently, the court can only interfere with the decision of the bodies established under the Act by way of Judicial Review proceedings or where a new cause of action is introduced after the proceedings of the Minister have closed. Then,***

***and only then can the court interfere by way of an ordinary suit or Judicial Review Proceedings.”***

22. Considering the Minister’s decision established the respondent’s customary ownership of the suit property against the appellants or their predecessors, as the case may be, it follows that the appellants are unlawfully occupying the suit property and are trespassers. They cannot, therefore, hide behind the veil of customary trust, as that issue has already been determined.
23. Ultimately, this court agrees with the finding of the learned trial magistrate that the respondent acquired the suit property through a recognised process; it also agrees with her that the appellants intend to deny the respondent possession; and it further agrees with her that the respondent’s case was for allowance. This court also concurs with the respondent’s counsel that the appeal is not merited.
24. Therefore, for the above reasons, this court concludes that the learned trial magistrate did not err in her conclusions and findings, and this court will therefore not disturb the lower court judgment. This court finds and holds that this appeal is devoid of merit. It is hereby dismissed, and this court upholds the orders issued in the judgment rendered on 24/06/2024. Appeal is dismissed. It is well-established law that costs follow

the event, but for the special reasons that parties are close relatives, each party shall bear their respective costs of this appeal.

Orders accordingly.

**Delivered and Dated at Machakos this 2<sup>nd</sup> day of  
December, 2025.**

**HON. A. Y. KOROSS**

**JUDGE**

**02.12.2025**

**Judgment delivered virtually through Microsoft Teams  
Video Conferencing Platform**

In the presence of;

Ms. Kanja Court Assistant.

Mr. Nzioka for the Appellant.

Mr. Wambua for the Respondent.