



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC LAND APPEAL NO. E013 OF 2024

**STELAMARIS SYOMITO MUNENE, acting as the legal
representative of JUVENALIS MUSYOKI KAVITA.....**

1ST APPELLANT

STEPHEN MUNYAO MUTUA.....2ND

APPELLANT

VERSUS

**VOKENI
MUTUNGA.....RESPONDENT**

JUDGMENT

**[Appeal from the judgment of Hon. Daffline Nyaboke Sure
PM, delivered on 25/03/2024 in Kangundo CM's Court ELC
Case No. 24 of 2012(Vokeni Mutunga v Stelamaris Syomito
Munene acting as the legal**

**representative of Juvenalis Musyoki Kavita and Stephen
Munyao Mutua)]**

Background of the appeal

1. To provide context for the appeal, it is essential to outline the subject matter of the dispute that was before the trial court and is now before this court. In the lower court, the respondent filed a suit against the appellants through a plaint dated 30/03/2012.
2. It was the respondent's case that he owned the parcel of land known as **Plot No. 67D ("suit property")** at Kimiti Farmers Cooperative Society, having purchased it from Mutua Mukali ("**Mukali**") - now deceased on 27/03/1988, and had been in open, quiet, and uninterrupted occupation of the land since then. He had carried out extensive developments thereon and had even buried his children within it.
3. According to him, the defendants, in collusion with the District Officer of Matungulu Division, Jane Kangati, had been demanding that he vacate the suit property. To reinforce these threats, the appellants entered the suit property in March 2012, accompanied by several youths, tilled the land, and started constructing there without his consent, authority, or

permission. Consequently, he sought the following reliefs before the trial court: -

- a. A permanent injunction restraining the appellants, their agents, servants, and/or employees and/or any other person claiming under their title, from entering into, using, building, cultivating, disposing of, raising, alienating and in any other way from interfering with the suit property.***
- b. The costs of the suit and interests at court rates.***
- c. Any other relief that the honourable court deems fit and just to grant.***

4. Upon being presented with the pleadings, the appellants contested them with a defence dated 24/04/2012. This was amended by a defence and counterclaim dated 04/07/2013, before ultimately filing a re-amended defence and counterclaim dated 12/01/2024. By the latter document, it was stated that the suit was malicious and false, and it was maintained that the 1st appellant had a good title, much better than that of the respondent, and that the 1st appellant had been in possession since purchase. The appellants sought the eviction of the respondent from the suit property, damages, and loss of user. They also sought the dismissal of the respondent's suit and the allowance of the counterclaim.

5. Subsequently, the matter was heard, with the parties calling their respective witnesses, relying on witness statements, oral testimonies, and produced documents. In the appellants' case, their witnesses included themselves, Sammy Wambua Masika **(DW3)**, Boniface Mulei Muoki **(DW4)**, and Stelamaris Syomiti Munene **(DW5)**. The respondent's evidence comprised his own testimony along with that of Thomas Kituku Nzila **(PW2)**, Dominic Ndolo Nzioki **(PW3)**, and Benson Muisyo Vokeni **(PW4)**.
6. Accordingly, judgment was delivered in the matter whereby the learned trial magistrate found the respondent's suit merited and allowed the reliefs sought, and dismissed the counterclaim. Costs were awarded to the respondent.

Appeal to this court and the hearing

7. Dissatisfied, the appellants appealed to this court and filed a memorandum appeal dated 11/04/2024 and filed on 12/04/2024, where they questioned the impugned judgment on 10 grounds, where they maintained that the learned trial magistrate erred in law and fact in: -

a. Wholly misapprehending and misconceiving the evidence as taken by previous magistrates, thus arriving at a decision that was against the spirit of the evidence.

- b. Considering irrelevant matters, making contradictory findings that showed open bias against the appellants and failing to appreciate the nature of the dispute between the parties and thus arrived at a decision not supported by pleadings and facts.***
- c. Failing to appreciate the evidence placed before her and considering extraneous issues, hence arriving at a decision that was erroneous and against the evidence placed before her.***
- d. Failing to appreciate the core evidence of DW4 and misapplying the same.***
- e. Creating and deciding on issues that were not pleaded.***
- f. Misdirecting herself in the appraisal of the evidence and failing to consider that the authenticity of the documents originating from the Kimiti farmers' society was not in any way rebutted.***
- g. Wholly believing the respondent's evidence despite the glaring inconsistencies and contradictions evident in his case.***
- h. By assuming the role of prosecuting the respondent's case and by answering the allegations levied against the appellants by***

creating grounds for the respondent, and misapplying the law.

i. By writing a judgment that is not only incomplete but also not based on proper evaluation and consideration of pleadings, evidence on record, submissions and applicable laws and principles on admission of documents.

j. In exercising her discretion capriciously and not judiciously.

8. Accordingly, the appellant urged this court to grant the appeal, overturn the contested judgment, enter a judgment in their favour as claimed in the counterclaim, and award them the costs of the appeal and the lower court suit.

9. As directed by the court, the appeal was canvassed by the appellants' submissions filed by the law firm of **Ms Gladys Gichuki & Associates**, dated 14/04/2025, which consolidated some of the grounds. The respondent also filed his submissions through the law firm of **Ms Calistus & Co. Advocates**, dated 20/05/2025. The respondent also submitted a replying affidavit sworn on 12/04/2024 in opposition to the appeal, which this court considers inappropriate in such proceedings, and it is hereby struck out.

Issues for determination, Analysis and Determination

10. As this is a first appeal, the authority of this court is set out in **Order 42 Rule 32** of the **Civil Procedure Rules**. Additionally, the court shall be guided by the principles articulated in the well-cited case of **Selle v Associated Motor Boat Company Ltd [1968] EA 123**, which encapsulates the guiding principles as follows: an appellate court shall not interfere with the challenged judgment unless it is convinced that the learned trial magistrate misdirected herself and consequently arrived at an erroneous decision, exercised her discretion improperly, and thereby caused injustice through such an erroneous exercise.
11. Regarding the matter at hand, this court has carefully reviewed the records, the impugned judgment, and the competing submissions, and it is necessary to address preliminary issues concerning the grounds of appeal. Some of the grounds were repetitive and challenged the learned trial magistrate's *obiter dictum* and reasoning rather than the findings, which, according to prevailing jurisprudence, is not permissible, as the grounds of appeal are drawn from the final orders of the trial court. Guidance on this is drawn from the Court of Appeal decision of **Attorney General v Bala (Civil Appeal 223 of 2017) [2023] KECA 117 (KLR) (3 February 2023) (Judgment)**, which weighed in on this issue, albeit inaccurately referencing **Order 43** instead of **42**, and stated: -

“5. Under the Civil Procedure Act and the Civil Procedure Rules made thereunder, an appeal lay only as against a decree or as

against an order passed under rules from which an appeal was expressly allowed by order 43, rule 1 of the Civil Procedure Rules. The first sentence in the two paragraphs the appellant cited were mere findings by the High Court. The last sentences were his views. No appeal could lie against a mere finding for the simple reason that the Civil Procedure Act and the Civil Procedure Rules did not provide for any such appeal.”

12. Therefore, this court concludes that *ground (e)* of the appeal was improper. Additionally, having scrutinised the impugned judgment, it is sufficient to note that it adhered to the requirements of **Order 21** of the **Civil Procedure Rules** regarding the content of judgments, and therefore, *ground (i)* of the appeal, which claims that the judgment was incomplete, is entirely unjustified.

13. Thus, having disposed of the preliminary issues, it is the considered opinion of this court that the grounds of 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 his case and that the appellants did not prove their counterclaim. This court will consider this issue under two headings: possession and ownership, beginning with the former before moving to the latter.

I. Possession

14. In addressing this issue, it is necessary to lay out the definition of possession and highlight the prevailing jurisprudence on it.

In the book by **Sheehan, Duncan. *The Principles of Personal Property Law*, Bloomsbury Publishing Plc, 2017, pages 65 and 66**, the author describes the various forms of possession in the following manner: -

“There are several types or forms of possession -
1. De facto possession is the closest to the lay meaning of the term. It is actual control of, or detention of, the thing. It consists of two elements a) the fact of physical possession- corpus possessionis, or manual indicium and b) the intention to possess - animus possidendi, or cognitive indicium. 2. Legal possession may be retained by someone who is not in actual possession. 3. Constructive possession is the

right to take actual possession from a party who may be in de facto possession.”

On the other hand, **Black’s Law Dictionary** defines possession as follows: -

“1. The fact of having or holding property in one’s power; exercise of dominion over property. 2. The right under which one may exercise control over something to the exclusion of all others; the continuing exercise of a claim to the exclusive use of a material object. 3. ...The detention or use of a physical thing with the intent to hold it as one’s own...4. Something that a person owns or controls.”

15. Respecting the instant case, it was undisputed from the pleadings of both parties that the respondent was in *de facto* possession of the suit property.

The averments in opposing pleadings affirmed this position. The unshaken evidence also corroborated this. Moreover, the appellants’ submissions have not challenged this position. The respondent’s testimony that he had occupied the suit property from 1988 was not questioned except by DW2; however, the evidence of the other witnesses was consistent and corroborated. Therefore, this court concurs with the conclusion of the learned trial magistrate that the respondent had been in

active occupation from his date of alleged purchase, which was allegedly in 1988.

16. Turning to the appellants, they have argued in their submissions that the learned trial magistrate failed to recognise that the appellants had erected semi-permanent structures for the workers in 1995 on the suit property, as well as subsequent permanent structures, including a permanent house, a latrine, and a cow shed. On this matter, the respondent's counsel contends that the appellants only trespassed onto the suit property immediately prior to the institution of the suit and immediately afterwards. With these contrarian arguments, what does the evidence reveal?
17. The respondent testified that he had a peaceful occupation until a year before he testified in 2014, when the appellants trespassed on the suit property. In other words, they trespassed in 2013. To him, they even demolished his houses. DW4, who is the respondent's son, stated that all was well until sometime from 2011 onwards, when the 2nd appellant invaded the suit property, destroyed crops, and started constructing. This evidence was contradictory as to the date of the appellants' entry.
18. As for the appellants, the 1st appellant testified that he took possession in the early 1990s when he started cultivating the land, but later, in 2009, he erected a structure. The 2nd

appellant, who was an employee of the 1st appellant, stated that he farmed on the suit property in 1994, built a fence, and, eventually, in 1995, erected a semi-permanent structure on the suit property. He did not specify what had been constructed on the suit land by DW1 in 2009, nor did he disclose when the 1st defendant built a permanent house, latrine, and cowshed on the suit properties. DW5, who was the 1st appellant's wife, testified that they only occupied 7 acres of the suit property, although she did recall when they took possession.

19. Having considered the evidence, this court agrees with the appellants that the learned trial magistrate misapprehended the appellants' evidence regarding their date of occupancy. Accordingly, this court finds that the respondent entered the suit land in 1988, occupying it well before the 1st appellant, who entered in 1994. Does the date of entry and possession have a bearing on the case? The answer is yes, and this court adopts the Court of Appeal's decision in **Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR)**, which stated as follows: -

"In its pleadings, the 1st, 2nd and 3rd respondents aver that they have always been in possession of the suit land. It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails

***against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v- Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient.*"**

20. Flowing from this, considering that the equities are equal since none of the parties holds a title document, and recognising that the respondent had been in occupation long before the appellants, this court finds that the respondent has a stronger claim to the suit property than the appellant. Importantly, since trespass constitutes an injury to possession and the respondent was in prior occupation of the suit property, he had the right to sue the appellants for their continuous acts of trespass.

II. Ownership

21. Concerning this matter, the legislation concerning unregistered land, in contrast to registered and surveyed land, lacks complete clarity. Consequently, the proof of ownership is established through documentary evidence, which forms the fundamental basis of ownership of the properties in question. In such circumstances as the present case, courts typically rely

on the evidence provided by the authors of various documents who have attributed ownership to different parties.

22. This position was reaffirmed by the decision in **Caroline Awinja Ochieng & another v. Jane Anne Mbithe Gitau & 2 others [2015] KEHC 4896 (KLR)**, which was cited by the respondent and adopted by this court. The said decision articulated as follows: -

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history.

The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of

unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title paramount certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’; per Nourse LJ in Sen v Headley [1991] Ch 425 at 437.”

23. In the case before the trial court, both parties had the burden of proving their cases as they had sued and countersued each other. As previously stated, the suit property is unregistered, and each party presented their respective documents as proof of ownership. Essentially, they both invited the trial court to treat these documents as evidence of ownership.
24. On considering the evidence before her, the learned trial magistrate upheld the respondent’s agreement for sale with Mukali. In contrast, she stated that the transfers by Mukali to the 1st appellant and a survey receipt of Kshs. 3,000/- were suspicious; there was a discrepancy in acreage in various documents, did not produce an agreement for sale or receipts of payment and thrashed an affidavit allegedly by Mukali and a land control board consent (**“LCB consent”**). The respondent

has affirmed this reasoning, but the appellants have challenged it and argued that the learned trial magistrate erred in her analysis, as the documents produced by the 1st appellant proved he was the owner of the suit property.

25. Faced with these arguments and counterarguments, and considering that the suit property consists of unregistered land, this court has the challenging task of reviewing the evidence submitted by the parties as proof of ownership and reaching an independent conclusion. This court intends to initially address the appellants' evidence and documents prior to examining that of the respondent. Pointedly, it was undisputed that Mukali was the initial owner of the suit property; he was unmarried and did not have children, and he died in 2003.

26. With regard to the appellants' documents, the first document was allegedly a transfer form from Mukali to the 1st appellant. It is unclear who the intended recipient of this document is, as it features the letterhead of a government entity but appears to be executed by private individuals. The document bears two dates-11/02/1985 and 12/03/1985-which discrepancy was not clarified by the 1st appellant. Furthermore, the document does not specify which society held the 14.5 acres being transferred; more problematically, disclosures were not made as to who the witnesses described as chairman and secretary were and which entity they so represented. It is

also evident that the appellants did not produce any document showing exemption from paying the consideration demanded by this document, or that such payment was ever made.

27. The second document is the affidavit allegedly sworn by Mukali on 25/07/1996, in which he stated that he sold his **Plot No. 67** in Kimiti Co-operative Society, measuring 14 acres, for Kshs. 64,000/=. From this document, it suffices that Mukali was selling a different property from the suit property; the parcel size differs from that contained in the earlier-referred transfer document, and the appellants have not substantiated, through receipts, cheques, or acknowledgements by Mukali or his agent, that the consideration was ever paid. In the considered view of this court, these two documents that formed the genesis of the appellants' ownership were unreliable, unsubstantiated and not credible.

28. Having failed to establish the origin of his ownership, this court finds there was no basis for Kimiti Farmers Co-operative Society Ltd to issue various documents to the 1st appellant, including a survey receipt, non-member certificate, and LCB application, among others. He also did not provide any sale agreement between himself and Mukali, or, if at all such an agreement was lost as he claimed, call a witness who witnessed the agreement to verify or support his claims. Ultimately, this court finds that the 1st appellant did not discharge the burden of proof concerning his ownership of the

suit property. It also agrees with the respondent's arguments and finds that the trial magistrate did not err in dismissing the appellants' counterclaim.

29. Respecting the respondent's documents, he produced a translated sale agreement, purportedly between him and Mukali, stating that Mukali sold the suit property measuring 11.5 acres for Kshs. 47,000 to the respondent on 27/03/1988. It is alleged that a deposit of Kshs. 20,000 was paid on that date, which Mukali acknowledged; there is also an acknowledgement of a balance of Kshs. 22,000/= by Mukali on an unspecified date prior to the final balance of Kshs. 5000 being settled on 07/07/1996, which Mukali also acknowledged.
30. These transactions were allegedly witnessed by T. Kituku Nzula, who testified as PW2, Muema Nduu, and Kioko Muli. The trial court was informed that the latter two witnesses were deceased. The appellants have attacked the agreement, allegedly because it was executed on different dates, by the same hand, and not properly attested to by the witnesses. However, having considered the evidence, the thumbprints of the respondent and Mukali as contained in these agreements were never contested, and neither was the content of the agreement nor the mode of payment of the consideration by instalments questioned during the hearing. In any case, the court cannot rewrite contracts for parties.

31. The appellants have heavily relied on **Section 3 (3)** of the **Law of Contract Act** regarding the mode of attestation of contracts, but they have failed to recognise that this law was not in force at the time the agreement was executed. **Section 3 (3)** of the **Law of Contract Act** specifies what constitutes a contract for the disposition of an interest in land and importantly, it mandates that a contract effecting such dispositions must be in writing, attested and signed by the parties involved. This requirement is also reiterated by **Section 44** of the **Land Registration Act**.
32. However, the requirements of these provisions were not always the case before 1/06/2003, which is when the respondent and Mukali allegedly entered into the agreement. This repealed **Section 3 (3)** of the **Law of Contract Act**, which was operative upto 1/06/2003, stated as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon which the suit is founded, or some memorandum or note thereof, is in writing and is signed by the party to be charged or by some person authorised by him to sign it, provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has

performed or is willing to perform his part of a contract -

(i) Has in part performance of the contract taken possession of the property or any part thereof or

(ii) Being already in possession, continues in possession in part performance of the contract and has done some other act in furtherance of the contract.”

33. This legislation did not mandate the attestation of an agreement. It was also highly flexible, allowing contracts to be established either orally or in writing. Furthermore, the documentation was not required to be elaborate, as a memorandum would be acceptable. Therefore, it follows that the contract met the necessary legal standards.

34. In this case, since the appellants contend that the agreement was written in the same handwriting, which they consider questionable, it was incumbent upon them during the pre-trial directions to subject it to an expert document examiner, which they did not. Therefore, it is not permissible for them to raise it at this stage of the proceedings. In conclusion, this court finds that the respondent proved his case before the trial court. It also finds the trial court did not err in allowing the respondent's case.

35. 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 25/03/2024. Since it is trite law that costs follow the event, and being the appeal was unsuccessful, this court awards costs to the respondent.

Orders accordingly.

**Delivered and Dated at Machakos this 2nd 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.

Miss. Gichuki for the Appellant.

Miss. Kimani holding brief for Ms. Odhiambo for the Respondent.

ORIGINAL