

16649 (I.R.No. 69924) (hereinafter referred to as “the suit property”).

The 1st Respondent averred that the suit property was allocated to him by the Government of the Republic of Kenya, and he was issued with a certificate of title after meeting all the conditions. The 1st Respondent averred that he had never sold the suit property. The 1st Respondent averred that his title to the suit property was confirmed by the National Land Commission in a report that was published in the Kenya Gazette dated 17th July 2017. The 1st Respondent averred that in 2018, the Appellant destroyed the barbed wire fence he had put around the suit property and erected a stone perimeter fence. The 1st Respondent averred that when the Appellant entered the suit property and destroyed the barbed wire fence, he also destroyed the beacons that had been fixed on the property by a surveyor engaged by the 1st Respondent and a metal signage that the 1st Respondent had put on the suit property warning the public that the suit property was not for sale. The 1st Respondent averred that he suffered a loss amounting to Kshs. 188,304/- arising from the Appellants' encroachment on the suit property, the particulars of which he pleaded.

The 1st Respondent averred that he notified the 2nd Respondent of the Appellant's trespass. The 1st Respondent averred that the Appellant had forcibly taken possession of the suit property, claiming that the same was allocated to him by the 2nd Respondent. The 1st Respondent averred that between 8th and 12th March 2021, the Appellant brought building materials on the suit property ready to commence construction on the suit property. The 1st Respondent averred that the Appellant had denied him the use and enjoyment of the suit property. The 1st Respondent prayed for judgment against the Appellant and the 2nd Respondent jointly and severally for:

1. A declaration that the 1st Respondent was the legal owner of the suit property.
2. A declaration that any letter of allotment issued to the Appellant by the 2nd Respondent relating to the suit property was invalid, null and void.
3. A permanent injunction restraining the Appellant and the 2nd Respondent by themselves or through their servants or agents, or howsoever from interfering, wasting, disposing or alienating the suit property.

4. Kshs. 188,384/- as special damages.

5. Costs of the suit.

The Appellant filed a statement of defence dated 28th April 2021 in which he denied the 1st Respondent's claim in its entirety. The Appellant averred that he was a stranger to the suit property. The Appellant averred that he was the registered owner of Plot No. KSM/ Mamboleo/ Block 16646/ 415 and Plot No. KSM/ Mamboleo/ Block 16646/416, also known as Plot No. SG-16646/415 Mamboleo-Kisumu Municipality and SG-16646/416 Mamboleo-Kisumu Municipality, respectively (hereinafter referred to as "the Appellant's land"). The Appellant averred that he purchased his land from one Victor Alfred Ochieng on 11th April 2017, innocently, without notice of the 1st Respondent's claim over the same.

The Appellant denied that he entered the suit property and destroyed the 1st Respondent's fence. The Appellant averred that the parcel of land on which he entered and deposited building materials was his land and not the suit property. The Appellant averred that he had a good title to his land, which his predecessor in title acquired from the 2nd Respondent. The Appellant urged the court to dismiss the 1st

Respondent's suit with costs. The 2nd Respondent did not enter an appearance.

The lower court heard the 1st Respondent's claim and the defence that was put forward against it by the Appellant. In a judgment delivered on 18th May 2023, the court allowed the 1st Respondent's claim as prayed in the amended plaint. The lower court stated that upon considering and analysing the pleadings and the evidence adduced by the parties, it was satisfied that the 1st Respondent had proved his case against the Appellant and the 2nd Respondent on a balance of probabilities. The lower court also found that the actions of the Appellant and the 2nd Respondent had caused the 1st Respondent loss, which was particularised in the amended plaint.

The Appellant was aggrieved by the decision of the lower court and preferred the present appeal. In his Memorandum of Appeal dated 8th June 2023, the Appellant challenged the lower court's judgment on the following grounds;

1. That the learned trial magistrate erred in failing to give the Appellant a fair hearing by failing to consider the evidence adduced by the Appellant before the court.

2. That the learned trial magistrate erred in failing to find that the 1st Respondent did not prove his case on a balance of probabilities to warrant the grant of the orders sought in the plaint.
3. That the learned trial magistrate erred in failing to consider that the Appellant and the 1st Respondent owned different parcels of land.
4. That the learned trial magistrate erred in law in failing to consider the history of how the Appellant acquired his parcels of land.
5. That the learned trial magistrate was absolutely biased against the Appellant since the matter had previously been handled by three different magistrates, a fact that occasioned an injustice to the Appellant.
6. That the learned trial magistrate's judgment clearly showed that it was a demolition of the Appellant's case by the court rather than an administration of justice.

The Appellant prayed that the appeal be allowed and the judgment of the lower court be set aside, and in place thereof, judgment be

entered for the Appellant. The Appellant also prayed for the costs of the appeal and the lower court suit.

The appeal was heard by way of written submissions.

The Appellant's submissions

The Appellant filed submissions dated 5th May 2025. The Appellant submitted that the 1st Respondent did not prove his case against the Appellant on a balance of probabilities. The Appellant submitted that he proved his title to the Appellant's land. The Appellant submitted that he proved that he purchased the Appellant's land and had been in occupation thereof since 2017. The Appellant averred that he had also proved that he had been paying land rates to the 2nd Respondent for the properties. The Appellant submitted that he made it clear that he was a stranger to the suit property and that his claim was in respect only of the Appellant's land, which was different from the suit property, claimed by the 1st Respondent. The Appellant submitted that the mere fact that PW3 did not have the records of the Appellant's land did not mean that the land did not exist. The Appellant submitted that the 1st Respondent claimed that the Appellant's land belonged to him without proving the claim. The

Appellant submitted that the trial court did not consider his evidence in its judgment. The Appellant urged the court to allow the appeal.

The 1st Respondent's submissions

The 1st Respondent filed his submissions on 20th June 2025. The 1st Respondent submitted that from the testimony of PW2, Gildine Gatwiri Karani, the Principal Land Registration Officer based at the office of the Chief Land Registrar, it was demonstrated that the 1st Respondent was the bona fide registered owner of the suit property. The 1st Respondent submitted that Joseph Munyendo Nanzala (PW3), who was the Assistant Director of Surveys, confirmed the existence of the suit property but denied that of the Appellant's land. The 1st Respondent submitted that the Appellant did not produce in evidence the titles for the Appellant's land, and the instrument of transfer through which the properties were transferred to him by the purported seller. The 1st Respondent submitted that one of the purported agreements of sale was not witnessed as required by the law, and no evidence was produced showing that the Appellant paid the purchase price for the Appellant's land as he claimed. The 1st Respondent submitted further that the Appellant argued only one

ground of appeal, namely that the trial court erred in its finding that the 1st Respondent had proved his case against the Appellant on a balance of probabilities.

The 1st Respondent submitted that all the appellant's grounds of appeal had no merit. The 1st Respondent submitted that the Appellant was given a fair hearing. The 1st Respondent submitted that the refusal by the trial court to admit the Appellant's Further List and Bundle of Documents, which was filed after the 1st Respondent had closed his case, and on the day of the hearing of the Appellant's case, was justified. The 1st Respondent submitted that, contrary to the contention of the Appellant in his grounds of appeal, the 1st Respondent proved his case to the required standard. The 1st Respondent submitted that the Appellant placed no evidence to prove his claim that the trial court was biased against him. The 1st Respondent submitted that the judgment of the trial court was right and cannot be faulted. The 1st Respondent urged the court to dismiss the appeal with costs.

Analysis and Determination

I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant, and the submissions by the parties. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court.

In Gitobu Imanyara & 2 Others v. Attorney General [2016] KECA 557 (KLR), the Court of Appeal stated as follows on the mandate of the court on a first appeal:

“...this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect. See *Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123* and *Williamson Diamonds Ltd. V. Brown [1970] E.A.L.*

As we discharge our mandate of evaluating the evidence placed before the High Court, we keep in mind what the

predecessor of this Court said in Peters -vs- Sunday Post Ltd [1958] EA 424. In its own words: -

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide.””

In Kenya Ports Authority v. Kuston (Kenya) Limited [2009] 2EA 212, the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

I am of the view that the Appellant’s grounds of appeal raise only one issue for determination, namely, whether the lower court erred in its

finding that the 1st Respondent had proved his case against the Appellant and the 2nd Respondent on a balance of probabilities.

In Halsbury's Laws of England, 4th Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:

“13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.

14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”

The 1st Respondent's case against the Appellant was based on trespass. Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page 923, paragraph 18-01. In Gitwany Investments Limited v. Tajmal Limited & 3 others

[2006] eKLR, it was held that title to land carries with it legal possession. Halsbury's Laws of England 3rd edition, Volume 38 at page 739 paragraph 1205 defines trespass as follows:

“A person trespasses upon land if he wrongfully sets foot on, or rides or drives over it, or takes possession of it, or expels the person in possession of pulls down or destroys anything permanently fixed to it, or wrongfully takes minerals from it, or places or fixes anything on it, or it seems if he erects or suffers to continue on his own land anything which invades the air space of another, or if he discharges water upon another’s land, or sends filth or any injurious substance which has been collected by him on his own land to another’s land.”

In the Court of Appeal, Fourth District, Division 1, California, in Ralphs Grocery Co. v. Victory Consultants Inc. (2017) 17Cal. App.5th 245, 261; CACI No. 2000, the court stated that:

“In the instant action, Appellants have sued Respondents for trespass. “Trespass is unlawful interference with possession of property.” (Staples v. Hoefke (1987)189 Cal.App. 3d 1397,1406). The elements of trespass are: (1) the plaintiff’s ownership or control of the property; (2) the defendant’s intentional, reckless, or negligent entry onto the property; (3) lack of permission for the entry or acts in excess of

permission; (4) harm; and (5) the defendant's conduct was substantial factor in causing the harm. (See CACI No. 2000)."

Before determining whether the 1st Respondent proved that the Appellant trespassed on the suit property, I need to address a preliminary issue that the Appellant raised before the lower court and has also raised before this court. The lower court did not express any opinion on the issue. The issue is whether the parcel of land referred to as L.R. No. 16649(I.R. No. 69924) (the suit property) by the 1st Respondent, and as Plot No. KSM/Mamboleo/Block 16646/415 (Plot No. SG-16646/415 Mamboleo-Kisumu Municipality) and Plot No. KSM/Mamboleo/Block 16646/416 (SG-16646/416 Mamboleo-Kisumu Municipality) ("the Appellant's land"), are on the same location on the ground, and as such is the same parcel of land. According to the evidence adduced at the trial by the 1st Respondent and his witnesses, the suit property was allocated to the 1st Respondent by the Government of Kenya on 26th August 1991 as unsurveyed Plot No. 43-Kisumu Municipality measuring 0.30 hectares. The suit property was surveyed after allocation, and a deed plan number 206843 was produced. It was based on this deed plan that the suit property was given L.R. No. 16649 and subsequently issued with Grant No. I.R. No.

69924 under the Registration of Titles Act, Chapter 281 Laws of Kenya (now repealed). The suit property after the survey measured approximately 0.2082 hectares. From the deed plan attached to a copy of Grant No. I.R. No. 69924, which was produced in evidence as P.EXH1(b) by PW2, the suit property has fixed boundaries with beacons. The 1st Respondent led evidence that was not challenged, that he fenced the suit property with barbed wire and cedar posts along its boundaries. The 1st Respondent led evidence that the Appellant destroyed the said fence and erected a stone perimeter wall around the suit property. The 1st Respondent led evidence that after the Appellant destroyed his boundary fence and the beacons, he engaged a licensed surveyor who came to the suit property and re-established the beacons. The 1st Respondent produced in evidence a copy of a receipt for Kshs. 20,000/- paid to the licensed surveyors, Opiyo & Associates, for re-establishing the beacons on the suit property. I am satisfied from the evidence presented by the 1st Respondent at the lower court that the 1st Respondent was certain of the location of the suit property on the ground and proved that the parcel of land that was fenced by the Appellant as the Appellant's land was the suit property.

I am of the view that once the 1st Respondent produced prima facie evidence that he was the registered owner of the suit property and that the Appellant had trespassed on the suit property, the burden of proof shifted to the Appellant, who claimed that the Appellant's land was separate and distinct from the suit property, to prove that fact. In Kurshed Begum Mirza v. Jackson Kaibunga [2017] eKLR, the court stated as follows:

“(16)Turning to the second issue; according to section 107 of the Evidence Act, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”

The majority of the Supreme Court in Presidential Election Petition No. 1 of 2017, Raila Amolo Odinga & Another v. IEBC & 2 Others [2017] eKLR stated as follows in paragraphs 132 and 133 of the judgment on the evidential burden of proof, which keeps shifting during the trial:

“[132] Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant through a trial with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and

its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

[133] It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce ‘factual’ evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law...”

The burden was on the Appellant, who claimed that the suit property and the Appellant’s land were separate and distinct, to prove that fact. From the evidence on record, the Appellant did not discharge that burden. The Appellant produced no evidence showing that the Appellant’s land had been surveyed. The Appellant produced no evidence of a title issued in his name by the 2nd Respondent from which he claimed to derive his claim over the Appellant’s land. PW3, an Assistant Director of Surveys who gave evidence on behalf of the

Director of Surveys, told the court that they only had the details of the suit property in their records and that the Appellant's land did not appear in their records. PW2, a Principal Land Registration Officer, told the court that land in Mamboleo, Kisumu County, was Government Land and as such titles to the same could only be issued by the Government of Kenya and not the Kisumu County (Municipal Council of Kisumu). He stated that, according to the search on the suit property, the 1st Respondent was the owner thereof. The Appellant did not challenge the evidence of these witnesses to the effect that the Appellant's land did not appear in the Government of Kenya land records, and in the office of the Director of Surveys. With the Appellant's land not being on the official survey records, there was no basis on which the Appellant could claim that the Appellant's land and the suit property were separate and distinct, and were not on the same location on the ground. Arising from the foregoing, it is my finding that the suit property and the Appellant's land were the same parcel of land on the ground.

This now paves the way for me to determine whether the 1st Respondent proved his case against the Appellant on a balance of

probabilities. In Hubert L. Martin & 2 Others v. Margaret J. Kamar & 5 Others[2016] eKLR, the court stated as follows:

“A court when faced with a case of two or more titles over the same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain...Every party must show that their title has a good foundation and passed properly to the current title holder. With the nature of case at hand, I will need to embark on investigating the chain of processes that gave rise to the two titles in issue as it is the only way I can determine which of the two titles should be upheld.”

From the evidence on record, I am satisfied that the 1st Respondent proved that he was the registered owner of the suit property and that he acquired the suit property procedurally and lawfully. The 1st Respondent proved the process through which he acquired the suit property from the allotment to the issuance of a title. The 1st Respondent's title to the suit property was issued on 22nd July 1996. The Appellant, on the other hand, did not produce any document of title. The Appellant, who claimed to have purchased the suit property

from one Victor Alfred Ochieng produced in evidence agreements of sale between him and the said Victor Alfred Ochieng made in 2017. The Appellant also produced copies of letters allotment dated 28th September 2007, said to have been issued to the said Victor Alfred Ochieng by the Municipal Council of Kisumu in respect of the Appellant's land. Finally, the Appellant produced the rates demand notices and payment request issued to the said Victor Alfred Ochieng and subsequently, the Appellant. The Appellant did not produce evidence showing that the Municipal Council of Kisumu, which purported to allocate the Appellant's land to Victor Alfred Ochieng, owned the property. The 1st Respondent produced in evidence a determination that was made by the National Land Commission in 2017 following an inquiry into the allocation of several parcels of land by both the Government of Kenya and the Municipal Council of Kisumu at Kanyakwar, Mamboleo, and Kibos within Kisumu County. The National Land Commission upheld the allocation by the Government of Kenya and recommended the revocation of the allocation that had been made by the Municipal Council of Kisumu. The National Land Commission (NLC) found that the concerned parcels of land belonged to the Government of Kenya, and not the

Municipal Council of Kisumu, and had already been allocated by the Government. Among the parcels of land which were in contention was the suit property. The National Land Commission's determination was published in the Special Issue of the Kenya Gazette published on 17th July 2017. The said determination by the NLC shows that the suit property was allocated by both the Government of Kenya and the Municipal Council of Kisumu. This reinforces the 1st Respondent's contention that the suit property that was allocated to him by the Government of Kenya and the Appellant's land that was purportedly allocated to Victor Alfred Ochieng is one parcel of land.

Since the suit property did not belong to the Municipal Council of Kisumu, the council could not purport to allocate the same to Victor Alfred Ochieng, from whom the Appellant claimed to have purchased the same. There was also no evidence of payment of the purchase price of Kshs. 3,600,000/- by the Appellant to the said Victor Alfred Ochieng. There was also no evidence that Victor Alfred Ochieng transferred the property to the Appellant. Neither the Municipal Council of Kisumu nor Victor Alfred Ochieng gave evidence in the lower court in support of the Appellant's claim over the suit property.

As mentioned earlier, the 1st Respondent was registered as the owner

of the suit property on 22nd July 1996. When the same property was purportedly allocated again to Victor Alfred Ochieng as Plot No. KSM/Mamboleo/Block 16646/415 and Plot No. KSM/Mamboleo/Block 16646/416 on 28th September 2007, the 1st Respondent had owned the suit property for 11 years.

It is my finding that the 1st Respondent proved on a balance of probabilities that he was the lawful registered owner of the suit property purportedly allocated to Victor Alfred Ochieng as Plot No. KSM/Mamboleo/Block 16646/415 and Plot No. KSM/Mamboleo/Block 16646/416 by the Municipal Council of Kisumu on 28th September 2007. The 1st Respondent also proved that the Appellant trespassed on the suit property and that he suffered loss in the process. The 1st Respondent's loss, which was particularised, was also proved at the trial. I agree with the lower court that the 1st Respondent proved his case against the Appellant to the required standard. I also find no merit in the Appellant's other grounds of appeal.

Conclusion

In conclusion, I find no merit in the appeal before the court. The appeal is dismissed with costs to the 1st Respondent.

Delivered and signed at Kisumu on this 18th day of December 2025

S. OKONG'O

JUDGE

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellant

Mr. Omulama for the 1st Respondent

Ms. J. Omondi -Court Assistant

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