Sang v Kipkemoi & another (Environment and Land Appeal E035 of 2024) [2026] KEELC 358 (KLR) (31 January 2026) (Judgment)

Neutral citation: [2026] KEELC 358 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E035 OF 2024

MAO ODENY, J

JANUARY 31, 2026

BETWEEN

DAVID KIPKEMOI SANG ..... APPELLANT

AND

JOHN KIRUI KIPKEMOI ..... 1ST RESPONDENT

JUSTUS KIBET KORIR ..... 2ND RESPONDENT

(Being an appeal from the judgment delivered by Hon. B. R. Kipyegon Principal Magistrate (PM) on 27th June, 2024 in Molo ELC No. E21 of 2021)

JUDGMENT

1. This appeal arises from a judgment delivered on 27th June, 2024 in Molo ELC No. E21 of 2021. The Appellant being aggrieved by the said judgment, lodged a Memorandum of Appeal dated 15th July, 2024 and listed the following grounds:

    1. That the Learned Trial Magistrate erred in law and in fact by upholding the prayers sought by the Plaintiff in his Plaint.

    2. That the Learned Trial Magistrate erred in law and in applying wrong principles while allowing the prayers sought by the Plaintiff in the suit.

    3. That the Learned Trial Magistrate erred in fact and law in believing the evidence of PW1 and PW2 respectively without subjecting the said evidence to suitable interrogation.

    4. That the Learned Trial Magistrate failed and/or neglected to cumulatively and/or exhaustively evaluate the entire evidence (both oral and documentary) on record and hence arrived at an erroneous and slanted conclusion contrary to and in contradiction of the evidence on record.

5. That the Learned Trial Magistrate erred in law and in fact by failing to render any determination and the reasons (sic) for such determination. Consequently, the judgment of the Learned Trial Magistrate contravenes the mandatory provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.

6. That the Learned Trial Magistrate erred in law in applying wrong principles in dismissing the Appellant's counter-claim.

7. That the Learned Trial Magistrate greatly misdirected himself in treating the evidence tendered and the submissions of the Appellant very superficially thereby erroneously arriving at a wrong conclusion.

8. That the Learned Trial Magistrate erred in law and fact in finding that the Plaintiff had established a case on a balance of probabilities hence a prima facie case.

9. That the Learned Trial Magistrate erred in law and fact in finding that the Appellant had not proved his counter-claim on a balance of probabilities.

10. That the Learned Trial Magistrate erred in law and in fact in considering extraneous issues while arriving at his decision contrary to the evidence on record.

11. That the Learned Trial Magistrate erred in law and in fact in applying wrong principles of law in arriving at the said judgment.

2. A brief background to this appeal is that the 1st Respondent had filed a plaint dated 12th March, 2021, seeking a permanent injunction restraining the Respondents from trespassing onto land parcel Nakuru/Kuresoi/Saino/1941. The Appellant filed an Amended Statement of Defence and Counterclaim dated 1st September, 2021, where he denied the claim in the plaint and sought an order that he be declared a bona fide purchaser and owner of the suit property.

3. The matter was heard and the Trial Magistrate in his judgment dated 27th June, 2024, found that the 1st Respondent had proved his case on a balance of probabilities and allowed the prayers as sought in the Plaint.

4. The Trial Magistrate in dismissing the Appellant's counterclaim found that the same were mere allegations that were never proved which led to the Appellant filling this appeal.

Appellant's Submissions

5. Counsel for the Appellant identified the issues for determination as follows:

   a. Whether the Learned Trial Magistrate erred in law and fact in finding that the Respondent had proved his case on a balance of probabilities.

   b. Whether the Learned Trial Magistrate erred in law and fact in dismissing the appellant's counter-claim.

   c. Who should bear the costs of the appeal?

6. On the first issue, counsel submitted that the evidence established that the 1st Respondent had allegedly acquired the suit parcel by virtue of being a member of the Ogiek community, but when he realized that his name had been removed from the list of beneficiaries, he raised a complaint with the Olengurone Tribunal.

7. Counsel further submitted that the alleged complaint at the Tribunal was never prosecuted and the Respondent did not tender any evidence to prove any allegation of collusion. In addition, the Respondent confirmed that his name was not in the list of beneficiaries of the Settlement Scheme, and the allegation of bribery was never proved, and he relied on Section 107 of the *Evidence Act*.

8. According to counsel, no tangible or credible evidence was ever tendered by the Respondent to show that he possessed any legal rights over the property, as he had no valid documentation, and relied on the case of Samuel Kipngeno Letting V Ezekiel Tonui [2016] eKLR.

9. Mr. Makori also stated that the Learned Trial Magistrate was wrong in addressing issues which were never part of the pleadings, including awarding a relief for general damages which was neither assessed nor prayed for by the Respondent in his Plaint. Counsel relied on the case of Vivo Energy Kenya Ltd V Maloba Petrol Station Ltd & 3 others [2015] eKLR, and urged the court to allow the appeal with costs.

Respondent's Submissions

10. Counsel submitted that the Respondent has lived on the subject suit property for the last 29 years and had explained to the court how he came into occupation of the suit property.

11. Counsel further submitted that the reasons as to why transfer had not been effected could not be explained and the Appellant opted not to come to court and testify or justify how he acquired the suit parcel of land and urged the court to dismiss the appeal with costs.

Analysis and Determination

12. This being a first appeal, the court is cognizant of its duty to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this principle was enunciated 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 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 allowance in this respect..."

13. Similarly, in the Court of Appeal case of Gitobu Imanyara & 2 Others vs Attorney General [2016] eKLR:

> " 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".

14. The Appellant listed many grounds of appeal, which were repetitive and can be summarized into two issues. Having reviewed the appeal in its entirety, I identify two issues for determination as to whether the court erred in upholding the Plaintiff's prayers sought in the Plaint and dismissing the Defendant's counterclaim, and secondly, whether the Court applied the wrong principles of law in arriving at the Judgment.

15. It was the Appellant's case that he bought the parcel of land known as Nakuru/Saino Settlement Scheme/1941, at a consideration of Kshs. 1,500,000/= from Daniel Terer, who had purchased it from the 2nd Respondent. Neither Daniel Terer nor the 2nd Respondent Justus Kibet Korir gave evidence in the lower court on the origin of the suit land.

16. The title produced in the lower court was in the name of Justus Kibet Korir which was issued 12th October 2005. The 2nd Respondent was a party to the suit but never participated in the proceedings even though he was served with summons to enter appearance.

17. The Trial Magistrate in his judgment took judicial notice of the fact that there was a government caveat in Mau Complex in a bid to revert the forest to the government and prevented any dealings in the area. The Trial Magistrate identified the unchallenged facts as per the exhibits as follows:

    i. There was indeed a claim made by the plaintiff at Olenguruone LD Tribunal and the 1st Defendant summoned accordingly,

    ii. The Title deed copy in the name of the 1st defendant as is bore no accompanying official search certificate since 2005, no indication of the Government Caveat as alluded to by the parties and this court takes judicial notice of placement of such Caveat in most areas falling under the Mau Forest Complex.

    iii. The same title deed copy on Proprietorship Section, though reflects entries No. 2 & 3, entry No. one remains undisclosed."

18. I note that the title in the name of the person who purportedly sold the land to the Appellant was issued during the subsistence of the caveat in the Mau Forest. Entry No. 1 is not indicated. Similarly, there was no official search certificate to authenticate the current ownership of the suit land.

19. The Appellant faulted the Trial court for not considering his counterclaim, but from the evidence on record and the judgment, it shows that the court considered all the issues as per the pleadings and the evidence. The only error that the trial court made was to award general damages, which were neither pleaded nor proved. The Plaintiff was therefore not entitled to an award of general damages.

20. In the Supreme Court of India in Bachhaj Nahar v Nilima Mandal & Anr., (Civil Appeal Nos. 5798-5799 of 2008), (2008) 17 SCC 491, while addressing the question whether the court can go beyond what is pleaded in the pleadings for adjudication laid down the following fundamental principles:

    a. No amount of evidence can be looked into, upon a plea which was never put forward in the pleadings. A question which did arise from the pleadings and which was not the subject matter of an issue, cannot be decided by the court.

    b. A Court cannot make out a case not pleaded. The court should confine its decision to the question raised in pleadings. Nor can it grant a relief which is not claimed and which does not flow from the facts and the cause of action alleged in the plaint.

    c. A factual issue cannot be raised or considered for the first time in a second appeal

21. The general rule is that courts should determine a case on the issues that flow from the pleadings and may only pronounce judgement on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. Parties are bound by their pleadings.

22. In the case of Mwangi V Wambugu [1984] KLR 453 it was held that an appellate court will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of the evidence; or where the court has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence.

23. The Appellant has not demonstrated to the court why it should interfere with the Judgment of the lower court. The only variation that the court makes is that the award of general damages is hereby set aside.

24. The upshot is that the Appeal partially succeeds to the extent that the award for general damages is set aside. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 31ST DAY OF JANUARY 2026.

M. A. ODENY

JUDGE