



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**  
**ELC LAND APPEAL NO E043 OF 2023**

**JAMES KASWII MASAI.....1<sup>ST</sup>**  
**APPELLANT**

**JOSEPH MASAI KASWII.....2<sup>ND</sup>**  
**APPELLANT**

**VERSUS**

**JOHN MUMO MUNGUTI.....1<sup>ST</sup>**  
**RESPONDENT**

**HELLEN MUTHONI CHEGE.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

**[Appeal from the judgment and decree of Hon. M.A. Otindo, PM, delivered on 13/12/2023 in Machakos Magistrate's Court ELC Civil Suit No. E011 of 2020 between John Mumo Munguti & Another Versus James Kaswii Masai & Another**

**Background of the appeal**

1. To give some context to the appeal, in a plaint dated 8/10/2020 and amended on 13/01/2021, the respondents brought a case against the appellants. They claimed to be the registered owners of the entire parcel of land known as **plot no. 603 (“plot 603”)**, which covers approximately 0.5 acres and was situated within Katelembo Athiani Muputi Farming & Co-operative Society Ltd. The respondents stated that the appellants trespassed on this land on several occasions in 2019 and 2020. They maintained that the appellants had denied them access. Accordingly, they sought the following orders from the lower court: -

***a) An order declaring that the respondents are the sole legal and rightful owners of plot no. 603 in Katelembo Athiani Muputi Farming & Ranching Co-operative Society Ltd, measuring 0.5 Acres.***

***b) An order of injunction restraining the appellants, either acting themselves, their agents, servants or proxies from trespassing on plot no. 603 in Katelembo Athiani Muputi Farming & Ranching Co-operative Society Ltd, or interfering howsoever with the respondents’ use of plot no. 603 in Katelembo Athiani Muputi Farming & Ranching Co-operative Society Ltd, as it is marked in the Katelembo FCS Ltd maps.***

***c) An order directing the officer commanding station (OCS) Katheka Kai Police Post to supervise and offer security to the respondents***

**as they mark and fence off plot no. 603 in Katelembo/Athiani/Muputi Farming and Ranching Society.**

**d) Costs of the suit and interests.**

2. When the pleadings were presented, the 1st appellant, in a defence dated 2/02/2021, contested these allegations by denying them and putting the respondents to strict proof. He also mentioned that he had no interest in the plots claimed by either the respondents or the 2nd appellant. Furthermore, he emphasised that he had not committed any actionable wrongs as alleged by either party.
3. As for the 2nd appellant, in a defence and counterclaim dated 5/02/2021, not only against the respondents but also against Katelembo Athiani Muvuti Farming and Ranching Co-Operative Society Limited, Romana Ngina Kitusa and Lazarus Muema Ndivo, he denied the respondents' assertions and put her to strict proof.
4. Furthermore, he asserted that, by virtue of a purchase in 2008 of plot no. **607 ("plot 607")** from Nthenya Kumwaka, a member No. 768, Katelembo Athiani Muvuti Cooperative Society ("the society"), payment of transfer fees to the society and fees to Arch Surveys for delineating plot 607, he was the rightful owner of the disputed property. He maintained that he had been in continuous, open, and uninterrupted occupation and use of the disputed property from 2008 until 2019, when

the respondents commenced their claims over his plot, erroneously asserting that it was plot No. 603.

5. He also alleged that Romana Ngina Kitusa and Lazarus Muema Ndivo, who were the 4th and 5th defendants in the counterclaim (they are not parties to the appeal), conspired with the respondents and, with the society's acquiescence and without the approval of the Director of Surveys, purported to amend the area map. This action appeared to be an attempt to justify the claims of the 1st and the 2nd respondents that their plot 603 was located where plot 607 was situated. Ultimately, he sought the following reliefs from the trial court:

***a) An order of mandatory injunction to permanently restrain the respondents and the 3<sup>rd</sup> to 5<sup>th</sup> defendants in the counterclaim from interfering with his quiet possession and from amending the area map to change the position of plot No. 607 belonging to him.***

***b) General damages.***

***c) Costs and interest on the decretal amount at court rates.***

6. 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 the 2<sup>nd</sup> appellant and a surveyor,

Benjamin Mutua Matiku (**DW2**). The respondents' evidence comprised that of the 1<sup>st</sup> respondent (**PW1**) and that of Lazarus Muema Ndivo, a land surveyor (**PW2**).

7. 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**

8. Dissatisfied, the appellants appealed to this court and filed a memorandum appeal dated 18/12/2023 and filed on 20/12/2023, where they questioned the impugned judgment on seven grounds, albeit listed as eight, where they maintained that the learned trial magistrate erred in law and fact in: -

***a. Failing to find and hold that the appellants had proved their case.***

***b. Applying the wrong principles of law.***

***c. Failing to consider the appellants' evidence and submissions.***

***d. Misguiding herself by entirely relying on the surveyor's testimony and report, which refers to plot nos. 603 and 608 instead of the plot nos. 603 and 607.***

***e. Failing to acknowledge that the society's surveyor is the one who conducted the survey***

***exercise on 05/06/2008, upon the 2<sup>nd</sup> appellant purchasing the parcel no. 607 and paying fees, and is the same surveyor who pointed out to the respondents their parcel no.603.***

***f. Relying on an unregistered survey plan to arrive at her conclusion.***

***g. Arriving at a one-sided decision and issuing an injunction order to a parcel that does not belong to the respondents.***

9. Accordingly, the appellant urged this court to uphold the appeal, reverse the contested judgment, and enter a judgment in their favour as alleged in the counterclaim. Alternatively, this court orders a retrial of the case before a different magistrate with the appropriate jurisdiction. Additionally, it awards them the costs incurred in the appeal and the lower court proceedings.

10. As directed by the court, the appeal was canvassed by the appellants' submissions filed by the law firm of **Ms R.K. Mutua & Co. Advocates**, dated 15/07/2024, which argued the grounds of appeal wholly. The respondents also filed their submissions through the law firm of **Ms Loki & Associates**, dated 22/11/2024. These submissions will be considered in this court's analysis and determination.

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

11. 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.
12. 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.”***

13. Further, as regards the ground of appeal on submissions, this court finds that the learned trial magistrate appreciated the appellants' submissions, and this court finds that this ground of appeal is a non-starter and it fails.
14. Thus, having resolved 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 by concluding that the respondents proved their case and that the appellants did not substantiate their counterclaim. Significantly, the ownership documents for plot nos. 603 and 607, which pertain to unsurveyed and unregistered land, were not contested, and the primary dispute before the trial court was whether plot nos. 603 and 607 constitute the same parcel of land on the ground, and who encroached upon between the 2nd appellant and the respondents.

15. Concerning this issue, unsurveyed land, unlike registered and surveyed land, is slightly unclear. Therefore, proof of location is provided by documentary evidence that traces the subject properties' locations. In such circumstances as the case herein, courts usually benefit from the evidence of the authors of various documents who have bestowed ownership to multiple parties and that of survey experts. Another significant consideration is that of possession. ***See the Court of Appeal's decision of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR).***

16. In the present case, the 1st respondent informed the trial court that although he was constructing a perimeter fence on 603 whose beacons were shown on purchase, he was subsequently advised of an overlapping issue which was being addressed. It was at this point that he was shown plot 603, the land he was fencing, whilst the appellant (presumably 2nd) was shown a different piece of land. The respondent further stated that the disputed land is unoccupied. Additionally, he mentioned ongoing disputes over land because the Society continually amended the map. Regarding PW2, he based his testimony on his 4/9/2020 report regarding plot nos. 603 and 608. This is what he stated in part while tendering his evidence: -

*“Plots 607 and 603 are different. The exercise was in the presence of the parties and the management committee of the society. No plot was moved from its original location, the only challenge was done misrepresentation on the ground leading to people taking up different positions on the ground. Plot 603 was claimed to be 608 by Joseph Masai since it is just below 607. The plot was occupied by another person Justus Solomon Kitua who is not a party. His plot in 1382 but had occupied 608. Next to Kitua was Phillip Kilonzo who had occupied more than 1/2 acre into 608. We did a survey and put them on the exact acreage of 1/2 acre and correct position. Joseph Masai however declined to take up his plot which is 608...607 belongs to Joseph Masai Kaswii. He never moved from the plot we only aligned them to the correct position as per the map. He also owns 594 where he has built his home. There were no amendments to the map parties were only shown where they are supposed to be...there were no amendment to the map hence no need for registration of a new map.”*

17. The 2nd appellant admitted that the society's committee prepared a report, but he was dissatisfied with it and maintained that he had no dispute regarding plot 607. DW2 stated as follows when questioned on his report of 11/03/2022:

*“there was an issue on number 603 & 607. The map we received shows the two plots we saw were the two plots here. In between there is plot number 604. There is a 12m road in between. On the ground we recovered that committee came up with amendments. There are overlaps. We were able to identify. There is a road in between. There is 604 and a 12m road. Joseph has not trespassed in 603... our client Joseph gave us a map. The map was old...Joseph told me of the survey done by the katelembo committee. What I observed on the plan...”*

18. This court has had to cease outlining the extract of the evidence, as subsequent to this portion, there is a remark by the trial court which states verbatim thus:-

*“..(gets lost in explanation).”*

19. In their submissions, the respondents contended that although the appellants have sought a retrial, such a retrial is permitted solely when it is necessary for the interests of justice and when the original trial was flawed or unlawful. The court agrees with this position, relying on the Supreme court decision in **Export Processing Zone Authority & 10 others (suing on their own behalf and on behalf of all residents of Owino-Uhuru Village in Mikindani, Changamwe Area, Mombasa) v National Environment Management Authority & 3 others [2024] KESC 75 (KLR)**, which

stipulates that the primary consideration for any retrial must always be the pursuit of justice.

20. Moreover, **Section 78** of the Civil Procedure Rules delineates the general jurisdiction of this court as a court of first appeal. Among its powers is the authority to order a retrial, which includes remitting the proceedings with appropriate directions.

21. In the present case, this court has placed significant emphasis on evidence that the lower court did not record. In the court's considered opinion, as a court of record and while evaluating the critical evidence presented by the expert **(DW2)** concerning maps and plans, it was essential for the trial court to seek clarifications as envisaged by, **Order 18 Rule 10** of the **Civil Procedure Rules** and in accordance with the applicable law of evidence; to pose such questions to the expert as the court deems appropriate instead of merely stating that the explanation was incomprehensible to the court. The relevant provision of the **Evidence Act** is found in **Section 173 (1)** of the **Evidence Act**, which reads: -

***“A judge or magistrate may, in order to discover or to obtain proper evidence, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact whether or not it is otherwise admissible; and may order the production of any document or thing; and neither***

***the parties nor their agents shall be entitled to object to any such question or order, nor, without leave of the court, to cross-examine the witness upon any answer given in reply to any such question:***

***Provided that judgment shall be based only upon facts which are otherwise admissible and which have been duly proved.”***

22. To this court’s mind, failure to seek clarification from the expert witness or to record his evidence for the reasons provided by the trial court resulted in significant injustice to the appellants, as the expert's testimony had a direct impact on the outcome of their case. The court hereby so finds. It also finds the appeal is successful. Consequently, for the reasons and findings set forth above, this court sets aside the judgment and decree appealed from in their entirety. It is well-established law that costs follow the event; however, considering the particular circumstances of this case, each party shall bear their respective costs associated with the lower court suit and the appeal. Accordingly, this court issues the following final disposal orders:

***a) The entire trial court proceedings, judgment and decree are hereby set aside in entirety.***

***b) The matter is hereby remitted to the lower court for a new trial to be held on a priority***

***basis by a Hon. Magistrate other than Hon. M.A. Otindo.***

***c) The suit shall be mentioned before the relevant duty Magistrate of the Machakos Law Courts within 30 days from the date of delivery of this judgment for purposes of giving directions regarding the hearing and disposal of the suit.***

***d) Each party shall bear their own costs of the appeal and of the proceedings of the lower court.***

Judgment accordingly.

**Delivered and Dated at Machakos this 17<sup>th</sup> day of February, 2026.**

**HON. A. Y. KOROSS  
JUDGE  
17.02.2026**

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

In the presence of;

Ms Kanja Court Assistant.

Mr. Loki for respondent.

Miss Mutua for respondent.

ORIGINAL