

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT
KERUGOYA
ELCA NO. E001 OF 2023

FRANCIS NGUGI MUKUNDI

APPELLANT

VERSUS

FREDRICK NGARI MUCHIRI

RESPONDENT

[Being an appeal against the judgment and decree of Hon. A. K. Ithuku, CM, delivered on 8th June 2023 in Kerugoya CMCC No. 15 of 2006]

JUDGMENT

1. This appeal arose from the judgment of **Hon. A.K. Ithuku, CM**, delivered on **8th June 2023** in **Kerugoya CMCC No. 15 of 2006**. In the impugned judgment, the learned trial magistrate declared that **Plot No. C348 Wang'uru Market** belongs to the respondent and that any purported subdivision or allotment of any portion thereof to the 1st or 2nd defendant, or to any other person, was illegal, null, and void. The trial court further issued a permanent injunction restraining the defendants, jointly and severally, whether by themselves, their agents or servants, from interfering with the respondent's

possession and enjoyment of the suit plot. Costs of the suit were awarded to the respondent.

2. Aggrieved by the impugned judgment, the appellant lodged the present appeal vide a Memorandum of Appeal dated 5th July 2023. In substance, the appellant contends that the learned magistrate erred in law and in fact in holding that the respondent had proved his case to the requisite standard and in granting the orders sought in the plaint. It is argued that the evidence on record was insufficient to establish trespass or unlawful encroachment by the appellant. The appellant maintains that he is in lawful occupation of **Plot No. C353 Wang'uru Township**, which he asserts exists independently and separately from **Plot No. C348 Wang'uru Market**. He faults the trial court for failing to find that the two plots are distinct on the ground and for concluding, without sufficient and admissible evidence, that **Plot No. C353** was carved out of or juxtaposed upon **Plot No. C348**.

The appellant further contends that the learned trial magistrate did not fully consider his evidence, including documentary exhibits and written submissions, and failed to properly evaluate the respondent's admissions in cross-examination regarding the measurements of **Plot No. C348**. He also relies on the evidence of the 3rd defendant, the Kirinyaga County Government, to the effect that plot sizes within the area had been reduced to create access

roads, which, in his view, did not constitute unlawful interference. It is therefore argued that the burden of proof under **Section 107 of the Evidence Act** was not discharged and that the judgment was against the weight of the evidence.

The appellant accordingly seeks that the appeal be allowed, the judgment and decree of the lower court be set aside, and the respondent's suit be dismissed with costs.

3. The background of the suit before the lower court is that the respondent initiated the suit in the lower court by way of the Amended Plaint dated 8th March 2016, seeking for the following reliefs:

1) A declaration that **Plot No. C348 Wang'uru** Market legally belongs to him and the nullification of any purported subdivision or allotment of any portion thereof to the 1st or 2nd defendant or any other person;

2) A permanent injunction restraining the defendants, jointly and severally, whether by themselves, their agents or servants, from interfering with his quiet possession and enjoyment of the suit plot;

3) Special damages of Kshs.5,000/= against the 3rd defendant; and

4) General damages for unlawful trespass together with costs and interest.

4. His case was that he is the lawful owner of **Plot No. C348 Wang'uru Market** by virtue of a transfer from one **Charles K. Nyamu**, which transfer was sanctioned by the predecessor of the 3rd defendant through **Minute No. WTPM & H/158/2000** of the Special Works, Town Planning, Markets and Housing Committee. He pleaded that in or about January 2005, the appellant entered the suit plot with a view to carrying out construction, claiming ownership through an alleged chain of acquisition from Ephraim Kanake, who in turn had purportedly acquired the plot from Paul K. Mwangi.

The respondent averred that he had previously had a dispute with the said Paul K. Mwangi, which dispute was determined by the predecessor of the 3rd defendant in his favour. Following that determination, the respondent stated that he fenced the entire plot with barbed wire at a cost of Kshs.5,000/=. However, on 15th January 2006, agents, servants or employees of the 3rd defendant's predecessor allegedly demolished the fence, removed the materials, and purported to subdivide the plot into two equal portions, ostensibly allocating one portion to the appellant.

The respondent further pleaded that after the said subdivision, the 1st defendant threatened to resume construction on the suit plot. He also alleged that on or about 12th January 2006, the 2nd defendant, who was constructing a foundation on an adjacent plot, extended the construction into a portion of **Plot No. C348** and indicated an intention to continue with the encroachment despite protest.

5. In response, the appellant and the 2nd defendant each filed statements of defence dated 4th May 2007. The appellant denied the respondent's claim in its entirety. He asserted that he was only aware of **Plot No. C353 Wang'uru Market**, which he stated he purchased from Ephraim Kanake Rwamba on or about 19th January 2000, and of which he had taken possession. He denied any knowledge of Paul K. Mwangi in relation to **Plot No. C348 Wang'uru Market** and further denied any awareness of the alleged demolition on 15th January 2006 or any subdivision of **Plot No. C348** to create a portion for him. He maintained that **Plot No. C353** exists separately and independently from the respondent's plot, and that he has been in quiet possession thereof without any interest in **Plot No. C348**. He contended that the respondent had no cause of action against him and prayed for dismissal of the suit with costs.

6. The 2nd defendant similarly denied the claim. She averred that she was not aware of **Plot No. C348 Wang'uru Market** and did not own any property by that description. She stated that she was only aware of **Plot No. B25 Wang'uru Market**, which her husband had purchased from George Ngumi Gathuka and which he had been developing without interference. She maintained that she had been wrongly sued, that no cause of action lay against her, and prayed for dismissal of the suit.

7. The 3rd defendant entered an appearance and filed a defence in which it acknowledged that **Plot No. C348** belonged to the respondent, **Plot No. C353** to the appellant, and **Plot No. C251** to the 2nd defendant. It averred that there had been several disputes among allottees in the area, which had been resolved administratively. It further stated that the original layout maps had been altered to create access roads and back lanes, resulting in a reduction in plot sizes on the ground and consequent overlap of some plots.

The 3rd defendant admitted to demolishing the barbed wire fence erected by the respondent, stating that the fence had encroached onto three plots and therefore had to be removed. It denied that there had been any subdivision of the respondent's plot or allocation of any portion thereof to other parties. It further averred that the

respondent had been trespassing upon adjacent plots and harassing other allottees. The 3rd defendant contended that the suit was bad in law and an abuse of the process of the court and urged for its dismissal with costs.

8. Upon directions of this Court, the appeal was canvassed by way of written submissions. The learned counsel for the appellant filed submissions dated 14th March 2025, and submitted inter alia that the respondent failed to discharge the burden of proof. It was argued that no survey maps, beacon certificates, or official plans were produced to demonstrate that **Plot No. C348 and Plot No. C353 Wang'uru Market** overlapped or occupied the same ground. Counsel contended that the respondent merely testified that he was shown the plot by the seller and took possession without evidence that the boundaries were established by a county surveyor.

It was further submitted that the trial court placed undue reliance on the recommendation contained in the minutes of the defunct Kirinyaga County Council dated 29th June 2005 arising from a dispute between the respondent and Paul K. Mwangi, yet the said Paul K. Mwangi was not a party to the suit. Counsel argued that no independent technical evidence was tendered to support the conclusion reached by the trial court, and in particular, there was no finding that **Plot No. C353** did not exist as a distinct parcel. The appellant maintained that there was no

evidentiary basis to conclude that **Plot No. C353** had been curved out of **Plot No. C348**. Counsel further pointed to the respondent's admission during cross-examination that he had no evidence to show that any subdivision of his plot had been undertaken by the County Council.

In the absence of comparative maps or survey plans, it was submitted that the trial court's finding was unsupported by the record. The counsel accordingly urged the Court to find that the appeal has merit and to allow it.

9. The learned counsel for the respondent filed written submissions dated 23rd March 2025, and submitted inter alia that the complaint in Ground 1 was misplaced, as the learned magistrate did not grant all the reliefs sought in the amended plaint, but only those supported by the evidence. It was contended that the trial court properly found, on the basis of the pleadings and evidence, that **Plot No. C348 Wang'uru Market** belonged to the respondent and correctly issued a declaration and a permanent injunction. Counsel maintained that there was both verbal and documentary evidence before the trial court establishing the respondent's ownership of the suit plot.

With regard to Ground 2, it was submitted that once the learned magistrate found that the suit property belonged

to the respondent, he was entitled to restrain interference therewith. In response to Ground 3, counsel argued that a trial court is not required to reproduce every sentence of a party's evidence or submissions in its judgment in order to demonstrate that it considered them. As to Ground 4, counsel submitted that the court was bound to determine the dispute in accordance with the evidence and the law, and not in line with the expectations of any party.

Regarding the general complaint that the judgment was against the weight of evidence, counsel submitted that the decision was well reasoned, had identified the issues for determination, and made findings supported by both oral and documentary evidence. It was therefore contended that the appellant's grievances were unsubstantiated and that the respondent had discharged the burden of proof. Counsel urged this Court to find that the learned trial magistrate properly evaluated the evidence and correctly held that the ground in dispute formed part of **Plot No. C348 Wang'uru Market** belonging to the respondent, and to dismiss the appeal with costs.

10. This appeal raises a single overarching issue for determination, being whether the learned trial magistrate erred in law or in fact in finding that the respondent had proved that the appellant encroached upon or interfered with **Plot No. C348 Wang'uru Market**, thereby warranting the grant of declaratory and injunctive relief.

11. The court has carefully considered the grounds on the memorandum of appeal, the record of appeal, and the submissions by the learned counsel, and come to the following findings:

a. This is a first appeal, and the duty of this Court is to re-evaluate the evidence afresh and draw its own conclusions, while bearing in mind that it did not see or hear the witnesses. This principle was stated in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the Court of Appeal held:

“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... 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.”

b. The appeal challenges the trial court’s finding that the respondent had proved that the appellant had encroached upon **Plot No. C348 Wang’uru Market**

and that declaratory and injunctive relief were warranted. The starting point is the burden of proof. Under **Section 107(1) of the Evidence Act Chapter 80 of Laws of Kenya** provides that:

“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

There is no dispute that each party holds documentation issued by the 3rd defendant in respect of their respective plots within Wang’uru Market. The 3rd defendant itself confirmed that the plots were allocated and that beacon certificates were issued.

- c. It is equally not disputed that the acreage of the plots was later reduced in order to create access roads and that, as admitted in the 3rd defendant’s defence, *“out of the said reduction, there has been an overlapping of plots and disputes have arisen.”*

This admission is significant, as it means the alleged overlap did not arise from double allocation in the ordinary sense. Rather, it arose from an administrative action, namely, replanning by the 3rd defendant resulting in reduction of plot sizes to accommodate access roads.

The question that then arises is whether the trial court could conclusively determine trespass without the original approved layout plan; the revised layout plan after the re-planning and reduction in plot sizes; a survey report showing the current ground position of each plot in consideration and evidence reconciling how the overlaps were addressed by the planning authority.

- d. Ownership on paper does not automatically translate into physical positioning on the ground. Where the dispute concerns encroachment or overlap following replanning, technical evidence becomes indispensable. Under **Section 107 of the Evidence Act**, the burden of proof lies on he who alleges. The respondent bore the burden of proving trespass. However, trespass in a boundary dispute cannot be established by merely producing a title or beacon certificate. The claimant must demonstrate, through survey or mapping evidence, that the defendant has encroached onto the claimant's defined boundaries.

In the present case no original layout plan was produced; no revised layout plan was produced; no surveyor testified; no boundary re-establishment exercise was conducted and no evidence was presented to show how the admitted overlaps were reconciled on the ground. In the absence of such

evidence, any finding that one party encroached upon the other would rest on conjecture.

- e. Further, the 3rd defendant, being the planning authority and custodian of the planning records, was best placed to provide the maps and survey documentation. Its admission that replanning caused overlaps, imposed upon it an obligation to demonstrate how those overlaps were resolved, especially in respect of the suit plots, but no such evidence was provided. The trial court, therefore, determined a technical boundary dispute without the technical evidence necessary to resolve it. That was a misdirection on the part of the learned trial magistrate, and the court finds the appeal has merit.
- f. **Section 27(1) of the Civil Procedure Act chapter 21 of Laws of Kenya** provides, in mandatory terms that:

“Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out

of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall not bar the court for ordering that the costs be paid. Provided that the costs of any action shall follow the event unless the court or judge shall for good reason otherwise order.”

From the above provision, the general rule is that costs follow the event, save where good reason exists to depart from the rule. The trial court had through misdirection found in favour of the respondent and in view of this court’s findings above, and the outcome in the appeal, I find this an appropriate case for each party to bear their own costs.

12. In the result, and for the reasons stated above, the Court finds and orders as follows:

a. The appeal has merit and succeeds.

b. The judgment and decree of the learned trial magistrate delivered on 8th June 2023 in

Kerugoya CMCC No. 15 of 2006 is hereby set aside.

c. Pursuant to the principles in Article 159(2)(b) & (d) of the Constitution 2010, the objectives and duty of court set out in sections 1A & 1B of Civil Procedure Act chapter 21 of Laws of Kenya, section 19(1) of Environment and Land Court Act No. 19 of 2011 and with a view of ensuring a practical solution to the quagmire the parties find themselves in, is resolved without undue delay, this court finds it fair and just to direct that the question of the physical ground position, boundaries, and extent of Plot No. C348 Wang'uru Market vis-à-vis the adjoining plots to be determined through a joint boundary re-establishment exercise to be undertaken in observation of the following guidelines:

i. That the Respondent shall, within thirty (60) days from the date hereof, formally apply to the County Surveyor, Kirinyaga County, for a boundary re-establishment exercise.

- ii. The County Surveyor shall visit the site in the presence of the parties, a representative of the 3rd defendant and the adjoining plot owners to reconcile the original plan; the revised plan; and the actual ground position of the plots, and prepare a report thereof.**
- iii. The County Surveyor's report shall be filed before the trial [lower] court within four (4) months from the date of this judgment, or such other time as may be extended on application by this court.**
- iv. Upon filing of the County Surveyor's report, the matter shall be mentioned before the trial [lower] court for directions and determination strictly on the basis of the surveyor's findings.**
- v. In default of the Respondent moving the County Surveyor within the stipulated sixty (60) days, or in default of the Surveyor's report being filed within four (4) months or such other time as may be extended by this court, the suit shall stand**

struck out without further reference to the trial [lower] Court.

vi. Each party shall bear their own costs in this appeal.

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON
THIS 4TH DAY OF MARCH 2026.**

**S. M. Kibunja
ELC**

JUDGE

In the presence of:

Appellant - No appearance

Respondent - Mr. Muchiri

Kinyua - Court Assistant.

Kibunja

S. M.

ELC

JUDGE