

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ELC APPEAL NO. E021 OF 2024

ANTHONY KYALO MANG'ELI.....
APPELLANT

-VERSUS

SAMMY AMNGO KATIMU... ..RESPONDENT

JUDGMENT

1. The Respondent had filed a suit against the Appellant in which he sought the following reliefs against the Appellant:

- 1) **An order of permanent injunction do issue restraining the Defendant, his agents, servants or anyone acting or claiming through him from entering, trespassing committing any acts of wastage thereon, pulling down the fence and or in any other manner interfering with the Plaintiff's parcel of land being title No. Okia/Mukuyuni/2479.**
- 2) **General damages for compensation as well as punitive damages.**
- 3) **Costs of the suit.**

2. The case was fully heard and in a judgment delivered on 8th November, 2024, the trial magistrate issued an injunction against the Appellant and granted costs to the Respondent.

3. The Appellant was aggrieved with the judgment of the trial magistrate and he preferred an appeal to this court in which he raised the following grounds:

- 1) **The trial court erred both in law and fact by entering judgment in favour of the Respondent when he (Respondent) had not proved his case on a balance of probabilities.**
- 2) **The trial court erred both in law and fact by delivering a judgment against the Appellant notwithstanding the fact that the court, in the same judgment, had exonerated the Appellant of blame.**

- 3) **The trial magistrate was plainly wrong in that he ignored the provisions of Section 107 – 108 of the Evidence Act on the question of burden of proof.**
- 4) **The trial court erred both in law and fact by failing to fully engage its judicial mind to all the issues stemming from the parties pleadings and evidence and ended up arriving at a wrong decision. For instance, the trial court did not subject the Appellant’s evidence to exhaustive examination.**
- 5) **The trial magistrate erred both in law and fact by passing a skewed judgment. For instance, the court found as a matter of fact that the appellant had not entered into the subject land but still found against him.**
4. The parties were directed to file written submissions. The Appellant filed his submissions dated 18th February, 2026.
5. The Appellant opted to argue the five grounds as one ground namely that the trial magistrate erred in both fact and law by giving a judgment in favour of the Respondent who had not proved his case.
6. The Appellant submitted that during cross examination the Respondent admitted that the Appellant had not committed the acts of trespass complained of and that notwithstanding, the trial magistrate proceeded to find him culpable of trespass.
7. The Appellant further submitted that the Respondent had not pleaded vicarious liability in the plaint and that having exonerated the Appellant of blame, he went ahead to injunct him and condemn him to pay costs of the suit.
8. The Appellant further submitted that the Respondent had not discharged the burden of proof bestowed upon him by Section 107 and 108 of the Evidence Act. He relied on the case of **Miller –vs- Minister of Pension (1974) 2 ALL ER 372** where Lord Denning J. stated as follows:

“That degree I well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide on way or the other which evidence to accept, where both partiesare equally (un) convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained.

9. The Respondent submitted that the trial magistrate did not err in law or fact as he found the Appellant culpable on account of the principle of vicarious liability. He further submitted that the injunction which was granted was proper and well founded in law.

10. I have carefully considered the proceedings before the trial court, the memorandum of appeal as well as the submissions by the parties. The duty of the first appellate court was aptly stated in the case of **Selle and Another –vs- Associated Motor Boat Co. Ltd & Others EA 123** as follows:

“.....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 allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either it has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression

based on the demeanor of a witness is inconsistent with the evidence in the cases generally”.

11. There is only one issue which emerges for determination. This is whether the Respondent proved that there was trespass on to the Respondent's land. There is no contention that the Respondent is the registered owner of LR No. Okia/Mukuyuni/2479. The Respondent produced a copy of title deed which showed that he was registered as owner of the property on 24th November, 2021.
12. In May, 2022, the Appellant trespassed on to the Respondent's land and started cutting trees and grazing his animals on it. The Respondent telephoned him and told him that he had seen his servants on his land and asked him to stop them from committing the acts of trespass. The Appellant ignored him.
13. The Respondent produced printed messages which he sent to the Appellant which confirm that he had brought the issue of trespass to his land to the attention of the Appellant. The Respondent also produced an assessment report of the damage to the properties of the Respondent. There was no objection to the production of the printed messages sent to the Appellant or the report by the County Agricultural Officer.
14. The Respondent had pleaded in his plaint that the trespass was malicious. Indeed in his witness statement, the Appellant stated that he did not recognize the existence of the Respondent's land and that if it existed, it was a product of an illegal and fraudulent process. This confirms the spite with which he held the Respondent's interest in the property.
15. The Appellant may have not been the one who personally committed the acts of trespass but the fact remains that it is his servants who were doing so and he is therefore vicariously held liable. The evidence which was adduced was that it was his workers who were committing the acts of trespass. The

Respondent telephoned him and told him as much and cautioned him of legal consequences but he did not heed.

16. The Appellant appears to have selectively picked certain parts of the trial magistrate's judgment and tried to claim that there were contradictions. It is a fact that it is not the Appellant who committed the acts of trespass in person. It was his servants for whom he is vicariously held liable.

17. The Appellant cannot ride on the erroneous finding of the trial magistrate that the Appellant was not to blame as it was his employee who committed the acts of trespass. The trial magistrate stated in his judgment that the Respondent could not be compensated in the manner suggested in the report. This was a true statement as there was a special damage claim which was not pleaded in the plaint and could not thus be allowed. The trial magistrate was however alive to the fact that trespass had been committed and that is why he proceeded to grant an injunction and costs of the suit. I therefore find that the Appellant's appeal is devoid of merit. The same is dismissed with costs to the Respondent.

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HON. E. O. OBAGA

JUDGE

**JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT
TEAMS THIS 12TH DAY OF MARCH, 2026.**

IN THE PRESENCE OF:

Mr. Ngolya for Appellant.

Mr. Munyasya for Respondent

Court assistants – Musyoki and Nyaanga