

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT**  
**KERUGOYA**  
**ELCLA NO. E017 OF 2023**

**LYDIA W. MURUGAMI .....**  
**APPELLANT**

**VERSUS**

**MICHAEL KIMANI GITHITU ..... 1<sup>ST</sup>**  
**RESPONDENT**

**COUNTY GOVERNMENT OF KIRINYAGA ..... 2<sup>ND</sup>**  
**RESPONDENT**

*(Being an appeal from the judgment of Hon. M. Opanga, PM,  
delivered on 22<sup>nd</sup> August 2023 in Wang’uru PM ELC Case No. 95  
of 2014)*

**JUDGMENT**

1. This appeal arises from the judgment of **Hon. M. Opanga, PM**, delivered on **22<sup>nd</sup> August** in **Wang’uru PM ELC Case No. 95 of 2014**. In that decision, the learned trial magistrate entered judgment in favour of the 1st respondent by declaring her the legal owner of **Plot No. A412, Wang’uru**.

The court further issued a permanent injunction restraining the appellant, his servants, agents, or

anyone claiming under him from entering, remaining on, or in any way interfering with the respondent's quiet enjoyment of the said plot. The trial court additionally awarded the respondent costs of the suit with interest.

2. Aggrieved by the said decision, the appellant, who was the 2<sup>nd</sup> defendant, in the trial court, lodged the present appeal vide a Memorandum of Appeal dated 14<sup>th</sup> September 2023, raising eight (8) grounds that:

1) The learned magistrate erred in law and in fact in arriving at findings against the weight of the evidence, in entering judgment for the plaintiff, and in failing to find that the 1st respondent had not proved his case on a balance of probabilities.

2) The learned magistrate erred in law and fact by disregarding the report of the Kirinyaga County Government Physical Planning Officer and the County Surveyor, which clearly stated that it was not possible to identify the position on the ground of the 1st respondent's **Plot No. A412, Wang'uru.**

3) The learned magistrate erred in law and fact by filling gaps in the 1st respondent's claim regarding **Plot No. A412** despite the admitted inability of the expert officers, the Physical Planner and the

County Surveyor to locate or establish the position of that plot.

- 4) The learned magistrate erred in law and in fact by failing to find that the appellant had proved the existence of her **Plot No. 38, Wang'uru**, which was supported by an allotment letter and a Part Development Plan (PDP), unlike the respondent's **Plot No. A412** which lacked documentary support.
- 5) The learned magistrate erred in law and fact in condemning the appellant to pay costs, which was legally and factually unjustified in the circumstances.
- 6) The learned magistrate erred in law and fact in failing to find that the 1st respondent prematurely and unnecessarily filed **MCL&E Case No. 95 of 2014**, contrary to the advice given by the 2<sup>nd</sup> respondent that he should first lodge his complaint with the relevant land department; and that consequently the 1<sup>st</sup> respondent ought to have been condemned to pay the costs of the suit.
- 7) The learned magistrate erred in law and fact in failing to find that the 1<sup>st</sup> respondent's **Plot No.**

**A412** was not supported by any Part Development Plan or beacon certificate as proof of its existence.

8) The learned magistrate erred in law and in fact by failing to find that the appellant had proved her counterclaim in **MCL&E Case No. 95 of 2014**, and that judgment ought to have been entered in the appellant's favour on the counterclaim.

It is on the basis of the foregoing grounds, that the appellant prays for the following:

- i. That the appeal be allowed;*
- ii. That the judgment of the trial court be set aside and substituted with an order dismissing the 1st respondent's suit with costs to the appellant;*
- iii. That the appellant's counterclaim in MCL&E Case No. 95 of 2014 be allowed and judgment entered as prayed therein; and*
- iv. That the appellant be awarded the costs of this appeal and the costs in the lower court.*

3. Pursuant to the court's directions, the appeal was canvassed through written submissions, which both parties duly filed and the court has considered them.

4. The learned counsel for the Appellant filed her written submissions dated 4<sup>th</sup> July 2025, arguing inter alia that

the joint report by the County Surveyor and the County Physical Planning Officer actually supported her position. Counsel submitted that when the experts stated that *“it is therefore difficult to tell the position of **Plot No. A412** unless one relies on the owner’s knowledge”* and that *“**Plot No. 38** can be clearly identified on the Part Development Plan **Ref. CKR/352/95/5** which allocated **Plot No. 38**,”* they meant that the position of **Plot No. A412** could not be confirmed because the PDP relied upon by the 1<sup>st</sup> Respondent had no plot numbers. In contrast, **Plot No. 38**, belonging to the Appellant, was clearly identifiable both on the PDP and on the ground. Counsel emphasized that the County Surveyor and the Physical Planner were the competent experts on the interpretation of maps, development plans, and plot locations, and that their inability to authenticate **Plot No. A412** meant that the 1<sup>st</sup> Respondent’s alleged plot was not backed by any valid PDP. The experts could not, in counsel’s view, rely on the 1<sup>st</sup> Respondent’s personal knowledge of where he believed his plot to be situated. The Appellant maintained that because her **Plot No. 38** was definitively established on the PDP and on the ground, she could not be said to have encroached upon or interfered with the 1<sup>st</sup> Respondent’s purported **Plot No. A412**.

Counsel therefore submitted that the 1<sup>st</sup> Respondent failed to prove his case on a balance of probabilities. She further argued that before filing suit, the 1<sup>st</sup> Respondent had been advised to lodge a dispute with the County Government of Kirinyaga, but he chose instead to file the matter in court without exhausting the dispute-resolution mechanisms available to him. Counsel invoked the doctrine of exhaustion, submitting that the suit was premature.

On the counterclaim, counsel asserted that the Appellant had proved ownership of **Plot No. 38**, which was identifiable on both the PDP and the ground, and the counterclaim ought to have been allowed. The Appellant also sought costs, arguing that she was wrongly brought to court before the 1st Respondent pursued administrative remedies.

In conclusion, the Appellant prayed that the appeal be allowed, the judgment of the trial court be set aside, the 1st Respondent's suit be dismissed with costs, and the Appellant's counterclaim be allowed.

5. The learned counsel for the 1st Respondent, through their submissions dated 19<sup>th</sup> May 2025, maintained that his knowledge and occupation of **Plot No. A412** were well established and supported by documentary and official verification.

Counsel submitted that a census had been undertaken in the area during which County Officers confirmed the 1<sup>st</sup> Respondent as the legitimate allottee of the plot. He relied on a beacon certificate showing **Minute No. WTPM&H 161/91**, the minute allocating the plot to him, as well as an approved building plan sanctioned by both the County Physical Planner and the County Surveyor. Counsel argued that the 1<sup>st</sup> Respondent had taken possession of the plot immediately after allocation and had consistently paid rates, further affirming his ownership. He also pointed out that the respondent's plot was allocated in 1991, whereas the Appellant's plot was allocated in 1997, demonstrating priority in time. Counsel submitted that the road expansion leading to Wang'uru Secondary School affected neighbouring plots, including the 1<sup>st</sup> Respondent's, and this exercise occurred without any objection or participation from the Appellant, further confirming that she had no claim over the site.

The counsel relied on the joint expert report, arguing that it supported the position that **Plot A412** was located on a different ground altogether, and that **Plot No. 38**, belonging to the Appellant, was not situate where the Respondent's developments stand. Counsel argued that the Appellant had wrongly accepted a ground that did not correspond to the PDP, and since she was not laying any claim over the site where the

Respondent's building stands, she had no basis to seek demolitions or relocation orders.

On costs, counsel submitted that the trial court properly applied **Section 27 of the Civil Procedure Act**, as costs follow the event, and the 1st Respondent had been the successful litigant. Responding to the exhaustion argument, counsel submitted that this was not a dispute that the County Dispute Resolution Committee could entertain because the reliefs sought included a declaration of ownership and a permanent injunction, which the committee had no jurisdiction to issue.

Additionally, the County Government itself was sued as a party, placing the matter beyond the committee's mandate. Counsel concluded by asserting that the 1st Respondent had proved his case before the trial court, and urged that the appeal be dismissed with costs.

6. From the record of appeal and submissions filed by the parties, the court finds the following issues arises for determination:

- a. Whether the disputed ground is the site for Plot No. A412 or to Plot No. 38.*
- b. Whether the trial court misapprehended or misapplied the expert report by concluding that the 1st Respondent had proved his claim.*

- c. Whether the 1<sup>st</sup> Respondent discharged the burden of proving that the ground he occupied was Plot A412.*
- d. Whether the Appellant proved the counterclaim that the Respondent had trespassed upon Plot 38.*
- e. Whether the doctrine of exhaustion applied.*
- f. Whether the trial court properly exercised discretion in awarding costs.*
- g. Who bears the costs in the appeal?*

7. I have carefully considered the grounds on the memorandum of appeal, record of appeal, the rival submissions of the parties, superior court decisions cited and come to the following determinations:

- a. The dispute before the trial court arose from a claim by the 1<sup>st</sup> respondent, who sought a declaration that he is the lawful owner of **Plot No. A412 Wang'uru**, together with a permanent injunction to restrain the appellant from interfering with his occupation and intended developments on the plot. He asserted that the plot had been validly allocated to him jointly with one Joseph Mungai by the then Kirinyaga County Council in 1991, the allocation having been confirmed through council minutes issued in 1994. He later purchased Mungai's share, and the council subsequently approved the transfer to him, making him the sole

allottee. He maintained that he had consistently paid all dues relating to the plot and had even obtained an approved building plan from the County Council, which had been endorsed by the Public Health Office, the Physical Planning Officer, the District Works Office, and the Clerk to the Council. He contended that he took possession of the land in the early 1990s, was shown its physical location by the County Surveyor, fenced it, and constructed a small house and reservoir tank, though these structures were later vandalised. He stated that he had stored building materials on the site for years and had resumed construction in July 2014. According to him, County Government officials stopped the construction on 8th July 2014, and the following day, they seized his workers' tools after receiving a complaint from the appellant, who claimed ownership of a different **Plot, No. 38.**

The 1<sup>st</sup> respondent stated that this intervention halted his developments and caused wastage of his materials, prompting him to file a suit to protect what he considered his lawfully allocated plot.

- b. The record shows that although the 2<sup>nd</sup> Respondent was properly served and given time to

file a defence, it failed to enter an appearance or submit any responsive pleadings. As a result, the trial court issued an interlocutory judgment against it. The case therefore continued without any substantive defence, explanation, or clarification from the County Government of Kirinyaga, 2<sup>nd</sup> respondent, regarding the allocation, identification, or physical position of either **Plot No. A412 or Plot No. 38**.

- c. The matter proceeded to a hearing on 6th June 2023, during which both the 1st respondent and the appellant testified and subsequently filed written submissions as directed. The trial court also reviewed the documentary record, including the joint report prepared by the Kirinyaga County Physical Planning Officer, Mr. Stephen Wambugu, together with the County Surveyor. The joint report formed the backbone of the trial court's determination. In their assessment, the experts concluded that the position of **Plot No. A412** could not be definitively confirmed, as the applicable development plan did not contain plot numbers.

They further stated that **Plots A412 and 38** did not occupy the same position on the ground according to **PDP No. CKR/352/95/5**, and

importantly, that **Plot No. 38** did not fall on the disputed site. The report also acknowledged that each party appeared to be the genuine allottee of their respective plots as per the County records.

Significantly, it noted that the position of **Plot No. 38** could be clearly identified from the PDP, and that its mapped and ground position lay on a different line of plots from the site in dispute. While the officers indicated they could not authoritatively confirm that the disputed location corresponded to **Plot A412**, they were categorical that the disputed site was not **Plot No. 38**.

Relying heavily on these conclusions, the learned trial magistrate held that the evidence favoured the 1<sup>st</sup> respondent. She reasoned that if the disputed site was not **Plot No. 38**, yet the appellant asserted ownership of that plot, then the appellant had failed to dislodge the 1<sup>st</sup> respondent's claim. The court therefore found that the 1<sup>st</sup> respondent had proved his case on a balance of probabilities and entered judgment in his favour, granting the declaratory and injunctive orders sought.

- d. Turning to the question of whether the disputed ground position corresponds to **Plot No. A412 or**

**to Plot No. 38**, it is important to appreciate that the dispute before the trial court, and now on appeal, turns not on allocation or ownership of the respective plots, but on which of the two plots occupies the disputed physical ground.

Both parties accepted the authenticity of their allotment documents, and the experts report filed in the lower court unanimously acknowledged that each party had been properly allocated their respective plot. Thus, the contest is strictly one of ground identification. The County Physical Planner and the County Surveyor conducted a joint site visit in the presence of both parties.

- e. Their findings, reproduced in the trial court record, can be summarised as follows: -
- i. Both the Appellant and the 1<sup>st</sup> Respondent are lawful allottees of **Plot 38 and Plot A412**, respectively.
  - ii. The existing development plan relied upon contains no plot numbers, making the precise location of **A412 and Plot No.38** impossible to identify with certainty.
  - iii. Plot 38, belonging to the Appellant, is identifiable both on the **PDP No. CKr/352/95/5** and on the ground.

iv. The disputed ground is not **Plot 38**. The experts explicitly stated that Plot 38 lies elsewhere and not on the contested site.

These findings were not challenged by either party through cross-examination or through presentation of independent expert evidence.

f. Under our law, such a jointly prepared report, filed by a competent statutory office holders, carries substantial probative weight, unless discredited. Expert evidence, especially where both parties participate in the site visit, is only to be departed from where there is credible contrary evidence, or where the methodology is impeached.

In the case of **Nzyoka versus Mativo & Others; Kibua (Interested Party) (Environment and Land Appeal 8 of 2017) [2023] KEELC 15940 (KLR) (22 February 2023)** (Ruling), this court held that:

***“Although courts are not bound by expert evidence, expert evidence is to be given high regard by the courts, and unless there is cogent grounds, that evidence ought not be rejected. In Juliet Karisa v Joseph Barawa & Another Civil Appeal No.***

**108 of 1988 (unreported), the Court of Appeal observed that:**

***“Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.”***

No such contrary evidence was tendered in this matter.

- g. Although both parties hold valid allotments, the obligation lay upon the 1<sup>st</sup> Respondent, as the plaintiff in the trial court, to prove on a balance of probabilities that:
  - i. The physical ground he occupied corresponded with **Plot A412**; and
  - ii. The Appellant’s occupation of the same ground amounted to trespass.
  
- h. The expert report left no ambiguity on where the Appellant’s plot could probably be located, and was clear it could not be located on the disputed ground position. Therefore, on the basis of the said

expert evidence, the undisputed planning records, and the principles governing disputes of ground identity, this Court finds that the disputed ground report is not **Plot 38**, as per the expert report. Though the experts report indicated that the development plan they relied on did not have plot numbers, it was procedurally sound and made critical findings inter alia that:

- i. **Plot No. 38** is identifiable on **PDP Ref. CKR/352/95/5** and on the ground.
- ii. The disputed site is **NOT Plot 38**.
- iii. The position of **Plot No. A412** could not be authoritatively confirmed, because the PDP presented for **A412** does not bear plot numbers.
- iv. The experts could not authoritatively confirm that the disputed site corresponds to **Plot No. A412**.

This means the report provided certainty only in respect of what the disputed ground is NOT, but provided no certainty as to what is actually IS.

- i. The trial court treated the report as determinative in favour of the 1<sup>st</sup> Respondent. Both the appellant and 1<sup>st</sup> respondent did not present any other expert evidence to counter that in the expert's report. The 1<sup>st</sup> Respondent relied heavily on the following inter alia:

- i. Long-standing occupation since the early 1990;
- ii. Being shown the ground by the County Surveyor at allocation;
- iii. Approved building plans;
- iv. Payment of rates;
- v. A county census in which he was verified as owner; and
- vi. The appellant not objecting during road expansion works.

These are significant indicators of possession and administrative recognition, and as the experts report has clearly shown the appellant's **Plot 38** is situated on a different site other than the disputed ground position, the court finds no reason to fault the learned trial magistrate's finding in favour of the 1<sup>st</sup> respondent.

- j. The trial court concluded that the 1<sup>st</sup> Respondent had proved his case "*on a balance of convenience.*" With respect, the learned trial magistrate applied the wrong legal test, as the standard is balance of probabilities, not balance of convenience. The latter applies only in interlocutory injunctions, not in a final determination of title or declaratory rights. This did not affect the final determination as the 1<sup>st</sup>

Respondent had proved his case on a balance of probabilities.

- k. The Appellant's counterclaim was anchored on her assertion that she was the lawful allottee of **Plot No. 38 Wang'uru Town**; that her plot was clearly identifiable on the **Part Development Plan (PDP No. CKR/352/95/5)**; and that the 1<sup>st</sup> Respondent had trespassed onto that plot by depositing building materials and commencing construction. She sought declaratory orders, eviction, and a permanent injunction.

The expert report by the County Physical Planner and County Surveyor confirmed that **Plot No. 38** is clearly identifiable on the PDP, and that it does not fall on the disputed site. The report corroborated the Appellant's documentary evidence of allotment and the existence of a PDP supporting her title. What remained unresolved, however, was whether the disputed site corresponded to **Plot No. 38** on the ground, and whether the 1<sup>st</sup> Respondent had indeed entered onto that identifiable parcel. The report did not make such a finding, but it instead indicated that while **Plot No. 38** is identifiable on paper, it is not on the ground the parties are disputing over.

l. The Appellant therefore failed to establish on the evidence before the trial court that the disputed ground was the same as **Plot No. 38**. Without proof that the 1<sup>st</sup> Respondent occupied her parcel, a declaration of trespass could not issue. Trespass is a fact specific tort, and the claimant must show that the impugned entry occurred on the land she owns or possesses, and that burden was not discharged. Accordingly, the trial court did not err in dismissing the appellant's counterclaim. The appellant proved ownership of **Plot No. 38**, but did not prove that the 1<sup>st</sup> Respondent had entered or interfered with that specific plot on the ground. The counterclaim, therefore, failed for want of proof of trespass.

m. **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 burden lies on the party challenging a costs order to demonstrate that the trial court exercised its discretion improperly, capriciously, or on the basis of a wrong principle. In the present matter, the trial court found the 1<sup>st</sup> Respondent to be the successful litigant and consequently awarded him costs. That conclusion has been confirmed in this appeal.

8. Having come to the determinations set out above, the court finds and orders as follows:

**a. That the appeal is without merit and is dismissed in its entirety.**

**b. That the judgment of the learned trial magistrate delivered on 22<sup>nd</sup> August 2023 in Wang'uru PM ELC Case No. 95 of 2014 is hereby upheld.**

**c. The 1<sup>st</sup> Respondent is awarded costs in this appeal.**

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED THIS 11<sup>TH</sup> DAY OF MARCH 2026.**

**Kibunja**

**JUDGE**

**S. M.**

**ELC**

**In the presence of:**

Appellant - M/s Kimathi for Okwaro

Respondents - No appearance

Kinyua - Court Assistant.

**Kibunja**

**S. M.**

