



**Maina v Gichia & another (Environment and Land Appeal E003 of 2024)  
[2026] KEELC 1243 (KLR) (26 February 2026) (Judgment)**

Neutral citation: [2026] KEELC 1243 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT AND LAND APPEAL E003 OF 2024  
MD MWANGI, J  
FEBRUARY 26, 2026**

**BETWEEN**

**JANET W MAINA ..... APPELLANT**

**AND**

**FREDRICK W GICHIA ..... RESPONDENT**

**AND**

**COUNTY GOVERNMENT OF KAJIADO ..... INTERESTED PARTY**

*(Being an Appeal from the judgement from the Chief Magistrate's Courts at Kajiado  
of Hon. Mrs. R.A Oganyo delivered on the 1 February, 2024 in MC. ELC/66/2007)*

**JUDGMENT**

**Introduction**

1. The suit before the trial court that gave rise to this appeal was initiated by a Plaintiff dated 5 March 2007, filed by the Respondent against the Appellant and her husband in Kajiado Chief Magistrate's Court Civil Case No. 66 of 2007. In the Plaintiff, the Respondent asserted that he was the rightful owner of the Business Plot No. 121 located at Olekasasi Trading Centre in Ongata Rongai, having purchased it from the original allottee, Mr. Nahashom M. Kabuu. The Respondent asserted that he took physical possession and began developing the property after officials from the then Ol Kejuado County Council identified the boundaries and beacons of the plot. He further pleaded that in January 2007 he discovered that the Appellant, who owned a neighboring plot, had fenced off his property. Despite being confronted and asked to stop trespassing and to remove the materials placed on the site, especially after the Council confirmed that the plot belonged to the Respondent, the Appellant and her husband allegedly failed to move out and continued encroaching onto the land.



2. As a result of these actions, the Respondent instituted legal proceedings seeking judgment against the Appellants for a permanent injunction to restrain them, jointly and severally, from trespassing upon, encroaching onto, interfering with the Respondent's use and possession of, alienating, disposing of, or in any other way dealing with Business Plot No. 121 at Olekasasi Trading Centre, Ongata Rongai, Kajiado District. The Respondent also sought a declaration that he is the lawful and legitimate owner of the said plot, an award of costs of the suit, and any other relief the court might consider appropriate in the circumstances.
3. In her Statement of Defence dated 2 April 2007, the Appellant wholly denied the allegations made against her. Through a counterclaim, she contended that she was in fact the lawful owner of a different property, namely Plot No. 893 (Residential) located at Olekasasi Trading Centre, Ongata Rongai, Kajiado District, which had been allocated to her by the Ol Kejuado County Council on 12 October 2005. After paying the required rent and survey fees and completing plot identification procedures, the Appellant asserted that she was shown the plot by a council surveyor on 14 October 2005 and issued with a map indicating the marked parcel. She further stated that her subsequent application for change of user from residential to business, together with the building plans, were duly approved. The Appellant also alleged that when she later attempted to pay the 2007 rates, she was shown a notice indicating that all dealings involving plots within the council's jurisdiction had been suspended.
4. The Appellant further contended that the Respondent's suit was an abuse of the court process, intended to prevent her from accessing and utilizing the property so that the Respondent could proceed with its development. She asserted that shortly after being served with the court summons, the Respondent began developing the disputed property. On that basis, the Appellant sought orders from the court declaring that the suit property, Plot No. 893 (Residential), rightfully belongs to her. She also prayed for an injunction restraining the Plaintiff, his agents, or anyone acting on his behalf from interfering with or otherwise dealing with the property. Additionally, she requested that the Respondent's suit be dismissed and that the court grant any other relief it considered appropriate in the circumstances.
5. The Interested Party was joined in these proceedings following an application made by the Appellant.
6. In a judgment delivered on 1 February 2024, the Learned Magistrate, Hon. R. A. Oganyo, allowed the Respondent's claim as prayed, having found that the Respondent had proved his case on a balance of probabilities against the Appellant. Regarding the issue of costs, the Learned Magistrate made the following observation at paragraph 25 of the judgment:

“On costs, it is trite law that costs follow the event. See Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another {2016}eKLR. The Plaintiff having proved his case against the Defendant on a balance of probability gets the costs of the suit.”
7. Subsequently, the Appellant filed two Notices of Motion dated 18 March 2024 and 17 May 2024 before the Chief Magistrate's Court seeking orders for stay of proceedings, judgment, and the decree pending the hearing and determination of the present appeal. The Appellant also sought an order restraining the third-party auctioneers from selling, by way of public auction scheduled for 18 May 2024, the goods that had been proclaimed in execution of the decree.
8. Upon considering the applications, the Learned Magistrate allowed them on condition that the Appellant provides security of Ksh. 60,000/- in addition to the Ksh. 20,000/- already deposited in court, within 21 days, for the orders of stay of execution to remain in force. In her ruling, the Learned Magistrate further observed that the only issue raised in the appeal concerned the costs payable.



9. Aggrieved by the Learned Magistrate determination on costs, the Appellant approached this court through a memorandum of Appeal dated 22<sup>nd</sup> February, 2024 alleging as follows;
  - a. The learned judge of the superior court erred in law and fact in awarding costs in this suit while clear facts of the case and circumstances do not justify an award of costs.
  - b. The learned judge of the superior court erred in law and fact by failing to uphold the doctrine of precedent, the already determined decisions by superior courts and appreciate and be guided by case law with similar facts on the issue of award of costs.
10. Premised on the above allegation, the Appellant sought for orders that
  - a. The judgment and orders by the lower court on the award of costs against the Appellant in the chief Magistrate Court, Environment and Land Court at Kajiado by Hon. R.A Aganyo delivered on 1<sup>st</sup> February,2024 in Kajiado CM ELC No. 66 of 2007 Fredrick W. Gichia v Alex Maina and Janet W. Maina be set aside/varied.
  - b. This honorable court does grant any further orders to ensure that the ends of justice are met.
  - c. Costs of this Appeal be borne by the Respondent.

### **Courts directions**

11. When the appeal came up for directions on 11 June 2025, the court directed that it be determined by way of written submissions. Counsel for both the Appellant and the Respondent duly complied with this directive.

### **Appellant's Submissions**

12. The core of the Appellant's grievance in this appeal centers on the trial court's decision to award costs to the Respondent, predicated on the general principle that "costs follow the event". The Appellant contends that while this is the standard rule, the trial court failed to exercise its discretion judicially by neglecting to consider the unique circumstances and the conduct of the parties involved in the litigation.
13. The Appellant relies on Section 27 of the *Civil Procedure Act*, which grants the court full power and discretion to determine by whom and to what extent costs are to be paid. While the proviso dictates that costs shall follow the event, the Appellant emphasizes that this is not an absolute mandate if "good reason" exists to order otherwise.
14. Citing *Patel v EA Cargo Handling Services Ltd* [1974] EA 99, the Appellant argues that this discretion must be exercised after taking into account all relevant circumstances, including the nature of the case and the conduct of the litigants. Furthermore, the Appellant points to *Joseph Oduor Anode V Kenya Red Cross Society* [2012] eKLR, noting that where a court departs from the general principle, it is enjoined to provide reasons for doing so.
15. A central pillar of the Appellant's argument is that the litigation was not caused by the malice or negligence of either the Appellant or Respondent, but by the County Government of Kajiado (the Interested Party).The Appellant asserts that the County Council (now County Government) was primarily responsible for the dispute by allocating the same physical parcel of land to both parties under different plot numbers (Plot 121 and Plot 893).
16. The Appellant maintains she acted in good faith, possessing an allotment letter and receipts for rent, survey, and plot identification fees, none of which were challenged for authenticity or credibility. It



is the Appellant's submission that she was physically shown the suit land as Plot 893 by the County Council's surveyor.

17. The Appellant argues that the trial court's judgment was ultimately based on a "discovery" made during the proceedings through court-ordered surveyor reports, rather than through the primary efforts or evidence of the Respondent. The Appellant invokes the reasoning of Thacker J. in *Norman Main V Adam Ferguson (1942-1943) KLR*, suggesting that when a party "wins" via a discovery made at the "eleventh hour" by the court itself—specifically where both parties may have fallen into the same error regarding a fact—it is "manifestly unjust and inequitable" to order the unsuccessful party to pay costs.
18. The ownership and physical identification of the land were unknown to all parties until the County Surveyor was summoned multiple times to clarify the dispute. Because the survey report was the deciding factor in identifying the correct owner, the order for costs serves as a "penal measure" against the Appellant for a wrong occasioned by the local authority.
19. Finally, the Appellant highlights her diligence throughout the protracted litigation, noting that her late husband, Mr. Alex Maina, tragically died in a road accident while traveling to court for this matter. She contends that since her conduct was above reproach and she was misled by the allocating authority, she should not be burdened with the Respondent's costs.
20. The Appellant urges the court to set aside the order for costs and either:
  - a. Order that each party bear its own costs.
  - b. In the alternative, order the County Government of Kajiado (the 3rd Party) to pay the costs, as they were the primary cause of the litigation

### **Respondent's Submissions**

21. The Respondent (the successful Plaintiff in the lower court) maintains that the trial court's decision to award costs was a proper exercise of judicial discretion. The Respondent argues that the litigation was necessitated by the Appellant's own actions and that the general rule of costs following the event should be upheld.
22. The Respondent contends that the dispute was not a result of "official confusion" by the County Government, but rather a clear case of trespass by the Appellant.
23. The Respondent asserts that he purchased Business Plot No. 121 from the original allottee, Nahashon M. Kabuu, and took physical possession. The Respondent points out that the local authority (Ol Kejuado County Council) issued a letter as early as February 22, 2007, confirming the Respondent's ownership.
24. The Respondent highlights a fundamental difference in the properties: the Respondent's land (Plot 121) is commercial, while the Appellant's land (Plot 893) is residential. The Respondent argues the Appellant failed to prove a change of user for Plot 893 and that the surveyor confirmed the Appellant's sketch was handwritten and not part of the official records.
25. The Respondent relies on Section 27 of the *Civil Procedure Act*, emphasizing that while costs are at the court's discretion, the statutory proviso is that costs must follow the event unless there is a recorded "good reason" to depart from that rule. Citing *Joseph Oduor Anode v Kenya Red Cross Society*, the Respondent argues that a court is only required to justify its decision when it refuses to award costs to a successful party. Awarding costs to the winner is the default and does not require extraordinary justification.



26. Following the Supreme Court ruling in *Rai & 3 others v Rai & 4 others*, the Respondent asserts that costs are intended to reimburse the successful party for the "trouble taken" and expenses incurred in fighting the action, rather than to penalize the loser.
27. The Respondent argues that the Appellant has not met the high threshold required for an appellate court to overturn a discretionary order. Citing the landmark case *Mbogo & Another V. Shah*, the Respondent submits that an appellate court should only interfere if the trial judge misdirected himself, acted on wrong principles, or if the decision is "manifestly wrong" resulting in injustice.
28. The Respondent directly rebuts the Appellant's claim that there was "no successful party". The Respondent maintains the trial court made a definitive finding that Plot 121 belonged to the Respondent and that the Appellant was the unsuccessful party.
29. The Respondent characterizes the litigation as a direct consequence of the Appellant's trespass onto the Respondent's land. The Respondent further argues that the Appellant's claim of being "mised" by the County Council is not supported by the record, as the Appellant was notified of the Respondent's ownership early in the dispute. Because the Appellant allegedly trespassed despite the local authority's confirmation of the Respondent's title, the Respondent claims that they had no choice but to file the suit to protect their property rights.
30. The Respondent urges this Court to:
  - a. Dismiss the appeal and uphold the trial court's award of costs.
  - b. Order the Appellant to pay the costs of this appeal.

### **Analysis and Determination**

31. Upon carefully reviewing the entire record of appeal, together with the rival submissions by learned counsel, I find that the sole issue for determination is whether the appeal is merited in seeking a variation of the Learned Magistrate's order on costs.
32. As the first Appellate court, I am duty bound to independently re-evaluate and re-asses and re-analysis entire proceedings before the Chief Magistrate's court noting that I did not have the opportunity to deal with the matter first hand before I arrive at my own conclusion. This annotation was extensively deliberated upon in *Selle and another v Associated Motor Boat Company Ltd and others* [1968] 1 EA 123.
33. Further, in *Susan Munyi v Keshar Shiani* [2013] KECA 472 (KLR), the Court of Appeal described the role of a first appellate court as follows;

"As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions."
34. The Appellant seeks review and vacation of the Learned Magistrate's directive which awarded costs to the Respondent. According to the Appellant, this directive was unjustified because the court never took into consideration the established principles on award of costs while exercising its judicial discretion. Although the subject of this Appeal was instituted by the Respondent, it is argued that the Learned Magistrate should have taken into consideration circumstances of the case, conduct of the parties and misrepresentation by the Interested Party. This is because Plot 893 which the Appellant



claimed ownership of was allocated and shown to her by the Interested party after payment of the requisite plot identification fee.

35. It is submitted that the Appellant should not be made to bear liability and penalized for the wrongful actions of the Interested Party. This is so because the authority and credibility of the Appellant's purported plot was not tested. Additionally, the issue of plot identification was discovered by the trial court in the course of the proceedings.
36. The guiding principle in awarding costs of the suit is stipulated in Section 27 *Civil Procedure Act* (Cap. 21) as follows:
  - “(1) 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 of 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 be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”
37. The above provision was further elaborated upon by the Supreme in its decision in *Rai & 3 others v Rai & 4 others* [2014] KESC 31 (KLR) as follows
  - “It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference, is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”
38. While dealing with the issue of costs, the Court of Appeal in *Farah Awad Gullet v CMC Motors Group Limited* [2018] KECA 158 (KLR) held as follows;
  - “The position in law is that costs are at the discretion of the court seized of the matter with the usual caveat being that such a discretion should be exercised judiciously, meaning, without caprice or whim and on sound reasoning (see *Githiaka versus Nduriri* [2004] 2KLR). Secondly that a Court can only withhold costs either partially or wholly from a successful party for good cause to be shown.”
39. In light of the foregoing principles, it is not in dispute that the award of costs is a discretionary power vested in the trial court. However, such discretion must be exercised judiciously, upon sound reasoning, and in accordance with the settled principle that costs ordinarily follow the event unless the court, for good reason, orders otherwise.
40. From the record, the Respondent instituted the suit seeking declaratory and injunctive reliefs in respect of Business Plot No. 121. Upon full hearing, the trial court made a definitive finding that the Respondent had proved his case on a balance of probabilities. The court accepted the evidence,



including that of the Interested Party's witness, to the effect that Plot No. 893 claimed by the Appellant did not feature in the Partial Development Plan (PDP) and that the Respondent's plot was distinct and properly identifiable. Consequently, judgment was entered in favour of the Respondent.

41. The "event" contemplated under Section 27 of the *Civil Procedure Act* was therefore the success of the Respondent's claim. In those circumstances, the learned Magistrate applied the general rule that costs follow the event and awarded costs to the successful party. The court expressly cited the authority in support of that position and did not depart from the statutory proviso.
42. The Appellant urges this Court to find that the dispute arose from the actions or confusion attributable to the Interested Party and that neither litigant should be penalized. While it is true that the conduct of parties and the surrounding circumstances are relevant considerations in the exercise of discretion, the record does not demonstrate that the trial court ignored these factors or misdirected itself on any point of law. The court heard evidence from all sides, including the Interested Party, and ultimately found that the Respondent's claim was proved while the Appellant's counterclaim was not.
43. The Appellant has not demonstrated that the learned Magistrate acted on wrong principles, failed to consider relevant factors, considered irrelevant matters, or reached a decision that is plainly wrong so as to occasion injustice. The threshold for appellate court's interference with the exercise of discretion, as set out in *Mbogo & Another v Shah*, has therefore not been met. An appellate court will not lightly interfere merely because it would have reached a different conclusion.
44. Further, the argument that the discovery regarding plot identification emerged during the proceedings does not, in itself, constitute "good reason" to deny a successful party costs. Litigation necessarily involves evaluation of evidence and clarification of contested facts. The fact that the court relied on survey evidence to resolve the dispute does not negate the reality that the Respondent was compelled to come to court to vindicate his proprietary rights and ultimately succeeded.
45. On the contention that the Interested Party should bear the costs, I note that the trial court did not make a finding of liability against the Interested Party. In the absence of a specific determination that the Interested Party's conduct was the proximate and legal cause of the loss suffered by either litigant, it would be improper at this appellate stage to shift the burden of costs.
46. I am satisfied that the learned Magistrate exercised her discretion judicially and in accordance with Section 27 of the *Civil Procedure Act* and the guiding jurisprudence of the superior courts. There is no basis upon which this Court can properly interfere with the order on costs.
47. Accordingly, the appeal lacks merit and is hereby dismissed.
48. The order of the Chief Magistrate awarding costs of the suit to the Respondent is upheld. The Respondent shall also have the costs of this appeal against the Appellant.

It is so ordered.

**DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 26<sup>TH</sup> DAY OF FEBRUARY 2026.**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Oduor h/b for Mr. Mwariri for the Appellant

Mr. Kabucho for the Respondent



Court Assistant: Mpoye

