

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND COURT LAND APPEAL NO. E002 OF
2024

JOHN NKORONGO NKORONGO.....APPELLANT

VERSUS

SAMWEL MWITA RIOBA.....1ST

RESPONDENT

LANDS MIGORI COUNTY GOVERNMENT.....2ND

RESPONDENT

MIGORI COUNTY GOVERNMENT.....3RD

RESPONDENT

*(Being an Appeal from the Judgment and Decree in Kehancha SPM ELC
E018 of 2021 delivered on 24th January 2024 by Hon. M.O. Obiero)*

JUDGEMENT

1. By way of Plaintiff dated 20th December 2021, the Appellant sought the following orders in the trial court;

1) Declarations that the plaintiff is the lawful, bonafide and registered owner of LR NO. NYABASI/BOMERANI/814 and thus entitled to exclusive and absolute occupation, possession and usage thereof without interference by the Defendants herein whatsoever.

2) Permanent injunction restraining the Defendants either by themselves, their agents, servants and/or anyone claiming under the Defendants from further entering, re-entering, trespassing unto, undertaking excavation and/or establishing, constructing and/or continuing with construction of the road of access, interfering with and/or in any other manner dealing with the suit property that is LR NO. NYABASI/BOMERANI/814.

3) An order of mandatory injunction to compel the Defendants, their agents, servants and/or anyone acting under their instructions to restore the suit property to its original status closing the road of access illegally constructed on LR NO. NYABASI/BOMERANI/814 or in the alternative the Plaintiff herein be allowed to close the road of access illegally establish and/or constructed on the suit property LR NO. NYABASI/BOMERANI/814 and the O.C.S KEGONGA Police Station do provide Security during the period of such closure.

4) Compensation for the nature and/or extent of destruction caused to the suit land LR NYABASI/BOMERANI/814 and in particular payments of the sum of Kshs. 496,883 only.

5) General and aggravated damages for trespass.

6) Costs and interest.

2. The Plaintiff pleaded that he is the registered owner of the parcel of land known as LR Nyabasi/Bomerani/814 and further, that in May 2021, the defendants encroached on a portion of his land and established a road thereon. That the actions or omission by the defendant caused extensive damage to the land. He urged that he procured the services of an agricultural officer and a valuer who proceeded to ascertain the value of the crops damaged and the suit land as Kshs. 67,664/- and Kshs. 74,069/-, for which he sought compensation. He listed the particulars of trespass and urged the court allow the suit and grant the orders prayed.

3. The 2nd and 3rd Defendants responded to the Plaintiffs claim by way of Defence dated the 31st day of January, 2022. In the Statement of Defence, the Defendants denied the Plaintiffs claim and urged this Court to dismiss the same with costs.

4. At the close of pleadings, the matter proceeded to hearing and the trial court dismissed the suit with costs.
5. Being dissatisfied with the decision of the trial court, the Appellant instituted the present appeal vide a Memorandum of Appeal dated 22nd February, 2024 premised on the following grounds;
 - 1) **The Learned Trial Magistrate erred in law and fact in making a finding the appellant had failed to prove that it was indeed the respondents who created the illegal road in land parcel no. LR. NO. NYABASI/BOMERANI/814 and destroyed his property.**
 - 2) **The Learned Trial Magistrate erred in law and fact in failing to grant the prayers sought in the plaint and ordering the plaintiff to pay costs of the suit.**
 - 3) **The Learned Trial Magistrate erred in law and fact in believing the testimony of DW1 that it was not the 3rd defendant who constructed the road in land parcel no. LR. NO. NYABASI/BOMERANI/814 belonging to the appellant and chose not to believe the testimony of the appellant herein.**
 - 4) **The Learned Trial Magistrate erred in law and fact in failing to consider the pleadings, submissions, testimony and exhibits produced by the appellant.**
 - 5) **The Learned Trial Magistrate erred in law and fact in finding that the plaintiff /appellant did not prove his claim on a balance of probabilities.**
 - 6) **The Learned Trial Magistrate erred in law and fact in dismissing the suit of the appellant herein.**

6. It is worth considering the evidence of the parties at the trial.

Hearing at the trial court

7. **PW1** was the Appellant herein who produced his Identity Card and title deed for Nyabasi/Bomerani/814. He also produced a copy of the official search and stated that in the month of May 2021, he heard a tractor had come to clear a road. He went outside and saw many people but did not see the 1st Respondent. He stated that the tractor belonged to the county of Migori and that the 1st Respondent had requested for it. He stated that he did not receive any letter from the County Government and further, that the tractor made a road through his land and damaged many things including crops and trees. He produced as exhibits, the photographs, a valuation report, an OB extract, a report from the agricultural officers' assessment, a mutation and the surveyors' report.
8. He, together with his other witnesses, produced a number of documents in support of his case numbered **12**. It is worth noting at this stage that the photographs which were produced as PExhibit No. 4 were not accompanied by a Certificate of Electronic evidence as required under **Section 106B** of the Evidence Act and therefore could not be held in consideration as evidence. They could not be vouched for.
9. **PW2** was **Luke Okeyo**, a valuer who visited the land and did the valuation. He stated that the report showed that the land was encroached by road construction activities and that it was constructed across the land. The valuation for the land was Kshs. 300,000/- and the total compensation was Kshs. 922,184/-.
10. **PW3** was **James Oketch Atata**, a land surveyor. He testified that the plaintiff came to their office and complained that a road had been made on his land. He visited the site and found that the

road was on the ground but not on the map. He produced the report dated 26th September 2021 and the Registry Index Map that showed the position of the road.

- 11. PW4 was Frimpones Warus Kingoina**, a retired Agricultural Officer. He stated that the Appellant came to his office on 5th May 2021 and complained that a road had been made on his land. He visited the site and prepared a report wherein he assessed the damage at Kshs. 67,664/-. He produced the report as an exhibit in court.
- 12. PW5 was Kenneth Were Ongonga**, a forester by profession, who stated that the appellant requested for assistance of damaged trees on land. He visited the land and prepared a report on the trees that had been felled. The cost of the damage was Kshs. 74,066/- and he produced a report to that effect.
- 13. DW1 was Christopher Odhiambo Rusana**, the County executive member in Migori Government. He adopted his witness statement as evidence in chief.
- 14.** His written Statement was that he County Secretary of the Migori County and duly authorized to make the statement. He stated that the County Government did not and had never carried out any work on the plaintiff's property, the suit land herein. Further, the County Government had never instructed or contracted anyone to carry out any establishment or construction of a road on the plaintiff's land. He added that the county government was therefore a stranger to the allegations by the plaintiff which he was supposed to prove strictly. He concluded that the County Government was therefore not liable and had not committed any acts of trespass, destruction or any wrong or tort against the plaintiff's property.

- 15.** On cross examination he admitted that he did not have a list of the workers who were working in his offices but he was the County Secretary and Head of Public Services. Further, the Roads and Transport was part of his docket. He added that the road was not procured, and he had attended court to confirm that at no point did the County Government of Migori construct a road on the plaintiff's land. Again, there was no road that had been procured and so he could not go to certify it. He added that the project did not exist in the County List of projects. He confirmed the county government does roads among other works but it uses contractors. Further, that the County Government does not directly to the work.
- 16.** In every examination he stated that there are other agencies that carry road works.

Appellants submissions

- 17.** Learned counsel for the appellant submitted on whether the appellant had proved his case on a balance of probabilities before the trial court, citing the case of *Mwangangi v Gathogo* (Civil Appeal E267 of 2020) [2025] KEHC 2764 (KLR) (Civ) (13 March 2025) (Judgment) on burden of proof and additionally, *Maria Ciabaitaru M'mairanyi & Others v Blue Shield Insurance Company Limited* -Civil Appeal No. 101 of 2000 [2005] 1 EA 280.
- 18.** Counsel urged that during the cross examination of the plaintiff, the Appellant stated that the employees of the respondent were present at the scene where the tractor was being used to cultivate the land. He urged that it is not a mandatory requirement that a fact has to be proved by more than one witness. That the plaintiff having seen the 1st respondent who was the area Member of County Assembly coupled with individuals who were on the uniform of the 3rd respondent showed that

indeed the 3rd respondent was involved. Further, that in any case, the least that the trial court would have done was to hold the 1st respondent for the wrongs that were committed by the respondents.

19. Counsel urged that in the testimony of the DW1, he simply gave statements of denial and never denied the absence of the 1st respondent at the scene. Further, that DW1 never produced any document proving that the existing tenders excluded the one for making any road at the locality of the appellant. He indicated that the work is done through third parties and that the same is procured but failed to produce a list of the procured services for opening of the roads. Counsel urged that the appellant proved his case on a balance of probabilities.

20. On costs, Counsel cited Section 27 of the Civil Procedure Act and the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd Nyeri High Court Judicial Review application No. 6 of 2014, urging this court to find the instant appeal to have merit, and order the respondent to bear the burden of paying the costs of the instant appeal.

2nd and 3rd Respondents' Submissions

21. Learned Counsel for the 2nd and 3rd respondents submitted that the trial magistrate correctly and adequately considered and analysed the evidence before court and arrived at the right finding by dismissing the suit. Counsel urged that the Appellant did not establish that a road was constructed on his parcel of land to wit; LR No. Nyabasi/Bomerani/814 as alleged. That here was no proof that the photographs he showed court were indeed taken on his parcel of land and the sub-county surveyor who testified on his behalf admitted that there is a road reserve bordering appellant's parcel of land. Counsel urged that the onus of proof was upon

appellant to establish that indeed the alleged road was on his parcel of land, not on the land reserved for roads.

- 22.** Counsel urged that the mutation form dated 19th February 2002, the registry index map (R.I.M) and the sub-county surveyor's report dated 29th April 2021 that were produced to court by appellant did not bear proof of any connection with the photographs shown to court by appellant. Therefore, he failed to prove the allegation that a road was constructed on his land and the trial court correctly found due to the doubtful evidence.
- 23.** Counsel submitted that the Appellant did not prove trespass upon his land committed by 2nd & 3rd respondents. He failed to prove that they performed any road construction work on his land as alleged or at all. The Appellant confirmed that he did not see or identify any agent, worker or employee of the County Government of Migori at the scene. He offered no proof that the alleged yellow tractor belonged to the County Government of Migori, not even its registration number. He too did not provide any evidence showing that the County Government of Migori was involved or played any role in the alleged construction works.
- 24.** Counsel posited that the Construction of roads in Kenya is not a preserve of County Governments. Many government agencies, departments, organizations and even individuals do carry out road construction works within counties e.g. KeNHA, Rural Roads Boards, World Bank, CDF, NCOS, politicians etc. It was therefore incumbent upon appellant to provide proof e.g. through tender documents, adverts, notices, official list of road projects done by the County Government of Migori etc to prove his claims. He did not provide any evidence connecting the alleged road construction work with County Government of Migori. As clearly explained by the respondents' witness, the alleged road project, if it existed, was not done by the County Government of Migori since

it was not advertised or tendered for and was not in the records/list of road projects of the County Government of Migori. The Appellant did not avail evidence to rebut that assertion.

- 25.** Counsel submitted that the onus of proof was upon appellant to establish his allegations. He cited the provisions of Section 107 (1) & (2) of the Evidence Act and Section 109 of the same Act, urging that it was upon the appellant to prove that the defendants' agents, servants, workers or employees committed tire acts complained by availing evidence to prove the allegations but he did not. He placed reliance on the decision in the case of *James Muniu Mucheru v National Bank of Kenya Limited (2019) eKLR* in support of this submission.
- 26.** Counsel reiterated that the appellant failed to avail any credible and believable evidence connecting the 2nd & 3rd Respondents to the alleged road construction works and prayed that the court dismiss the appeal with costs.

Analysis and Determination

- 27.** This being an appeal, I must state the duty of the appellate court. In **Williamson Diamonds Ltd and another v Brown [1970] EA 1**, the court held that:

“The appellate court when hearing an appeal by way of a retrial, is not bound necessarily to accept the findings of fact by the trial court below, but must reconsider the evidence and make its own evaluation and draw its own conclusion.”

- 28.** Additionally, the Court the of Appeal, in the case of **Susan Munyi v Keshar Shiani (2013) eKLR** stated 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

analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”

29. Having considered the record of appeal and attendant submissions, the following issues arise for determination;
Whether the trial court erred in dismissing the Appellants’ Suit.

30. The Cause of action in the trial court arose from the alleged construction of a road by the Respondents. The Appellant contended that the 1st Respondent was a Member of the County Assembly for Migori County, and he, the appellant, saw employees of the County present on site when the road was being constructed. Additionally, that they were dressed in uniforms labelled Migori County government.

31. It is trite that he who alleges must prove, which position is succinctly captured in Sections 107, 109 and 112 of the Evidence Act. Section 107 provides as follows:

“ (1) 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.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

32. Sections 109 and 112 of the same Act states as follows:

“ 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

33. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in **Mumbi M'Nabea vs David M. Wachira [2016] eKLR** stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

34. I have considered carefully the record of appeal, and even the original court record of the trial court. From the proceedings or record it is clear, there was no evidence tendered to corroborate the allegation that the construction as undertaken by any staff from the 3rd Respondent. Only PW1 testified on the fact of the presence and actions of the alleged workers or agents of the 3rd Defendant. There was no independent evidence from either a witness or even by way of photographs to show that, indeed, such people were the ones who participated in the alleged construction of the road. Particularly, the appellant alleged that the road was constructed in broad daylight. It was then easy to take photographs and even videos of the activities that allegedly violated the appellant’s rights to property.

35. Additionally, no evidence was tendered by the Plaintiff with regard to his claim that the 1st Respondent was a Member of the County Assembly, and that if he was, the works he is alleged to have carried out in his presence and property were done for and

on behalf the third Defendant, the County Government of Migori. Additionally, despite the allegation that the road was constructed in broad daylight, the Appellant did not call any witnesses to corroborate his claims on the said construction or that indeed the same was carried out by the Defendants, or provide any proof, even in form of photographs, of the alleged construction, specifically by the County Government. All that the Plaintiff produced, between pages 47 and 58 both inclusive, were photographs of felled trees and a road constructed. As stated above, this was evidence proven, contrary to Section 106B of the Evidence Act hence inadmissible. But there was no single photograph of any of the workers of the Defendants or even the alleged machinery in the name or registration of the defendants, especially, the County Government.

- 36.** Furthermore, the plaintiff did not lead evidence to confirm whether his parcel of land lay within the township or area where the County Government is mandated or obligated by law to construct roads. What is left for the court to is to speculate as to the position vis a vis the parts of the county where the bodies such as Kenya Rural Roads Authority or the Kenya National Highways Authority exercise their mandate in construction of roads.
- 37.** In my humble view, the plaintiff did not establish the nexus between the cause of action, if any, and the Respondents. No evidence was led to link the 1st Respondent, if he had any actions, to the 3rd Respondent. Further, no evidence was led to link the 3rd Respondent to the construction of the said road.
- 38.** I am therefore in agreement with the finding of the trial court that the Plaintiff failed to prove his case to the required standard and uphold the decision of the trial magistrate. In the premises, the Appeal is dismissed with costs to the Respondents.

Judgment dated, signed and delivered virtually via the Teams Platform this 11th day of March 2026.

**HON. DR. IUR F. NYAGAKA
JUDGE**

In the presence of,

Ms. Apondi Advocate for the Appellant

Mr. Nyasimi Advocate for the 2nd and 3rd Respondents