

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ELC APPEAL NO. E005 OF 2025

CECILIAH NYONYI MSHABWA.....
.....APPELLANT

=VERSUS=

SIMON MWACHOO MWANJALA
RESPONDENT

JUDGMENT

1. This appeal is against the judgment of Hon. T. N. Sinkiyian - SPM delivered on 11th March 2025 wherein the Learned Magistrate delivered her judgment in favour of the Respondent and directed the Appellant to vacate the suit property within 90 days. The Magistrate also directed the Appellant to bear the costs of the suit.
2. The Appellant being aggrieved by the said judgment lodged he instant appeal vide a Memorandum of Appeal dated 17th March 2025 which raised several grounds set out thereunder.
3. The court upon admission of the appeal directed the same was canvassed by way of written submissions. The

Appellant filed her written submissions dated 16th February 2026. No written submissions had been filed by the Respondent from the Case Tracking System (CTS) as at the time this court retired to write its judgment.

The Appellant's submissions

4. The Appellant submitted on the following issues:-

(i) Ownership of the suit property.

(ii) Legality and validity of the records from Kishamba 'B' Group Ranch.

(iii) Costs of the appeal.

5. It was submitted that during trial, the Respondent and the Appellant produced several documents to prove ownership and it is an uncontested fact that the suit property is situated in Kishamba 'B' Group Ranch which is registered in favour of Kishamba 'B' Group ranch as evidenced from the title document produced in evidence as 'DExh4'. The said land is held in trust and in favour of its members by Kishamba 'B' Group Ranch. Thus neither the Appellant nor the Respondent has any title document to the suit property.

6. It was further submitted that being a group ranch, the land is governed by the Constitution of Kenya, Community Land Act (previously governed by Group Representation Act now repealed) and the Kishamba 'B' Group Ranch Constitution. Reliance was made to the case of **Beja Mnyika =Versus= Haranga Nyiro & 2 Others (2020) KEELC 783 (KLR)**.
7. It was further submitted that the Respondent relied on a sale agreement dated 30th July 2016 which was produced during trial as DEx2 as a basis of her ownership claims yet Clause 14 of the Kishamba B Group Ranch Constitution bars any member from cultivating on the land that does not belong to him or her and further that the said provision barred any member from selling or leasing any piece of land within the boundaries of the group ranch.
8. While citing the case of **Akhila & Another =Versus= Mutia & Another (Environment and Land Appeal 009 of 2023 (2024) KEELC 7115 (Environment and Land) (30 October 2024) Judgment**, it was argued that the court while dealing with the issue of selling of land within Kishamba 'B' Group Ranch issued a declaratory order to the effect that sale agreement relating to sale of part of

land falling under Taita/Taveta/Sagalla Kishamba 'B'/1 was null and void having been made by non vendors who had no interest on the land.

9. It was further submitted that the Respondent's acquisition of the land through the sale agreement and subsequent purchase remains void and cannot be validated by lapse of time, waiver, act of parties or procedural regularities and/or irregularities.

10. In respect to the Appellant's ownership claim to the suit property, it was submitted that the Appellant in her pleadings and its witness statement explained to the trial court that she inherited the suit property from her late brother. This is confirmed at pages 36 to 44 of the court proceedings which are found at pages 230 to 238 of the record of appeal. This is corroborated by the testimony of DW2 and DW3 who are cluster member and village elder/mzee wa mtaa of Kirumbi area within Kizumanzi Village where the suit property is located.

11. It was further submitted that the Appellant produced Dexh 1 - 4 which inter alia, included letters from the group ranch committee through its secretary confirming that the

suit property duly belongs to the Appellant. The letters produced as Dexh 3(a) to (c) goes an extra mile to identify the Appellant as the true owner of the suit property.

12. It was further submitted that the Respondent albeit in vain, tried to counter the letters produced by the appellant by producing Pexh 19 to 26 in a bid to discredit the Secretary Mr. Anthony Kisagha by claiming he was removed as the secretary but ran away with the tools of the office in defiance as highlighted by the trial court.

13. The Appellant faulted the trial court for heavily relying on the testimony of PW4 Geoffrey Kiara by stating at paragraph 61 that the group ranch leadership was in wrangles with previous officials disappearing with original files for the group ranch.

14. It was further submitted that to substantiate this, among the documents produced by PW4 is Pexh 26, the most recent certificate of registration, which shows that Mr. Anthony Kishagha is among the committee members of Kishamba 'B' Group Ranch Committee. There the letters produced by PW4 to insinuate that Mr. Kishagha was voted

out as from the secretary position was frivolous, false and fictitious.

15. The court was urged to allow the appeal with costs, set aside the trial court's finding and dismiss the Respondent's suit in the lower court.

Analysis and Determination

16. **Section 78(2) of the Civil Procedure Act** and **Order 42 Rule 32 of the Civil Procedure Rules** mandates this court sitting as the first Appellate Court to evaluate the evidence afresh and make own conclusions albeit bearing in mind that it did not have the opportunity of seeing or hearing the witnesses first hand. This was also the position taken in **Ciero & Another -vs- Njanja & Others Civil Appeal 111 of 2022 [2025] KECA 1541 KLR] (3rd October 2025) (Judgment)**, where the court stated that the mandate of the appellate court of first instance is to analyze and re-assess the evidence on record and reach its own conclusion also noting the holding in the case of **Gitobu Imanyara -vs- Attorney General [2006] eKLR**, that it has to give credit to the trial court, which saw and heard the witnesses testify.

17. Having considered the entire record of appeal, the Memorandum of Appeal and further the Appellant's submissions, the following issues arise for determination: -

(i) Who between the parties has the legitimate proprietary interest over the suit property.

(ii) Whether the trial court erred in law and fact in arriving at its decision.

(iii) What are the appropriate reliefs to issue in respect to this appeal.

Issue No. (i)

Who between the parties herein has the legitimate proprietary interest over the suit property

18. From the Record of Appeal and the proceedings before the trial court both the Appellant and Respondent are laying claim over the suit parcel which was described in the plaint as the land situated at Kirumbi along Mombasa - Nairobi Highway measuring 5 acres.

19. The Appellant claimed to have acquired the property through inheritance from his late brother one Gabriel Mshabwa who had passed away sometimes in the year 2007 and she moved to the property in the year 2013. It

was also her case that she did sale a portion of the 5 acre being 100ft by 100ft to one George Mungai sometimes in the year 2022 and that she obtained the requisite consent from Kishamba B Group Ranch Committee and hence therefore the Respondent was an intruder to the said parcel.

20. On the other hand, the Respondent claimed to have acquired the suit parcel through purchase sometimes in the year 2006 from Gabriel Mshabwa the brother of the Appellant.

21. It was also the Respondent's case that he permitted the Appellant who is his sister in law and a widow to be living in his house in Kaloleni and at the same time do farming on the suit property so that she can get food to sustain herself and her children. Later she found out that the Appellant had constructed a house on the same and even sold a portion to one George Mungai. According to him the construction of the house and subsequent sale of a portion to one George Mungai was done without his consent.

22. It is trite law that It is trite law that he who alleges must prove. This is set out under **Section 107(1)(2)** of the **Evidence Act**, which 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.”

Sections 109 and **112** of the same Act states;

“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.”

23. Equally a counterclaim just like a suit ought to be proved to the required standard and any party desiring and or seeking any relief before the court must prove that he is entitled to the same.

24. It is settled that whenever a title to property is challenged the owner has to demonstrate how he or she acquired the same and the court must equally examine the root and history of its acquisition.

25. From the analysis of the evidence tendered before the trial court, it is was not disputed that the suit parcel falls under the larger parcel belonging to Kishamba B Group Ranch.

26. The management of Kishamba B is currently in a state of statutory transition. Historically governed by the Land (Group Representatives) Act (Cap 287), the ranch is now subject to the Community Land Act (No. 27 of 2016). Under Article 63 of the Constitution of Kenya, all land formerly held as group ranches is classified as Community Land. The land is held in trust on behalf of its members.

27. On tracing the root of acquisition of the said property, none of the parties had a title to the same since the land belongs to Kishamba B Group Ranch. It is also clear that both the Appellant and Respondent claimed to have acquired the land from one Gabriel Mshabwa with the Appellant claiming to have acquired the same through purchase.

28. From the cross-examination of the Respondent during trial, he conceded that even though he bought the land from Gabriel, the Kishamba B Constitution did not allow a person to sell or lease land in the ranch or go and live in a village that they don't come from. He also conceded that the committee ought to be notified of the said sale and in this particular case he did not notify Kishamba B Committee nor did he have any consent from them.

29. Geoffrey Mwanjala Kiara who testified as the Vice Chairman of Kishamba B Group Ranch stated in cross examination that he knows both the Appellant and Respondent and that according to Rule 14(a) of their constitution, no member is allowed to build or cultivate in a

village where he does not belong. He also stated that the Respondent was from a different village. He was from Mghange but the Appellant was from Kizumanzi and Kirumbi is in Kizumanzi village. He also stated that there was a letter which had required the Respondent not to encroach on the land that is not in his village. He was requested to move to his land.

30. The suit property is in Kirumbi which is in Kizumanzi and which was the village where the Appellant belonged to. The Respondent was from a different village. The letter from Kishamba B Group Ranch which was produced as PExhibit 10 had directed the Respondent to vacate the suit property and return to his village being Mghange.

31. Evidence was also tendered to the effect that Clause 14 of Kishamba B Group Ranch Constitution stipulated that no member shall be allowed to live and cultivate a piece of land in a village where he/she does not belong and further no member shall be allowed to lease or sale any piece of land within the boundaries of the Ranch.

32. There was no evidence tendered that the Respondent was allowed to purchase the said land by the Ranch. No

consent was obtained and it therefore follows that the said purchase was invalid and hence therefore the Respondent cannot be considered as the bonafide owner of the same.

33. It is therefore the finding of this court that the Respondent cannot have been the bonafide owner of the suit parcel. The land in question belongs to the Appellant and this was further corroborated by the ruling of the dispute resolution committee which had ruled in favour of the Appellant.

34. Conversely, the Appellant's claim is rooted in her status as a member of the **Kizumanzi Village**, the specific cluster where the land is located. Her occupation is supported by the Group Ranch Secretary and the Village Elders, who confirmed her right to inhabit the land following the demise of her brother

Issue No. (ii)

Whether the trial court erred in law and fact in arriving at its decision

35. The evidence on record clearly confirmed that the suit property was purchased by the Respondent contrary to the Constitution of Kishamba B Group Ranch. No

authorization and or consent was obtained prior to the said transaction. The Respondent was equally from a different village from the suit property and as such the said purchase was null and void.

36. From the analysis of the first issue and the evidence that was tendered during trial, it is indeed clear that the trial court erred in law and fact in finding that the Respondent was the owner of the suit parcel.

37. Owing to this, the judgment of the trial court ought to be overturned as the Learned Magistrate erred in law and fact. The Learned Magistrate failed to consider the overwhelming evidence tendered to the effect that the Appellant acquired the property after she was given the same by her brother who was a member of Kishamba B Group Ranch and was from Kizumanzi village where the suit property was located.

38. It is the considered view of this Court that the Learned Trial Magistrate misdirected herself by treating this dispute as a standard "willing-buyer, willing-seller" private land transaction. She failed to apply the specialized

laws governing Community Land and the internal regulations of the Kishamba 'B' Group Ranch.

Issue No. (iii)

What are the appropriate reliefs to grant in this appeal

39. From the analysis of the issues herein, this court has already made a finding that the Respondent was not the lawful owner of the suit property. The Respondent's claim of ownership via a Sale Agreement (DEx2) flies in the face of the **Kishamba 'B' Group Ranch Constitution**. Clause 14 serves as a restrictive covenant that bars members from selling or leasing land. It is a fundamental principle of law that a party cannot pass a better title than they themselves possess—*nemo dat quod non habet*. Since the land belongs to the Community, Gabriel Mshabwa (deceased) had no capacity to sell the land to the Respondent without the express sanction of the Group Ranch Committee.

40. Following the precedent in **Beja Mnyika vs. Haranga Nyiro & 2 Others [2020] KEELC 783**, transactions that contravene the statutory and

constitutional framework of Group Ranches are void *ab initio*. The Respondent's purported purchase was an illegality that cannot be cured by the passage of time. The Respondent did not prove his claim to the property to the required standard. The court has now to consider what are the appropriate reliefs to grant.

41. The Appellant had filed a Defence and Counterclaim dated 29th July 2022 which sought the following reliefs:-

(i) A declaratory order that the property rights in the suit property solely and absolutely vests in the Defendant.

(ii) Permanent injunction restraining the Plaintiff whether by himself and/or his agents, servants and/or representatives from entering onto/or trespassing and/or remaining on and/or cultivating, selling, transferring, and/or constructing on and/or dealing in any other manner whatsoever interfering with the suit property.

(iii) General damages for unlawful encroachment and pain and suffering occasioned thereof.

(iv) costs of and incidental to this suit.

42. This Court must now address the merits of the Appellant's Counterclaim dated 29th July 2022. Under Section 78 of the Civil Procedure Act, an appellate court possesses all the powers of a court of first instance. Where the record is sufficient, the Court is duty-bound to determine the counterclaim to finality rather than remanding it for a retrial.
43. The Appellant sought a declaration that the property rights vest in her. To succeed, she was required to prove her status within the community. The evidence of **DW2** and **DW3** (the Village Elder), coupled with the Secretary's letters (**DExh 3a-c**), establishes that she is the legitimate occupant recognized by the Group Ranch. Conversely, the Respondent's claim was cannot form the basis of a proprietary interest.
44. On the Permanent Injunction sought, to grant a permanent injunction, the Court must be satisfied that the Appellant has a clear right and that the Respondent's interference is unlawful. The Appellant is entitled to protection from further encroachment. This Court finds

that a permanent injunction is necessary to preserve the substratum of the land. The court is satisfied that the Appellant was able to prove his claim to the suit parcel to the required standard and thus deserving of the reliefs sought.

45. In respect to costs, considering that the dispute involves family members, this court will direct each party to bear own costs of the appeal and the suit before the trial court.

Final Orders

46. In view of the foregoing, the Appeal succeeds and the judgment of the trial court is hereby set aside and substituted with the following orders: -

(i) The Respondent's suit before the trial court in respect to the plaint dated 15th June 2022 is hereby dismissed.

(ii) Judgment is hereby entered in favour of the Appellant as per her Counterclaim dated 29th July 2022 as follows:

(a) A declaration is hereby issued that the proprietary rights in the suit property vests in the Appellant.

(b) A permanent injunction be and is hereby issued restraining the Respondent whether by himself or his agents, servants and or representative from entering onto/trespassing and/or removing, cultivating, selling, transferring and or constructing on the property or dealing in any other manner whatsoever and interfering with the suit property.

(c) Each party to bear own costs of the suit before the trial court and costs of this appeal.

Judgment accordingly.

Dated, Signed and Delivered Virtually at Voi this 19th day of March, 2026.

**E. K. WABWOTO
JUDGE**

In the presence of: -

Mr. Motuka for the Appellant.

Mr. Mwazighe for the Respondent.

Court Assistants: Mary Ngoira and David Ngoosa.

ORIGINAL