

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ELC LAND APPEAL NO. E022 OF 2024

RICHARD KAINO KIPSERET
APPELLANT

VERSUS

JOHN LUKE AMEMO OSIEMO 1ST
RESPONDENT
MAJOR JOHN KIPCHUMBA YATOR 2ND
RESPONDENT

JUDGMENT:

1. This Appeal emanates from the judgment and decree of Hon. P. Areri (Senior Principal Magistrate) in ELDORET CMELC NO.64 OF 2018 delivered on 7th May, 2024.
2. Aggrieved by the said decision, the Appellant lodged the present Appeal against the judgment and decree vide the Memorandum of Appeal dated 28.05.2024 outlining the following grounds of Appeal THAT: -
 - i. **The Learned Trial Magistrate erred in law and in fact by denying the Appellant an opportunity to call witnesses, thereby breaching the Appellant's right to a fair hearing as guaranteed by Article 50 of the Constitution of Kenya, 2010.**
 - ii. **The Learned Trial Magistrate erred in law and in fact by conclusively determining that the appellant was a trespasser without sufficient**

evidence proving exclusive possession and entitlement by the respondent over the entire parcel of land.

- iii. The Learned Trial Magistrate erred in law and in fact by failing to properly evaluate the evidence presented, which indicated that the appellant had rightful occupancy over a quarter (1/4) of an acre within the disputed parcel as a member of the Marakwet Development Association.**
- iv. The Learned Trial Magistrate erred in law and in fact by issuing a permanent injunction without adequate justification and consideration of the legal rights of the appellant as a part owner and occupant of the suit property.**
- v. The Learned Trial Magistrate erred in law and in fact by awarding costs to the plaintiff without proper consideration of the Appellant's legal rights to occupy part of the land and the impact of the denial of a fair hearing on the outcome of the case.**
- vi. The Learned Trial Magistrate erred in law and in fact in applying the wrong principles of law in rendering the judgment**
- vii. The Learned Trial Magistrate erred in law and in fact in failing to take note that the title adduced**

in evidence by the 1st respondent was obtained during the pendency of the suit.

- viii. **The Learned Trial Magistrate erred in law by failing to afford the appellant and his witnesses an opportunity to be heard and ventilate his case on merit.**
- ix. **The Learned Trial Magistrate erred in law and in fact in failing to consider the dictates of substantive justice and fair hearing as enshrined in the constitution of Kenya, 2010.**
- x. **The Learned Trial Magistrate erred in law and in fact by closing the defendant's case yet the defence had witnesses ready to testify on the defendant's behalf upon issuance of witness summons by the court.**

3. Consequently, the Appellant sought the following Orders: -

- a. **That the judgment and decree in ELDORET CMC ELC NO. 64 OF 2018 between John Luke Amemo Osiemo vs Richard Kaino Kipseret & Major John Kipchumba Yator be set aside.**
- b. **That this honourable court do order for a retrial by another court.**
- c. **That costs of the appeal be awarded to the appellant.**
- d. **Such orders as would be just and expedient in these circumstances be made.**

4. A brief background of the dispute herein to contextualize the appeal is that the 1st Respondent herein (plaintiff in the trial court) filed a suit vide a Plaint dated 26.03.2018 and filed on 27.03.2018 against the appellant seeking the following orders:-
 - i. an order of eviction against the defendant, his agents and employees and all those under his control from suit parcel KIPLOMBE/KIPLOMBE BLOCK 13 (GREEN FIELD)/459
 - ii. Costs of this suit
5. It was the 1st Respondent's claim that he is the legal and registered owner of all that parcel of land known as KIPLOMBE/KIPLOMBE BLOCK 13 (GREEN FIELD)/459 (hereinafter referred to as the 'suit land') measuring approx. 0.41Ha. That the Appellant without any lawful cause and justification, invaded the suit land, destroyed trees and put up structures on the suit land.
6. That as a result of the Appellant's actions, the 1st Respondent had been deprived of use of his land and which has subsequently occasioned him losses. That demand to have him remove the illegal structures from the suit land have gone unheeded.
7. The 1st Respondent's suit was opposed. The Appellant filed a Memorandum of Appearance dated 18.04.2018, Statement of Defence and Counter Claim dated 03.05.2018 and severally amended, with the latest amendment being on 20.11.2019.
8. The Appellant in his defence denied all the allegations raised against him by the 1st Respondent and put him to strict proof

thereof. It was the Appellant's claim that he is the rightful and legal owner of the suit land, having been legally allocated the same by the Marakwet Development Association, being part of his membership shares.

9. It was his contention that at the time of allocation, the suit land was vacant and upon allocation of the same in the year 2014, he had been in peaceful, exclusive occupation of the suit land since its allocation, undertaking development activities, including fencing, building a house and planting trees and flowers.
10. He thus averred that any registration of the 1st Respondent as the proprietor of the suit land was fraudulent and illegal and outlined the particulars of fraud on the part of the 1st Respondent and the 2nd Respondent herein (who was a Third party in the lower court case).
11. In his counter-claim, the Appellant sought the following orders against the 1st Respondent (Defendant in the counter-claim):-
 - i. That this honourable court be pleased to make a declaration that the suit land was illegally and fraudulently registered in the name of the plaintiff.
 - ii. That this honourable court be pleased to order a fresh survey of the parcels of land L.R. No. 23201/21 and 23201/23 (GREENVILLE PLANTATIONS LIMITED) to determine the actual acreage and allocate the plaintiff his rightful share subject to his statutory and MDA membership obligations.

- iii. That this honourable court be pleased to issue a declaration that the defendant is a bonafide owner of the suit plot.
 - iv. That this honourable court be pleased to order registration of the suit land in the plaintiff's name cancelled and with the replace rightful owner.
 - v. That this honourable court be pleased to order permanent injunction stopping the plaintiff or his agents, servants, employees from trespassing on the suit land in any manner whatsoever.
 - vi. That this honourable court be pleased to dismiss this suit with costs.
 - vii. That this honourable court be pleased to issue such further and/or other reliefs as it deems fit.
12. In the Counter-claim, he averred that MDA was the sole registered proprietor of the suit land before it was alienated, surveyed and subsequently allocated to its members.
13. That upon allocation, the Appellant became the actual and beneficial owner of the suit land by virtue of his shares in MDA and denied the claims of ownership made by the 1st Respondent.
14. It was his claim that the 2nd Respondent illegally and without authority of MDA, caused the suit land to be registered in the 1st Respondent's name and as a result violated the Appellant's constitutional right to property as enshrined under Article 40 of the constitution.

15. He accused the 2nd Respondent of procuring the title of the suit land while acting as the MDA chairman and reiterated that his actions are illegal, null and void.
16. He also accused the 1st Respondent of uprooting and illegally altering the fixed boundary of the suit land, defaced the maps of the plots 1, 2, 3 and 4 and amalgamating the plots to form the suit land. He thus urged the court to allow his claim against the Respondents as sought.
17. The Amended Statement of Defence and Counter-claim was served upon the 1st Respondent who filed a Reply to the Amended Defence and Defence to Counter-claim dated 06.11.2019 wherein he denied the allegations made therein and reiterated the contents of the plaint in response thereto.
18. The Appellant also filed a 3rd Party Notice dated 03.09.2019. His claim against the Third Party (2nd respondent in the present appeal) was that he gave the 1st Respondent the entire suit land, thereby depriving him of his $\frac{1}{4}$ share. That his action was without the authority of the Marakwet Development Association, who were the original owners of the land.
19. The Third-Party Notice was duly served upon the 2nd Respondent and he filed a Statement of Defence thereto dated 13.03.2020. In his defence, the 2nd Respondent denied the allegations made in the Amended Counter-claim and put him to strict proof thereof.
20. He particularly denied and dismissed the claims of fraud against him as unsubstantiated wild claims and allegations. He however admitted at all times relevant to the suit, he was the chairman

of the MDA but maintained that all his actions and dealings with MDA in his capacity as the chairman were valid and legal.

21. He outlined the process of acquisition of the various parcels of land within Uasin Gishu County, formerly Eldoret Municipality, the allocation of such parcels was dependent on a member's value of shares individually held at Marakwet Development Association.
22. Further, that the members aggrieved by the process had a chance of applying, re-applying for re-allocation based on availability of parcels and consideration of other members of the association.
23. Upon close of pleadings, the matter was set down for hearing of the main suit.
24. The 1st Respondent's case proceeded for hearing on 10.08.2023. The 1st Respondent testified as PW1 and thereafter closed his case. The defence case proceeded for hearing on 14.11.2023 and the Appellant testified as DW1 and thereafter closed his case.
25. The 2nd Respondent did not prosecute his case.
26. Upon close of the defence case, parties filed and exchanged their rival written submissions. Consequently, the suit was determined vide the judgment issued on the 07.05.2024, whose effect was to allow the 1st respondent's suit as claimed hence the instant appeal.
27. The Record of Appeal was admitted for hearing on 05.11.2025 and the court issued directions on the disposal of the appeal by way of written submissions. The appellant filed his submissions dated 05.12.2025 while the 1st respondent filed his submissions

dated 23.02.2026 together with authorities, which I have read and considered.

Analysis and Determination:

28. This court's jurisdiction as a first appellate court is to reappraise the evidence or issues which were before the trial court and make its own conclusion. This mandate does not however entail taking on board new issues which were never brought to the trial court's attention or matters that were not subject of the trial court's consideration or tribunal as in the instant case. See the Court of Appeal decision in **Oi Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR.**

29. In case of **Mbogo & Another vs Shah [1968] EA, p.15** the court held as follows;

“An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

30. I have carefully considered the grounds in the Memorandum of Appeal, the Record of Appeal and the rival submissions in totality. Consequently, it is my considered view that the main

issue for determination is whether this Court should interfere with the trial court's findings and exercise of discretion by setting aside the judgment delivered on 7.5.2024 and allowing the appeal. I will determine the same on account of the following; -

- a) Who is the actual, beneficial, bonafide and registered owner of the suit land known as KIPLOMBE/KIPLOMBE BLOCK 13 (GREENFIELD)/459**
- b) Whether the occupation and/or use of the suit land by the appellant amounts to trespass and/or encroachment.**
- c) Whether the 1st respondent proved his claim against the appellant to warrant the grant of the orders sought**
- d) Whether the Appellant proved his counter-claim to the required standard to warrant the grant of the orders sought.**
- e) Whether the appellant's right to fair hearing was violated.**
- f) Whether the appeal is merited.**
- g) Who should bear the costs of the present appeal.**

31. Having identified the above issues for determination, I will proceed to discuss the same as hereunder.

Who is the actual, beneficial, bonafide and registered owner of the suit land known as KIPLOMBE/KIPLOMBE BLOCK 13 (GREENFIELD)/459;

32. At the center of the dispute between the parties herein is the ownership of the suit land known as KIPLOMBE/KIPLOMBE BLOCK 13 (GREENFIELD)/459.
33. Both parties have laid ownership claims in respect to the suit land which measures approx. 0.41Ha. The appellant avers that he is the rightful owner of the suit land, the same having been allocated to him in the year 2014 by the MDA pursuant to his membership shares and on recommendation by the complaint tribunal established by the MDA.
34. The 1st respondent on the other hand also maintained that he is the actual, bonafide and registered owner of the suit land. It is his claim that upon payment of Kshs. 3,200,000/= to MDA, where he was a shareholder, he was allocated Blocks 21 and 23 measuring 20 acres each and 40 acres in total.
35. That the suit land measuring 1 acre is contained within Block 23 which was allocated to him and he had taken possession in the year 2003.
36. In support of his ownership claims, the 1st respondent produced the following documents; a copy of the certificate of official search and copy of the title deed both in respect to the suit land and showing the registration in his name and an extract of the MDA members register, MDA's Savings Account marked as Pexhibits 1,2,6 and 7 respectively. These documents explained the root of the 1st respondent's ownership claims and the title deed issued in his favor.

37. The appellant on his part, despite stating that he was legally allocated the suit land in the year 2014 by MDA pursuant to his membership shares did not adduce any evidence in support of the said claims. He did not produce any document in the form of a Share Certificate to prove his membership of MDA claims. He did not provide any proof of payments receipts. Further, on cross-examination by counsel for the 2nd Respondent, he conceded that he did not buy the suit land from MDA.
38. It is common ground that the suit land herein is a portion within Block 23. It is also not in dispute that same was purchased and allocated by MDA to its members by virtue of their respective share entitlement.
39. The appellant admitted that they were initially allocated plot 21 on Block 20. However, they discovered that the same was within a swampy area. They consequently wrote to MDA requesting for an alternative land. A dispute resolution tribunal was formed, whose role was to investigate the complaints raised and make a recommendation.
40. The appellant's complaint was investigated and confirmed and the tribunal made a recommendation that they be issued with an alternative land. It is therefore the appellant's claim that in implementation of the said recommendation by the tribunal, MDA issued them with an allotment letter in respect to the suit land.
41. However, despite the elaborate explanation preferred by the appellant, he did not adduce sufficient evidence to prove the

said averments. There is nothing to show that indeed what was allocated as compensation was the suit land in the form of an allotment letter or the procedure followed to identifying the suit land as the alternative land for compensation. Was the same vacant and available at the time of the said allocation in 2014?

42. This court being a court of record cannot without sufficient proof hold in favor of the appellant. The Evidence Act is clear on this regard, that he who alleges must prove.
43. It is therefore evident from the foregoing that the 1st respondent is the actual, beneficial and registered owner of the suit land. He gave an explanation on the acquisition of the suit land, which is a portion within Block 23 and adduced the relevant documents of how the suit land was acquired and registered in his name and a valid title deed issued to that effect.
44. Section 26(1) of the Land Registration Act is clear to the effect that a certificate of title shall be taken as prima facie evidence that the person named therein is the absolute and indefeasible owner, unless the title is challenged on grounds of fraud, misrepresentation, illegality, unprocedural acquisition, or corrupt scheme, to which the proprietor is proved to have been a party.
45. The appellant in his amended counter-claim also raised allegations of fraudulent and illegal registration of the suit land in the name of the 1st respondent and in collusion with the 2nd respondent.

46. It is trite law that allegations of fraud must be pleaded and strictly proved. In **Vijay Morjaria vs. Nansingh Madhusingh Darbar & another [2000] eKLR** Tunoj JA (as he then was) stated as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”

47. Save for specifically pleading and outlining the particulars of the fraudulent actions on the part of the 1st and 2nd respondents as alleged, from a look at the trial court record and the exhibits produced thereto, it is my considered view that the appellant failed to distinctively prove the said allegations of fraud and illegality.

48. To this end therefore, this court finds that the claims and allegations of fraudulent and illegal registration of the suit land in favor of the 1st respondent were not sufficiently proved.

49. In essence therefore, this court finds that the 1st respondent is the actual, beneficial, bonafide and the registered owner of the suit land herein and the title deed document adduced as Pexh. 2 is

a prima facie proof that the 1st respondent is the absolute proprietor of the suit land.

Whether the occupation and/or use of the suit land by the appellant amounts to trespass and/or encroachment;

50. It was the appellant's claim that he was the lawful and beneficial owner of the suit land No. 459, the same having been duly allocated to him and one William Komen by the MDA. That his entry into the suit land and the subsequent occupation and use was therefore sanctioned by MDA through its decision to give him land to compensate the land which had earlier been allocated but was in a swampy area as recommended by the MDA Tribunal and MDA Implementation Committee.
51. The 1st respondent on the other hand maintained that the appellant's entry, occupation and use of the suit property amounted to trespass and in violation of his ownership rights and interests as a registered owner of the said suit land and therefore urged the court to issue an order of eviction against the appellant.
52. Section 3 (1) of the Trespass Act, Cap 294 provides that:
- "Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."***

53. From the evidence tendered and the documents produced, it is not in dispute that the 1st Respondent is the registered owner of the suit land. Further, his title deed has not been impeached on the grounds outlined under section 26 (a) and (b) of the Land Registration Act or at all.
54. In a claim for trespass, the defendant is under a duty to provide a reasonable cause, explanation and justification of their entry into the suit property and continued occupation and use thereof, to the required standard and to the satisfaction of the court.
55. In view of the finding in issue No. (i) above, the Appellant has in my considered view failed to discharge this burden and provide a reasonable justification for his continued occupation and use of the suit land.
56. Thus, having held that the 1st respondent is the actual, bonafide, beneficial and registered owner of the suit land, it is the finding of this court that the appellant's continued occupation and use of the suit property amount to trespass and encroachment.
57. Consequently, this court finds that grounds 2, 3 and 4 in the memorandum of appeal are not merited. The trial court's finding on the issue of trespass and the subsequent orders made thereto on permanent injunction and yielding a vacant possession was on a proper analysis of the facts of the case and the evidence adduced in support of the rival claims.

Whether the 1st respondent proved his claim against the appellant to warrant the grant of the orders sought;

58. This issue seeks to examine and re-evaluate whether the 1st respondent proved his case in the trial court to warrant the grant of the orders sought.
59. Having held that the 1st respondent is the actual, bonafide, beneficial and registered proprietor of the suit land, it follows that he is entitled to a vacant and absolute possession of the suit land thereof, occupation and use of the same to the exclusion of everyone else including the appellant, together with all rights and privileges appurtenant thereto as provided under section 24 of the Land Registration Act.
60. Consequently, it is the finding of this court that the 1st Respondent sufficiently proved his claim against the appellant and was therefore entitled to the orders sought in the plaint and granted by the trial court. Thus, the trial magistrate did not err in granting the same.

Whether the Appellant proved his counter-claim to the required standard to warrant the grant of the orders sought;

61. As outlined hereinabove, the appellant in his amended counter-claim sought several orders including a declaration of ownership of the suit land, declaration of illegal and fraudulent registration of the suit land in the name of the 1st respondent, cancellation of the 1st respondent's name as the owner of the suit land, permanent injunction among others.
62. The issue of ownership of the suit land and the claims of fraudulent and illegal registration made against the 1st

respondents have sufficiently been discussed in issue no. (i) above and I therefore do not wish to restate the same.

63. Further, I wish to point out that the certificate of title produced by the appellant as Dexh. 21 was in relation to a parcel of land known as Kiplombe/ Kiplombe Block 13 (Greenfield)/443 which parcel is in respect to the parcel originally allocated plot No. 21 on Block No. 20 and which was found to be in a swampy area hence the need for reallocation of an alternative land.
64. It is not in dispute that 1st respondent's allocation of the suit land preceded the appellant's alleged allocation which was pursuant to a complaint resolution process and after the recommendation of the MDA Tribunal on the need to compensate them for the land on the swampy area.
65. From the material and evidence placed before the trial court and which this court has had the opportunity to reappraise, re-evaluate and re-consider, the appellant did not adduce any documentary evidence to prove his alleged membership and share entitlement in MDA, allotment and /or allocation claims in respect to the suit land, minutes and decision from the tribunal, payment receipts or confirmation in his name. It is therefore not clear how he acquired the suit land.
66. In view of the foregoing and the findings in the above issues, it is evident that the appellant did not sufficiently prove his claim in the counter-claim to the required standard to warrant the grant of the reliefs sought against the 1st respondent.

Whether the appellant's right to fair hearing was

violated;

67. This issue seeks to examine whether the appellant's right to be heard and fair hearing was violated in the conduct of the proceedings before the trial court.
68. It is the appellant's claim under grounds 1, 8, 9 and 10 in the memorandum of appeal that he was denied the opportunity to call his witnesses to testify and adduce evidence in support of his case and as a result, he was denied his right to be heard and the right to fair hearing violated.
69. I have carefully and critically looked at the proceedings of the trial court leading up to the close of the defence case and I have noted the following;
- i. On 02.11.2023, the defence counsel Ms. Kogo made an application that DW1 be stood down so that they can regularize the position as to the documents filed in support of his case.
 - ii. The application for adjournment was allowed and the matter was adjourned to 14.11.2023.
 - iii. On 14.11.23, the matter proceeded for hearing of the defence case and the Appellant testified as DW1.
 - iv. At the end of the re-examination, Ms. Kogo sought an adjournment and for summons to issue to Advocate Cheptarus.
 - v. The said application despite opposition from the 1st Respondent's counsel, was allowed and the same was

marked as the last adjournment. In addition, witness summons was issued as prayed.

- vi. The matter came up for further defence hearing on 01.02.2024. Ms. Kogo once again made an application for adjournment on the grounds that the witness summons were not signed, which application was opposed by the 1st Respondent's counsel.
 - vii. The court denied the said application by the defence counsel and ordered the matter to proceed as scheduled for the further defence hearing.
 - viii. Ms. Kogo thereafter made an oral application for the court to recuse itself from hearing the matter. In response to the said application the trial court asked the defence counsel to make a formal application.
 - ix. Since the defence had no witness in court and were not ready to proceed, the defence case was closed.
70. The right to be heard and the right to a fair hearing are enshrined in Article 50 of the constitution. However, from the above order of events, it is clear that the appellant was accorded more than one opportunity to prosecute his case and call his witnesses to testify in support of his case.
71. A denial of an application for adjournment made without sufficient cause should not be construed to mean a denial of the right to be heard. Both parties to the suit are entitled and guaranteed a right to be heard and the right to a fair hearing, which entails among other things the expeditious disposal of a case. The maxim of justice delayed is justice denied is clear in this regard.

72. In essence therefore, it is my considered view that the appellant's right to fair hearing and the right to be heard were not violated as alleged.
73. Consequently, grounds 1, 8, 9 and 10 of the memorandum of appeal lacks merit.

Whether the appeal is merited;

74. The duty of an appellate court is now well settled. An appellate court will not interfere with findings of fact unless they are based on no evidence, a misapprehension of the evidence, or the wrong application of legal principles.
75. In the present appeal, no such misapprehension of the facts and evidence adduced or application of wrong legal principles has been satisfactorily demonstrated to the required standard.
76. Further in view of the findings in the issues above, which are to the effect that the appellant did not adduce sufficient evidence to controvert either the 1st respondent's claim and evidence or to support his claim as contained in the counter-claim, this court finds that the appeal lacks merit.
77. In the premises therefore, this court finds no basis to fault the trial court's finding as contained in the judgment dated 07.05.2024. The same was arrived at upon careful consideration of the evidence adduced by each party and a proper appraisal of each party's case.
78. Consequently, this court finds that the appeal is not merited.

Who should bear the costs of the present appeal;

79. The general rule is that costs shall follow the event in accordance with the proviso to section 27 of the Civil Procedure Act unless the court directs otherwise.
80. In the instant case, having held that the appellant has failed to prove his appeal to the required standard, it is the finding of this court that the 1st respondent should be awarded costs for defending the appeal.
81. The costs of the appeal will therefore be borne by the appellant.

CONCLUSION:

82. In the upshot, I accordingly find that the Memorandum of Appeal dated 28th May, 2024 is not merited and the appeal is hereby dismissed with costs to the 1st Respondent.
83. It is so ordered.

DATED, SIGNED and DELIVERED in ELDORET this 16th day of APRIL, 2026.

**HON. C. K. YANO
JUDGE**

In the virtual presence of; -

Ms. Kogo for Appellant.

Ms. Kesei for 1st Respondent.

No appearance for 2nd Respondent.

Court Assistant - Laban