



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELCL APPEAL CASE NO. E072 OF 2024

RINGERA KANAKE.....

APPELLANT

=VERSUS=

TABITHA KARENSEA MITHIKA.....1ST

RESPONDENT

FESTUS MURIIRA MITHIKA.....2ND

RESPONDENT

CHRISTOPHER KABERIA MITHIKA 3RD

RESPONDENT

(An Appeal against the Judgment of the Principal Magistrate Court at Maua [Hon M C Nyigei - PM] dated 10/9/2024 in Maua CMC Civil Case No. 230 of 2013)

JUDGMENT

Introduction

- 1.** This appeal challenges the judgment of the Principal Magistrate Court at Maua [Hon M C Nyigei - PM] rendered

on 10/9/2024 in **Maua CMC Civil Case No. 230 of 2013**. The key issue that arose for determination in the said suit was whether the respondents were illegal encroachers on the suit land, which the appellant described as **parcel number Amwathi/Maua/1261**. The land was alleged to measure approximately 0.1677 hectares. The broad issue to be determined in this appeal is whether the appellant proved the allegation that the respondents were illegal encroachers on the suit land who were liable to be decreed to vacate the land. Before I analyse and dispose the issue, I will briefly outline a brief background to the appeal. I will also summarize the parties' respective submissions in the appeal.

Background

- 2.** Vide a plaint dated 1/10/2013, the appellant sued the respondents in Maua CMC Civil Case No 230 of 2013. He sought an order decreeing the respondent to vacate the suit land. He also prayed for costs of the suit. His case was that, he was the registered proprietor of the suit land, which he described **Amwathi/Maua/1261**, measuring approximately 0.1677 hectares. He alleged that the respondents had encroached on the suit land and had refused to vacate the land.
- 3.** Through his written witness statement dated 1/10/2013, which he adopted as part of his sworn evidence-in-chief, he stated that during land adjudication, the relevant land adjudication committee allocated and showed him a piece of land in Maua Town, adding that after demarcation, the said piece of land "was transferred" to a location near

Luluma Primary School, the location where the suit land sits. He fenced the land but he was unable to go to the land regularly because he lived at **Mukululu Village** in **Mukululu Location** which was far from the land. When he visited the land after 5 years, he established that the respondents had built homes on the land and were farming on it. His attempts to have the respondents vacate the land were unheeded, hence the suit.

4. In answer to the suit, the respondents filed a joint defence dated 11/3/2014. The defence was amended on 5/11/2014. The case of the respondents was that, the 1st respondent was a widow of the late **Silas Mithika** (also spelt as **Sailas Mithiga**) while the 2nd and 3rd respondents were sons of the late **Silas Mithika**. The late Silas Mithika was the demarcated and registered proprietor of the suit land which they described as parcel number **Amwathi/Maua/5890**. The late Mithika died in 1989 and was buried on the suit land. The 1st respondent got married to the late Silas Mithika in 1972 and were blessed with 8 children, all born and raised on the suit land. The family of the late Mithika had been in occupation of the suit land all along and there had been no dispute about the late Mithika's ownership and occupation of the suit land.
5. The respondents further contended that the appellant's suit was statute-barred under the **Limitation of Actions Act**. They added that if the appellant had obtained a title to the suit land, the said title had been procured fraudulently and was an overlap onto parcel number

Amwathi/Maua/5890 and a fraudulent displacement of parcel number **Amwathi/Maua/5890** occupied by the family of the late Silas Mithika. They urged the court to dismiss the appellant's suit with costs.

6. Upon conducting trial and upon receiving submissions, the trial court rendered the impugned judgment in which it found that the appellant had failed to prove that the respondents were occupying his land. The trial court dismissed the appellant's claim with costs.

Appeal

7. Aggrieved by the judgment and decree of the lower court, the appellant brought this appeal vide a memorandum of appeal dated 30/9/2024 in which he advanced the following verbatim grounds:

1. ***That the Learned Principal Magistrate erred in law and fact in relying solely on an inconclusive surveyor's report and finding that the appellant had failed to prove that the respondents occupy his parcel of land.***

2. ***That the Learned Principal Magistrate erred in law and facts by ignoring and disregarding the appellant's other evidence which demonstrated that the respondents are in actual possession of the suit land and relying solely on the inconclusive surveyor's report.***

3. ***That the Learned Principal Magistrate erred in law and facts in failing to order the relevant government land officers to provide***

conclusive evidence which would shed light on the position of the suit land.

4. That the Learned Principal Magistrate erred in law and facts by completely considering irrelevant matters in her decision and ignoring the relevant issues canvassed before her and therefore came to the wrong decision/conclusion.

5. That the Learned Principal Magistrate's decision is against the facts and evidence presented before her and therefore bad in law.

8. The appellant urged this court to allow the appeal with costs.

Appellant's Submissions

9. The appeal was canvassed through written submissions dated 2/12/2025, filed by ***M/s Mbogo & Muriuki & Co. Advocates.*** Counsel for the appellant pointed out that the main issue to be determined in the appeal was whether the trial court erred in relying solely on an inconclusive surveyor's report and in finding that the appellant had failed to prove that the respondents were occupying his parcel of land.

10. Counsel submitted that the appellant's advocate [sic] made an oral application to have the surveyor and the Land Registrar file a joint report related to parcel numbers ***Amwathi/Maua/1261*** and ***Amwathi/Maua/5890.*** Counsel argued that the trial court should have drawn the

terms of reference with the involvement of the parties and their advocates to address all the issues in the dispute. Counsel added that the surveyor's report failed to comply with the directions of the trial court, pointing out that it lacked the input of the Land Registrar yet the order of 21/2/2018 required the surveyor and the Land Registrar to "*conduct a joint report*". Counsel contended that the report did not address the main issue in controversy in the suit, which was ownership of land parcel number Amwathi/Maua/1261.

- 11.** Counsel for the appellant further argued that the trial court erred in adopting the report without giving an opportunity to the parties to interrogate it by way of cross-examination. Counsel pointed out that the two parcels of land in dispute were distinct and appeared on different map sheets and did not share a common boundary, adding that the trial court ought to have ordered a "full hearing to enable the maker of the report to be cross-examined on the contents of the report". Counsel argued that the manner in which the trial court determined the suit by adopting the surveyor's report was "erroneous and unsupported by law".
- 12.** Counsel for the appellant further submitted that the parties having complied with the requirements of **Orders 3, 7 and 11** of the **Civil Procedure Rules**, it was clear that the issue in controversy was the ownership of land parcel number **Amwathi/Maua/1261**. Counsel contended that the manner in which the court determined the above issue was erroneous and should not be allowed to stand.

- 13.** Lastly, counsel submitted that in their joint defence, the respondents raised defences of fraud/mistake and limitation of action, adding that the above defences raised serious issues that required the trial court “to direct the suit to be heard on merit”. Counsel urged the court to allow the appeal.

Respondents’ Submissions

- 14.** The respondents filed written submissions dated 6/1/2026 through **M/s Maitai Rimita & Co. Advocates**. Counsel for the respondents submitted that the trial court relied on the appellant’s evidence which indicated, *inter alia*: (i) demarcation of interests in land in Amwathi Adjudication Section was conducted in accordance with the provisions of the Land Adjudication Act; (ii) the appellant neither owned nor occupied the suit land; (iii) the appellant’s land was located in Maua Town and was not the suit land which is located near Luluma Primary School; and (iv) land which the appellant was allegedly shown in 1992 was land that was occupied by the respondents and had already been recorded as parcel number Amwathi/Maua/5890, measuring 0.2837 hectares.
- 15.** Counsel for the respondents further submitted that the 1st respondent testified as DW1 and informed the court that they had occupied and developed the suit land since 1972 [when she got married to the late Mithika] without any claim from anybody else, adding that DW1 further testified that when the late Mithika died in 1989, he was buried on the suit land without any contestation. Counsel added that the 1st respondent’s testimony was corroborated by the

testimonies of DW4 [an officer from the Land Registry] and DW5. Counsel argued that the trial court did not err in its analysis of the evidence before it. Counsel urged the court to reject and dismiss the appeal.

Analysis and Determination

- 16.** The court has read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. As pointed out in the opening paragraph of this judgment, the broad issue to be determined in the appeal is whether the appellant proved the allegation that the respondents were illegal encroachers on the suit land who were liable to be decreed to vacate the land. Before I analyse and dispose the issue, I will outline the principle that guides this court when exercising appellate jurisdiction.
- 17.** The task of a first appellate court was summarized by the Court of Appeal in the case of ***Susan Munyi v Keshar Shiani (2013) eKLR*** 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.”

18. The principle was similarly outlined in ***Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR*** as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reason either way.”

19. From the pleadings and the evidence on record, the respondents are members of the family of the late Silas Mithika *also known as* Sailas Mithiga. To be precise, the 1st respondent is the widow of the late Mithika while the 2nd and 3rd respondents are sons of the late Mithika. It does also emerge from the evidence on record that the late Mithika’s family was in occupation of the suit land prior to land adjudication and has remained in occupation since then. Indeed, the late Mithika married DW1 in 1972 while living on the suit land and established his matrimonial home on it. He lived on the suit land with his family till his death in 1989. He was buried on the suit land.
20. The 2nd respondent testified that he was born on the suit land in 1978 and was raised on the land. He got married on the land and resides on it with his family. The 3rd respondent testified that he was born on the suit land in 1989 and was raised on the land. He got married on the land and has since then resided there with his family. The

three respondents testified that the late Mithika owned the suit land which was demarcated and subsequently registered in his name as parcel number **Amwathi/Maua/5890**. **DW4** tendered an extract of the register showing that parcel number Amwathi/Maua/5890, measuring 0.287 hectares, was demarcated and conclusively adjudicated in the name of Sailas Mithiga in 1997 and was subsequently registered in his name in 2017 upon finalization of the adjudication register for Amwathi/Maua Adjudication Section

- 21.** On his part, the appellant testified that prior to land adjudication, his late father owned land within Maua Town. He became owner of the said parcel within Maua Town by dint of the fact that it belonged to his late father. The appellant added that in 1992, during land adjudication, his piece of land which was in Maua Town “was transferred” to the suit land, which is located near Luluma Primary School, and he became owner of the suit land by dint of the said “transfer” which was done by the Maua Adjudication Committee Members. He stated that he was shown the suit land in 1992 and the suit land was subsequently adjudicated in his name in 1997. The land was registered in his name in 2011.
- 22.** The appellant added that he all along resided far away in Mukululu Village within Mukululu Location. He had never occupied the suit land. He nonetheless asserted that the suit land was the land that he was shown in 1992.

23. DW4 [Robert Mwenda - an officer from the Land Registry] confirmed that parcel number Amwathi/Maua/1261 was registered in the name of the appellant while parcel number Amwathi/Maua/5890 was registered in the name of Silas Mithiga. **DW5** [David Kanake -a Surveyor from Meru North Survey Office] gave the following verbatim evidence”

“Parcel 1261 appears on Sheet 5/9. Parcel 5890 appears on Sheet 4/12. That is according to the Registry Index Map. Regarding this matter, parcel No. 5890 is occupying parcel number 1261 on the ground. I have the documents - maps - Exhibit 7”

24. It is clear from the above evidence that what the appellant was shown in 1992 as an alternative to his land that was in Maua Town was land that was owned by the late Mithika and was occupied by the late Mithika’s family. It does clearly emerge from the surveyor’s evidence that the title [Amwathi/Maua/1261] which the appellant is waving relates to parcel number **Amwathi/Maua/5890** which belongs to the late Mithika and which is occupied by the late Mithika’s family.

25. The appellant insisted that parcel number Amwathi/Maua/1261 and parcel number Amwathi/Maua/5890 were two distinct parcels that existed on two different map sheets and locations. He did not, however, lead evidence relating to the separate existence of the parcels on the ground. If the appellant genuinely believed that the parcels existed distinctively on the

ground, nothing prevented him from moving the Land Registrar under the Land Registration Act to determine the precise boundaries of the alleged two distinct parcels on the ground. He is the one who sought to uproot the family of the late Mithika from their home of more than 55 years. He bore the burden of proving that the parcels existed separately and distinctively on the ground. He did not discharge that burden.

- 26.** The appellant faulted the trial court for placing reliance on the evidence of **DW5** [*the surveyor*] and argued that the trial court should have called for a joint report. The appellant knew his case and the respondents' case. He elected not to lead evidence to address the key issue in the dispute, which related to the question as to whether the two parcel numbers related to the same land on the ground and the question as to whether parcel number 5890 existed elsewhere on the ground. The trial court cannot, in the circumstances, be faulted for the appellant's failure to lead evidence in support of his claim.
- 27.** Similarly, the contention that there were serious issues that required the trial court to direct the suit to be heard on merit is strange because the trial court conducted a trial and accorded parties the opportunity to lead evidence and to examine and cross-examine witnesses. This was a merit hearing. There is no evidence suggesting that the appellant requested to cross-examine a witness and was denied the opportunity to do so.
- 28.** For the above reasons, it is the finding of this court that the appellant failed to prove his claim to warrant the

uprooting of the family of the late Mithika from their home of more than 55 years. The result is that the court does not find merit in this appeal. The appeal is rejected and dismissed for lack of merit.

- 29.** In tandem with the general principle in **Section 27** of the **Civil Procedure Act**, the appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 13TH DAY OF APRIL, 2026.

B M EBOSO [MR]

ELC JUDGE