REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC LAND APPEAL NO. E041 OF 2024

ALEXANDER DICK KATONA……. APPELLANT

VERSUS

MICHAEL PETER MUSYOKA &
JOHNSON NDAMBUKI KILONZO
***(sued as the personal representatives of the estate of the late* JOHN KILONZO KIOKO (DECEASED)**
…….RESPONDENT

JUDGMENT

[Appeal from the judgment of Hon. Ole Keiwua K. D. CM, delivered on 31 July 2024 in Kangundo CM's Court, ELC Case No. E16 of 2020 (MICHAEL PETER MUSYOKA & Ano as personal representatives of the estate of the late John Kilonzo Kioko .v. ALEXANDER DICK KATONA)]

1. To give some background for the appeal, it is helpful to understand the dispute previously addressed in the trial court and now before this court as a first appeal. In the lower court and by a plaint dated 3 November 2020, the deceased respondent, as the registered owner of land parcel no. **Matungulu/Katine/890 ("suit land")** sued the appellant for trespass. From the proceedings, it appears that they are step-siblings, sharing one father but different mothers. He claimed the appellant had trespassed on a portion of the suit land by cultivating thereon without permission. Consequently, he sought the following reliefs: -

    a. ***A permanent injunction restraining the appellant, whether by himself, or his agents, employees, servants or subjects, from entering, cultivating, dividing, constructing, trespassing, interfering, residing, selling, subletting, transferring, charging, alienating or in any way dealing with the suit land.***
    b. ***Any other suitable relief as the honourable court may deem fit and just to grant in the circumstances.***
    c. ***Costs and interests of the suit.***

2. The appellant vigorously contested the suit through his defence dated 8 March 2024, in which he denied being a trespasser and argued that he occupied a portion of the

disputed land by virtue of a decision from the Land Disputes Tribunal, namely **land dispute case no. 43 of 2005 between David Nyumu, the appellant, and 2 others v. Ndambuku Kilonzo and 2 others** ("tribunal case"), which was adopted as a judgment of the court in **Machakos CM Misc. 92 of 2006.** In his defence, he named David Nyumu Katona ("David") as an interested party and stated that he entered the portion with David's permission, having been successful in the tribunal case. He asserted that this decision had ordered that a portion of the suit property be allocated for the benefit of the appellant's family.

3. Subsequently, the matter was heard, with the parties calling their respective witnesses, relying on witness statements, oral testimonies, and produced documents as appropriate. In the appellant's case, he testified alone, whereas Michael Peter Musyoka and Antony Muema Jimmy testified for the respondent as PW1 and PW2.

4. Later, the impugned judgment was delivered in the matter, whereby the learned trial magistrate stated that since the respondent died in 2002, it was not tenable for the tribunal case to adjudicate over the estate of a deceased person and allowed the respondent's prayers.

5. Dissatisfied, the appellant appealed to this court and filed a memorandum of appeal dated 28 August 2024 and filed on 29

August 2024, in which he challenged the impugned judgment on several repetitive grounds, asserting that the learned trial magistrate erred in law and fact in the following respects:

a. ***Erred in law and fact in holding that the respondent had proved his case.***
b. ***Erred in law and fact in deciding the case against the weight of the evidence on record.***
c. ***Erred in law and fact in failing to consider the appellant's evidence and submissions.***
d. ***Was biased.***

6. Accordingly, the appellant urged this court to grant the appeal, overturn the impugned judgment and substitute it with an order dismissing the respondent's case with costs and award him the costs of the appeal.

7. Accordingly, following the court's directions, the appeal was argued through written submissions filed by the law firms representing all parties. In compliance, **Ms. Susan Tum & Co. Advocates** for the appellant dated 9 January 2026 and **Ms. Nzuki Nzioka & Co. Advocates** for the respondent dated 12 February 2026. Thus, we shall now proceed with the issues for determination, analysis and determination

8. As this is a first appeal, the authority of this court is outlined in **Order 42 Rule 32** of the **Civil Procedure Rules.**

Additionally, as an appellate court, this court will not interfere with the impugned judgment unless it is satisfied that the learned trial magistrate misdirected himself and thereby reached an incorrect decision, exercising his discretion wrongly and causing injustice through such erroneous exercise of discretion. The role of an appellate court was aptly described in the decision of **Watt v Thomas [1947] AC, 484 at p 485,** which was cited with approval in the Court of Appeal decision of **Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] eKLR,** thus: -

> ***"Lord Simon's speech in* Watt v Thomas [1947] AC, 484 at p 485 *as follows:***
>
> > ***"….an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.***
>
> ***But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at***

the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight…"

9. Regarding the matter at hand, this court has carefully reviewed the records, the impugned judgment, and the parties' submissions, and it is the considered view of this court that the grounds of appeal can be effectively evaluated by examining the singular ground of **whether the learned trial magistrate erred in finding that the respondent proved his case and was entitled to the reliefs sought.** However, prior to proceeding further, it is imperative to note that, contrary to the respondent's assertions, at the appellate stage, the appellant retains the right to issue new instructions to the law firm currently representing him. Furthermore, the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** could not suffice in the scenario herein. ***See Tobias M. Wafubwa v Ben Butali [2017] eKLR*** *and* ***Francis Omondi Odhiambo versus Hippolitus Omondi Ochieng [2022] eKLR***

10. Furthermore, although the appellant argued that the learned trial magistrate was biased, this court has not observed such

biasness in the proceedings or judgment. Regarding the ground of appeal based on submissions, this court considers it a non-issue as submissions are merely arguments and, in any case, the appellant has had another opportunity by lodging this appeal. We proceed.

11. The case before the trial court was of trespass. Hence, it is essential to delineate the pertinent legal and jurisprudential framework on this claim. **Article 40** of the **Constitution** recognises that every person has the right to acquire and own property of any kind and in any location within Kenya. The protections and limitations related to such land rights are governed by **Sections 24, 25,** and **26** of the **Land Registration Act,** which demarcate land rights, privileges, appurtenances, liabilities, and interests. Other relevant provisions of the law are contained in the **Land Act** and the **Trespass Act,** which specifically stipulate:

Section 152A of the **Land Act 2016** states as follows: -

> ***"A person shall not unlawfully occupy Private, Community or Public Land."***

Section 3 (1) of the **Trespass Act** defines trespass as: -

> ***"any person who without unreasonable 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."

12. As for the writings of eminent scholars, the text of **Clerk & Lindsell on Torts, Sweet & Maxwell, 18th Edition, at page 923,** defines trespass to land as follows: -

> *"**Trespass to land consists of any unjustifiable intrusion by one person upon land in the possession of another."***

Page 927 of the same text discourses as to who may sue for trespass, and it states as follows: -

> ***"Trespass is actionable at the suit of the person in possession of land, who can claim damages or injunction, or both... Similarly, a person in possession can sue although he is neither owner nor derives title from the owner, and indeed may be in possession adverse to the owner."***

13. In the book of **Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition, page 428,** trespass is discussed as follows:

"Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land."

14. The prevailing theme in the definition of trespass, as articulated by these esteemed scholars, is that ownership is not a prerequisite for such a claim. Nevertheless, the assertion of a person holding title to the land takes precedence in cases of competing claims of possession. In the instant case, the respondent's claim of ownership was uncontested by the appellant. It was also undisputed that the appellant was in occupation of a portion thereof. The question that was before the trial court and is now before this court is whether the existence of the tribunal case, which was adopted as a judgment of the court, would justify the appellant's right of entry and occupancy.

15. When faced with this issue, the learned trial magistrate stated that it was not tenable for the tribunal case to proceed in the manner it did in the absence of the respondent, who was then deceased or his legal representatives. This court concurs with this finding by the learned trial magistrate. **Rule 3 (3)** of the repealed **Land Disputes Tribunals (Forms and Procedure) Rules, 1993**, required a notice of attendance for a hearing to be served on the objector.

16. In the tribunal case, Ndambuku Kilonzo and two others were the objectors, and disclosures were not made regarding the identities of these other two. One of them was probably the respondent, who had died on 13 September 2002, well before the tribunal case was filed in 2005. It is now established legal doctrine that a lawsuit filed against a deceased individual is inherently null and void from the outset. This principle has been consistently affirmed in a series of judicial decisions.

In **GEETA BHARAT SHAH & 4 OTHERS v OMAR SAID MWATAYARI & ANOTHER [2009] KECA 126 (KLR),** the Court of Appeal made the following rendition: -

> ***"In the result, as Bharatkumar Nathalal Shah was already dead by the time the suit was filed, we hold the view that the suit was a nullity and Mr.***

Oddiaga, is with respect right in conceding the appeal in respect of him on that score."

Further, in **Manyange (Deceased) v TG (Minor suing through her mother and next friend WMG) [2024] KEHC 1083 (KLR),** in reiterating on the settled law, cited several court decisions which this court concurs with:-

'In the case of Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018] eKLR, the court stated as doth: -

> ***"The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.***

In the Indian case of C. Muttu v. Bharath Match Works AIR 1964 Kant 293 the court observed,

17. If, at all, he was not made a party, then orders could not be issued against him as the owner of the suit land, as this would contravene **Article 50** of our **Constitution,** which stipulates that a party must be granted the right to a fair hearing. This principle aligns with the *audi alteram partem* maxim, a fundamental legal doctrine that mandates parties be given an opportunity to be heard before any adverse orders are issued against them. The Court of Appeal had an opportunity to clarify this principle in the case of **Pashito Holdings Limited & Another vs. Paul Nderitu Ndungu & 2 Others [1197] eKLR,** when it stated:

> ***"The rule of "audi alteram partem", which literally means hear the other side, is a rule of natural justice. According to Jowitts Dictionary of English Law (2nd Edition)***
>
> > ***"It is an indispensable requirement of justice that the party who had to decide shall hear both sides, giving each an opportunity of hearing what is urged against him".***
>
> ***There is an unpronounceable Latin maxim which in simple English means: "He who shall decide***

***anything without the other side having been heard, although he may have said what is right, will not have done what is right.*"**

18. Most notably, and to reinforce the invalidity of the tribunal's case, **Section 2** of the repealed **Land Disputes Tribunals Act** is pertinent. This **Section** delineates the parcels of land over which the Land Disputes Tribunal could exercise jurisdiction by defining land as follows:

> ***" "land" means "agricultural land" as defined in section 2 of the Land Control Act, whether or not registered under the Registered Land Act, but does not include land situated within an adjudication section declared under the Land Adjudication Act or the Land Consolidation Act or land which is the subject of determination by the Land Registration Court under the Land Titles Act;"***

19. In the present case, it emerged from uncontroverted evidence that the suit land originated from a land adjudication section. PW1 testified that the survey process began in 1978, but what is certain is that during the tribunal case in 2005, the suit land was still subject to adjudication, as it was registered on 8 May 1995 and the title was issued on 28 November 2014,

removing it from the jurisdiction of the **Land Disputes Tribunals Act** by virtue of **Section 2.**

20. From the submissions, it is clear that the appellant lacks clarity regarding the adjudicative mechanisms that applied to the suit land and has conflated the procedures outlined in the **repealed Land Disputes Tribunals Act** with those under the **Land Adjudication Act.** For clarity, the statutory procedures governing the suit land prior to the issuance of the title deed were those prescribed by the **Land Adjudication Act.** The process therein is comprehensive and permits the parties to present their grievances at various stages.

21. Typically, proceedings commence with the land adjudication committee. Should a party be dissatisfied, they could escalate the matter to the arbitration board. If the grievance remained unresolved, they could petition the land adjudication officer before ultimately appealing to the Minister. ***Refer to Sections 20, 21, 22, 26, and 29(1) and (2) of the Land Adjudication Act.*** Only in exceptional circumstances, as delineated in **Section 30,** could a party initiate proceedings before the court.

22. Therefore, this court concludes that the Land Disputes Tribunal lacked jurisdiction over the suit land. It further determines that the proceedings before the tribunal were null and *void ab initio* and had no legal effect. The court also finds

that the learned trial magistrate did not err in his analysis of the evidence and accordingly concludes that the appeal lacks merit.

23. Therefore, for the above reasons and findings, the appeal is dismissed, and this court upholds the orders issued in the judgment rendered on 31 July 2024. Since it is a trite law that costs follow the event, and for reasons the appeal was unopposed, the appellant shall bear her costs of this appeal.

Judgment accordingly.

Delivered and Dated at Machakos this 5th day of May, 2026.

HON. A. Y. KOROSS
JUDGE
05.05.2026

Judgment delivered virtually through Microsoft Teams

Video Conferencing Platform

In the presence of;

Ms. Kanja Court Assistant

Mr. Nzioka for respondent.

Miss Tum for appellant