REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ISIOLO

ELC APPEAL E018 OF 2025

ESTHER MWARANIA CHARLES [Suing as the Legal Representative of the Estate of CHARLES NGITI [deceased]……APPELLANT

VERSUS

ABRAHAM MURIKI MWENDA [sued as the legal Representative of STEPHEN MITHIKA……. RESPONDENT

[Being an Appeal from the Judgment/Decree of Hon. M A Odhiambo – Senior Resident Magistrate in Isiolo MCELC E027 OF 2021 delivered on 23rd May, 2025]

JUDGMENT

1. The Appellant herein, [*who was the Plaintiff in the Lower court*], filed the plaint dated 27.08.2021, wherein the Appellant sought various reliefs.
2. The reliefs sought were:

    i. An order of permanent injunction to be issued against the defendant, his siblings, employees, agents, servants, assigns or any other person acting under his directions from working, building, dealing and or interfering in any manner with the plaintiff's use and possession of plot number un-surveyed plot number 395 Kula Mawe- Isiolo.

ii. An order of Eviction against the defendant, if in occupation of plot number un-surveyed residential plot 395 Kula Mawe- Isiolo.

iii. Costs and Interests of the suit.

iv. Any other relief this court deems necessary.

3. The gravamen/crux of the Appellant's suit was that: The Appellant is the Legal Administrator of the Estate of one Charles Ngiti [deceased]; the deceased was the owner of plot number 395 – Kula Mawe ; the deceased was in possession of the suit property; the Plaintiff has always been in possession of the suit property; the Defendant entered upon and trespassed onto the suit property in the year 2020; the actions of the defendant *[now Respondent]* have interfered with the Appellant's rights to the suit property; the Respondent has no legal rights to and in respect of the suit property.

4. Flowing from the foregoing contentions, the Appellant sought various reliefs as against the respondent. The reliefs have been highlighted in the preceding paragraphs hereof.

5. The Respondent duly entered appearance and filed a statement of defence. The statement of defence was dated the 01.10.2021. The Respondent denied the claims by/on behalf of the Appellant. In particular, the Respondent averred that same is the owner of plot number 143 Kula Mawe; the same has been and still is in occupation of the said plot; and that same has no knowledge of the Appellant's Plot, or at all.

6. Additionally, the Respondent posited that: the same is not privy to or aware of the Appellant's plot; the complains by the Appellants are misconceived; the activities complained of are being taken/carried out on plot 143; and the Respondent does not know of where the Appellant's plot is situated, if at all, the Appellant's plot does exist.

7. In the premises, the Respondent invited the court to find that the Appellant's suit is misconceived; barred by limitation of actions; and legally untenable. The Respondent implored the court to dismiss the suit with costs.

8. The suit in the Lower court was heard and disposed of *vide* Judgment rendered on the 23.05.2025, whereupon the Learned Trial Magistrate [Hon. M A Odhiambo – SRM] found that the Appellant had neither proved nor established ownership of or trespass to the suit property. To this end, the trial court dismissed the Appellant's suit and awarded costs to the Respondent.

9. Dissatisfied with the Judgment and the consequential decree, the Appellant has now approached this court *vide* amended Memorandum of appeal dated the 10.03.2026. The grounds at the foot of the Memorandum of appeal are:

    i. That the Learned Trial Magistrate erred in law and fact by failing to properly evaluate the evidence presented by the Appellant and particularly the documents of ownership in

respect of Plot No. 395 Kula Mawe and thereby erroneously dismissed the Appellant's Claim.

ii. ***That the Learned Trial Magistrate erred in law and fact by dismissing the Appellant's suit on the basis that the Appellant did not tender evidence of compliance with allotment terms a fact that was undisputed and not in issue.***

iii. ***That the Learned Trial Magistrate erred in law and fact by failing to consider the report by the district surveyor dated 18th October, 2022 and clearly confirmed both the aspect of ownership and trespass on plot No. 395 Kula Mawe and thereby find that the Appellant had proved the claim on a balance of probabilities.***

iv. ***That the Judgment of the Learned Trial Magistrate is against the law and weight of evidence on record.***

10. The subject appeal came up for directions on the 10.03.2026, whereupon learned counsel for the Appellant intimated to the court that same had filed and served the record of appeal. In addition, Learned counsel posited that the record of appeal was complete. To this end, learned counsel sought directions as pertains to the hearing and disposal of the appeal in line with the provisions of **Order 42 Rule 13 of Civil Procedure Rules,2010.**

11. With the concurrence of the learned counsel for the Respondent, the court proceeded to and issued directions on the hearing and disposal of the appeal. The directions were: the appeal shall be heard before One Judge, sitting at Isiolo, for one day; the appeal shall be canvassed by way of written submissions; the Appellant shall file and serve written submissions within 14 days from the date of the directions; the Respondent shall file and serve written submissions within 14 days from the date of service; and the Appellant shall be at liberty to file rejoinder submissions [if any] within 7 days of service.

12. The Appellant filed written submissions dated the 20.04.2026 and wherein the Appellant has raised and canvassed two [2] key issues. The issues are: Whether the Learned Trial Magistrate erred in law and in fact by failing to properly evaluate the evidence presented by the Appellant thereby erroneously dismissing the Appellant's suit; and Whether the Appellant established trespass onto plot number un-surveyed plot number 395 Kula Mawe – Isiolo [the suit property].

13. Regarding the first issue, learned counsel for the Appellant has submitted that the Learned Trial Magistrate misapprehended the nature of the Appellant's suit and claims and thereby failed to addressed the critical questions/issues raised by the Appellant. In particular, it was submitted that the Learned Trial Magistrate engaged herself with the issue of whether the Appellant was the lawful owner of the suit plot, yet there was no dispute as pertains to ownership of the suit plot. For good measure, it was submitted that the Respondent did not contest or dispute ownership of the suit property.

14. Additionally, it was submitted that the Learned Trial Magistrate ventured forward and interrogated whether the Appellant had complied with or satisfied the conditions at the foot of the letter of allotment, yet the issue of compliance with the terms of the letter of allotment, had neither been raised nor disputed by the Respondent.

15. Moreover, it was contended that the Learned Trial Magistrate misconstrued the evidence on record, including failing to appreciate that the Appellant was the person in occupation of the suit plot. In particular, it was submitted that had the Learned Trial Magistrate appreciated the evidence, same would have come to the conclusion that possession of the suit plot constitutes 9/10 [nine-tenth] of ownership.

16. To buttress his submissions that possession constitute 9/10 ownership, learned counsel for the Appellant has invoked and referenced the doctrine of *Seisin*, which was elaborated upon by the Court of Appeal in the case of **Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR).**

17. Other than the contention that the Learned Trial Magistrate misapprehended the Appellant's case/claims; and misconstrued the import of possession, it has also been submitted that the Learned Trial Magistrate framed her own issues and thus violated the doctrine of departure, which essentially commands that parties; and by extension the Court, are bound by their pleadings.

18. Learned counsel for the Appellant thereafter cited various decisions. The decisions are: **Wangui (Suing for and on behalf/Attorney of Lucy Mumbi Kibochi) v Nderitu [2026] KECA 124 (KLR) ; Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] KECA 457 (KLR); King'ori versus Karanja and another [2026] KECA 480; and Gitobu Imanyara and 2 others versus Attorney General [2016] eKLR,** respectively.

19. The next issue that has been canvassed by learned counsel for the Appellant relates to the failure of the Learned Trial Magistrate to consider and take into account the contents of the Surveyor's report dated the 18.10.2022 and which is said to have been filed in court. In particular, it has been submitted that on the 05.10.2021, the court ordered a scene visit which was to be conducted by a surveyor in the presence of the parties. Moreover, it was posited that the scene was indeed visited and thereafter a report was filed.

20. Furthermore, it has been submitted that the report which was filed and thus formed part of the record of the court showed that there existed two plots on the ground, but that the two plots had been fenced in one area. Besides, it was submitted that the report confirmed that both the suit plot and plot number 143 Kula Mawe – Isiolo were existing on the ground.

21. It was contended that even though the report formed part of the record of the court, the Learned Trial Magistrate failed to consider and take into account the findings thereunder.

22. To this end, it was posited that had the learned trial magistrate considered the report, same would not doubt, have come to the conclusion that the Appellant proved/established trespass.

23. Thereafter, learned counsel for Appellant has cited and reference the holding in the case of **Church Commissioners for Kenya of the Anglican Church of Kenya v Wayuga [2024] KECA 1048 (KLR),** wherein the Court of Appeal highlighted the ingredients underpinning trespass and ventured forward to address what constitutes continuing trespass.

24. *In a nutshell*, learned counsel for the Appellant has contended that the Judgment of the Learned Trial Magistrate is wrought with errors and thus same ought to be set aside. Simply put, learned counsel has invited the court to find merits in the appeal and to allow same.

25. The Respondent filed written submissions dated the 29.04.2026 and wherein the Respondent has highlighted two [2] key issues. The issues highlighted are: The Appellant did not prove ownership of the suit property; and the Appellant did not establish trespass as against the Respondent.

26. Regarding the first issue, it was submitted that the Appellant had approached the court contending that the suit plot lawfully belonged to one Charles Ngiti [deceased]. Moreover, it was posited that the Appellant thereafter tendered and produced before the court various

documents, including a copy of the letter of allotment, in and endeavor to demonstrate ownership of the suit property.

27. It was submitted that having raised the issue/question of ownership of the suit property [un-surveyed plot number 395 Kula Mawe] the Appellant was obligated to prove the question of ownership. Sadly, it was been contended that the Appellant failed to prove ownership.

28. In addition, it has been submitted that the Learned Trial Magistrate correctly apprehended the issues that were placed before her and thereafter addressed the issues in her Judgment. In any event, it has been submitted that the Appellant was obliged to prove that same, or the deceased, had complied with and satisfied the terms of the letters of allotment.

29. Secondly, it was submitted that the burden of proving trespass laid at the doorsteps of the Appellant. To this end, learned counsel has cited and reference the provisions of **Section of 109 of the Evidence Act, Chapter 80 Laws of Kenya.**

30. Furthermore, it has been submitted that despite bearing the burden of proving trespass, the Appellant herein failed to tender/adduce any credible evidence to prove trespass. In this regard, it was contended that the Appellant's case was rightfully dismissed.

31. Based on the foregoing, learned counsel for the Respondent has submitted that the appeal before the court is devoid of merits and the court has been invited to dismiss same with costs.

32. Having reviewed the record of appeal, the grounds at the foot of the memorandum of appeal; the written submissions; and the applicable law, I come to the conclusion that the determination of the appeal turns on two key issues. The issues are: Whether the Learned Trial Magistrate misapprehended the nature of the Appellant's claims and thereafter framed issues outside the pleadings; and whether the Appellant proved/established the plea of trespass or otherwise.

33. Before venturing to address the thematic issues that have been isolated in the preceding paragraph, it is important to highlight that what is before me is a first Appeal. By virtue of being a first Appeal, this court is mandated to undertake a fresh and exhaustive scrutiny, review, and analysis of the totality of evidence tendered before the court of first instance. The court is obligated to review the evidence and determine whether the finding[s] and conclusion[s] arrived at by the trial magistrate accord with the evidence on record and the legal principles; and thus should stand or otherwise.

34. Notably, the court is seized of the authority and jurisdiction to arrive at an independent conclusion and to depart from the findings of the trial court. However, it is established that the appellate court can only depart from the factual finding[s] and conclusion[s] of the trial court where it is demonstrated; that the conclusions were based on no evidence; the conclusions are perverse to the evidence on record; the

findings are based on misapprehension of the evidence and law; and that there is a demonstrable error of principle, which vitiates the findings of the Trial Court.

35. Suffice it to state that, barring the foregoing, the first appellate court is enjoined to defer to the findings and conclusions of the trial court. Instructively, the jurisdiction of the first appellate court to interfere with the findings/conclusions of the trial court is circumscribed. The jurisdiction is not at large.

36. The jurisdictional remit of the first appellate court, while undertaking its mandate as pertains to the first Appeal, has been the subject of various court decisions. In the case of **Odera t/a AJ Odera & Associates v Machira t/a Machira & Co Advocates [2013] KECA 208 (KLR),** the Court of Appeal expounded on the scope of the jurisdiction.

37. The court stated thus

> *46. We also wish to be guided by the reasoning of this court in the case of* ***Mwana Sokoni versus Kenya Business Limited (1985) KLR*** *931 page 934,934 thus:-"Although this court on Appeal will not lightly differ from the Judge at first instance on a finding of fact, it is undeniable that we have the power to examine and re-evaluate the evidence on a first Appeal if this should become necessary. As was said by the House of Lords in Sottos Shipping versus Sauviet Sohold, The Times, March 16, 1983."It is uncertain whether their Lordships should have reached the same conclusion on the evidence, but it is important that, sitting in the appellate*

court they should be over mindful of the advantages enjoyed of the trial Judge who saw and heard the witnesses and was in a comparably better position than the Court of Appeal to assess the significance of what was said, how it was said, and equally impotent what was not said" Again in Peters versus Sunday Post Limited (1958) EA424, a decision of the Court of Appeal for Eastern Africa, Sir Kenneth O' Conner, P said at page 429: "It is a strong thing for an appellate court to differ from the finding on a question of fact of the Judge who tried the case and who has had the advantage of seeing and hearing and the witnesses.

38. Recently, the Court of Appeal revisited the jurisdictional remit in the case of **Kenya Urban Roads Authority & another v Belgo Holdings Limited [2025] KECA 764 (KLR).** The Court stated as hereunder:

We have considered the Appeal, and this being a first Appeal, we

are under a duty to subject the entire evidence and the judgment to a fresh and exhaustive examination with a view to reaching our own conclusions in the matter. In carrying out this duty, we have to remember that we had no opportunity of seeing and hearing the witnesses who testified during the trial and to make an allowance for the same. We have also to remember that it is a big thing to overturn the findings of a trial court which has had the singular opportunity of reaching its conclusions based on a combination of the evidence adduced and observation by the court of the demeanour of witnesses. In a nutshell, a first appellate court must

of necessity proceed with caution in deciding whether or not to interfere with the findings of a trial court, but of course, where such findings are not supported by the evidence on record or where they are founded on a misapprehension of the law, the axe must fall on the impugned judgment. This position is anchored in section 78 of the Civil Procedure Act, which requires a first appellate court to re-evaluate, reassess, and reanalyse the extracts of the record and draw its own conclusions. These provisions have been underscored in numerous decisions of the Superior Courts among them Peters v Sunday Post Limited [1958] EA 424, where the predecessor to this Court expressed itself as follows: "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has 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 really is 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 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. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of

Appeal) of having the witnesses before him and observing the manner in which their evidence is given…

Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial Judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial Judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question…It not infrequently happens that a decision either way may seem equally open, and when this is so, then the decision of the trial Judge who has enjoyed the advantages not available to the appellate court becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgment of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate

the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

39. Back to the issues for determination. I shall deal with the issues sequentially.

40. Regarding the first issue, it is important to recall and reiterate that the Appellant approached the Lower court *vide* plaint dated the 27.08.2021. The Appellant contended that same was the legal administrator of the estate of Charles Ngiti [deceased]. The Appellant also posited that the suit plot had been allocated to Charles Ngiti and in this regard, the Appellant tendered and produced a copy of the letter of allotment to that effect.

41. Moreover, the Appellant contended that on the basis of the letter of allotment, the deceased and by extension herself, acquired rights to and interest over the suit plot.

42. My understanding of the contention by the Appellant is to the effect that the suit plot lawfully belonged to the estate of Charles Ngiti [deceased] on the basis of the letter of allotment. For good measure, the crux of the Appellant's case is predicated on ownership and possession of the suit plot.

43. Having raised the foregoing contentions at the foot of the plaint, it was incumbent upon the Appellant to place before the trial court evidence to demonstrate ownership of or entitlement to the suit plot. In any event, there is no gainsaying that proof of ownership or entitlement to

the suit property, are pre-conditions to demonstrating rights or interest to immovable property.

44. I beg to clarify that proof of ownership or entitlement to immovable property, takes various perspectives. In particular, the perspectives are influenced and guided by the relevant/applicable legal regime. There are legal regimes, which require a certificate of title/certificate of lease [whichever is applicable] as proof of ownership. [See the provisions of **Sections 24 and 25 of the Land Registration Act, 2012**].

45. On the other hand, there are legal regimes, for instance the **Land Consolidation Act [Chapter 283 Laws of Kenya]** and the **Land Adjudication Act [Chapter 284 Laws of Kenya],** where a letter of confirmation signed by the designated officer confirms ownership/entitlement ,prior to the eventual issuance of the Certificate of Title.

46. The bottom line is that wherever a party, the Appellant not expected claims ownership or entitlement to land, the claimant must tender/adduce the deed, [read, the Instrument], underpinning the claim of entitlement. The deed may include the certificate of title; the certificate of lease or such other documents, recognized under the law, as constituting entitlement.

47. In the case of **Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School (Civil Appeal 64 of 2014) [2023] KECA 371**

(KLR) (31 March 2023) (Judgment), the Court of Appeal addressed the issue in the following manner:

> ***The best evidence of ownership of immovable property is the title deed to it and that is why the question of the root of title is important.***
>
> ***Root of title is the deed to which title to a property is ultimately traced to prove that the owner has good title. Accordingly, when there are competing interests as in this case, the parties are required to give evidence of title, starting with a "good root of title." A good root of title and an unbroken chain of ownership is required. To be a good root of title, a document must satisfy each of the following requirements: (a) it must deal with or show the origin of the ownership of the whole legal and equitable interest in the land in question; (b) it must contain a recognizable description of the property; (c) it must not contain anything that casts any doubt on the title."***

48. In respect of the instant matter, it is the Appellant who had claimed ownership/entitlement to the suit property. The Appellant posited that same had possessory rights to the Suit Plot. In addition, it is the Appellant who tendered/adduced before the trial court a copy of the letter of allotment as [sic] the basis of her claim to the suit property.

49. Insofar as the Appellant tendered the said documents, read the letter of allotment, it was incumbent upon the Appellant to demonstrate that the terms of the letter of allotment had been complied with. Furthermore, the Appellant was obliged to demonstrate that upon

compliance with the terms of the letter of allotment [if at all], same had been issued with the requisite certificate of title/certificate of lease. [See the holding of the Court of Appeal in the case of **Dr. Joseph N.K Arap Ngok versus Justice Moijo Ole Keiuwa [1997] Eklr; and Wreck Motors Enterprises Limited versus Commissioner of Lands and Another [1997] eklr**]

50. I beg to underscore that it behooved the Appellant to prove/establish his claim as pertains to ownership/entitlement to the suit plot. Instructively, proof of ownership/entitlement to the suit plot, was a condition precedent to the Appellant staking any rights or interest, including possessory rights to the suit plot. Suffice it to state the possessory rights, which belie a claim for trespass, must be founded on some documents of title known to law. Moreover, the Deed/ Document underpinning the Claim of Title/ entitlement, must be known to and recognized by Law.

51. The question that falls for determination is whether the Learned Trial Magistrate committed an error in interrogating the letter of allotment and whether the Appellant had complied with the terms thereof? According to the Appellant, the Learned Trial Magistrate ought not to have interrogated the letter of allotment and whether the terms thereof, had been complied with.

52. If I hear the Appellant correctly, same seems to suggest that the Learned Trial Magistrate ought and should have proceeded on the basis of assumption; conjecture; or hypothesis that the Appellant

owned the suit plot, without interrogating the basis of such a statement. Surely, a court of law is enjoined to interrogate the contention by parties and the documents tendered, in an endeavor to discern the veracity thereof or otherwise.

53. In respect of the subject matter, it was incumbent upon the Learned Trial Magistrate to authenticate whether the Appellant, who had approached the court, had any legal or equitable rights over the suit plot. This could only be addressed and discerned by interrogating the letter of allotment, which was the only document/ Instrument [sic] of title placed before the court. I repeat, the Learned Trial Magistrate was not obligated to proceed on the basis of assumption.

54. **Section 109 of the Evidence Act, Chapter 80 Laws of Kenya**, speaks to a cardinal principle of law. The principle relates to the burden and standard of proof in civil matters. Simply put, the golden thread in civil proceedings is to the effect that the claimant must prove the allegations or all the allegations, which are adverted to in his/her claims, subject only to the exceptions contained in **Section 112, of the Evidence Act [supra].**

55. In the case of **Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & another [2014] eKLR,** the Court of Appeal underscored the obligation of the claimant to prove the averments/allegations at the foot of the pleadings, even where there is [sic] no denial filed by the adverse party.

56. The court stated thus:

It is a firmly settled procedure that even where a defendant has not denied the claim by filing of defence or an affidavit or even where the defendant did not appear, formal proof proceedings are conducted. The claimant lays on the table evidence of facts contended against the defendant. And the trial court has a duty to examine that evidence to satisfy itself that indeed the claim has been proved. If the evidence falls short of the required standard of proof, the claim is and must be dismissed. The standard of proof in a civil case, on a balance of probabilities, does not change even in the absence of a rebuttal by the other side.

57. Bearing in mind the exposition of the law in terms of the preceding paragraphs, my answer to issue number one is thus: The Appellant had laid a claim to the suit property; the Appellant was enjoined to prove ownership/entitlement to the suit property; The Learned Trial Magistrate was obligated to interrogate the averments and documents tendered; the Learned Trial Magistrate correctly interrogated the contents of the letter of allotment; the Learned Trial Magistrate correctly apprehended the law on letter of allotment; and the Learned Trial Magistrate correctly found and held that the Appellant had not demonstrate ownership of; **or entitlement** to the suit property.

58. To my mind, the Learned Trial Magistrate framed the correct issues, including the aspect of ownership of or entitlement to the suit plot by the Appellant and thereafter correctly interrogated the claims on behalf of the Appellant. I wish to repeat and reiterate that the Learned Trial Magistrate was called upon to exercise a judicial mind to the

issues. The Learned Trial Magistrate did exactly what the law required of her.

59. *In a nutshell*, the contention by the Appellant that the Learned Trial Magistrate framed issues outside the pleadings and thereafter misapprehended the Appellant's claim, is misconceived. I am unable to discern any violation of the doctrine of departure by the Learned Trial Magistrate. In any event, I am afraid that the submissions by the learned counsel for the Appellant are based on misapprehension of the claim that was canvassed by the Appellant herself in the Lower court.

60. I now wish to turn to the second issue, namely; whether the Appellant proved the plea of trespass or otherwise. To start with, it is common ground that whosoever seeks to prove trespass, the Appellant not excepted, is obligated to prove inter-alia the following:

i. Ownership of or entitlement to the designated property.

ii. Offensive entry or intrusion upon the property

iii. Provision of evidence of intrusion

iv. Lack of consent/permission

61. In the case of, **Doshi v Chemutut & 7 others [2025] KECA 776 (KLR)** the Court of Appeal stated thus:

> ***Trespass, as stated by this Court in the case of Charles Ogejo Ochieng v Geoffrey Okumu [1995] KECA 169 (KLR), is an injury to a possessory right, and therefore the***

proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. As for the ingredients of trespass, the Court in William Kamunge Gakui v Eustace Gitonga Gakui (Civil Appeal 16 of 2013) [2014] KECA 39 (KLR) stated that trespass is a violation of the right to possession, and that a plaintiff must prove that he has the right to immediate and exclusive possession of the land. Justice Chemutut did not name Mr. Doshi as a defendant in the suit.

62. Did the Appellant prove trespass? While addressing the first issue, I have found and held that the Appellant did not tender or produce any evidence to demonstrate ownership [if at all] of the suit plot. In addition, I have also found that the Appellant did not demonstrate entitlement to the property, in whatever nature.

63. Other than the foregoing, it is trite that trespass can only be proven on the basis of credible and cogent evidence. In an endeavor to prove trespass, the claimant, the Appellant included, must tender expert evidence, to demonstrate the offensive intrusion/entry on the designated property. In this case, it was incumbent upon the Appellant to adduce and tender a surveyor's report, if any, to show the extent of [sic] the suit plot and the portion thereof [if any] encroached onto.

64. I beg to state that the Appellant did not tender and or produce any surveyors report before the Lower court. Moreover, it is important to point out that a court of law is only called upon to interrogate and consider the evidence tendered before it in the conventional manner.

Suffice it to state that the court cannot interrogate and consider a document which was not adduced before it as part of the evidence. [see section 3 [2] of **the Evidence Act, Chapter 80 Laws of Kenya**]. See also the holding in the case of ***General & another v Hussein & 3 others*** **(Civil Appeal 100 (ELD No. 32) of 2018) [2025] KECA 1022 (KLR) (5 June 2025) (Judgment).**

65. Importantly, the manner of proving trespass, if any, was recently considered in the case of **Barta (Suing as the Legal Representative to the Estate of the Late Oloishuro ole Barta Kura) v Farah & another [2026] KECA 764 (KLR).**

66. The Court stated thus:

> **…….*Before determining whether there was trespass, it was incumbent on the parties and by extension the superior court to determine the boundaries of the property of the Appellant and the respondents respectively*. *The function of determining boundary is exclusively the realm of the Land Registrar and courts are very slow if at all to interfere with the findings of the Land Registrar in matters relating to boundaries. [emphasis supplied]***

67. The importance of a Surveyor's report in establishing the plea of trespass was also underscored in the case of **Kenya Power and Lighting Company Limited versus Margret Olang Okoth [2017] KECA.**

> ***We also endorse the Appellant's submissions that the court has to consider such evidence together with the other evidence called.***

However, in this case, the trial court dealt with the issue of expert witnesses thus:-

"22. To get to the determination of the question whether or not the defendant ended up with more land that (sic) it bought from the plaintiff, actual measurements and calculations must be carried out

23. Such is the duty and area of the professions of surveyors. Indeed, the ultimate court's opinion must be guided by an opinion of an expert in that field. Section 48 of the Evidence Act may be of help to the court in this regard…..

24. In the matter before me both parties appreciated that it would take the survey or as an expertise (sic) to resolve the question. Both parties engaged the services of surveyors in the words of Pw1, Pw2 and Dw1 but only the plaintiff availed a report and called the maker of that report to produce it, give evidence and be cross-examined.

25. Based on that report, and there being no evidence or opinion in rebuttal, I am persuaded that my opinion on whether or not there was encroachment can only be founded on the report by the expert……I further make the inference that the defendant having commissioned a surveyor but declined to avail such a report in evidences, (sic) he so held back the report because had it produced it, it would have been adverse to its case."

With this kind of reasoning, how can the trial court be accused of relying on the opinion of an expert surveyor without establishing its relevance? In our view, the respondent's entire evidence and

that of DW 1 in cross - examination could lead a reasonable tribunal to the conclusion which the trial court reached. The trial court has ably justified why the evidence of the respondent's surveyor came in handy. The Appellant did not expect the trial court to move to the locus and determine the encroachment or otherwise by taking measurements itself. The trial court was least qualified for such undertaking. The trial court may well have come to a different conclusion had the Appellant's surveyor testified and tendered evidence in rebuttal. It did not.

68. In respect of the instant matter, the Appellant did not tender or produce before the court any surveyor's report. The evidence on record shows that the Appellant produced a total of seven exhibits. The details of the exhibit are captured in the body of the proceedings undertaken on 22.11.2022.

69. Quite clearly, there was no surveyor's report.

70. Moreover, it is not lost on me that a surveyor's report is an expert opinion/document and same can only be tendered and explained by the expert. No such expert testified on behalf of the Appellant.

71. Before concluding on this issue, there is one more complaint by the Appellant which requires a short answer. The Appellant has complained that the Learned Trial Magistrate disregarded and failed to consider the report dated 18.10.2022, which was filed [sic] by the District Surveyor. To my mind, two sub issues arise.

72. Firstly, the report in question was never tendered nor produced as an exhibit. To this end, it did not form part of the evidence before the court for consideration in the conventional manner. [See the holding in the case of **Kenneth N. Mwige versus Austin Kiguta [2015] eklr- paragraphs 17-22, respectively]**

73. Secondly, the author of the report, was never called by the Appellant to testify before the court. It then means that the contents of the said report were never subjected to the requisite cross examination, in the manner provided for under the law.

74. Finally, if the Appellant had wanted the report to form part of the record and to be considered during the determination of the matter, same ought to have procured an appropriate order, to wit: the report [if any] filed shall form part of the record and be used by the parties during the hearing.

75. That was not the case and hence the report, which the Learned Trial Magistrate has been accused of not considering, did not fall for consideration. If anything, the said report was *devoid* probative value, same not having been produced by the author.

76. In view of the foregoing, I come to the conclusion that the Appellant herein did not prove/establish the plea of trespass. In this regard, my finding is to the effect that the Learned Trial Magistrate correctly dismissed the Appellant's suit.

Conclusion

77. Bearing in mind the analysis espoused herein before, and taking into account the principles in the case of **Mwanasokoni versus Kenya Bus services Limited [1985] eKLR , Jabane versus Olenja [1986] eKLR,** I come to the conclusion that no basis arises to warrant departing from the findings and conclusion of the trial court.

Final orders

78. Flowing from the foregoing, I find and hold that the appeal is *devoid* of merits. In this regard, the final orders that commend themselves to the court are:

i. The Appeal be and is hereby <u>Dismissed.</u>

ii. The Judgment of the Lower court delivered on the 23.05.2025 be and is hereby <u>affirmed.</u>

iii. Costs of the appeal be and are hereby awarded to the Respondent.

iv. The Costs in terms of clause [iii] shall be agreed upon an in default be taxed in the usual manner.

79. It is so ordered.

DATED, SIGNED AND DELIVERED AT ISIOLO THIS 13TH DAY OF MAY, 2026

OGUTTU MBOYA, FCIArb;CPM [MTI-EA]

JUDGE

In the presence of

Mukami: Court Assistant

Mr. Kariuki for the Appellant

Mr. Muriithi for the Respondent