

Section and Plot No. 300A & 300B were the same or different parcels of land.

- 5) The learned magistrate erred in both law and fact when he took into account extraneous matters to arrive at this decision.
- 6) The learned magistrate erred in both law and fact when he referred the matter before him to the National Land Commission after making findings on the issues before him.
- 7) The learned trial magistrate erred in law and fact when he dismissed the Defendant's defence.
- 8) The learned trial magistrate erred in both law and fact when he failed to take into account the Defendant's submissions.

Submissions by the parties

7. The Respondents were directed to file written submissions within 14 days from 14th February, 2026. The Appellant had already filed his submissions dated 17th December, 2025. As at 10th March, 2026, the Respondents had not filed submissions. The Respondents' counsel undertook to file submissions within 7 days from 10th March, 2026 but as at 10th May, 2026 when writing this judgment, no submissions had been filed.

Analysis and Determination

8. This is a first appellate court and the duty of a first appellate court was stated in the case of **Selle and Another –vs- Associated Motor Boat Co. Ltd & Others EA 123 (1968)** as follows:

“.....An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either it has clearly failed on

some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanor of a witness is inconsistent with the evidence in the cases generally”.

Analysis and Determination

9. I have carefully gone through the evidence adduced before the lower court as well as the submissions by the Appellant. The rival contentions before the lower court as well as the submissions by the Appellant. The rival contentions before the lower court is that the Respondents were claiming that plot No. 1317 which the Appellant was claiming was created within their plots. On the other hand, the Appellant's contention was that plot No. 1317 was within Kinyoo Adjudication Section and the interest in that plot had been recorded in his name on behalf of his siblings. The Appellant's contention is that there is no way a plot within Emali Town would have been subject of adjudication.
10. The issues for determination in this appeal are firstly whether plot 1317 was created out of parcel Nos 300A and 300B/Emali Town. Secondly, whether the Appellant and the Respondents proved their respective claims. Thirdly, whether the trial magistrate was right to order the National Land Commission to investigate the authenticity of the documents produced before court after finding that the Appellant was a trespasser on the suit property.

Whether plot 1317 was created out of parcel numbers 300A and 300B/Emali Town

11. There was absolutely no evidence adduced by the Respondents to show that Plot No. 1317 was created out of plot 300A and 300B/Emali Town. Cumulatively plot Nos. 300A and 300B/Emali Town measured 100x100 ft which is equivalent to a quarter of an acre. Though there is no evidence of

the acreage of plot 1317, there is no evidence to show that this plot was created from plot Nos. 300A and 300B/Emali Town.

12. The part development plan and area map were marked for identification but they were not produced. During the hearing, the 1st Respondent admitted in cross examination that he is the one who inserted the plot numbers on the map by hand. It is not known who the maker of the map was and in any case it was not produced in evidence. A document which is marked for identification but which is not produced is of no evidential value. See the case of **Kenneth Nyaga Mwige –vs- Austine Kiguta & 2 Others (2015) eKLR.**

13. The Appellant adduced evidence that parcel 1317 was outside Emali Town and that its creation was as a result of the process of adjudication within Kinyoo adjudication section. The Appellant called DW2 James Kyalo Kitaka a Land Adjudication Officer based at Kibwezi who confirmed that parcel 1317 was recorded in favour of the Appellant and was within Kinyoo adjudication section. This witness produced a letter confirming that the Appellant was recorded as owner of plot 1317. He also produced a certified copy of the demarcation book where the Appellant's name is shown under plot No. 1317. It is therefore not true as the Respondents claim that plot 1317 was created from parcel Nos. 300A and 300B/Emali Town.

Whether the Appellant and the Respondents proved their respective claims

14. The Respondents testified that they were allocated plot Nos 300A and 300 B/Emali Town vide allotment letters dated 18th June, 1987. Though they produced the two allotment letters to confirm that they had been allocated the plots, there was no evidence adduced to show the location of the two plots.

15. The map and the Part Development Plan (PDP) were marked but not produced. The plot numbers 300A and 300B/ Emali Town were inserted by the 1st Respondent on the map and the PDP. There was no surveyor who was brought by the Respondents to confirm the existence or otherwise of plot

Nos. 300A and 300B Emali Town or whether plot 1317 was created out of plot Nos. 300A and 300B Emali Town.

16. Ownership of plot Nos. 300A and 300B/Emali Town not having been proved, there is no basis upon which the trial magistrate would have found that the Appellant was a trespasser to plot Nos. 300A and 300B/Emali market. There was absolutely no basis for grant of an injunction restraining the Appellant from plots whose existence had not been proved on the ground.
17. The Appellant had adduced evidence on how plot 1317 was created within Kineyoo adjudication section. He called a Land Adjudication Officer from Kibwezi who confirmed that the interest in parcel No. 1317 Kinyoo adjudication Section was recorded in the Appellant's name. The Appellant and his siblings have been on parcel 1317 even before the adjudication process began. The adjudication officer testified that the adjudication process was complete and there was no dispute over parcel 1317 which had been recorded in favour of the Appellant.
18. The Appellant having adduced evidence to show that parcel 1317 was as a result of an adjudication process, he was entitled to a declaration that he was the owner of parcel No. 1317. The trial magistrate was therefore wrong in dismissing the Appellant's counterclaim on grounds that he did not produce a map to show that he was owner of parcel 1317. On the contrary, the map which he relied on to find that the Respondents had proved that they were owners of plot Nos. 300A and 300B/Emali town were not produced in evidence. They had only been marked for identification.
19. The trial magistrate himself had serious doubts on the authenticity of the documents relied on by the Respondents that is why he suspended the taking effect of the injunction granted in favour of the Respondents pending investigation by the National Land Commission.

Whether the trial magistrate was right to order the National Land Commission to investigate the authenticity of the documents produced

before court after finding that the Appellant was a trespasser on the suit property

20. The trial magistrate was wrong in ordering the National Land Commission to investigate the authenticity of the documents before the court with a view to determining whether fraud had been committed. The action by the magistrate was strange given the mandate of the National Land Commission. The trial magistrate was bound to make a definite determination of the issues before him. He abdicated his role by asking the National Land Commission to investigate a case which he had already determined.

21. The trial magistrate's intention was to have the perpetrators of the perceived fraud prosecuted without stating the fate of the judgment which he had already pronounced.

Disposition

22. It is clear from the above analysis that the trial magistrate was wrong in allowing the Respondent's claim and dismissing the Appellant's counterclaim. I therefore allow the appeal and proceed to set aside the judgment delivered on 6th May, 2021 in its entirety and in place thereof make an order dismissing the Respondent's claim before the lower court with costs. I make an order allowing the Appellant's claim before the lower court. The Appellant shall have the costs of this appeal.

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HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 14TH DAY OF MAY, 2026.

IN THE PRESENCE OF:

Mrs. Isika for Appellant.

Court assistant – Musyoki and Kilonzo