

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELCA NO. E033 OF 2022**

**KABARE FARMERS CO-OPERATIVE SOCIETY  
LTD ..... APPELLANT**

**VERSUS**

**NANCY NJOKI MURIITHI .....  
RESPONDENT**

**JUDGEMENT**

***(Being an appeal against the judgment and decree of  
the Hon. Alex Ithuku, CM, delivered on 15<sup>th</sup> November  
2022 in Kerugoya***

***MCELC No. 138 of 2018.)***

1. This appeal arises from the judgment and decree of **Hon. Alex Ithuku, CM**, delivered on **15<sup>th</sup> November 2022** in Kerugoya MCELC No. 138 of 2018.

In that judgment, the trial court found that the Respondent had proved ownership of **Plot No. 129 Kutus Township** and that the Appellant had encroached onto the said plot. The court consequently issued orders restraining the Appellant from interfering with the plot and directed the County Surveyor and Physical Planner to clearly beacon

and mark the boundary between **Plot No. 14 and Plot No. 129.**

Aggrieved by that determination, the Appellant preferred this appeal vide a Memorandum of Appeal dated 25<sup>th</sup> November 2022, raising the following five (5) grounds:

1. The Learned Magistrate erred in law and in fact in finding that the plaintiff had proved her case on a balance of probabilities.
2. The Learned Magistrate erred in law and in fact in finding that the plaintiff was the owner of part of the suit property when no sufficient evidence was adduced to this effect.
3. The learned Magistrate erred in law and in fact in disregarding the evidence of the defendant.
4. The learned Magistrate erred in law and in fact in failing to analyse the evidence adduced, and in particular that of fraud on the part of the plaintiff.
5. The learned Magistrate erred in law and in fact in failing to analyse the evidence adduced hence reaching a wrong conclusion.

The appellant prayed that the appeal be allowed; that the judgment and decree made on 15<sup>th</sup> November 2022 be set aside and substituted with an order dismissing the suit with costs; and that the costs of the appeal be awarded to the appellant.

2. The dispute before the trial court concerned two adjacent plots within Kutus Township, that is, **Plot No. 14**, which is not in dispute as belonging to the Appellant, and **Plot No. 129**, which the Respondent claimed to own.

Through the plaint dated 9<sup>th</sup> November 2018, the Respondent sought for a declaration that she is the lawful owner of **Plot No. 129**, measuring approximately 11 metres by 15.75 metres.

She further alleged that the Appellant had trespassed onto her land by extending construction from **Plot No. 14** into her parcel and sought injunctive relief to restrain such interference. Her case, as pleaded and testified, was that she had been allocated **Plot No. 129** by the then Municipal Council, had commenced construction thereon, and that the Appellant unlawfully encroached onto approximately four (4) metres of her land and interfered with her construction works. She also asserted that she had reported the dispute to the County authorities without resolution.

3. The Appellant filed a statement of defence dated 15<sup>th</sup> November 2019 denying the existence of **Plot No. 129**, and asserting ownership of **Plot No. 14**. It contended that the Respondent's claim was an afterthought, arising from a landlord-tenant relationship between the Appellant and the Respondent's husband, who had occupied **Plot No. 14** as a tenant from 2006, and had been required to vacate pursuant to proceedings before the **Business Premises Rent Tribunal**. The Appellant further challenged the authenticity of the Respondent's documents and alleged fraud.
4. The record confirms that the suit proceeded to hearing on merit during which the trial court conducted a site visit in which the County Surveyor and a Physical Planning Officer participated.
5. The court on 22<sup>nd</sup> May 2025 directed the appeal to be canvassed through written submissions. The learned counsel for the appellant and respondent consequently filed their submissions dated the 13<sup>th</sup> June 2025 and 9<sup>th</sup> July 2025, respectively.
6. The counsel for the Appellant inter alia submitted that the Respondent had failed to discharge the burden of proof placed upon her, both as to the existence of **Plot No. 129** and, more critically, as to her alleged ownership thereof.

Counsel submitted inter alia that courts are courts of evidence and not speculation, and that the burden of proof rests upon the party who asserts a fact. Reliance was placed on **Sections 107 and 108 of the Evidence Act chapter 80 of Laws of Kenya** and the decision in the case of **Attorney General versus W.O.1 Samuel Chege Gitau & 283 Others [2023] KECA 1386 (KLR)** for the proposition that a party must not only allege, but must prove to the requisite standard.

7. Developing that argument, counsel submitted that the Respondent failed to establish even the foundational fact of the existence of **Plot No. 129** on the ground. It was contended that the area map and development plan produced did not reflect the existence of such a plot.

Counsel placed particular emphasis on the evidence of the County Surveyor, who while able to identify **Plot No. 14** through measurements, was unable to locate **Plot No. 129** by coordinates or otherwise, and instead deferred to information allegedly held by the Physical Planner. That information it was submitted, was never availed before the trial court, thereby leaving a critical evidentiary gap. From this, counsel urged the court to draw the inference that **Plot No. 129** does not exist on the ground, and that the trial court erred in proceeding on the assumption of its existence.

8. On the question of ownership, counsel submitted that even if the plot were assumed to exist, the Respondent failed to demonstrate any lawful allocation. It was argued that the burden lay squarely on the Respondent to prove not only its existence, but lawful allocation and ownership, particularly in the context of unregistered land where title is not evidenced by registration, but by a chain of documentary history.

Counsel challenged the Respondent's reliance on minutes of the Municipal Council, submitting that the said minutes were not only insufficient to confer ownership, but were in any event, fraudulent. In that regard, reliance was placed on correspondence from the County Government indicating that the minutes relied upon by the Respondent did not form part of official records. Counsel further pointed to the existence of different versions of the same minutes, arguing that this demonstrated manipulation and rendered the Respondent's documentary evidence unreliable.

9. In contrast, the Appellant maintained that **Plot No. 14** had been lawfully allocated to it by the Commissioner of Lands through a letter of allotment issued in 1992.

Counsel submitted that once such allotment is made, and the conditions thereof met the land ceases to be available for allocation to any other person. In support of that

proposition, reliance was placed on the case of **Lagat versus Kebut [2023] KEELC 18432 (KLR)** and the decision in **Rukaya Ali Mohamed versus David Gikonyo Nambachia**, to the effect that a valid letter of allotment confers enforceable proprietary rights unless impeached on grounds such as fraud or illegality.

It was further submitted that the Respondent's claim was inconsistent with the admitted fact that her husband had been a tenant of the Appellant on **Plot No. 14** for a prolonged period, paying rent up to the year 2018. Counsel posed the rhetorical question as to why such rent would be payable if the Respondent indeed owned the land, urging the court to view the Respondent's claim as an afterthought designed to defeat the Appellant's proprietary rights.

10. On the allegation of fraud, counsel submitted that while the Respondent's documents were demonstrably unreliable, the trial court failed to properly interrogate that issue, and instead accepted the Respondent's case without subjecting it to the required evidentiary scrutiny.

In conclusion, the Appellant urged the court to find that the Respondent failed to prove both the existence and ownership of **Plot No. 129**.

The counsel further submitted that the trial court misdirected itself on the evidence, and argued this court to allow the appeal, set aside the judgment, and substitute it with an order dismissing the suit with costs.

11. The counsel for the Respondent submitted inter alia that the respondent had proved her case before the trial court on a balance of probabilities and that the appeal was devoid of merit.

Counsel submitted that the Respondent is the lawful owner of **Plot No. 129 Kutus Township** and that she had produced documentary evidence in support of that claim, including allocation documents, a beacon certificate, a map showing the plot, and rates payment receipts. It was contended that this body of evidence established her ownership and was not effectively controverted by the Appellant. Particular emphasis was placed on the findings of the trial court following the site visit conducted in the presence of the County Surveyor.

Counsel submitted that during that visit, both **Plot No. 14** and **Plot No. 129** were identified on the ground as adjacent parcels, and that the surveyor confirmed that the Appellant had encroached onto the Respondent's land. It was argued that those findings were based on direct observation and expert input, and therefore ought not to be lightly disturbed on appeal.

12. On the issue of trespass, counsel submitted that the Respondent had demonstrated unlawful entry by the Appellant onto her land, and that once such entry is established, proof of damage is not necessary. Reliance was placed on the case of **Gitwany Investment Ltd versus Tajmal Ltd & 3 Others [2006] eKLR** for the proposition that trespass is actionable per se.

Counsel further submitted that the trial court afforded both parties a fair hearing, and that its findings were grounded in both the documentary evidence and the physical inspection of the locus in quo. It was urged that an appellate court ought to exercise restraint and should not interfere with findings of fact unless they are shown to be plainly erroneous.

13. On the Appellant's allegations of fraud, counsel submitted that fraud must be specifically pleaded and strictly proved to a standard higher than a balance of probabilities. It was contended that the Appellant failed to meet that threshold, having not called any witness from the County Government or investigative agencies to substantiate the allegations.

Counsel further pointed out that one of the authors of the letters relied upon by the Appellant was present during the

site visit and confirmed the existence of the plots and the encroachment, thereby undermining the Appellant's case.

Counsel also drew a distinction between **Plot No. 129 Kutus Old Town** and **Plot No. 129 Kutus Mjini**, submitting that the Appellant's documentary evidence related to a different parcel altogether and was therefore irrelevant to the dispute at hand. In conclusion, the Respondent urged the court to find that the existence and ownership of **Plot No. 129** had been proved, that the finding of trespass was justified, and that the appeal should be dismissed with costs.

14. In this appeal, the issues that arise for determinations by the court are as follows:

- a. Whether Plot No. 129, Kutus Township, exists.*
- b. Whether the Respondent proved ownership of Plot No. 129.*
- c. Whether the trial court misapprehended or misapplied the evidence in finding in favour of the Respondent.*
- d. Who pays the costs?*

15. The court has considered the grounds on the memorandum of appeal, record of appeal, submissions by both learned counsel, the superior court decisions relied on, and come to the following determinations:

- a. This being a first appeal, this Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions, while bearing in mind that it neither saw nor heard the witnesses testify and must make due allowance for that fact. This principle was settled in **Selle & Another versus Associated Motor Boat Co. Ltd & Others [1968] EA 123**, where the Court of Appeal held that:

***“An appeal to this Court is by way of retrial... 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...”***

- b. The Appellant has throughout the trial, and this appeal challenged the existence of **Plot No. 129, Kutus Township**, contending that the same does not exist on the ground and is not reflected in official planning documentation.

The Respondent, on the other hand, relied on both documentary and oral evidence to demonstrate the existence of the said plot. From the record, the following three strands of evidence emerge:

- i. Firstly, there is an extract of minutes of the Municipal Council meeting held on 7<sup>th</sup> September 2007, which records that:

*“Application for confirmation of **Plot No. 129 Kutus** by Nancy Njoki Muriithi was considered.”*

While the probative value of those minutes in establishing ownership will be considered subsequently, their relevance at this stage lies in the fact that they constitute contemporaneous administrative recognition of a plot described as **Plot No. 129 Kutus**.

- ii. Secondly, there is a correspondence dated 21<sup>st</sup> September 2018 from the County Government of Kirinyaga, Department of Lands, Housing and Urban Development, addressed to the Appellant. In that letter, the County Government states, inter alia that:

*“...we have also requested you to lodge any complaint you have against the owner of Plot No. 129 Kutus without any success... you are requested therefore to submit your ownership documents... and*

*lodge officially any dispute you may have against Plot No. 129 Kutus.”*

That communication is significant in two respects. It not only references **Plot No. 129** as an identifiable parcel within the County’s records, but also treats the same as having an identifiable claimant or owner. It further demonstrates that the County Government itself recognized the existence of a dispute relating to that plot.

iii. Thirdly, the Respondent produced a beacon certificate issued on 22<sup>nd</sup> October 2018 in respect of **Plot No. 129 Kutus Old Town** in her favour. A beacon certificate, while not in itself proof of ownership, is indicative of a parcel that has been identified, surveyed, or earmarked on the ground within the planning framework.

c. The above documentary elements are complemented by the oral evidence of the County Surveyor during the site visit, who pointed out **Plot No. 129** and its position relative to **Plot No. 14**. The law on expert evidence is that, although not binding, it is entitled to considerable weight, and should not be rejected without cogent reason.

In the case of **Nzyoka versus Mativo & Others; Kibua (Interested Party) (Environment and Land Appeal 8 of 2017) [2023] KEELC 15940 (KLR) (22 February 2023) (Ruling)**, this court held that:

***“Although courts are not bound by expert evidence, expert evidence is to be given high regard by the courts, and unless there is cogent grounds, that evidence ought not be rejected. In Juliet Karisa versus Joseph Barawa & Another Civil Appeal No. 108 of 1988 (unreported), the Court of Appeal observed that:***

***“Expert evidence is entitled to the highest possible regard and though the court is not bound to accept and follow it as it must form its own independent opinion based on the entire evidence before it, such evidence must not be rejected except on firm grounds.”***

No contrary expert evidence was placed before the court to displace the surveyor’s identification of the plot.

- e. The Appellant’s contention that the surveyor was unable to produce coordinates or complete technical

details does not, in itself, negate the existence of the plot. Rather, it goes to the completeness of the technical record, not the physical or administrative existence of the parcel.

When the above strands of evidence are considered cumulatively, namely:

- i. administrative records referencing the plot;
- ii. official correspondence acknowledging it;
- iii. a beacon certificate issued in respect thereof; and
- iv. on-site identification by the County Surveyor:

the existence of **Plot No. 129** emerges as more probable than not. In the absence of any cogent evidence to the contrary, I am satisfied that the Respondent established, on a balance of probabilities, that **Plot No. 129 Kutus Township**, exists. The finding of the trial court on this issue is therefore upheld.

- f. The central issue in the appeal is evidently whether the Respondent proved ownership of **Plot No. 129**. The Respondent bore the burden of proving on a balance of probabilities that she held a legally cognizable interest in **Plot No. 129 Kutus Township**.

That burden is anchored in **Sections 107 and 108 of the Evidence Act Chapter 80 of Laws of Kenya**, which places upon a party who asserts a fact the

obligation to prove it. Her case on ownership rested on, among others, the following:

- i. An extract of minutes of the Municipal Council meeting held on 7<sup>th</sup> September 2007, certified and signed by the then Town Clerk;
  - ii. A Beacon certificate issued on 22<sup>nd</sup> October 2018 in respect of **Plot No. 129 Kutus Old Town**;
  - iii. Correspondence from the County Government referencing the plot and her association with it; and
  - iv. The oral testimony of the County Surveyor, Mr. Stephen Wambugu, who identified the plot and stated that it was allocated to her.
- g. The Appellant, while disputing the respondent's claim relied on on inter alia, the following:
- i. Separate version of the minutes for the same date;
  - ii. A letter of allotment in respect of Plot No. 14; and
  - iii. Correspondence from the County Government suggesting that the Respondent's minutes were not part of official records.

The Appellant placed considerable reliance on the assertion that the Respondent's minutes were forged. The law is settled that allegations of fraud or forgery

must be specifically pleaded and strictly proved. No such pleading was made, nor was cogent evidence led to meet that elevated standard.

Further, although certain letters were produced purporting to disown the Respondent's minutes, those documents were not produced through their makers, but through employees of the Appellant. In the absence of the makers, the evidentiary weight of those documents is necessarily limited. In the circumstances, this Court is unable to make a definitive finding of forgery, but that, however, does not resolve the matter before the court.

- h. Even in the absence of a finding of forgery, the Court must still interrogate whether the Respondent has established a credible and consistent evidentiary basis for ownership. In that regard, the record reveals notable inconsistencies.

The court has noted that the same County surveyor, Mr. Stephen Wambugu:

- i. Authored correspondence suggesting that the Respondent's minutes did not originate from official records;
- ii. Authored earlier correspondence indicating that Plot No. 129 had been allocated to the Respondent; and

iii. Testified in court, affirming that the plot belonged to the Respondent and identifying its location on the ground.

These evidently changing positions by the County Surveyor are not easily reconcilable. While this Court does not resolve that inconsistency by preferring one version over the other in the absence of proper evidentiary grounding, its effect is to diminish the overall reliability of the administrative record upon which the Respondent's claim rests.

i. It is acknowledged that in respect of township plots previously administered by defunct local authorities, ownership is not always evidenced by formal title documents. Courts have therefore accepted a range of documents, including minutes, plot cards, rates records, and survey documentation, as capable of establishing interests in land. However, what remains constant is the requirement that such evidence must form a coherent and credible chain pointing to allocation and entitlement.

In the case of **Dina Management Limited versus County Government of Mombasa & 5 Others (2023) eKLR**, the Supreme Court underscored that allocation of public land follows a structured process,

the culmination of which is the crystallization of a recognizable proprietary interest.

- j. The following is discernible in the present case:
- i. That the minutes relied upon, while certified, are contested and surrounded by contradictory administrative positions.
  - ii. That no letter of allotment or equivalent primary allocation instrument was produced by the Respondent.
  - iii. That no plot register or plot card was placed before the court.
  - iv. That the beacon certificate, though indicative of identification on the ground, is derivative and presupposes an underlying allocation.
  - v. That the oral testimony of the County Surveyor, while confirming the existence and location of the plot, does not independently establish the legal process of allocation.

Taken cumulatively, that evidence demonstrates that the Respondent has been associated with Plot No. 129 in certain administrative and physical contexts. However, it does not establish with the degree of certainty required by law, that she holds a legally cognizable proprietary interest therein.

- k. This Court is not persuaded that the minutes relied upon by the Respondent were forgeries, as fraud was neither pleaded nor strictly proved. However, the conflicting and unresolved state of the documentary record, coupled with the absence of foundational allocation documents, renders the Respondent's claim to ownership uncertain. In the result, the Respondent did not discharge the burden of proving ownership of **Plot No. 129** on a balance of probabilities.
- l. The duty of this Court, as a first appellate court, is not merely to re-evaluate the evidence, but also to determine whether the trial court:
- i. Failed to take into account relevant matters;
  - ii. Took into account irrelevant matters; or
  - iii. Arrived at a conclusion not supported by the evidence on record.

The gravamen of the Appellant's complaint is that the trial court found in favour of the Respondent on ownership and trespass without a sufficient evidentiary basis. From the record, it is evident that the trial court placed considerable reliance on the site visit conducted at the locus in quo; the evidence of the County Surveyor identifying **Plot No. 129**; and the apparent encroachment by the Appellant onto the said plot.

m. There is no fault in the trial court's reliance on that evidence for purposes of establishing the existence, location, and physical relationship of the plots. Indeed, as already found, that evidence properly supports the conclusion that **Plot No. 129** exists and is adjacent to **Plot No. 14**. However, the difficulty arises in the use to which that evidence was put.

The trial court proceeded from proof of existence and physical encroachment to a finding of ownership in favour of the Respondent, without sufficiently interrogating:

- i. The evidentiary foundation of the Respondent's claim to title;
- ii. The inconsistencies in the documentary record; and
- iii. The absence of a coherent chain of allocation demonstrating a legally cognizable interest in the land.

In effect, the trial court conflated physical identification of a parcel of land with proof of legal entitlement to that land. A finding of trespass is predicated on proof of a superior proprietary or possessory right. Trespass is actionable per se, but only where the claimant has established a right to the land in question. In the absence of proof of ownership or a legally protectable interest, the foundation upon which the finding of trespass rested was not established.

n. Further, the trial court did not adequately address the contested nature of the minutes relied upon by the Respondent, nor did it evaluate the evidentiary gaps in the allocation history of the plot in dispute. That omission resulted in a conclusion that was not supported by a holistic evaluation of the evidence.

Accordingly, I am satisfied that the trial court misapprehended the evidence and thereby arrived at a determination that cannot be sustained from the availed evidence.

o. Under **Section 27 of Civil Procedure Act, Chapter 21 of Laws of Kenya**, costs follow the event unless where otherwise ordered on reasonable grounds by the court. Although the appellant has succeeded in the appeal, and would ordinarily be entitled to costs, I find that in view of the contradictory positions from the County Government as exhibited through the County Surveyor, it is only fair and just that each party bears their own costs both in this appeal and trial court.

16. In view of the foregoing conclusions, the court finds and orders as follows:

**a. That the appeal has merit and is allowed.**

**b. That the trial court's judgement of 15<sup>th</sup> November 2022 and the decree thereof is set aside in its entirety, and substituted with an order dismissing the respondent's suit.**

**c. That each party bears their own costs both in the appeal and trial court.**

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS  
13<sup>TH</sup> DAY OF MAY 2026.**

**Kibunja**

**JUDGE**

**In the Presence of:**

Appellant - M/s Muhoro

Respondent - Mr. Mumo

Court Assistant - Kinyua/Charles

**S.**

**M.**

**ELC**

**S. M.**

**Kibunja**

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