



**Mutisya v Masila (Environment and Land Appeal 9B of 2023)
[2025] KEELC 5452 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL 9B OF 2023**

**EO OBAGA, J
JULY 23, 2025**

BETWEEN

DANIEL MUTINDA MUTISYA APPELLANT

AND

PATRICK M MASILA RESPONDENT

*(Being an appeal from the Judgment and decree of Senior Resident
Magistrate Hon. Mutegi delivered on 27th February, 2020 in Senior
Principal Magistrate's court at Tawa in Civil Case No. 16 of 2013)*

JUDGMENT

Introduction

1. The Appellant filed a suit against the Respondent in which he sought for an order of permanent injunction restraining the Respondent by himself, agents or servants from dealing in any manner with his plot No. X5 at Mavindu Market. The Appellant also sought for declaration that plot No. X5 Mavindu Market belonged to him.
2. It was the Appellant's evidence before the lower court that he had applied for and was allocated plot X5 by the defunct Makueni County Council. He continued paying plot rent, rates and conservancy charges. In the month of February, 2012, the Respondent trespassed to his plot and started constructing on it. He sought the intervention of Makueni County Council who wrote a letter dated 27th February, 2012 asking the Respondent to stop the construction.
3. Despite the Makueni County Council's letter, the Respondent continued to construct. He was forced to file a suit against the Respondent. He obtained an injunction stopping the construction but the Respondent continued to construct.



4. The Respondent denied the Appellant's claim and stated that he was not aware of any existence of any plot known as plot No. X5 and that he was not the one constructing on the alleged plot No. X5. He stated that he was occupying his father's plot No. 6 at Mavindu Market and that he was not the one constructing on plot 6 but the construction was being done by his father. He stated that he was his father's employee.
5. At the conclusion of the hearing, the trial magistrate dismissed the Appellant's case with costs to the Respondent. Aggrieved with the judgment, the Appellant filed an appeal to this court in which he raised the following grounds:
 1. The learned trial magistrate erred in law and fact and misdirected himself by disregarding the Plaintiff's submissions.
 2. The learned trial magistrate erred in law and fact and misdirected himself by failing to consider the applicable case law availed by the Plaintiff.
 3. The learned trial magistrate erred in law and fact and misdirected himself by failing to consider the evidence tendered by the Plaintiff.

Parties submissions

6. The parties were directed to file written submissions. The Appellant filed his submissions dated 17th February, 2025. The Respondent filed his submissions dated 6th March, 2025.

Appellant's submissions

7. In his submissions, the Appellant submitted that he was bound to prove that plot X5 at Mavindu Market belonged to him; that the Respondent had encroached to it and that plot No. X5 lies in between plot No. 5 and 6.
8. The Appellant submitted that he produced a letter of allotment from the defunct Makueni County Council confirming that he was the owner of Plot No. X5 Mavindu Market. He further submitted that a report from the Acting Chief Officer for Lands, Mining and Physical Planning confirmed that he was owner of Plot No. X5.
9. The Appellant submitted further that the Respondent had not proved that plot No. 6 at Mavindu Market belonged to his father and further that the report from the Acting Chief Officer for Lands, Mining and Physical Planning had confirmed that plot 6 Mavindu Market belonged to Kisilu Kaindi and that there was no evidence to confirm that the Respondent's father had purchased plot 6 from Kisilu Kaindi.
10. On the issue of encroachment to plot X5, the Appellant submitted that the Respondent's father had admitted during cross examination that the building had indeed encroached on to the Appellant's plot and that he was the one responsible for the construction.
11. On whether plot X5 was between plot No. 5 and 6, the Appellant submitted that his plot No. X5 was in between Plot No. 5 and 6 and that this had been confirmed by a report dated 2nd February, 2019, which showed that allocation of plots was being done on the basis of available space on the ground and that the Respondent's assertion that there was an escape space between Plot 5 and 6 was not proved by evidence.



Respondent's Submissions

12. The Respondent on his part submitted that the Appellant had not proved his case. He submitted that the application for registration of plot dated 29th November, 2008 was only signed by Mwea Councillor to signify that the plot was within Tulimani Location and the Revenue Clerk was to recommend allocation. The allocation does not bear the plot number and was not approved by the clerk to the council. He further submitted that the letter dated 27th February, 2012 from the Clerk Makueni County Council did not mention ownership of plot X5. The letter only directed the Respondent to stop development until the matter was resolved by the council.
13. The Respondent further submitted that the receipts which the Appellant produced in evidence during the trial were all issued before he was allotted plot X5. The Respondent further submitted that the Appellant caused a report dated 7th February, 2019 to be filed which report did not show the location of plot X5. The report stated the actual location was going to be ascertained when the physical planning of the market is completed.
14. The Respondent submitted that contrary to the Appellant's assertion that ownership of plot 6 was not proved, there was evidence that the Respondent's father purchased plot 6 from Kisilu Kaindi and agreement to that effect was produced in evidence.
15. On the issue of encroachment, the Respondent submitted that evidence adduced was that plot No. X5 did not exist on the ground and that it was not between plot 6 and 5 as alleged. There is therefore no possibility of encroachment on to a non-existent plot.

Analysis and Determination

16. I have carefully considered the grounds of appeal in the memorandum of appeal as well as the submissions by the parties. The only issue for determination is whether the trial magistrate properly considered the evidence adduced the Appellant including his submissions.
17. The duty of a first Appellate court was stated in the case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123 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 due 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 that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression base on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif –vs Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.
18. The Appellant's case before the lower court rested on his witness statement and the evidence which he adduced during the trial and the documents produced in his evidence. The Respondent's evidence was based on the evidence adduced by him and that of his father. The parties agreed that there was need for evidence from the County Government of Makueni which was the successor of the defunct County Council of Makueni to be availed so that it could shed light on the position regarding the existence or otherwise of plot X5 on the ground.



19. An order of the court was made pursuant to which a report dated 26th May, 2015 was filed in court. The parties agreed that this report was of no assistance in light of the issues in contention. The court made another order pursuant to which another report which is undated but was filed in court on 9th September, 2015 was prepared. Summons were issued for the attendance of the Chief Officer Lands, Mining and Physical Planning from Makueni County to come and produce the report. When this was not forthcoming, the counsel for the Appellant wanted it discarded but counsel for Respondent wanted it considered. The court then decided that it is the Appellant who had requested for the report, he was going to rely on it in the judgment without calling the maker.
20. I have gone through the evidence on record as well as the submissions by the parties. I have also gone through the judgment of the trial magistrate. The judgment clearly shows that the trial magistrate considered the evidence adduced as well as the submissions before arriving at a conclusion that the Appellant had not proved his case. There is nowhere in his evidence in chief or in his written statement where the Appellant stated that he was allotted a big space which was between plot 5 and 6 as claimed in his submissions. These submissions were misleading and the trial magistrate was correct in ignoring them.
21. Submissions are not evidence and cannot take the place of evidence. This was the finding by the Court of Appeal in the case of Daniel Toroitich Arap Moi –vs- Stephen Mwangi Muriithi & Another 2014 eKLR where the court held as follows:

“Submissions cannot take the place of evidence. The 1st Respondent had failed to prove his claim by evidence. What appeared in the submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all”.
22. In the case of Githaiga –vs- Mwangi (Civil Appeal No. E064 of 2022) (2024) 13449 (KLR) (30 October, 2024) (Judgment), Justice Magare quoted the case of Erastus Wade Opande –vs- Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 where Justice Mwera (as he then was) stated as follows:

“Submissions simply concretise the focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence which a case can be decided”.
23. The Appellant had annexed a report dated 7th February, 2019 from the Chief Officer Department of Lands, Mining, Housing, Physical Planning and Urban Development to his submissions. This report had not been requested by the court or any of the parties and did not feature during the hearing. It only surfaced as an annexure to the Appellant’s submissions. Though the trial magistrate referred to this report in his judgment, he was not supposed to take it into consideration as it had not been agreed upon by the parties or had it been requested by the court. This notwithstanding, the trial magistrate relied on the report filed in court on 9th September, 2021 which had been ordered for by the court at the request of the parties.
24. The report filed on 9th September, 2021 showed that the allocation of the plots at Mavindu Market was done sequentially from plot No. 1 onwards. The report concluded that there was no plot No. X5 in between plot 5 and 6 and according to the records held, plot X5 was non-existent. The trial magistrate found that the Appellant had not adduced any evidence to show the allocation of the plot No. X5 which he alleged existed. What was in between plots 5 and 6 was a corridor as per the sketch plan attached to the report.



25. The receipts which the Appellant produced in support of his case were all issued prior to the allotment of plot X5 to the Appellant. Even if the procedure then was that allotment letters were issued after a plot had been registered, the Appellant had not adduced any evidence to show that plot X5 existed and that the Respondent had encroached into the alleged plot.
26. The evidence which emerged from the Respondent's side is that plot 6 belonged to Kisilu Kaindi who had stood as a guarantor for his son in law who had taken a loan from ICDC. When Kisilu's son in law failed to repay the loan, ICDC threatened to sell plot 6. It is at this time that Kisilu Kaindi sold the land to the Respondent's father. Though the records at the County Government of Makueni showed that the plot was still in the name of Kisilu Kaindi, the report which was filed in court on 9th September, 2015 showed that ownership in respect of plot 6 had changed but the records had not changed and there were no disputes on the change. Kisilu Kaindi had died and he would not be expected to testify.

Disposition

27. It is clear from the evidence adduced during the hearing that the Appellant had failed to prove his case. The trial magistrate was correct in dismissing it with cost. I therefore find that this appeal is devoid of merit. The same is dismissed with costs to the Respondent.

HON. E. O. OBAGA

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 23RD DAY OF JULY, 2025.

IN THE PRESENCE OF:

Ms. Kyalo for Appellant

Court assistant – Steve Musyoki

