



**Ndiwa v Maasai & 2 others (Environment and Land Appeal
E021 of 2024) [2025] KEELC 5408 (KLR) (17 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5408 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E021 OF 2024**

**EC CHERONO, J
JULY 17, 2025**

BETWEEN

GORDON NDIWA APPELLANT

AND

WILFRED KITIYO MAASAI 1ST RESPONDENT

ESTHER MAASAI 2ND RESPONDENT

THE LAND REGISTRAR BUNGOMA 3RD RESPONDENT

*(being an appeal arising from the Judgment of Hon. T.M OLANDO (P.M)
delivered on 12th April, 2024 in Bungoma CM-ELC NO. E050 of 2022)*

JUDGMENT

Introduction.

1. Vide a Memorandum of Appeal dated 08/05/2024, the Appellant who was the Plaintiff in the former suit preferred this appeal challenging the judgment delivered on 12/04/2024 in Bungoma MC-ELC E050 of 2022 by Hon. T.M. OLANDO wherein the court dismissed the Appellant's case with no orders as to costs.

Background.

2. The Appellant instituted the former suit by way of a plaint dated 30/05/2022 wherein he averred that he was the absolute and registered owner of L.R. No. Elgon/Chemonge/2X7 while the Respondents were in occupation of L.R. No. Elgon/Chemonge/3X1. That the Respondents, without any colour of right or his consent trespassed and/or encroached onto his land and were utilizing the same thus depriving him of his proprietorship rights. He averred that the 4th Respondent colluded with the other Respondents and ratified an erroneous boundary which saw him lose 12 acres of his land. That the 4th



Respondent now intends to rectify the Registry Index Map to reflect the said changes. The Appellant sought for the following orders;

- a. A declaration that the Plaintiff is the sole registered proprietor of all that parcel of land known as L.R No. Elgon/Chemonge/2X7 measuring 22 hectares.
 - b. An eviction order to forcefully eject the Defendants either themselves and/or acting through their agents, servants or family members from L.R No. Elgon/ Chemonge/2X7.
 - c. An order for permanent injunction restraining the defendants, their agents, family members and anyone working under their instructions from interfering in any way with L.R No. Elgon/ Chemonge/2X7.
 - d. Costs of the suit.
 - e. Interests on costs at court rates.
 - f. Any other relief this honourable court may deem fit.
3. In response to the Appellant's claim, the 1st and 2nd Respondents filed a statement of defence dated 20/07/2022 where they confirmed that the Appellant is indeed the registered proprietor of L.R No. Elgon/ Chemonge/2X7 measuring approximately 22.0ha and that they are in occupation of L.R No. Elgon/ Chemonge/3X1 measuring approximately 16.5ha which is registered in the name of their deceased father Jason Masai Machas who died on 22/11/2008. They averred that they have no interest in the Appellant's land. That the 3rd Respondent on the invite of Appellant re-established existing boundaries and they denied hiving out and/or encroaching onto the Appellant's land. They averred that the issue before the court was a boundary dispute that can only be handled by the Land Registrar and challenged the pecuniary jurisdiction of the trial court.
 4. The suit before the trial court was agreed to proceed by way of viva voce evidence with the Appellant calling two witnesses and the Respondents calling four witnesses in total.
 5. PW1 Charles Gordon Ndiwa adopted his witness statement dated 30/05/2022 as his evidence-in-chief. He also referred to his list of documents of an even date containing four (4) items which he produced as P-Exhibit 1-4. He testified that the 2nd and 3rd Respondents were his neighbours and that the land he occupies was ancestral land which was first registered in the year 1969 in his father's name. He argued that the dispute arose in 2020 and he reported to the area chief and later to the Land Registrar who came and placed the boundary.
 6. PW2 John Supory Bucheche adopted his witness statement dated 01/06/2023 as his evidence-in-chief. He testified that his land is bordering the land claimed by the parties herein. He testified that the Land Registrar used a wrong map when he visited the land after a dispute was reported.
 7. DW1 Wilfred Kitiyo adopted his witness statement dated 19/07/2022 as his evidence-in-chief and produced a copy of ID as D-Exhibit1, death Certificate-D-Exhibit 2, chief's report-D-MFI 3, chief's report dated 06/11/2020 as D-MFI 4 and a land Registrar's report-D-MFI 5. He testified that the Appellant's land is 22 ha while their land is 16.5ha separated by natural boundaries. It was his further evidence that the Land Registrar and the Land Surveyor visited the land and marked the boundaries.
 8. DW2 Esther Maasai adopted her witness statement dated 19/07/2022 as her evidence-in-chief. She stated that she attended the meeting called by the Land Registrar and Land Surveyor where boundaries were marked.



9. DW3 Allan Babu testified that he is the land Registrar Bungoma County and that he conducted a site visit on 09/11/2021 in the company of other land Registrars and Surveyor and prepared a report dated 13/01/2022 which was produced as D-Exhibit 5. That he re-established the existing boundaries as they had been placed 40 years ago. In cross-examination, he testified that they did not re-measure the area but relied on the existing boundaries as had been placed as the same had not been tampered with.
10. DW4 Evance Pasile Malinge testified that he is the assistant chief Chemusub Sub-location. He testified that a meeting was held on 30/10/2020 and that he wrote a report which he produced as D-Exhibit 3. He also produced minutes for a meeting held on 06/11/2020 as D-Exhibit 4. That the meeting was attended by the neighbours and Elders and that they found that the boundaries had not been tampered with. In cross-examination, he testified that he did not measure the land so he could tell if the Respondents had encroached into the Appellant's land.
11. The court thereafter made an order for the county land surveyor to attend court to shade more light on the sketch map attached to the Land Registrar's report. The surveyor, Brian Wafula Kubwa testified that he visited the site and the parties herein were allowed to air their grievances. That he took measurements on the ground and confirmed that the boundaries were as they appeared in the map. That the parties agreed that the boundary was as placed over 40 years ago and they re-established it. He stated that he did not measure the total acreage of the two parcels of land i.e L. R. No. Elgon/Chemonge/3X1 and 2X7.
12. Upon considering the issues before it, the trial court found that the Appellant had not proved his case on a balance of probabilities and dismissed the same with each party to bear their own costs.
13. Aggrieved by the trial court judgment, the Appellant preferred the current appeal on the following grounds;
 - a. That the learned trial magistrate erred in law and in fact in dismissing the Appellants suit.
 - b. That the learned trial magistrate erred both in law and in fact in failing to consider the Appellants evidence on record.
 - c. The learned trial magistrate erred in both law and fact by demonstrating obvious bias against the Appellant.
 - d. The learned trial magistrate erred in both law and in fact by relying on the Respondents evidence despite the glaring disparities and inconsistencies.
 - e. That the learned trial magistrate erred in both law and in fact by failing to give reasons for his judgment.
14. The Appellant sought to have the appeal allowed, the judgment of the trial court set aside and the costs of the appeal be awarded to him.
15. By consent, parties agreed to canvass the appeal by way of written submissions.
16. The Appellant filed submissions dated 23/04/2025 where he submitted that the trial court misguided itself by turning the issue before it to be a boundary dispute while his claim was for encroachment thus reaching an erroneous decision.
17. The 1st and 2nd Respondents filed their submissions dated 24/05/2025 where they submitted on five issues. First, it was submitted that the trial court properly directed itself in line with Section 18 of the *Land Registration Act*, 2012, which mandates the Land Registrar to ascertain and fix boundaries. Secondly, the Respondents argued that the trial court's findings were against the weight of the evidence



before it therefore proper. Thirdly, the Respondents submitted that if there was bias as claimed by the Appellant, it should have been raised before the trial magistrate as held in the case of Philip K Tunoi & Another Versus Judicial Service Commission & Another (2016) where the court observed that any speculations of biasness should be raised before the trial court for determination of recusal. They also cited the case of KIMANI V KIMANI [1995-1998] VOL.1 EALR page 134. They denied the allegation that their evidence was inconsistent and termed the Appellant's contention as baseless.

Analysis And Determination.

18. I have considered the summary of the facts and evidence before the trial court as contained in the Record of Appeal, the Memo of Appeal and the rival written submissions. As a first appeal Court, it is the duty of this Court to take into account that it can only interfere with the discretion of the trial Court where it is shown that its discretion was exercised contrary to the law, or that the trial Magistrate misapprehended the applicable law, and failed to take into account a relevant factor or took into account an irrelevant factor, or that on account of the facts and the applicable law, the decision is plainly wrong.
19. In the case of Mbogo & Another V Shar(1968) EA 93, the Court held thus;

“ An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice.” “The discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought whether by evasion or otherwise, to obstruct or delay the course of justice.”
20. Having carefully considered the Record of Appeal, the Grounds of Appeal, the respective written submissions by the parties herein, it is my view that the following issues commend for determination;
 - a. Whether the trial Court had Jurisdiction to hear and determine the dispute.
 - b. Whether the Appeal is merited.
 - c. Who should bear costs of this Appeal?Whether the trial Court had Jurisdiction to hear and determine the dispute.
21. The 1st and 2nd Respondents, through their pleadings and oral testimony, contested the jurisdiction of the trial court to entertain the former suit. They contend that the dispute primarily concerned a boundary issue, which, in their view, fell within the exclusive jurisdiction of the Land Registrar pursuant to the applicable legal framework i.e. Section 18 and 19 of the Land Registration Act, 2012. Additionally, they asserted that the Appellants claimed land measuring approximately 22 hectares valued in excess of Kshs. 20 million which fell outside the trial court’s pecuniary jurisdiction.
22. It is trite that Jurisdiction is everything, and without it, the court has no option but to down its tools. Regarding the trial courts pecuniary jurisdiction, the Appellant, in his witness statement which he adopted as his evidence, indicated that the value of the suit land was Kshs. 14.9 million. Although the 1st and 2nd Respondents alleged that the land was valued at over Kshs. 20,000,000/=, they failed to produce any evidence before the trial court to substantiate that claim. Pursuant to Section 107 of the Evidence Act, the burden of proof lies on he who alleges. In the absence of any credible evidence



to rebut the valuation provided by the Appellant who was the Plaintiff, the Respondents' assertions remained speculative and legally untenable.

23. With respect to the Respondents' contention that the issues before the trial court fell within the mandate of the Land Registrar, it is evident that the issue regarding the boundary had already been addressed by the Land Registrar's report annexed by the parties. Moreover, the reliefs sought in the plaint extend beyond the scope of a boundary dispute. The Appellant had sought orders for eviction and permanent injunction remedies that fall squarely within the jurisdiction of the trial court. Under Section 18(2) of the [Land Registration Act](#), No. 3 of 2012, the Land Registrar lacks jurisdiction to determine disputes relating to ownership or to grant injunctive or eviction orders. Accordingly, the issues raised in the plaint were properly before the trial court, and the Respondents' objection on jurisdictional grounds is therefore without merit.

Whether the Appeal is merited.

24. It is not in contention that the Appellant is the registered owner of L. R No. Elgon/ Chemonge/2X7 Measuring Approximately 22.0Ha while the 1st and 2nd Respondents are beneficiaries/administrators of the estate of the registered owner of L. R No. Elgon/ Chemonge/3X1 Measuring approximately 16.5ha. The contention by the Appellant is that the Respondents colluded and hived off 12acres of his land and that the 1st and 2nd Respondents are utilizing the same to his detriment.
25. From the evidence produced by the parties, it emerges that the dispute has initially been placed before the area chief and the minutes of the resolution were documented in the reports dated 30/10/2020 and 06/11/2020 produced as D-Exhibit 3 and 4. The resolutions thereof are to the effect that the boundary between L. R No. Elgon/ Chemonge/3X1 and 2X7 was intact as it had been fixed for over 40 years ago and that it has not been disturbed. Evidence shows that being dissatisfied with the outcome of those meetings, the Appellant invited the Land Registrar to resolve the prevailing dispute.
26. The Land Registrar in company of the land surveyor is said to have visited the site and prepared a report dated 09/11/2021. Upon hearing both parties and witnesses/neighbours who were in attendance, the Land Registrar noted in his report that the boundary in question is well existing and it matches the area map as confirmed by the surveyor.
27. It is trite law that, as absolute and indefeasible proprietors under Section 26(1) of the [Land Registration Act](#), No. 3 of 2012, both the Appellant and the Respondents are entitled to the full enjoyment of the rights and privileges appurtenant to ownership under the law. These rights include, inter alia, the right to possess, occupy, and use their respective parcels of land.
28. It is therefore my view that it is not sufficient for the Appellant to merely allege that the 1st and 2nd Respondents have trespassed onto his land without adducing cogent evidence in support of that claim. Notably, the Appellant did not produce the alleged correct Registry Index Map (RIM) upon which his assertion was founded. In the absence of such crucial documentary evidence, the allegation of trespass by the Appellant remains unsubstantiated and cannot be sustained. The burden of proving that the 1st and 2nd Respondent had encroached on his land lay with the Appellant and not the 1st and 2nd Respondent.
29. In that regard see Section 107 of the [Evidence Act](#) provides as follows:-

“Whoever desires any court to give judgment as to any legal right or liability dependent on existence of facts which he asserts must prove that those facts exist.”



To prove that the 1st and 2nd Respondents had indeed encroached on his parcel of land, the Appellant needed expert evidence on that issue. That evidence would be given by none other than the Land Registrar and the Land Surveyor who bear the legal responsibility of verifying the location, extent, and boundaries of land parcels, and are mandated to maintain proper and reliable records pertaining to such land.

30. A report by the said Land Registrar and Surveyor were produced by both parties as P-Exhibit 2 and D-Exhibit 5. While the Appellant maintains that the 1st and 2nd Respondents have encroached upon his land, he failed to adduce any evidence to rebut or impugn the findings of the Land Registrar and the County Land Surveyor in the said report dated 09/11/2021. It is important to note that the Land Registrar, in conjunction with the Land Surveyor are vested with the technical expertise and resources necessary to identify and ascertain boundaries pursuant to Sections 18 and 19 of the [Land Registration Act](#), No. 3 of 2012. Their evidence, being that of impartial government officers charged with boundary determination is critical and ordinarily, is accorded significant probative value. In the absence of any credible challenge to their common findings, the trial court properly directed himself in relying on their report in reaching his decision.
31. On the basis of my evaluation of the grounds of Appeal and the record generally, I cannot fault the Learned Trial Magistrate on the decision he arrived at. Consequently, I find no merit in this appeal and the same is hereby dismissed with costs to the Respondents.
32. Orders accordingly.

DATED AND SIGNED AND DELIVERED AT BUNGOMA THIS 17TH DAY OF JULY, 2025.

.....

HON.E.C CHERONO

ELC JUDGE

In the presence of;

1. Mr. Masiga H/B for Mr. Wekesa for the Appellant.
2. Mr. Wekesa H/B for Mr. Makokha for the Respondents.
3. Bett C/A.

