



**Mulaki v Yumbya (Environment and Land Appeal 28 of 2021)  
[2024] KEELC 1564 (KLR) (7 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1564 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 28 OF 2021  
LG KIMANI, J  
MARCH 7, 2024  
(FORMERLY MACHAKOS ELCA 15 OF 2021)**

**BETWEEN**

**FRANCIS NZIOKI MULAKI ..... APPELLANT**

**AND**

**NDEMWA YUMBYA ..... RESPONDENT**

*(Being an appeal from the original judgment of the Chief Magistrate S. Mbungi sitting at Kitui in his civil case number 121 of 2005 dated 16th of April 2021)*

**JUDGMENT**

1. This is an appeal from the Judgment of the Chief Magistrate S. Mbungi sitting at Kitui in civil case number 121 of 2005 dated 16<sup>th</sup> of April 2021. The Memorandum of Appeal dated 12<sup>th</sup> May 2021 sets forth several grounds of appeal that:
  1. The learned trial magistrate erred in law when he based his decision on inadmissible evidence, an error that led him to arrive at the wrong conclusion.
  2. The learned trial magistrate erred and misdirected himself when he based his decision on the evidence of the Respondent and failed to consider the evidence of the appellant and error that led him to arrive at the wrong conclusion.
  3. The learned trial magistrate erred in law when he failed to consider the public interest deductible and/or expressly arising from the case, a fact that led him to arrive at a decision which was clearly contrary to public policy.
  4. The learned trial magistrate erred in law when he failed to adjudicate on the case before him judicially, an error that led him to arrive at a decision supporting illegal and/or unlawful alienation of public land by the Respondent.



5. The learned trial magistrate erred in law when he failed to dismiss the Respondent's counter-claim with costs and allow the Appellant's claim with costs.
2. The Appellant prays that the appeal be allowed with costs, the lower court's judgment be quashed and/or set aside and the same be substituted with a judgment of this court allowing the plaintiff's claim with costs and dismissing the 1<sup>st</sup> Defendant's counter-claim with costs to the plaintiff.
3. The suit before the trial court was instituted vide Amended Plaint dated 20<sup>th</sup> April 2005 and amended on 23<sup>rd</sup> July 2009 where the Plaintiff avers that he was at all material times the owner of a corner plot known as plot number 192 Kabati Market measuring 50 by 100 feet which borders another corner plot number 83B Kabati Market owned by Loise Mbiviu Musee. The boundary between the two plots is a road reserve measuring 37 feet from outer wall and 25 feet from corridor to corridor.
4. The Plaintiff averred that on or about June 2002 without his consent or authority, the 2<sup>nd</sup> Defendants' employees entered upon this plot, the road reserve immediately next to his plot and purported to carve out a portion to constitute an independent plot measuring 10 by 100 feet but upon objection he was informed that his plot would remain the same.
5. In April 2005, the 1<sup>st</sup> Defendant entered into his plot in the road reserve and constructed a structure which action is wrongful, unlawful and amounts to trespass and nuisance as well as alienation of his property. The plaintiff sought a permanent mandatory injunction directing the defendants jointly and severally to give him vacant possession of the portion alienated and to restrain them from encroaching upon his land, general damages for trespass and costs of the suit.
6. The 1<sup>st</sup> Defendant filed a Defence and counter-claim where admitted that the Plaintiff is indeed the owner of the undeveloped plot number 192 situated at Kabati Market measuring 50 by 100 feet and that his plot borders wall to wall with his. He denied that his land was as a result of conspiring with the 2<sup>nd</sup> Defendant to alienate the plaintiff's land and states that none of the Plaintiff's portion of land has been alienated.
7. In the counter-claim, the 1<sup>st</sup> Defendant states that on or about 30<sup>th</sup> July 2002, he purchased Plot number 104 Kabati Market measuring 20 by 100 feet from one Mwanja Mukangi Nzasa and that the transfer was duly recommended by the Town Planning, Markets and Housing Committee of the 2<sup>nd</sup> Defendant in its meeting held on 2<sup>nd</sup> October 2002 and further approved by the full council meeting held on 4<sup>th</sup> June 2003.
8. The 1<sup>st</sup> Defendant averred that the correct site for his plot number 104 was duly pegged by the 2<sup>nd</sup> Defendant and his building plan approved by the District Physical Planning officer and therefore he is entitled to peaceful possession and enjoyment of his plot. He prayed for a declaration that he is the rightful owner of all that plot no.104, Kabati Market measuring 20 by 100 feet, that the plaintiff's claim be dismissed with costs as well as costs of the counter-claim.

### **Summary of the proceedings before the trial court**

9. When the matter was scheduled for hearing on 1<sup>st</sup> September 2011, counsel for the Plaintiff sought an adjournment which the trial court declined to grant and the plaintiff closed his case. The hearing proceeded with the 1<sup>st</sup> defendant's counter-claim.
10. DW 1, Fredrick Mwendwa Yumbwa clarified that he changed his name to Ndemwa Yumbwa. He testified that he owns Plot 104 Kabati Market which he bought from Mwanja Mukangi in 2002 at Kshs.62,500/= through a sale agreement and he obtained a certificate of sale from the County Council of Kitui. He acknowledged that plot 192 measures 50 x 100 feet and it belongs to the plaintiff and



borders his plot number 104 which measures 20 x 100 feet. He testified that he started developing his plot after applying for a building development plan which was approved. He produced the minutes of the 2<sup>nd</sup> Defendant's town planning and market committee where the approval of the sale occurred as well as the local physical development plan for Kabati market identifying his parcel of land and denied that he has blocked the plaintiff's plot.

11. Upon cross-examination, he stated that the two plots of land have an access road of 18 feet and denied that his plot of land is a road reserve.
12. DW 2, Mwanja Mukangi testified that he knows both the plaintiff and the defendant and that the plaintiff bought the plot next to his from Michael Nguli. He testified that he sold to the defendant an undeveloped plot at Kabati measuring 20 by 100 feet for KShs. 65,500/= and they entered into an agreement. He denied that the defendant had exceeded the boundaries of the suit property and that there is a construction on the plot by the defendant. He stated that when he sold the plot it had no number.
13. The defence closed its counter-claim and the Plaintiff testified in his defence against the counter-claim.
14. PW 1 Francis Nzioki Mulaki, the plaintiff testified that he owns a corner plot known as Plot 192 Kabati Market measuring 50 x 100 feet which he bought from one Micheal Nguli and they entered into a written agreement. The plot is surrounded by a wall and that there should be a road next to the corner plot. He submitted building plans but they were yet to be approved and prayed that the counter-claim be dismissed with costs. On cross-examination, he stated that the defendant's plot 104 was approved illegally and that it is near the road and is blocking his plot. He acknowledged that his plot is still undeveloped but stated that there is no access to it.
15. He further testified that he objected to County Council on the road when he found survey on the road reserve. He sued because his plot was blocked on one side from the road, He stated that plot 104 blocks him from the road and the correct procedure was not followed in creating the plot 104. He stated his plot was intact but there was no access.
16. On cross-examination he stated that between plots 104 and 83B there is a road reserve and plot 104 was approved illegally.
17. The trial Court made a visit to the site on 28<sup>th</sup> June 2019 when PW3 Jimmy Mungalo Elijah stated that he was the surveyor based in Kitui survey office and was summoned by the court to point out plot 104 on the ground according to the survey records. He stated that the plot borders the Plaintiff's plot 192 and an access road of 6 metres which is between plot 82 and 104 but noted that there is no access road between plot no.104 and 192. From the records, plot 192 belonged to Mr. Mulaki while 82A belonged to Musee Kaigwae and plot 104 had no name and is not developed. Plot 104 is a corner plot and borders two access roads. He stated that he had an original map and it is the only one they use in their office and he produced it in evidence and a map layout of Kabati market.
18. The trial court in its judgment found that the Plaintiff failed to testify and adduce evidence in support of his case and the 1<sup>st</sup> Defendant gave evidence which was not challenged, produced documents in support of his counter-claim and the court visited the scene. The 1<sup>st</sup> Defendant was found to have proven his counter-claim and judgment was entered in his favour against the plaintiff.

### **Appellant's written submissions**

19. Counsel for the Appellant reiterated the averments in the pleadings. He submitted that the 2<sup>nd</sup> Defendant refused to supply him with the development map that was very crucial to his case, he could not proceed with the hearing and his case was dismissed when the court declined an adjournment.



20. Counsel submitted on the 4<sup>th</sup> ground that the respondent had no claim against the appellant since he only prayed for a declaration that he is the rightful owner of Plot 104 Kabati Market.
21. The Appellant scrutinized and faulted the evidence of the surveyor, submitting that he had testified that plot 104 did not have an owner indicated on the map and that it was not developed. He also highlighted that the layout map produced by the surveyor did not bear a date shown when it was drawn and did not show all the plot numbers. On the 1<sup>st</sup> ground, it was submitted that the map produced by the surveyor was inauthentic and inadmissible
22. The Appellant also faulted the trial court's holding that his reply to the counter-claim were mere allegations in the absence of oral evidence to substantiate it, when he had testified against the counterclaim.
23. On the third ground, the appellant submits that in addition to the closure of part of his access to his corner plot, there was an illegal alienation of 20 feet of public access road. It is their submission that the trial court should have considered the 1<sup>st</sup> Defendant's documents individually and that the court failed to determine the issues raised in the case, quoting Order 21 rule 4 of the Civil Procedure Rules, 2010 on the content of a judgment in defended suits.
24. Submitting on ground 5, the Appellant submitted that the 1<sup>st</sup> Defendant's counter-claim ought to have been dismissed with costs.

### **Respondent's submissions**

25. Counsel for the Respondent submitted that the appeal is baseless, malice actuated and a misuse of the Honourable court's process as well as a waste of the court's time. Submitting on ground one of the Memorandum of appeal, counsel submitted that they did not tender inadmissible evidence and on ground two that, the trial magistrate correctly considered the 1<sup>st</sup> Defendant's evidence and all other evidence on record. It was highlighted that there was no plaintiff evidence on record for the learned trial magistrate to consider as his case was closed before he could produce any evidence.
26. On the third and fourth ground, the Respondent submits that there was no public interest at all in the case because the suit premises are not public land. He dismissed the statement and stated that the trial magistrate did not in any way support illegal and/or unlawful alienation of public land by the respondent.
27. On the fifth ground, it was submitted that the Learned trial magistrate made a decision based on the evidence on record, noting that there was none to support the plaintiff's claim. It is the respondent's submission that the appeal lacks merit and is a waste of the Honorable court's process aimed at delaying the respondent from enjoying the fruits of his rightfully obtained judgment.

### **Analysis and determination**

28. As the first appellate court, this court has the duty to re-evaluate and re-examine the evidence before the trial court and draw its own conclusions while at the same time appreciating that the Trial Court is the one that had the opportunity of hearing the testimonies of witnesses and seeing the evidence. This duty was succinctly stated by the Court of Appeal in *Okeno v- Republic* (1972) EA 32 as follows: -

“An appellant is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination and to the appellant's court own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. It is not the function of the first appellate court merely to scrutinize the evidence to see if there was



some evidence to support the lower court's findings and conclusions; it must make its own findings and conclusions. Only then can it decide whether the magistrate's findings can be supported. In doing so, it should make an allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses."

29. The Court has considered the grounds of appeal, record of appeal and submissions by Counsel and proceed to deal with the grounds of appeal:

Ground 1: The learned trial magistrate erred in law when he based his decision on inadmissible evidence, an error that led him to arrive at the wrong conclusion.

30. The Appellant claims that the trial court erred in relying on the map produced by the Surveyor Jimmy Mungalo. Counsel for the appellant submitted that the map was unauthentic and inadmissible for the reason that it had no date to show when it was made and did not have all plot numbers. He also faulted the map stating that the map showed that plot No. 192 was owned by Mr. Mulaki the plaintiff and the owner of plot 82 A was Musee Kangwe while 104 had no owner.

31. Counsel for the Respondent on his part stated that the court did not rely on any inadmissible evidence and in any event the Counsel for the Appellant did not object to the said evidence being tendered.

32. The Court has considered the map that was referred to by Counsel for the Appellant produced by PW2 the Surveyor Jimmy Mungalo. It is noted that the appellant did not include the said map in the record of appeal. However, the same is contained in the original trial court file and the witness produced in evidence a report dated 25<sup>th</sup> September 2019 marked as exhibit 1A and attached to the report exhibit 1B, being a certified copy of a part print of Kabati Market lay out certified as a true copy on 25<sup>th</sup> September 2019. The said lay out shows the location of plots 192, 104, 82A and the road between plots 104 and 82A.

33. The court observes from the trial court record that the scene visit and the presence of the surveyor who produced the impugned map was all agreed upon by consent of counsel for the plaintiff and the 1<sup>st</sup> defendant when they were in court on 8<sup>th</sup> November 2012. None of the Counsel present during the site visit and the subsequent hearing in court when the witness testified, objected to production of the documents. In the Court's view, it was expected that for the surveyor to point out the ground location of the suit plots he needed to carry with him the official survey records. The witness stated that he inherited the map from Kitui County Council the 2<sup>nd</sup> defendant and that there was no other map in Kitui offices apart from the one he produced in court.

34. Further to this, the 1<sup>st</sup> Defendant produced in evidence another map of Kabati Market which is also contained in the record of the trial court and produced as D Exhibit 1. The same shows that it was on 24<sup>th</sup> May 2018 certified as a true copy of the original by the Chief Physical Planner, County Government of Kitui. It is further shown that it was prepared before 1998 by the former County Surveyor. Both the map produced by the surveyor and the 1<sup>st</sup> Defendant show plot No's 192 and 104 located next to each other.

35. Survey records are public documents and Section 80 of the *Evidence Act* provides for the issuance of certified copies of public documents and states as follows;

- (1) Every public officer having the custody of a public document which any person has a right to inspect shall give that person on demand a copy of it on payment of the legal fees therefor, together with a certificate written at the foot of such



copy that it is a true copy of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

(2) Any officer who by the ordinary course of official duty is authorized to deliver copies of public documents shall be deemed to have the custody of such documents within the meaning of this section.

36. Further Section 83 of the *Evidence Act* provides as follows;

(1) The court shall presume to be genuine every document purporting to be a certificate, certified copy or other document which is–

(a) declared by law to be admissible as evidence of any particular fact; and

(b) substantially in the form, and purporting to be executed in the manner, directed by law in that behalf; and

(c) purporting to be duly certified by a public officer.

(2) The court shall also presume that any officer by whom any such document purports to be signed or certified held, when he signed it, the official character which he claims in such document.

37. From the foregoing the court is entitled to and does presume the map produced in evidence to be authentic and admissible based on the fact that they were certified as true copies of the original maps as per the records of the offices of the Ministry of Planning and National Government and the Lands Survey offices in Kitui County. The Court notes that the Appellant did not produce any other maps that showed the position of the plots in question that was contrary to what the 1<sup>st</sup> defendant produced.

38. The court is thus not persuaded that the maps produced in court were unauthentic and inadmissible and finds that the trial court did not err in accepting them in evidence.

Ground 2: The learned trial magistrate erred and misdirected himself when he based his decision on the evidence of the Respondent and failed to consider the evidence of the appellant and error that led him to arrive at the wrong conclusion.

39. The Appellant's claim before the trial court was for a permanent mandatory injunction directing the defendants jointly and severally to give to the plaintiff vacant possession of the portion alienated and to restrain them from encroaching upon his land Plot 192 Kabati Market, general damages for trespass and nuisance and costs of the suit. The Respondent on the other hand denied any encroachment and alienation of the appellant's land and prayed for a declaration that he is the rightful owner of all that plot no.104, Kabati Market measuring 20 feet by 100 feet, that the plaintiff's claim be dismissed with costs as well as costs of the counter-claim.

40. The plaintiff closed his case on 1<sup>st</sup> September 2011 when the same came up her hearing but he failed to proceed with his claim after an adjournment he sought was declined and the court proceeded with hearing of the counter-claim. The Appellant contends that the trial court failed to consider his evidence.



41. In the Court’s view, once the Plaintiff closed his case without tendering any evidence in support of his claim as contained in the plaint, the said party’s pleadings and bundle of documents are not to be taken as evidence but remain mere statements of facts with no probative value. The same was also held in the case which was quoted by the trial court, *North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi* [2019] eKLR.

42. The Appellant further faulted the trial court’s holding that his reply to the counter-claim was mere allegations in the absence of oral evidence to substantiate it, when he had testified against the counterclaim. The court has considered the trial court’s findings on the plaintiff’s defence to the counterclaim and the court agrees with Counsel for the Appellant that the trial court erred when he stated as and determined that:

“The plaintiff never testified either in support of his case or in defence of the counterclaim. His reply to the counterclaim remains mere allegations in absence of oral evidence to substantiate him.”

43. The court record shows that indeed the Appellant filed a reply to the 1<sup>st</sup> Defendant’s counter claim where he denied the claim that the Respondent purchased plot No. 104 and stated that if such a sale occurred it was illegal since there was no property to sell. He denied the existence and/or legality of the approval by the Town Planning Markets and Housing Committee and the full council meeting which if they happened did so in ignorance of the facts. The Appellant further denied the claim of payment of council rates and existence of any substantial development on the plot.

44. The Appellant also testified in opposition to the counterclaim and adduced documentary evidence and called a witness. From the court record the appellant produced an agreement for sale where he bought plot 192 and an unapproved building plans as well as letters and a part development plan.

45. In the court’s view the Appellant did not adduce any evidence in support of his case as the plaintiff and the trial court rightfully dismissed his case. However, the trial court did make an error in finding that the Appellant did not testify in defence of the respondent’s counter claim, when he in fact did.

Ground 3: The learned trial magistrate erred in law when he failed to consider the public interest deductible and/or expressly arising from the case, a fact that led him to arrive at a decision which was clearly contrary to public policy.

46. The appellant raised the ground of appeal that the trial magistrate failed to consider the element of public interest deductible and/or expressly arising from the case, which led him to arriving at the wrong conclusion. The Appellant’s claim is that plot No. 104 was created by curving out by illegal alienation of 20 by 100 feet of a public access road and the court did not address it’s mind to this.

47. The *Black’s Law Dictionary* describes public interest litigation as follows: -

“Public Interest Litigation means a legal action initiated in a Court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.”



48. The learned judges of the Supreme Court of Kenya in the case of *Okoti & 2 others v Attorney General & 14 others* (Petition (Application) 2 (E002) of 2021) [2023] KESC 31 (KLR) (21 April 2023) (Ruling) held as follows:

“Public interest litigation aims to address genuine public wrongs where legal action is initiated for the enforcement and advancement of constitutional justice and public interest..... gain, as we have stated above and reiterated the finding by the Constitutional Court of South Africa in *Biowatch*, the primary consideration in public interest constitutional litigation should always be seen to be the need to promote access to justice and not self-interest per se.”

49. The Court has carefully perused the pleadings before the trial court and finds that the Appellant clearly instituted this suit in his own personal capacity for his personal interest and did not include the interest of the public or any other community interests in his Pleint. The suit therefore cannot be classified as a public interest case. To demonstrate that the Appellant’s claim was not a public interest claim one has to look at paragraphs 8 of the plaint where the plaintiff accuses the Respondent of trespassing on his plot though he adds “road reserve”. Paragraph 10 where he states that in April 2005, the 1<sup>st</sup> Defendant entered into his plot in the road reserve and constructed a structure and the plaintiff avers that this action is wrongful and/or unlawful and amounts to trespass and nuisance as well as alienation of his property. The prayers in the plaint are that he sought a permanent mandatory injunction directing the defendants jointly and severally to give him vacant possession of the portion alienated and to restrain them from encroaching upon his land, general damages for trespass and costs of the suit. In the Court’s view, none of the prayers in the plaint involved return of the land to the public or was in public interest.

50. Further, the Appellant did not produce any documents to show that indeed the 20 by 100 feet plot number 104 was part of the road reserve. In contrast the 1<sup>st</sup> Defendant and the surveyor produced maps that showed the location of the road reserve which was outside of plot No. 104.

Ground 4 and 5: The learned trial magistrate erred in law when he failed to adjudicate on the case before him judicially, an error that led him to arrive at a decision supporting illegal and/or unlawful alienation of public land by the Respondent.

5: The learned trial magistrate erred in law when he failed to dismiss the Respondent’s counter-claim with costs and allow the Appellant’s claim with costs.

51. The Appellant faults the trial court on the ground that having erroneously found that the Appellant did not adduce any evidence in support of his case or in defence in the counter claim, the trial court analyzed the party’s evidence in five (5) sentences which were not supported by any reasons. The Appellant’s counsel submitted that the judgement violated Order 21 Rule 4 of the *Civil Procedure Rules* on what should be contained in a judgement.

52. As this court has found earlier, the trial court erred in failing to consider the evidence of the Appellant in defence of the counterclaim. The trial court assessed the evidence of the Respondent and found that he had proved his counter-claim, where his only prayers were a declaration that he is the rightful owner of all that plot no.104, Kabati Market measuring 20 feet by 100 feet, that the plaintiff’s claim be dismissed with costs as well as costs of the counter-claim.



53. In line with the 1<sup>st</sup> Appellate court's mandate which is to reconsider the evidence, evaluate it itself and draw its own conclusions as was found in *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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...”

54. This was also found in the case of *Okeno v Republic* [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

“An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (*Pandya v. R.*, [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (*Shantilal M. Ruwala v. R.*, [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see *Peters v. Sunday Post*, [1958] E. A. 424.”

55. The 1<sup>st</sup> Defendant's counter claim is that he purchased Plot No. 104 measuring 20 x 100 feet Kabati Market in the year 2002 at Kshs. 62,500.00. He applied for building plans which were approved and he started development but in the process he was served with an order of injunction. He produced in evidence the sale agreement, minutes of the Town Planning & Market Committee for 2<sup>nd</sup> October 2002 and receipts. He also produced the local physical development plans for Kabati Market approved by Physical Planning. He stated that he has not blocked the Appellant's plot. On cross-examination, he confirmed that between his plot 104 and plot 83B there is an access road of 18 feet and that his plot is not a road reserve. The 1<sup>st</sup> Defendant called a witness Mwanja Mukangi who testified and confirmed having sold plot No. 104 to the 1<sup>st</sup> Defendant.

56. The Plaintiff testified in defence of the counter claim stating that he was the owner of a corner plot number 192 Kabati Market measuring 50 by 100 feet which borders another plot number 83B owned by Loise Mbiviu Musee, which is also a corner plot. The boundary between the two plots of land is a road reserve measuring 37 feet.

57. The Plaintiff averred that on or about June 2002 the 2<sup>nd</sup> Defendants' employees entered upon this plot, the road reserve immediately next to his plot and purported to carve out a portion to constitute an independent plot measuring 10 feet by 100 feet but upon objection he was informed that his plot would remain the same.

58. He stated that in April 2005, the 1<sup>st</sup> Defendant entered into his plot in the road reserve and constructed a structure and the plaintiff avers that this action is wrongful and/or unlawful and amounts to trespass and nuisance as well as alienation of his property. He sought a permanent mandatory injunction directing the defendants jointly and severally to give him vacant possession of the portion alienated and to restrain them from encroaching upon his land, general damages for trespass and costs of the suit.



59. The court has considered the evidence in support of the counter claim and in opposition to the same. The 1<sup>st</sup> defendant produced in evidence the official records from the County Government of Kitui and its predecessor the County Council of Kitui. The certified copy of the map of Kabati Market certified by the Chief Physical Planner County Government of Kitui shows that the two plots No. 192 and 104 exist and are located next to each other. It shows that plot No. 104 has a road next to it.
60. The 2<sup>nd</sup> map on record was produced by the Surveyor Jimmy Mungalo who was summoned by the court by consent of Counsel for the parties to attend a site visit and point out the location of plot No. 104. The said Surveyor produced in court a report and a map certified as a true copy of the original by the Sub-County Surveyor Kitui showing the layout of plots at Kabati Market and he pointed out plot 104 measuring 20x100 feet showing that it borders plot 192. He confirmed that the map was drawn by the former Kitui County Council and is the only one in their offices. The counsels for the plaintiff took issue with the fact that the map did not have a date on which it was drawn and some of the plots did not have numbers. He also took issue with the fact that the name of the owners of plot No's. 192 and 82A were shown on the map while those of 104 were not shown. The Court has elsewhere in this judgement found that the maps produced were authentic and admissible and the court finds that they are a reflection of the existence of the two plots numbers 192 and 104 and that plot number 104 was the plot that was next to the road reserve and the said plot was not part of the said road reserve.
61. The Appellant on the other hand testified that he purchased plot No. 192 and described its location as a corner plot which was next to a road reserve measuring measuring 37 feet. The sale agreement produced in court states the plot is a corner plot. However, it is noted that the Appellant did not present any official documents to show the location of the plots in issue and in particular to show that plot number 104 was located on what ought to be a road reserve. He also did not produce in evidence official records to show that indeed his plot 192 borders the road reserve.
62. Further, the 1<sup>st</sup> defendant presented a map certified on 24<sup>th</sup> May 2018 as a true copy of the original by the Chief Physical Planner County Government of Kitui. The court is satisfied by the 1<sup>st</sup> Defendant's evidence and the two maps presented to court which show the same location for plot No's 104 and 192. The said two plots are shown to be next to each other with plot No. 104 being the one next to the road. Further, the surveyor who visited the site of the two plots identified the plots on the ground. The 1<sup>st</sup> Defendant also called a witness by the name Mwania Mukangi who testified that he sold the land to the him and that he knew that the Plaintiff had purchased the plot next to the one he sold to the 1<sup>st</sup> defendant.
63. Having re-examined, re- assessed and evaluated the evidence adduced before the trial court, this court finds that the trial court did not err in the final determination of the case in finding that the respondent has proved his counterclaim. In the court's view the Appellant did not disprove the respondent's evidence in support of the counterclaim. The Court of Appeal in *Mbutbia Macharia v Annah Mutua Ndwiga & another* [2017] eKLR discussed the burden of proof as follows:
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant. It was upon the appellant



to prove that he did not affix his signature on the transfer of the suit premises in favour of the 1<sup>st</sup> respondent.”

64. From the foregoing, the court finds that the appeal herein lacks merit and the same is hereby dismissed. On the issue of costs, the court has considered that the trial court erred on a very significant part of the case before him by failing to take into account evidence adduced before him by the Appellant and in finding that the same was not adduced contrary to the record before him. I will thus order that each party shall bear his own costs of the appeal but the Appellant will pay to the Respondent the costs of the suit before the trial court.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 7<sup>TH</sup> DAY OF MARCH, 2024.**

**HON. LADY JUSTICE L. G. KIMANI**

**ENVIRONMENT & LAND COURT**

The Judgement is read virtually and in open court in the presence of-

J. Musyoki Court Assistant

K. Musyoki for the Appellant

M/S Nzau for the Respondent

