



**Mbalitsi v Barasa (Environment and Land Appeal E046 of 2022)  
[2024] KEELC 3736 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3736 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT AND LAND APPEAL E046 OF 2022**

**DO OHUNGO, J**

**MAY 9, 2024**

**BETWEEN**

**HUDSON MBALITSI ..... APPELLANT**

**AND**

**AGNES ONGAYA BARASA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Chief Magistrate's  
Court at Kakamega (Hon. J N Maragia, Senior Resident Magistrate)  
delivered on 14th September 2022 in Kakamega MCELC No. E105 of 2020)*

**JUDGMENT**

1. Litigation leading to this appeal started in the Subordinate Court on 1<sup>st</sup> September 2020 when the respondent filed plaint dated 24<sup>th</sup> August 2020, against the appellant. She averred that she was the registered proprietor of the parcel of land known as Kakamega/County Block 4/101 which bordered the appellant's land parcel number Kakamega/County Block 4/31. That the appellant trespassed onto parcel number Kakamega/County Block 4/101 in the year 2017 and constructed a house thereon. She therefore prayed for judgment against the appellant for an order that the appellant's construction and occupation of Kakamega/County Block 4/101 was unlawful, eviction of the appellant from Kakamega/County Block 4/101 and for costs of the suit.
2. The appellant filed a statement of defence through which he denied the allegations of trespass and averred that he constructed his house in the year 2005. He further averred that the respondent had no claim over Kakamega/Municipality Block IV/31 and that the respondent was a trespasser thereon. He urged the court to dismiss the suit with costs.
3. Upon hearing the matter, the Subordinate Court (Hon. J N Maragia, Senior Resident Magistrate) delivered judgment on 14<sup>th</sup> September 2022 and entered judgment for the respondent as prayed in the plaint.



4. Dissatisfied with the outcome, the appellant filed this appeal on 13<sup>th</sup> October 2022, through Memorandum of Appeal dated the same date. He prayed that the judgment be set aside. The grounds of appeal are listed on the face of the Memorandum of Appeal. They can all be collapsed into one: that the decision went against the weight of the evidence.
5. The appeal was canvassed through written submissions. The appellant argued that the Learned Magistrate erred in the judgment since the case was lacking in documentary proof of the respondent's claim. That the respondent did not produce any documentary proof showing how she acquired ownership of Kakamega/County Block 4/101 and that the Learned Magistrate did not scrutinize the authenticity of the documents produced by the respondent. The appellant therefore urged this court to allow the appeal.
6. On her part, the respondent argued that she proved ownership through a certificate of lease and that the report by the Director of Survey Kakamega County showed that the appellant had constructed a house on the respondent's parcel. She further argued that the appellant did not prove that the house he built was within his parcel. She therefore urged this court to uphold the judgment of the Subordinate Court and to dismiss the appeal.
7. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See [\*Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates\*](#) [2013] eKLR.
8. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issue that arises for determination is whether the reliefs sought ought to have issued.
9. The respondent contended that the appellant had trespassed onto her property. Trespass is defined in the 10<sup>th</sup> Edition of Black's Law Dictionary as an unlawful act committed against the person or property of another; especially wrongful entry on another's real property.
10. The respondent referred to parcel numbers Kakamega/County Block 4/101 and Kakamega/County Block 4/31 in her plaint. From the material on record including the certificates of lease, it seems that the correct parcel numbers are Kakamega/Municipality Block 4/101 and Kakamega/Municipality Block IV/31. The respondent's case as pleaded was that she is the owner of Kakamega/Municipality Block 4/101 and that the appellant had trespassed into and constructed on the said parcel. The respondent maintained that he was within his Kakamega/Municipality Block IV/31.
11. In those circumstances, it was important to locate the actual position of the offending construction. In a bid to prove her case, the respondent produced a letter dated 29<sup>th</sup> March 2021 from the Director of Survey, County Government of Kakamega. The letter was addressed to the respondent and read thus:  
  
Re: Plot Identification - Kakamega Municipality Block Iv/101  
  
Refer to your letter dated 10<sup>th</sup> March, 2021 concerning the above matter.  
  
Parcel Kak/mun.block Iv/101 was physically identified on the ground and boundary beacons found intact.  
  
The parcel has a residential building that is occupied. This was officially shown to you on 18<sup>th</sup> March, 2021.



For your record and information.

12. The Learned Magistrate, in a very summary two page judgment, resolved the matter thus:

I have carefully considered the pleadings and evidence before the court. The certificate of lease shown by the defendant relates to Kakamega/Municipality Block IV/31 which is totally different from the subject land. The plaintiff has demonstrated that (sic) ownership of the subject land. Her claim and evidence remain unchallenged.

To this end, I find that the plaintiff has proved his (sic) case as against the defendant only on a balance of probability. I enter judgment in favour of the plaintiff as pleaded in the plaint.

13. The judgment could have benefitted from more analysis of the material that was placed before the court. To begin with, the appellant had all along maintained that his construction was within his Kakamega/Municipality Block IV/31 and that the construction had been there long before the respondent obtained title. It was therefore crucial that detailed survey evidence including a survey plan be received to help the court in establishing the true identity of the parcels, their boundaries and location of any development. The central role played by surveyors and survey plans was discussed by the Court of Appeal in *Elizabeth Wambui Gitbinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] eKLR. In addition to receiving evidence from surveyors, sometimes courts need to do site visits to receive further evidence.
14. In the litigation before the Subordinate Court, no survey plan was produced. The surveyor who authored the letter or report dated 29<sup>th</sup> March 2021 did not testify. The said report is very thin in details. It simply stated that parcel number Kakamega/Municipality Block IV/101 was identified and that there was an occupied residential house on it. Nothing was said of parcel number Kakamega/Municipality Block IV/31, its location and any development thereon. It is unclear how the Subordinate Court concluded that the residential house on referred to in the report was the one that the respondent was referring to.
15. It is clear that the proceedings before the Subordinate Court did not resolve the underlying dispute between the parties. The parties too must assist the court by placing before it sufficient material to enable it to achieve its overriding objective and the just determination of the dispute.
16. I find merit in this appeal. I set aside the judgment of the Subordinate Court. Hearing of the suit be undertaken afresh before a magistrate other than Hon. J. N. Maragia. Each party to bear own costs of this appeal.

**DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**D. O. OHUNGO**

**JUDGE**

Delivered in open court in the presence of:

No appearance for the Appellant

Mr J Mukavale for the Respondent

Court Assistant: M Nguyayi

ELCA No. E061 of 2022 (Kakamega) Page 2 of 2

