



**Mboo v Muthengi (Environment and Land Appeal E011 of 2021)
[2025] KEELC 702 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 702 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E011 OF 2021
LG KIMANI, J
FEBRUARY 20, 2025**

BETWEEN

MWANGANGI MBOO APPELLANT

AND

STEPHEN KANUI MUTHENGI RESPONDENT

(Being an appeal arising from the judgment of Hon. M. Onkoba delivered on 17th November 2021 in Mwingi Senior Principal Magistrates' Civil Case No.129 of 2017)

JUDGMENT

1. This is an appeal from the judgment of the Hon. M. Onkoba, delivered on 17 November 2021, in Mwingi Senior Principal Magistrates' Case No.129 of 2017. The Memorandum of Appeal, dated 14 December 2021, sets forth twelve grounds of appeal which are summarized below.
2. The Trial Magistrate failed to evaluate and analyse the evidence and submissions in support of the Appellant's case and relied on contradictory evidence and submissions from the Respondent.
3. The appellant claims that the learned Trial Magistrate erred when he based his judgment on the expert witness, the Agricultural Officer's report, which he had found to be exaggerated and/or faulty.
4. The Appellant contends that the Respondent did not fulfil his duty of proving his case on a balance of probability and the Trial Magistrate erroneously found in his favour.
5. Further, the Appellants contend that the Trial Magistrate erred in law and in fact by deviating from the material facts and the substance of the matter and taking into consideration extraneous and antecedents of the respondent in matters before the Court.
6. The appellant argued that it was an error to find that the damage assessed occurred on the Respondent's land when it is not indicated the parcel number for the purpose of identifying the property.



7. The Appellant prays that the appeal be allowed, the judgment of the Court be set aside and/or varied and the Appellant be awarded costs of the lower Court and the appeal.

The Case before the Trial Court

8. The Respondent in this appeal was the Plaintiff before the trial court. The Appellant filed the suit before the trial court through the plaint dated 12th July 2017 claimed that on diverse days in the month of November 2016, the Defendant grazed his cows on his parcel of land situated at the Kyome location destroying grafted fully matured mango plants, pigeon peas and semi-permanent fence.
9. Despite appeals made to the Defendant not to graze his goats and cows on the Plaintiff's farm, the defendant did not heed the pleas thus causing serious damage to the plaintiff's farm.
10. On or about 22nd November 2016, the Agricultural Extension Officer for Migwani sub-County Migwani Ward assessed the damage caused at Ksh.97,200/=. The Plaintiff sought payment of this amount and costs of the suit.
11. Judgement in default of appearance was entered in favour of the Plaintiff against the defendant on 2nd October 2017 and a certificate of stated costs was issued. The Defendant subsequently filed an application dated 7th March 2018, seeking to set aside the court's judgment and decree. The trial court allowed the application on 9th May 2015 on condition that the Defendant pays the Plaintiff thrown away costs of Ksh.10,000/=. The court has observed that the record of appeal does not contain a defence. The original court file does not also have the statement of defence. A look at the application to set aside the court judgement shows that prayer 2 sought orders "That the defendant be granted leave to file a defence". Even though a draft defence had been attached to the application no defence was ever filed though the Respondent refers to one in their submissions dated 11/6/2018.
12. The Defendant filed witness statements and the matter proceeded for hearing on 29th August 2018.

Evidence at the Trial

13. PW 1, the Plaintiff herein stated that he is a farmer by occupation at the Kyanika location in Mwingi Central. He adopted his witness statement dated 12th July 2017 as his evidence in chief. He stated that on several occasions the defendant encroached on his farm and grazed his animals without his consent despite verbal warnings. He stated that on the 11th, 12th, 13th and 4th of February 2016, the defendant had encroached onto his farm and he reported the matter to the area assistant chief. The area agricultural officer assessed the damage at Ksh.56,000 but he only paid Kshs. 15,000/=.
14. Later on, from 12th to 22nd November 2016, the defendant continued to graze on his land despite warnings. On 12th November 2016, the Defendant chased away the Plaintiff's uncle who was engaged as his caretaker after inquiring as to why he was grazing the animals on the plaintiff's land. The Plaintiff found that damage had been caused to his crops and engaged the services of an Agricultural Officer, who assessed the damage on 22/11/2016 at Ksh.97,200/=.
15. On cross-examination, PW 1 stated that the damaged mango trees consequently withered and he has never replaced them.
16. PW 2 Jefferson Mutaa Kavuvi adopted his witness statement dated 12th July 2017 as his evidence in chief. He confirmed that the Plaintiff is his nephew and the defendant is his neighbour. He is the caretaker of the Plaintiff's farm. On several occasions, the defendant encroached into the Plaintiff's shamba where he grazed his animals without his consent.



17. He recalled on 12th November 2016 he found the defendant and his son grazing in the plaintiff's shamba and on inquiring why he was doing so the defendant insulted him and chased him with a panga.
18. PW 2 reported the matter to the assistant chief. He also stated that he was present when the agricultural officer visited the shamba for damage assessment and he noted that the fence had also been destroyed.
19. On cross-examination, PW 2 confirmed that he knows the Defendant who is his distant cousin's brother and he did not have a grudge against him. His evidence was that the defendant has continuously allowed his herds of cattle to graze on the plaintiff's portion of land.
20. PW 3 Ngana Musyoka testified that he is an employee of the Ministry of Agriculture Livestock and Water, Kitui County, with his area of jurisdiction being Mwingi West sub-county in Migwani. He assessed the plaintiff's damaged crops and prepared a report on 22nd November 2016. He found twenty-seven grafted mango plants destroyed. One mango plant would cost Ksh.3000/=. He also assessed the damaged pigeon peas at Ksh.27,000.
21. In carrying out the assessment and writing the report, PW 3 relied on guidelines applicable in the region. The area chief was present during the assessment of the crop damage.
22. On cross-examination, PW 3 stated that he did not attach the rates and guidelines on the assessment of crop damage since they are universal guidelines. He noted that the damaged mango trees were fully matured and would produce an optimum number of mango fruits but due to the damage, they were likely to die. He denied that his report was exaggerated.
23. PW 4 Micheal Mbui was the area assistant chief of, Kyome Sub Location in Migwani, Kitui County. He adopted his statement dated 12th July 2017 as evidence and stated that on the material days, 12th and 22nd November 2016, the Plaintiff had reported that the defendant had trespassed onto the Plaintiff's farm and caused damage assessed at Ksh.97,200. The witness noted that the Plaintiff had complained several times over the invasion. Upon confronting the defendant, he accepted that he did it and said that he would continue grazing his animals in the same shamba whenever he felt like it.
24. PW 4 stated that on the 11th, 12th, 13th and 4th February 2016, the defendant had encroached onto the Plaintiff's farm and the defendant paid him Ksh,15,000/= instead of the Ksh.56,000/= that had been assessed by the agricultural officer.
25. The plaintiff closed his case and the matter proceeded to defence hearing, where the defendant appeared in person.
26. DW 1 Bernard Mwangangi Mboo, the Defendant, kicked off the defence hearing and adopted his witness statement dated 21st May 2018 as evidence in chief. He denied that his livestock trespassed onto the Plaintiff's land and destroyed crops. He also denied the validity of the Agricultural report assessing the Plaintiff's crop damage at Ksh.97,200/=:, stating that it is not practical and is a means for the Plaintiff to enrich himself unjustly. He stated that since 2014, no one has ever cultivated the land and that the only mango trees found there are very tall, such that cows cannot reach them and feed on the leaves and mangoes. He urged the Court to dismiss the suit with costs.
27. On cross-examination, the defendant acknowledged that he does own two cows but at the material time, he had only one cow. He stated that the agricultural assessment was exaggerated and that the cows could not reach the mango trees. He also stated that he did not contract another independent officer to assess the alleged damage and that no one called him to the land to see the damage done to the animals. He acknowledged that he did not respond to the advocate's demand letter.



28. DW 2 Ependas Musyoka adopted his witness statement dated 2nd May 2018. He stated that he knew that the suit parcel is registered in the name of Muthengi Kavuvi(Deceased), father to the Plaintiff. The witness stated that the last time he saw the parcel having been planted cash crops was in 2014 and that the plaintiff used to sell to people the pasture that is on the parcel of land. He also stated that the mango trees therein are too tall for the cows to reach.
29. On cross, examination, he stated that the defendant had 3 cows and that he had the same number of cows on the material date to this suit. He however denied that the cows entered the land and stated that there are other different people who graze their animals on the land. He also stated that the Plaintiff does not work on the land and it is his brother who works therein.
30. Judgment was delivered by the trial court on 17th November 2021. The Court found clear evidence of trespass on the plaintiff's land. The court accorded partial weight to the evidence of PW 3's assessment report and only allowed damages in the sum of Ksh.46,200/=, with Ksh.30,000 for 27 mango plants and allowed the amount assessed for the pigeon peas as well as costs of the suit.
31. Being aggrieved by the judgment of the trial court, the Defendant filed this appeal.

Appellant's Written Submissions

32. Counsel for the Appellant submitted that the judgment was based on a claim which is not defined, and that the respondent and PW 3 did not mention the parcel number. Thus submitting that the Respondent did not prove ownership of the suit land and its existence. No title deed nor a certificate of official search were produced.
33. It was highlighted that the assessment report was done without a report having been made to the police. The Appellant stated that the Plaintiff's evidence was contradictory that the mango trees were damaged while still young while the assessment was as if the mangoes had already borne fruit and some mango trees were still intact.
34. He also submitted that there is no evidence that the Appellant was called to attend the assessment and also faulted the same for not being accompanied by photographs of the crops that had been damaged. The Appellant also submitted that the Court disregarded the strong evidence that he tendered for no apparent reason.
35. Having found that the assessment report was exaggerated, the Appellant submits that the trial court should have disregarded it completely. He submits that the respondent did not prove the existence of the facts as required by Section 107 of the *Evidence Act* and relied on the holding in the case of Stephen Kinini Wang'onda vs. The Ark Limited(2016)eKLR, that the evidence of an expert witness is not decisive and should be considered in light of all other evidence tendered by the parties.
36. The Appellant further argued that it was not clear whether PW 3 is an expert to prepare an agricultural report since he did not give evidence as to his qualifications and that he did not attach the rates on the guidelines for assessment of crop damage which was of importance.
37. Reliance was placed on the following cases among others: Civil Appeal No.119 of 2018 Joel vs South Nyanza, Civil Appeal No.68 of 2019 Sospeter Kimuta & another vs Isaack Kipletii Boit, Civil Case No.601 of 2007 James Watega Kamau CMC Motors Group Ltd, David Sirunya ole Tukai vs Francis Arap Muge(Court of Appeal No.76 of 2014), Civil Appeal No.8 of 2018 Milimani Center for Mathematics Science and Technology Education in Africa vs Apex Security Services Ltd.



Respondent's submissions

38. Counsel for the Respondent submitted that the trial Magistrate duly evaluated and considered all the evidence, noting that the trial court did not grant the entire amount sought by the Plaintiff, reducing it to Ksh.46,200.
39. On ownership of the suit parcel, it was submitted by the Appellant that it was not an issue at all as it was admitted by all parties and that the defendant had also admitted that some trees belonging to the defendant were destroyed. That the Appellant did not bring any evidence to the contrary.
40. The Respondent also relied on their submissions before the lower court as well.

Analysis and Determination

41. The role of an appellate court was stated in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, where the Court of Appeal stated that;

“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 allowances in this respect.”
42. The court has considered the grounds of appeal set in the Memorandum of Appeal and the submissions by Counsel for the parties. The Appellant set out twelve grounds of appeal in the Memorandum of Appeal, which may be summarized into one issue for determination:
 1. Whether the Trial Magistrate erred and failed to take into account analyze and evaluate the evidence of the Appellant and his witnesses and only considered the evidence of the Respondent and his witnesses thus arrived at a wrong finding.
43. The Appellants counsel submitted that the Respondent did not prove ownership of the suit land before the trial court. The court notes that the Plaint before the Trial Court as filed by the Respondent discloses that the suit land is located at Kyome location. The Appellant in his witness statement did not deny the Respondent's ownership of the land in question. He acknowledged that the Plaintiff has a parcel of land and stated that “since 2014 no one has cultivated the land. He further stated that the plaintiff has been selling grass growing on the land. The only mango trees found there are very tall such that cows cannot reach and feed on the leaves or mangos”.
44. That the Plaintiff has a farm in Kyome Location is a fact that was acknowledged by all the parties herein and their witnesses. The assessment report by the agricultural officer who was PW 3 dated 22nd November 2016 indicated that the farm is situated in Kyome Village, Migwani division at Mwingi West Sub-County of Kitui County. None of the parties disputed this.
45. Defence witness Musyoka Mulungwa acknowledged the existence of the farm though claiming that it is registered in the name of Muthengi Kavuvi (father to the plaintiff).



46. It is trite law that trespass is a violation of a right to possession. The Court of Appeal sitting at Eldoret in the case of *Municipal Council of Eldoret v Titus Gatitu Njau* [2020] eKLR cited with approval the following authorities:

In *M'Mukanya v M'Mbijiwe* (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

trespass is a violation of the right to possession and a plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See *Thomson v Ward*, (1953) 2QB 153.”

Further, in *Winfield & Jolowicz on Tort, Sweet & Maxwell*, 19th Edition page 428 states as follows:

Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession.

47. The Respondent's right to immediate and exclusive possession of the suit land was not challenged by the Appellant and was a matter that was silently agreed upon by all the parties. If the Appellant had any qualms about the ownership of the suit land, he could led evidence to disprove this.
48. The Court of Appeal in *Mbuthia 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 1st respondent.”

49. In the court's opinion, the Respondent was able to prove on a balance of probabilities that he had a right to possession of the suit land and that the Appellant trespassed upon it. The area assistant chief testified to the trespass, which had been reported to him on several occasions and to the existence of an earlier case settled by him. This was not challenged by the Appellant.
50. The court further observes that the evidence adduced by the Appellant and his witness was set out in the judgement and due consideration of the same was given. The court agrees with the finding of the trial court that the defence evidence was contradictory stating that the land was not being cultivated and at the same time stating that there are mango trees on the land. Indeed the testimony that the Respondent used to sell the grass from the land was evidence that there was activity going on the land by the Respondent. In any event, the appellant did not show that he had a right to enter into the land and graze thereon,



51. The second contention that the Appellant herein has raised is the accuracy of the Agricultural Extension Officer's assessment report on damage that occurred to the Respondent's land and the report dated 22nd November 2016. The Appellant states that it was exaggerated and that the Court should have completely disregarded it.
52. Expert opinions provides information that helps the court in forming its conclusion. In the case of Christopher Ndaru Kagina Vs Esther Mbandi Kagina & Another (2016) eKLR, the Court stated that: -
- “Under the common law, for expert opinion to be admissible it must be able to provide the court with information which is likely to be outside the court's knowledge and experience, but it must also be evidence which gives the court the help it needs in forming its conclusions. The role of experts is to give their opinion based on analysis of the available evidence. The court is not bound by that opinion, but it can take into consideration in determining the facts in issue..... It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then rigidly judged with a mathematical precision.”
53. This court observes that expert evidence was needed in this case since the evaluation of the destruction done required technical or scientific knowledge only an expert in the field is likely to possess. The trial court considered the expert report but did not see itself as bound by the findings in the report but made its own assessment. The trial court appreciated the role of expert testimony which is to enable it to arrive at a fair and just decision. The court analysed the findings in the report together with the evidence of other witnesses and gave the expert testimony appropriate weight finding the assessment of Ksh.3000/= per mango plant totaling Ksh.81,000 was excessive and reduced the amount to a collective sum of Ksh.30,000/=. This is what is expected of a Court when making its findings where there is an expert opinion involved.
54. The court has not found any requirement in law that mandates that an expert report attach the guidelines, method or formula that the expert used to arrive at their conclusion as challenged by the Appellant.
55. Mativo J (as he then was)the Court in the case of Stephen Kinini Wang'ondv The Ark Limited [2016] eKLR that was relied on and quoted by the Appellant analysed expert evidence and the way the court is expected to deal with it vis-à-vis other evidence adduced:

“Expert testimony, like all other evidence, must be given only appropriate weight. It must be as influential in the overall decision-making process as it deserves; no more, no less. To my mind, the weight to be given to expert evidence will derive from how that evidence is assessed in the context of all other evidence. Expert evidence is most obviously needed when the evaluation of the issues requires technical or scientific knowledge only an expert in the field is likely to possess. However, there is nothing to prevent reports for court use being commissioned on any factual matter, technical or otherwise, providing; it is deemed likely to be outside the knowledge and experience of those trying the case, and the court agrees to the evidence being called.

While there are numerous authorities asserting that expert evidence can only be challenged by another expert, little has been said regarding the criteria a court should use to weigh the probative value of expert evidence. This is because, while expert evidence is important evidence, it is nevertheless merely part of the evidence which a court has to take into account. Four consequences flow from this.



Firstly, expert evidence does not “trump all other evidence”. It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.

Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be “artificially separated” from the rest of the evidence. To do so is a structural failing. A court’s findings will often derive from an interaction of its views on the factual and expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.

Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.

Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones.

A further criterion for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In *Routestone Ltd. v. Minorities Finance Ltd.* and *Another Jacob J.* observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented, “If the reasons stand up the opinion does, if not, not.” Where there is a conflict between experts on a fundamental point, it is the court’s task to justify its preference for one over the other by an analysis of the underlying material and of their reasoning.

It is my view that a court may find that an expert’s opinion is based on illogical or even irrational reasoning and reject it. A judge may give little weight to an expert’s testimony where he finds the expert’s reasoning speculative or manifestly illogical. Where a court finds that the evidence of an expert witness is so internally contradictory as to be unreliable, the court may reject that evidence and make its decision on the remainder of the evidence. The expert’s process of reasoning must therefore be identified so as to enable a court to choose which of competing hypotheses is the more probable.”

56. In conclusion, the court is of the view that the Respondent proved his case to the required standard and the Trial Court adequately analysed the evidence appropriately in the circumstances. The Appellant herein was unable to disprove the evidence of the Respondent.

57. The final order of the Court is that;

1. The appeal herein has no merit and the same is hereby dismissed.
2. Costs are awarded to the Respondent.

READ, DATED, SIGNED AND DELIVERED VIRTUALLY AT NYERI THIS 20TH DAY OF FEBRUARY 2025.

In the presence of:

No appearance for the Applicant.



No appearance for the Respondent.

Court assistant: Michael.

HON. LADY JUSTICE L. G. KIMANI

JUDGE

