



REPUBLIC OF KENYA



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**Mogusu v Boro (Environment and Land Appeal 70 of 2019)
[2025] KEELC 577 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 577 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL 70 OF 2019
OA ANGOTE, J
FEBRUARY 13, 2025**

BETWEEN

NAPHTALI MOGUSU APPELLANT

AND

JANE NUNGARI BORO RESPONDENT

(Being an appeal against the Judgment in CMCC Civil Case No. 7228 of 2014 delivered by Hon.. E. Wanjala Senior Resident Magistrate at Nairobi on 22nd August 2019)

JUDGMENT

1. The Appellant has filed this appeal against the entire judgment delivered in CMCC Civil Case No. 7228 of 2014 by Hon. E. Wanjala Senior Resident Magistrate at Nairobi on 22nd August 2019.
2. The Background of this appeal is that the Respondent, through a Plaint dated 1st December 2014, moved to court alleging that the Appellant had entered into her land, the suit property, (Nairobi Block 105/5308), and had commenced development thereon without authority and justification.
3. The Respondent averred in the Plaint that she bought shares in 1991 from Embakasi Ranching Company Limited and was issued with Plot Numbers 4171 and 4172. She stated that she was issued share certificate No. 12759 and an allocation stamp on 15th May 1992; that she never developed the plot and that it was only in 2012 when she intended to start developments that she found out that the Appellant had already developed the suit property.
4. According to the Respondent, she reported the Appellant's trespass at the police station and following investigations, the police established that the Defendant did not have a valid claim. It was her evidence that the Appellant was then arrested and charged at Kibera Law Courts with the offence of forcible detainer in Criminal Case No. 327 of 2012.
5. In her Plaint, the Respondent/Plaintiff prayed for the following orders:



- a. A permanent injunction order restraining the Defendant whether by himself, through his servants, workmen or agents from doing any of the following acts that is to say entering into, taking or assuming possession, trespassing and/or in any manner whatsoever interfering with the Plaintiff's peaceful occupation, possession and enjoyment of all those parcels of land known as Plots No. P4171 and P4172 in Embakasi Ranching Company limited (Now Nairobi Block 105/5308 and 105/5309) at Ruai.
 - b. Damages for trespass to land.
 - c. An order directing the Defendant to forthwith demolish and destroy all the structures now on the parcels of land and remove all the debris from the premises, failing which the Plaintiff be allowed to demolish and remove the same at the cost of the Defendant, to be billed after the demolition.
 - d. Costs and interest at court rates.
 - e. Any other relief that the Honourable Court may deem fit to grant.
6. In his Statement of Defence, the Appellant averred that he had been in possession of the suit property since 2001; that he was allocated Plot 105/ 5308 also known as Plot V. 4243 by Embakasi Ranching Company Limited through a non-member certificate issued to him on 12th October 2005; that he developed the land by constructing a house thereon and that he enjoyed quiet possession of the suit property until 2012 when the Respondent claimed she is the proprietor of the suit property.
 7. The Appellant argued that the Respondent had colluded with Embakasi Ranching Company and had processed documentation to show that the Plaintiff was the original owner of Nairobi Block 105/5308.
 8. After the hearing, the court delivered judgment in favor of the Plaintiff/Respondent. Being aggrieved by the decision, the Appellant/Defendant has filed this appeal on the following grounds:
 - i. The learned Trial Magistrate made findings and a judgment wholly against the weight of evidence tendered by the parties.
 - ii. The learned Trial Magistrate erred in law and in fact in making a finding that the Appellant had failed to demonstrate in a consistent manner that Plot No. 4171 which the Appellant claimed to be Plot V4243 is Nairobi Block 105/5308 Ruai belongs to the Appellant.
 - iii. The learned Trial Magistrate erred in law and in fact in making a finding that the Respondent had established that she was the equitable and beneficial owner of Plot No. 4171 Ruai also known as Nairobi Block 105/5308 occasioning injustice to the Appellant.
 - iv. The learned Trial Magistrate erred in law and in fact in finding that the Appellant had trespassed on Nairobi Block 105/5308 without the consent of the Respondent and erred in awarding the Respondent nominal damages for trespass.
 - v. The learned Trial Magistrate erred in law and in fact in finding that if the Appellant had any claim the same should be against the allocating authority Embakasi Ranching Company, which was not a party to the proceedings.
 - vi. That the learned Trial Magistrate erred in law and in fact in failing to consider the Appellant's written submissions in support of his defence.
 - vii. That from the case as a whole, the learned Trial Magistrate has been clearly wrong in the exercise of her judgment and discretion and that as a result there has been injustice to the Appellant.



- viii. That the learned Trial Magistrate erred in law and in fact in failing to take into consideration the evidence adduced by the Appellant in support of its case and in doing so, arrived at a wrong decision.
 - ix. The learned Trial Magistrate's judgement is wholly against the preponderance of evidence adduced in the suit.
 - x. The learned Trial magistrate erred in law and in fact in failing to evaluate and appreciate the law and evidence on record thereby reaching an erroneous decision.
9. The Appellant has sought that the following orders be made:
- a. This appeal be allowed.
 - b. The Judgment and decree of the Senior Resident Magistrates (E.Wanjala) dated 22nd August 2019, and all consequential orders cited above be set aside.
 - c. That this Honourable Court do dismiss the Plaintiff's suit and claim against the Defendant.
 - d. The court makes such orders as are in the interest of justice in the circumstances.
 - e. The court vacates the order of costs and order for damages for trespass made against the Appellant in the impugned judgment.
 - f. The costs of this Appeal be borne by the Respondent.
10. The appeal was canvassed by way of written submissions.

Submissions

11. Counsel for the Appellant submitted that the trial magistrate disregarded the Appellant's evidence in which he demonstrated that Plot V.4243 was Nairobi Block 105/5308, of which he was the legal owner and that the Appellant called Samuel Mang'era Mayenga as his witness, DW2, who stated that he witnessed the Appellant being allocated Nairobi Block 105/5308, referenced as Plot V/4243 on the Embakasi Ranching Certificate.
12. The Appellant's counsel argued that while the Respondent claims to be the owner of Plot 4171 and 4172 as allocated on 24th August 1991, it was only on 10th December 2010 that there was purportedly conversion of the title from Plot 4171 to Nairobi Block 105/5308 and from Plot 4172 to Nairobi Block 105/5309 and that this was five years after the Appellant had been allocated Nairobi Block 105/5308.
13. The Appellant's counsel submitted that the trial magistrate erred in finding that the Appellant was a trespasser and liable to pay the Respondent damages of Kshs. 50,000 and that at the time of entry onto Nairobi Block 105/5308, the Appellant was well aware that he was the legal and/or beneficial proprietor of the property from Embakasi Ranching Company.
14. It was submitted that the Appellant is not a trespasser onto Nairobi Block 105/5308, as his entry and possession of the suit land was founded on an allotment as a non-member shareholder and that he therefore did not require the consent of the Respondent for him to occupy his property.
15. With respect to the trial court's finding that the Respondent was the proprietor of the suit property, Counsel does not dispute that the Respondent made payments for Plot No. 4271 and 4272. He however argues that it beats logic that the Respondent could not tell the sizes of the plots and was not sure if the Appellant had developed on Plot 4272, as captured in the court's judgment.



16. Counsel submitted that at the time the claim of the alleged trespass arose, the search conducted listed Embakasi Ranching Group as the sole proprietor of the suit property and that PW2, Jack Kimeu Wachira, a registered land surveyor at Embakasi Ranching Company, testified that he went to the location of the plots and identified Plots P4171 and P4172 as Nairobi Block 105/5308 and 5309 respectively.
17. Counsel submitted that the evidence produced by PW2, Jack Kamau Wachira, was not credible as he failed to produce a practicing certificate as a surveyor and did not present any document before the trial court to confirm that he had authority to give evidence on behalf of the company.
18. Counsel relied on the case of *Mutonyi vs Republic* [1982] KLR 203 where the Court of Appeal held that before an expert witness gives their expert opinion, they must establish by evidence that they are specially skilled in their science or art, instruct the court in the criteria of their science or art so that the court can itself test the accuracy of the opinion and form its own independent opinion by applying these criteria to the facts, and give evidence of the facts, which may be facts ascertained by him or reported to him by another witness.
19. Counsel for the Respondent submitted that during trial, the Respondent led evidence on how she acquired Plot No. 4171, now Nairobi Block 10/5308; that she adduced documentary evidence such as the share certificate number 12759 accompanied by the allocation stamp dated 24th August 1991 and receipts for all payments made in respect of the suit property and that she also produced a letter from Embakasi Ranching Company dated 17th November 2014 confirming that she is the legal owner of the suit property and prohibiting the Appellant from developing the same.
20. It was Respondent Counsel's submission that this evidence was corroborated by the surveyor of the allocating authority, Embakasi Ranching Company, one Jack Kamau Wachira, who testified in the matter as PW2; that the surveyor produced a survey map and an allocation map and that he testified that from both maps, there only existed Plot Nos P4171 and P4172 and that there was no plot known as V4243 as alleged by the Appellants.
21. Counsel for the Respondent argued that PW2 further produced a survey plan from the Survey of Kenya which shows plots converted from unsurveyed to Block Numbers including Plot no. 4171 as Nairobi Block 105/5308 and Plot No. 4172 as No. Nairobi Block 105/5309 and that he also produced clearances for the issuance of title by the allocating authority, which indicate Plot No. 4171 as Nairobi Block 105/5308 and Plot No. 4172 as Nairobi Block 105/5309.
22. Counsel contended that while the Appellant holds a share certificate from the allocating authority, he failed to produce the allocation stamp or to show how his plot converted from V4243 to Nairobi Block 105/5308. It was submitted that during trial, it was established that the Appellant did not follow the outlined procedure of involving the services of a surveyor from the office of the allocating authority and that he was not shown the location of his plot, causing him to trespass into the Respondent's property.
23. Counsel submitted that the learned Magistrate did consider the documentary evidence adduced by the Appellant and the Respondent and faulted the Appellant for neither adducing his allocation stamp nor establishing how his plot converted from V4243 to Block 105/5308.
24. According to Counsel, the Appellant failed to produce an iota of evidence to support his claim that Plot V4243 is Nairobi Block 105/5308, and did not discharge the burden of proving the existence of his right as prescribed under Section 107 of the *Evidence Act*.
25. On the second issue of whether the Appellant had trespassed over Nairobi Block 105/5308, Counsel relied on the definition of trespass as set out in Section 3(1) of the *Trespass Act*. He also relied on the



definition of trespass in Clerks & Lindsell on Torts 18th Edition on page 923 as quoted in John Kiragu Kimani vs Rural Electrification Authority [2018] eKLR.

26. Counsel submitted that the trial court weighed the evidence on a balance of probabilities and found that the suit property belongs to the Respondent. It was submitted that as the Appellant had no claim over the suit property and as the suit property belongs to the Respondent, then the Appellant did indeed trespass into Nairobi Block 105/5308.

Analysis and Determination

27. Before this court is an appeal against the decision of the subordinate court. As a first appellate court, in determining whether or not the trial court was justified in reaching its decision, this court is obligated and is under a duty to re-evaluate the evidence and the materials that were placed before the trial court and it may, on re-evaluation, reach its own conclusion and findings. This was stated by the Court of Appeal in the case of *Selle & Another vs Associated Motor Boat Co. Ltd & Others* [1968] EA 123 as follows:

“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 or heard the witnesses and should make due allowance in this respect.”

28. These principles were reiterated more recently by the Court of Appeal in *Paramount Bank Limited vs First National Bank Limited & 2 Others* (Civil Appeal 468 of 2018) [2023] KECA 1424 (KLR) where the court held as follows:

“A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. A first Appellate Court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust. The first appeal has to be decided on facts as well as on law. While considering the scope of section 78 of the *Civil Procedure Act*, a first Appellate Court can appreciate the entire evidence and come to a different conclusion.”

29. In its mandate, this court is further bound not to interfere with the findings of the trial court unless such findings were not based on evidence or there was a misapprehension of the facts. This court is bound by the determination of the Court of Appeal in *Khalid Salim Abdulsheikh vs Swaleh Omar Said* [2019] eKLR where it stated:

“We nevertheless appreciate that an appellate Court will not ordinarily interfere with findings of fact by the trial court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings.”

30. The Appellant has raised several grounds of appeal which can be condensed into the following two issues:
- i. Whether the Appellant established ownership over Nairobi Block 105/5308.
 - ii. Whether the Appellant had trespassed over Nairobi Block 105/5308.



31. As detailed above, the dispute between the Respondent and the Appellant concerns the ownership of Nairobi Block 105/5308. In the lower court, the Respondent asserted that Nairobi Block 105/5308 was previously Plot No. 4171 which she purchased from Embakasi Ranching Company in 1991. On the other hand, the Appellant's case was that Nairobi Block 105/5308 was previously Plot V. 4243, which he purchased from Embakasi Ranching in 2005, and that he had been in possession of the property since 2001.
32. During the hearing of the suit, the Respondent (PW1), testified that she bought Plot 4171 and 4172 in 1991 from Embakasi Ranching Company. She presented a copy of the share certificate. She asserted that she paid Kshs. 7000 and was issued a receipt dated 22nd April 1991, and that she paid Kshs. 1000 as charging fees and she also paid Kshs. 5000/- for registration on 9th December 2010. She testified that she found someone had trespassed on her land in 2012 and was developing it.
33. The Respondent called PW2, Jack Kamau Wachira, as her witness, who asserted that he is a registered land surveyor who works at Embakasi Ranching Company Limited. PW2 produced a copy of a map for allocation. He stated that Plot P.4172 and P4172 were generated by Embakasi Ranching.
34. It was his evidence that after survey and allocation, these numbers are forwarded to Survey of Kenya which issues parcel numbers; that the Survey of Kenya issued the parcel number Nairobi Block 105/5308 and 5309 on 10th December 2010 in respect of the two plots; that at the back of the receipt, it shows that he went with the owner and identified the plot as P4171 as 105/5308 and P4172 as 205/5309.
35. PW2 stated that the Appellant had constructed on P4171 which is Block 105/5308; that although they summoned the Defendant to go to the office, he never went and that the Defendant's trespass was reported to the police where he charged in Kibera Criminal Case No. 327 of 2012.
36. PW2 confirmed that the non-membership certificate produced by the Appellant was issued by Embakasi Ranching and that the said certificate is for V4243 which was not one of the plots on the ground. According to the said surveyor, although titles for Plot P4171 and P4172 have not been issued, the said titles will be issued to the Plaintiff as referred to in the letter dated 17th November 2014, signed by the former Chairman of Embakasi Ranching.
37. The Respondent produced a bundle of documents which included a share certificate No. 12759 issued on 15th May 1991; a letter of allocation of Plots P4171 and P4172 from Embakasi Ranching Company Limited; receipts of payment of registration and survey fees; copies of searches showing the land was not yet registered; map of Nairobi Block 105 (Embakasi Ranching) identifying LR No, 105/5308 and LR No. 105/5309 formerly plots P4171 and P4172 and a letter of demand dated 21st November 2014.
38. The Appellant presented the evidence of two witnesses. According to the Appellant, in 2005, Samuel Mayienga introduced him to Embakasi Ranching. He stated that he met a surveyor by the name Sammy who showed him land known as 105/5308/08 and that he was issued a share certificate, and paid Kshs. 8500/- on 12th October 2005.
39. According to the Appellant, he paid Kshs. 21,700 being the balance of the fee, which he paid on 9th February 2012. He stated that he built a house on the land which is incomplete, and that the criminal case was determined and the court found that he did not have a case to answer. During cross-examination, the Appellant asserted that he bought the suit property at KShs. 60,000/- but he was not given a receipt for the Kshs. 60,000.
40. The Appellant produced the following documents in his bundle of documents: a copy of the non-membership share certificate; a copy of the receipt for payment of beacon fees of Kshs. 21,700; a copy



of the allocation stamp and copies of photographs showing the developments he has done on the suit property.

41. In the judgment by the trial court, the learned magistrate analysed the evidence produced by the parties. In her determination, she found that the Respondent (Plaintiff) had proved by way of documents that Plot No. 4171 was Nairobi Block 105/5308.
42. The trial court held that the Appellant (Defendant) had not demonstrated in a consistent manner that plot no. 4171 which he claims to be V4243 and Nairobi Block 105/5308 was his.
43. While the Appellant produced in evidence multiple documents, the only legible document was a copy of a non-member certificate of plot ownership, which indicates that he paid Kshs. 7000 for survey on 17th October 2005 and Kshs. 1500 for engineering on 13th February 2012. The plot number indicated in the non-member certificate was V. 4243.
44. The Appellant also produced in evidence a page on which it was indicated and signed “105/5308 Allocated”. Was this evidence sufficient to establish that the Appellant had proved that V.4143 was converted into Nairobi Block 105/5308?
45. Under Section 107 as read with Section 109 of the *Evidence Act*, the Appellant had to discharge the evidentiary burden of proving that he was allocated Plot V. 4243 and that the said plot was in fact Nairobi Block 105/5308.
46. The Appellant only presented a share certificate and receipts of payments made to Embakasi Ranching. He did not adduce any evidence from the management of Embakasi Ranching indicating the allocation of Plot V.4143 or any evidence to show that the said plot exists on the ground. The Appellant did not also establish when the purported V. 4143 was converted to Nairobi Block 105/5308.
47. Was the conversion in 2005 when the Appellant acquired the non-member share certificate, or was it in 2010? When was the allocation stamp “105/5308 Allocated” made? The Appellant did not present evidence to answer those pertinent questions. Consequently, the learned Magistrate rightfully found his evidence fell short of the required legal standard.
48. On the other hand, the Respondent adduced share certificate No. 12759; an allocation stamp indicating Plot numbers P4171 and P4172 and the date on which they were allocated, which was 24th August 1992 and receipts for the payment of Kshs. 7,000 and Kshs. 1000 issued on 22nd April 1991.
49. The Respondent also produced in evidence a letter from Embakasi Ranching Company Limited dated 17th November 2014 confirming that Jane Nungari Boro was the owner of Plot Nos P4171 and P4172.; a document which indicated that P4171 was now 105/5308 and P4172 was now 105/5309 which was signed by the owner on 10th December 2010 and a copy of the map which shows the location of plots 105/5308 and 105/5309.
50. The evidence adduced by PW2, the surveyor of Embakasi Ranching was critical. Being an employee of the allocating authority, he was in the best position to clarify the true status of Nairobi Block 105/5308, which he did with clarity.
51. While the Appellant alleged in his Defence and submissions that there was collusion between the Company and the Respondent to divert ownership of the suit property away from him, no evidence of such collusion or fraud was availed to the trial court. Further, no impropriety was established by the Appellant in the manner in which the Respondent acquired title to the suit property.



52. The Appellant has argued that the evidence by PW2 ought to have been disregarded because he failed to present any of his certifications to prove that he is a licensed surveyor. The question then is whether PW2 testified as an expert witness or as an employee of Embakasi Ranching Company Limited.
53. It is trite that expert evidence falls into the category of opinion evidence. The evidence adduced by the witness was however not based on his expert opinion. Rather, his testimony was linked to his position and proximity to the land buying company and was based on facts rather than opinion.
54. There was therefore no requirement for PW2 to produce a practicing certificate as a surveyor. As to the witness's failure to prove that he had authority to plead on the company's behalf, the Appellant did not raise any objections during hearing. Further, there is no legal basis for demanding that a witness for a company must produce authority to testify. This argument therefore has no grounding.
55. This court therefore upholds the finding of the trial court. The Respondent established her ownership of Plot P4171 which was later converted to Nairobi Block 105/ 5308.
56. Having found that the suit property is lawfully owned by the Respondent, this court must then similarly find that the Appellant has trespassed on the suit property.
57. The upshot of the foregoing is that the appeal is unmerited and the same is for dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF FEBRUARY, 2025.

O. A. Angote

Judge

In the presence of;

Ms Lukoye for Appellant

Ms Wangari for Gachie for Respondent

Court Assistant: Tracy

