



**Mugambi v Mutegi (Environment and Land Appeal E010 of 2023)  
[2024] KEELC 13305 (KLR) (20 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13305 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E010 OF 2023**

**CK YANO, J**

**NOVEMBER 20, 2024**

**BETWEEN**

**JAPHET NDAGARA MUGAMBI ..... APPELLANT**

**AND**

**STEPHEN CHABARI MUTEGI ..... RESPONDENT**

*(An Appeal from the judgment of Hon. Mbayaki Wafula, SRM,  
in Marimanti PMCC No. 22 of 2019 delivered on 5/12/2023)*

**JUDGMENT**

1. The appellant in this appeal moved the trial court vide a plaint dated 2<sup>nd</sup> December, 2019 seeking orders of a permanent injunction restraining the respondent, his children and agents from trespassing, encroaching and/or interfering with the appellant's peaceful possession of LR. No. 2027 Karocho Adjudication Section and costs of the suit.
2. It was the appellant's case that at all times, he was the registered owner of the suit land. That in or about October, 2019, the respondent without any colour of right trespassed into his land and started constructing a house therein and tilled the land and cultivated foodstuffs.
3. The respondent filed a statement of defence dated 13<sup>th</sup> December, 2019 wherein he denied the appellant's claim. The respondent pleaded that he was the registered owner of the suit land which he purchased from one Mark Mucee Munyambu in the year 2006 and has been cultivating and developing it since then. That the appellant has of late developed interest in the land and wanted to unlawfully wrestle it from the respondent.
4. Further, the respondent stated that the plaint as filed disclosed no reasonable cause of action, was frivolous, vexatious and an abuse of the court process.



5. The respondent averred that the suit was incompetent and defective and offended the relevant provisions of Chapter 283 and 284 of the laws of Kenya.
6. Upon considering the matter, the trial court found that the appellant had not proved ownership and occupation and had failed to prove that the respondent had trespassed on the suit property and dismissed the suit with costs to the respondent.
7. The appellant was aggrieved by the judgment and filed this appeal on the following grounds: -
  1. That the Learned Trial Magistrate erred in Law and in facts in failing to find that the respondent is a trespasser in the appellant land No. LR. 2027 Karocho Adjudication Section.
  2. The Learned Trial Magistrate erred in Law and in facts in failing to analyze the evidence on record properly and thus arrived on an erroneous conclusion.
  3. The Learned Magistrate erred in Law and in facts in failing to declare the appellant the sole proprietor of the suit land herein.
  4. The Learned Magistrate erred in Law and in fact in deciding the entire suit contrary to the evidence on record and against the weight as evidence.
8. The appellant prayed for the lower court judgment to be set aside and judgment to be entered in his favour.
9. The appeal was canvassed by way of written submission. The appellant filed his submissions dated 16<sup>th</sup> September, 2024 through the firm of L. Kimathi Kiara & Co. Advocates while the respondent filed his dated 14<sup>th</sup> October, 2024 through the firm of Basilio Gitonga, Muriithi & Associates Advocates.

#### **Appellant's Submissions**

10. The Appellant identified two issues for determination. The first issue for determination is who between the appellant and the respondent holds a good title to the suit premises and the second is whether the respondent trespassed on the appellant's parcel of land.
11. Regarding the first issue, the Appellant submitted that it is undisputed that the copy of the tribunal proceedings and the proceedings of Case No. 8/03 adduced by the appellant during trial indicate that he is the owner of the suit land. The appellant further submitted that the letter from the County Commissioner, the letters dated 22<sup>nd</sup> September, 2014 and 9<sup>th</sup> and 1<sup>st</sup> October, 2024 and a letter from adjudication dated 29<sup>th</sup> June, 2011 produced during the trial all show that the appellant has an interest in the suit land as proprietor. The appellant therefore submitted that he is the legal owner of the suit property as per the evidence adduced during the trial and that the respondent is just a trespasser.
12. Regarding the issue whether the respondent trespassed on the appellant's land, the appellant cited the definition of trespasser under the [Trespass Act](#) Cap 294 Laws of Kenya. It was submitted that the letter dated 22<sup>nd</sup> September, 2014 from DLASO is enough evidence that the respondent had trespassed on the appellant's land.
13. The Appellant further submitted that the trial magistrate failed to analyze the evidence on record hence arrived at an erroneous conclusion. The Appellant cited Section 107 of the [Evidence Act](#).
14. It is the Appellant's submission that the evidence on record adduced by the respondent could not support his case so as to lead to the trial magistrate declining to find the appellant the sole owner of the suit land.



15. The Appellant pointed out that in his evidence, he testified that he had constructed a house and a toilet in the land. Further that it was his evidence that suit land was demarcated by the district surveyor and the demarcation officer clearly. The appellant submitted that his evidence was uncontroverted.
16. The Appellant relied on the case of Muthiori Vs. Marion Muthana Kiara Civil Appeal No. 43 of 2017 and Obonyo & 3 others Vs. Lisaye ELCA No. 18 of 2021 and urged the court to allow the appeal as prayed.

### **Respondent's Submissions**

17. The respondent gave a brief background of the matter and proceeded to submit on ground 1 of the appeal. It was submitted that in the trial court, the appellant in his evidence in chief stated that the respondent trespassed on his land in the month of October, 2014 and further put up a temporary structure on the suit land. It was submitted that the testimony is contrary to the pleadings since at paragraph 4 of the plaint, the appellant alleges that the act of trespass occurred in the year 2019. That the pleadings therefore substantially differ with the appellant's evidence-in-chief.
18. The respondent further submitted that even assuming the act of trespass was in October 2014 then the cause of action had been overtaken by statutes of limitation in view of the provisions of Section 4 (2) of the Limitations of Actions Act, Cap 22 Laws of Kenya.
19. The respondent submitted that the subject of litigation before the trial court was not ownership, but trespass. That the trial court visited the locus in quo on 19<sup>th</sup> September, 2023 in the presence of parties, the Land Adjudication Officer (Marimanti) and the Surveyor/Demarcation Officer (Marimanti) and the chairman of the Land Adjudication Committee (Karocho) was also present. The respondent submitted that the report dated 28<sup>th</sup> September, 2023 indicated that development work on LP Nos. 2026 and 2027 and cultivation on the ground belong to a third party by the name Mark Mucee Munyambu. That the same did not belong to the Respondent at all. That the appellant, during the ground visit, alleged that part of his land overlapped LP No. 2026 for one Marck Mucee Munyambu and the whole of LP No. 3293 for the Respondent.
20. It was therefore submitted that it could not be clearly established who between the Respondent and the said Mark Mucee Munyambu had allegedly trespassed over the Appellant's land. That the said Mark Mucee Munyambu was not a party to the proceedings in the trial court.
21. The respondent submitted further that the Land Adjudication Officer was categorical that the disputed parcel of land over which the appellant was staking a claim was originally part of LP No. 2026 belonging to Mark Mucee Munyambu. That the Adjudication Officer was categorical that LP No. 2027 and 3293 were distinct and separate from each other. That the Appellant did not tender any evidence to show that the Respondent had in any way encroached on his land parcel No. 2027 and therefore the trial magistrate was right in dismissing the appellant's suit in the trial court.
22. The respondent submitted that parties are bound by their own pleadings and are not at liberty to tender evidence that is at variance with the pleadings. The respondent relied on the case of *Madara & 2 Others Vs. Chite & Another (Civil Appeal 111 of 2022)* [2023] KEHC 24270 (KLR) 24 October 2023 (Judgment) and *Ogando Vs. Watu Credit Limited & Another (Civil Suit E098 of 2022)* [2024] KEHC 3074 (KLR) (14<sup>th</sup> March, 2024) (Judgment).
23. Regarding ground 2 of the appeal which is whether the trial magistrate failed to analyze the evidence on record properly thus arriving at an erroneous conclusion, the respondent submitted that the trial court deeply analyzed the evidence before it and applied its mind to the fact before arriving at the conclusion.



24. With regard to ground 3 of the appeal in which the appellant faults the learned trial magistrate for failing to declare him the sole proprietor of the suit land, the respondent submitted that the appellant had not made a prayer for declaration that he is the proprietor of the suit land and the cause of action was based on trespass. That the court arrived at its conclusion on the strength of the pleadings and evidence of the parties and their evidence. The respondent submitted that the trial court could not be expected to make a finding on that which had not been prayed for in the suit. The respondent cited Sections 107 and 108 of the Evidence Act and pointed out that the appellant had prayed for a permanent injunction. That the trial court found that the appellant had not proved that the respondent had trespassed or encroached on the suit land hence dismissing the suit. That the trial court even wondered why one Mark Mucee Munyambu had not been enjoined as a party to the suit, yet the appellant alleged that he had allegedly encroached on his land.
25. The respondent submitted that ground 4 of the appeal is ambiguous and does not disclose what crucial evidence the trial court failed to put into consideration while arriving at its conclusion which culminated into the impugned judgment. It was submitted that the court relied on the evidence of the Appellant which was to the effect that the alleged trespass occurred in 2014. That there is also a further alleged trespass in October 2019 when the Respondent is alleged to have constructed a house and tilled part of the land. The respondent submitted that the only other evidence is that contained in the appellant's list of documents dated 2/12/2019.
26. The respondent submitted that the trial court could not have relied on the further list of documents dated 26/9/2023 filed by the appellant since they were filed long after the pleadings and the trial conference period had been closed and the appellant's case had also been closed, and without leave of court. That the trial court had observed the same and wondered why the appellant had included it in his record of appeal.
27. Having considered the record of appeal, the ground of appeal and the submissions filed, the issues for determination are:
- i. Whether the appellant had proved his case on a balance of probabilities.
  - ii. Whether the trial court failed to analyze the evidence on record properly and thus arrived at an erroneous finding.
  - iii. Whether the appeal has merit or not.
28. The appellant alleged that the respondent had trespassed into his land LR No. 2027 Karocho Adjudication Scheme and constructed a house thereon and cultivated the land. The appellant sought an order of permanent injunction against the respondent, his children and agents from trespassing, encroaching and/or interfering with the appellant's said land.
29. To determine the question of trespass, the court must establish the title to the land in issue. This was rightly summarized by the trial court in the impugned judgment. It is also trite law that the burden of proof lies on the person who alleges. This is clearly spelt out under Section 107 to 109 of the Evidence Act.
30. From the material on record, it is clear that the suit land was still under Karocho Adjudication Section. Indeed, the appellant produced a consent dated 27/11/2019 issued to him by the Adjudication Officer



to institute the suit under Section 30 and 8(1) of the [Land Adjudication Act](#). Paragraph 2 of the said consent stated as follows with regard to parcels No. 2027 Karocho Adjudication Section:

“In order to complete the Adjudication Register for Karocho Adjudication Section, I shall in due course require a copy of the final order...”

31. The import of the above, and as rightly found by the trial court, is that the Adjudication Register had not become final and a certificate to crystalize ownership was yet to be issued. Section 24 of the [Land Adjudication Act](#) provides that an Adjudication Register comprises the Demarcation map and the Adjudication Record. It was therefore upon the appellant to prove that he is the proprietor of parcel No. 2027 by tabling the Adjudication Register and a certificate to crystalize his ownership. This was very crucial, considering that the respondent pleaded that he had not trespassed onto the suit land because he had his own parcel No. 3293 whose ownership and occupation had not been impeached by the appellant. Having failed to table the Adjudication Register and a certificate to crystalize his ownership, the appellant was in essence inviting the court to determine the issue of ownership over land that was still under an adjudication Section and in which the Adjudication process was not complete. In my view, the learned trial magistrate was right in declining such invitation. This court is also not persuaded that it should venture into the arena of determining ownership over land whose adjudication process was still on and was not complete. The consent of the Land Adjudication Officer that was produced by the appellant as an exhibit confirms so.
32. In this case, the onus was on the appellant to prove that he is the owner of the suit land and that the respondent had trespassed on it without any justifiable cause. However, from the material on record, I am not persuaded that the appellant discharged that burden. The Land Adjudication Officer Report dated 28/9/2023 and another came dated 25/4/2023 were clear that it was parcel No. 2026 which had overlapped onto the suit land. That parcel No. 2026 is stated to be recorded in the name of one Mark Mucee Munyambu who testified as DW3 but was not a party to the suit. It is my humble opinion that the appellant has not demonstrated ownership on which the trespass is begged on. I therefore agree with the trial court that trespass had not been proved.
33. I have also perused the entire proceedings and the judgment. Having done so, I find that the trial court addressed its mind to the real question in controversy. I am satisfied that the learned trial magistrate analyzed the entire evidence and arrived at a justified finding. On a balance of probabilities, the appellant had failed to prove his case and the same was rightly dismissed by the trial court.
34. Consequently, it is my finding that the appellant’s appeal has no merit and the same is hereby dismissed with costs to the respondent.
35. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 20<sup>TH</sup> DAY OF NOVEMBER, 2024.**

Court Assistant – Mwangi

Basilio Gitonga for Respondent

No appearance for Kimathi Kiara for Appellant

**C. K. YANO**

**JUDGE**

