



REPUBLIC OF KENYA



**KENYA LAW**  
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**Njoroge v Kimani & 3 others (Environment and Land Appeal  
E025 of 2022) [2025] KEELC 444 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 444 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E025 OF 2022**

**A OMBWAYO, J  
JANUARY 30, 2025**

**BETWEEN**

**ISAAC MBUGUA NJOROGE ..... APPELLANT**

**AND**

**GIBSON KIMANI ..... 1<sup>ST</sup> RESPONDENT**

**HERMAN MURAYA & 2 OTHERS & 2 OTHERS & 2 OTHERS & 2 OTHERS &  
2 OTHERS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Isaac Mbugua Njoroge, the appellant herein has appealed from the judgment of Hon E Nyaloti Chief Magistrate made on 7th June 2022 in Nakuru CM ELC 66 of 2020 seeking prayers that the judgment of the trial Magistrate together with all other consequential orders therefrom be set aside and that this court enter judgment for the appellant. That costs of appeal be allowed.
2. The first ground of Appeal is that the learned trial Magistrate erred in law and fact by making a determination without considering the facts and in failing to appreciate adequately or at all, the sufficient evidence adduced by the Appellant during the trial. Moreover, that the Learned trial Magistrate erred in law and fact by arriving at a finding that the Appellant ought to have called the County Land Registrar, Nakuru and the County Land Surveyor, Nakuru as witnesses to prove his case which such witnesses were not necessary to prove the Appellant's case.
3. Furthermore that the learned trial Magistrate erred in law and fact in finding that the Appellant failed to prove his case on a balance of probability whilst the case was undefended and the Appellant had adduced sufficient evidence to prove his case and therefore, the Learned trial Magistrate erred in Law and fact in misapprehending the standard of proof in a case of trespass to land that was presented by the Appellant.



4. The appellant contends that the Learned trial Magistrate erred in law and fact in dismissing the Appellant's case with costs to the Respondents, yet the Respondents never made appearance nor filed any defence to warrant costs.
5. The appellant further contends that the Learned trial Magistrate erred in law and fact in finding that the Appellant did not prove his case on a balance of probability by only producing photocopies of the titles that were not certified by the Land Registrar yet the Appellant had the original titles in Court and upon inspection and at the urging of the Court the trial Court was satisfied with production of photocopies of the titles together with the other documents attached to the Appellant's List of Documents and that the learned trial Magistrate erred in law and fact in disregarding the Plaintiff's evidence and submissions.
6. The facts of the case are that the appellant sued the respondents in the lower court seeking a permanent injunction restraining the respondents from trespassing on the suit land Nakuru/ PLAVE Settlement Scheme/4299, 4300 and 4301. The respondents neither filed appearance nor defence. When the matter came up for hearing before the learned magistrate, the appellant testified that he was the proprietor of the suit lands and that the respondents were intermittently, trespassing on the land and had dug a toilet on his parcel of land. The respondent did not attend court to controvert those facts. The learned magistrate considered the evidence on record and found that the plaintiff had not proved his case against the defendants on a balance of probability. Moreover, that the plaintiff failed to call the Land Registrar or the County Surveyor as witness and that the title deeds produced in Court were photocopies and that the same were not certified as true copies of the original by the Land Registrar. The application was dismissed. This being the first appellate court aim required to re-evaluate the evidence on record and come up with my finding and determination. This being the first appeal, it is my duty to re-evaluate the evidence tendered before the trial court and arrive at an independent conclusion taking into account the fact that I did not have the advantage of hearing the witnesses. In a civil appeal in *Selle and Another versus Associated Motor Boat Company Ltd & Others* 1968 EA 123 at 126 where the Court ( Sir Clement Lestang, V.P) said: "I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of a 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. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdulla Hameed Saif v. Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)."
7. To begin with, this court finds that the evidence tendered by the appellant was not controverted that the appellant was the owner of the suit property. Moreover, it was not controverted that the respondents were intermittently, entering the land and causing damage to the appellant. This court finds that the appellant proved his case on a balance of probability as his evidence was not controverted. The issue of uncontroverted evidence was addressed by Justice Mwongo in *Peter Ngigi & Another (suing as legal representative of the Estate of Joan Wambui Ngigi) v Thomas Ondiki Oduor & Another* 2019 eKLR where he stated:-
  22. There are any authorities that deal with the question of uncontroverted evidence, such as the situation in the present case where the defence did not show up at the trial. The general position running through such authorities is that uncontroverted evidence bears a lot of weight and a statement of defence



without any evidence to support the assertions therein will amount to mere statements.”

8. In Janet Kaphiphe Ouma & Another v Marie Stopes International (Kenya) Kisumu HCCC No. 68 of 2007 Ali-Aroni, J. citing the decision in Edward Muriga Through Stanley Muriga v Nathaniel D. Schalter Civil Appeal No. 23 of 1997 held that:

In this matter, apart from filing its statement of defence the defendant did not adduce any evidence in support of assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remains mere allegations ... Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence”.

9. In Interchemie EA Limited v Nakuru Veterinary Centre Limited Nairobi (Milimani) HCCC No. 165B of 2000, Mbaluto, J. held that where no witness is called on behalf of the defendant, the evidence tendered on behalf of the plaintiff stands uncontroverted. Mulwa J, however in the case of Kenya Power and Lighting Company Limited v Nathan Karanja Gachoka & another [2016] eKLR stated: “I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence in unchallenged or not.”
10. In this case, I do find that the learned magistrate erred in fact and law in finding that the appellant did not prove his case on a balance of probability as the evidence of the plaintiff was not controverted. The appeal is hereby allowed in terms that the judgment of the trial Magistrate together with all other consequential orders therefrom are hereby set aside and that judgment is entered for the appellant in terms of the prayers in the plaint thus that a permanent injunction is issued restraining the respondents from trespassing on the suit lands namely; Nakuru/ PIAVE Settlement Scheme/4299, Nakuru/ PIAVE Settlement Scheme/4300 and Nakuru/ PIAVE Settlement Scheme/4301.is issued. That costs of appeal be borne by the respondents. Orders accordingly

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**THE JUDICIARY OF KENYA.**

**NAKURU ENVIRONMENT AND LAND COURT**

**ENVIRONMENT AND LAND COURT DATE: 2025-01-30 04:00:06**

**The Judiciary of Kenya**

