



REPUBLIC OF KENYA



**Mutugi & another v Mutero & 6 others (Environment and Land Appeal  
5 of 2020) [2023] KEELC 17177 (KLR) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17177 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 5 OF 2020**

**JM MUTUNGI, J**

**APRIL 20, 2023**

**BETWEEN**

**PATRICK JOSEPH MUTUGI ..... 1<sup>ST</sup> APPELLANT**

**ANTHONY KAMAU MUNYIRI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**REUBEN MURIUKI MUTERO ..... 1<sup>ST</sup> RESPONDENT**

**EUNICE WARUGURU MUNYIRI ..... 2<sup>ND</sup> RESPONDENT**

**CECILIA WAIRIUKO WANJOHI ..... 3<sup>RD</sup> RESPONDENT**

**PETER NGINYI MBITI ..... 4<sup>TH</sup> RESPONDENT**

**JOHN MUCOMBA MURIITHI ..... 5<sup>TH</sup> RESPONDENT**

**CYRUS MAINA MURIITHI ..... 6<sup>TH</sup> RESPONDENT**

**SAMUEL WAWERU MURIITHI ..... 7<sup>TH</sup> RESPONDENT**

*(Arising from the Ruling delivered on 13th February, 2020 by Hon.  
Alex Ithuku Chief Magistrate in Kerugoya CMCC No. 87 of 2016)*

**JUDGMENT**

1. The instant Appeal is against the Ruling and Order of Hon. Alex Ithuku delivered on 13<sup>th</sup> February, 2020 on the application dated 5<sup>th</sup> August, 2019 in Kerugoya CMCC No. 87 of 2016. The Application sought review and setting aside of an exparte Judgment delivered on 2<sup>nd</sup> November, 2017 by Hon. S.M.S Soita – Chief Magistrate.
2. In the application dated 5/8/2019 the Appellants who were the Applicants sought the following orders: -



1. That the matter be certified as extremely urgent and the same be heard immediately.
  2. That the Honourable Court be pleased to order a stay of execution of the Judgment delivered on 2<sup>nd</sup> November, 2017 and all consequential proceedings pending and determination of the application.
  3. That the Honourable Court be pleased to review and set aside the Judgment delivered on 2<sup>nd</sup> November, 2017 and order the fresh hearing of the suit upon the Applicants filing a response to the Plaintiff/7<sup>th</sup> Respondent's claim that River Rwamuthambi marks the border between the applicant's land parcel Mwerua/Kanyokora/488 and the Plaintiff/7<sup>th</sup> Respondent's land parcel Mwerua/Gitaku/26 as alleged in paragraph 4 of the Plaint.
  4. That the Honourable Court be pleased to enjoin the Applicant's herein as co-defendants in the Plaintiff/7<sup>th</sup> Respondent's claim on behalf of the estate of the late Leonard Munyiri Muthiga who was the registered owner of land parcel Mwerua/Kanyokora/488.
  5. That the costs of the application be in the cause.
3. The Appellants grounded the application on the fact that they had not been joined as a party in the suit and were not heard before the Judgment was rendered and that the Judgment directly affected their interest in land parcel Mwerua/Kanyokora/488.
  4. The Plaintiff/1<sup>st</sup> Respondent in the Appeal opposed the application vide a Replying Affidavit sworn by the Plaintiff/1<sup>st</sup> Respondent on 2<sup>nd</sup> September, 2019. The 1<sup>st</sup> Respondent asserted that the Applicants were the sons of the 1<sup>st</sup> Defendant (now 2<sup>nd</sup> Respondent in the Appeal) and had fully participated in the proceedings through their mother and could therefore not claim to have been condemned unheard.
  5. The Learned Trial Magistrate after considering the application, the Affidavits in support and in opposition, the submissions and the record found no basis upon which he could set aside and/or review the Judgment. There being no basis to set aside and/or review the Judgment, the Learned Trial Magistrate determined that there was no opportunity for the Appellants to be joined in the proceedings as the matter had been concluded. The Learned Trial Magistrate consequently dismissed the Appellants application with costs to the Plaintiff/1<sup>st</sup> Respondent.
  6. The Appellants being aggrieved by the decision/ruling of the Learned trial Magistrate have appealed to this Court setting out four grounds of Appeal as hereunder:-
    1. That the Learned Trial Magistrate erred in law and in fact in dismissing the Application dated 5/08/2019 yet the evidence on record did not support such a finding.
    2. That the Learned Trial Magistrate erred in law and in fact when he found that the Appellants herein did not constitute aggrieved parties in relation to the Judgment delivered on 02/11/2017.
    3. That the Learned Trial Magistrate erred in law and in fact in making conclusion of fact that were not supported by evidence.
    4. That the Learned Trial Magistrate erred in law and in fact in disregarding the submissions by the Appellant's Advocate.
  7. The Appellants pray that the Appeal be allowed and the Ruling by the Hon. Alex Ithuku – Chief Magistrate delivered on 13<sup>th</sup> February, 2020 be set aside in its entirety and in place thereof the Appellants



application dated 5/8/2019 be allowed and that the costs of Appeal and in the subordinate Court be awarded to the Appellants.

8. The Appeal before this Court being a first Appeal, the Court is under an obligation to re-evaluate and consider the evidence that was placed before the Subordinate Court to satisfy itself whether or not the Learned Trial Magistrate was justified to reach the decision that he did. The principle upon which an Appellate Court of first instance proceeds was well enuciated in the Court of Appeal case of *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) E.A 123 where the Court stated thus:-  
  
“ ---- 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 nor heard the witnesses and should make due allowance in this respect ----“.
9. In the present matter there was no oral evidence adduced and the Court would only evaluate the affidavit evidence, the parties submissions and the applicable Law.
10. The Appeal was canvassed by way of written submissions. The Appellants in their submissions asserted that land parcel Mwerua/Kanyokora/488 which was one of the land parcels that shared a boundary with land parcel Mwerua/Kanyokora/26 registered in the 1<sup>st</sup> Respondents name, was registered in the name Leonard Munyiri Muthiga (deceased) who was not made a party in the suit. The Appellants argued that the lower Court proceeded to have the suit before it heard and Judgment delivered that dealt with the issue of boundary affecting land parcel Mwerua/Kanyokora/488 without affording the registered owner and/or his personal representatives an opportunity of being heard. The Appellants contended that the rules of natural justice were breached and in support of their submissions relied on the Case of *Onyango –vs- Attorney General* (1986 – 1989) E.A 456 and the case of *Mbaki & Others –vs- Macharia & Another* (2005) 2 E.A 2006.
11. In the two Cases cited, the Court was emphatic that where a person’s right or interest was likely to be affected by a decision, such a person ought to be given an opportunity of being heard before the decision is made. The Appellants argued the Lower Court made a decision that affected the interests/ rights of the estate of the late Leonard Munyiri Muthiga without the Administrator of the estate being given an opportunity of being heard and that violated the rules of natural justice which rendered the decision unsustainable. It was on that account that the Appellants made the application before the Lower Court seeking the setting aside, review and joinder of the Appellants (as the nominated Administrators of the estate of the late Leonard Munyiri Muthiga (deceased) as parties in the suit). The dismissal of the application triggered the present Appeal.
12. The 1<sup>st</sup> Respondent in his submissions contended that in the suit before the lower Court he had sued the 2<sup>nd</sup> to 6<sup>th</sup> Respondents seeking vacant possession and in default their forcible eviction from his land parcel Mwerua/Gitaku/26 and for permanent injunction restraining them, their servants, agents or anyone claiming through them, from cultivating, trespassing or in anyway interfering with the 1<sup>st</sup> Respondent’s proprietary rights over his land parcel Mwerua/Gitaku/26. The 1<sup>st</sup> Respondent submitted that the 2<sup>nd</sup> Respondent, Eunice Waruguru Munyiri, who is the Appellants mother was party to the suit, entered appearance but never filed any Defence and neither did the other Respondents prompting the suit to proceed by way of formal proof hearing. That the Judgment delivered on 2/11/2017 was to the effect that River Rwamuthambi was the natural boundary feature between the 1<sup>st</sup> Respondent’s land parcel Mwerua/Gitaku/26 and land parcels Mwerua/Kanyokora/488, 489, 25 and 501 which were across the river. The Learned Magistrate in the Judgment upheld the 1<sup>st</sup> Respondent’s



- assertion that the occupiers of the land parcels 488, 489, 25 and 501 had encroached onto the 1<sup>st</sup> Respondents parcel of land across the river and consequently ordered them to vacate and in default they be evicted.
13. The 1<sup>st</sup> Respondent maintained in his submissions that the Appellants mother participated in the proceedings and never raised any issue of representation of the estate of the late Leonard Munyiri Muthiga. The Appellants mother together with the other Respondents even applied to set aside the Judgment dated 2/11/2017 but the application was unsuccessful. The 1<sup>st</sup> Respondent contends the Appellants Appeal is devoid of any merit and should be dismissed with costs.
  14. I have considered the rival arguments/submissions of the parties and the singular issue for determination is whether based on the evidence and the material placed before the Learned Trial Magistrate, he was justified in dismissing the Appellants application dated 5/8/2019.
  15. The Learned Trial Magistrate in considering the issue of joinder of the Appellants as parties to the suit was of the view that the Judgment had been entered against the 2<sup>nd</sup> to 7<sup>th</sup> Respondents who were ordered to be evicted from the 1<sup>st</sup> Respondent's land parcel Mwerua/Gitaku/26. He held the Appellants were not claiming the 1<sup>st</sup> Respondent's land and therefore could not be aggrieved persons within the provisions of Order 45 rule 1 of the Civil Procedure Rules. For their part the Appellants contend that their late father's land parcel Mwerua/Kanyokora/488 was a subject matter in the proceedings concerning where its boundary with the 1<sup>st</sup> Respondents parcel of land lay. In the affidavit in support of the application, the Applicants averred that the course of Rwamuthambi River which formed the boundary between the parcels had over time changed course into the Appellants land parcel Mwerua/Kanyokora/488 and had hived off a portion of land which the beneficiaries of the estate had crossed over to reclaim and which the 1<sup>st</sup> Respondent was unjustifiably laying claim to.
  16. Undeniably the 2<sup>nd</sup> Respondent, Eunice Waruguru Munyiri, mother of the Appellants participated in the proceedings before the Lower Court and was without doubt brought in as one of the persons who was encroaching onto the 1<sup>st</sup> Respondent's land parcel by virtue of being the beneficiary of land parcel 488. She never raised issue of the estate of the late Leonard Muchiri being unrepresented. The 1<sup>st</sup> Respondent was not laying claim to any portion of land parcel Mwerua/Kanyokora/488, 489, 25 and 501 all he stated was that the occupiers of these parcels of land had overlooked the common boundary, the Rwamuthambi River and had encroached onto his parcel of land. In essence what was in issue was the positioning of the boundary between the parcels of land. The Lower Court in its Judgment determined the river was the natural boundary between the land parcels. The Judgment of the court dated 2/11/2017 despite the 2<sup>nd</sup> to 7<sup>th</sup> Respondents applying to have the same set aside was not set aside and remains on record.
  17. Quite evidently the application by the Appellants dated 5/8/2019 was filed after the application by their mother and the other five Respondents dated 28/11/2018 seeking to set aside the exparte Judgment was dismissed by the Court on 2/4/2019. There can be no doubt that the Appellants were aware their mother was involved in the ongoing proceedings in Kerugoya CMCC No. 87 of 2016 and that the application dated 5/8/2019 could only have been an after thought after the dismissal of the application to set aside the Judgment and indeed constituted abuse of the Court process.
  18. Be it as it maybe, having found that the dispute between the parties directly related to the positioning of the boundary between the parcels of land, the Court in terms of Section 18(2) of the [Land Registration Act, 2012](#) lacked the jurisdiction to entertain the suit in as far as determining the boundary dispute was concerned. Section 18 of the Act provides as follows:-



- 18.(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19 (3), the determination of the position of any uncertain boundary shall be done as stipulated in the Survey Act, Cap. 299.

19. The Land Registrar and the Surveyor are the persons mandated under the Land Registration Act, 2012 Sections 18 and 19 to deal with disputes relating to boundary and until a disputed boundary has been dealt with as provided under the aforesaid provisions of the Act, the Court lacks jurisdiction to entertain a suit where the dispute relates to boundary. In the instant matter though the parties agree that the River forms the boundary between the land parcels, one party alleges the river changed course while the other party maintains the river is the boundary. Who determines whether or not the river has changed course and thus affected the boundary? It cannot be the Court.
20. I am of the view that the Learned Trial Magistrate properly considered the application dated 5/8/2019 and rightly dismissed the same as there were no grounds upon which he could set aside and/or review the Judgment.
21. There is no basis upon which this Court can interfere with the findings and decisions of the Learned Trial Magistrate. The Appeal lacks merit and the same is dismissed.
22. I order that each party bears their own costs of the Appeal.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20<sup>TH</sup> DAY OF APRIL 2023.**

**JOHN M. MUTUNGI**  
**JUDGE**

