



Kihura v Njoroge (Sued as the Legal Representative of the Estate of Njoroge Matubia, Deceased) (Environment and Land Appeal 48 of 2019) [2023] KEELC 16845 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELC 16845 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 48 OF 2019**

JG KEMEI, J

APRIL 13, 2023

BETWEEN

PATRICIA WANJIKU KIHURA APPELLANT

AND

MWANGI NJOROGE (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NJOROGE MATUBIA, DECEASED) RESPONDENT

(Being an appeal against the Judgement of Hon O M Wanyaga (SRM) in MCLE No 139 of 2019 delivered on the 17/5/2021)

JUDGMENT

Introduction and background of Appeal

1. The appellant herein was the defendant in the trial court while the respondent was the plaintiff.
2. Vide a plaint filed on the 12/8/2019 the plaintiff sued the defendant seeking the following orders;
 - a. A declaration that the continued occupation of the Suit Property Known As Land Parcel Ithanga/phase V/plot No. 28 (suit land) by the Defendant past 2016 is illegal and an act of trespass.
 - b. An order that the Defendant be evicted from the suit land being; land parcel Number Ithanga/ phase V/plot No. 28.
 - c. An order requiring the Defendant to forthwith cause the structures erected on the suit property to be demolished and crops harvested, cut or uprooted failure of which the Plaintiff to be at liberty to undertake the exercise.



- d. An order of permanent injunction restraining the Defendant her servants, agents, employees, assigns and or anyone claiming ownership under her, from occupying, constructing on, selling, subdividing, disposing or in any manner dealing with the properties and/or interfering with the quiet enjoyment of the right over the property Ithanga/phase V/plot No. 28 as to dispossess the Defendant.
 - e. Costs of this suit.
 - f. Interests on (a) and (b) above at Court rates till payment in full.
3. It was the Plaintiffs case that the suit land belonged to his father Njoroge Matubia, deceased which he acquired through a settlement scheme and at the time of filing the suit no title had been issued. That Plaintiff averred that he had been in uninterrupted occupation of the suit land during and after the death of his father. All was well until the months of May and September 2015 when the defendant alleged that she had acquired a portion of one acre to be excised out of the suit land from the Plaintiff and for unknown consideration. She trespassed onto the portion of the land and started farming and construction of permanent buildings without his authority consent and or colour of right. It was the Plaintiffs position that there was no valid sale and any intended sale was rescinded in 2016. The alleged sale was not approved at the LCB, no consideration was given that he had no capacity to sell the land to the defendant as alleged. His claim against the defendant therefore was for trespass, eviction form the land and a permanent injunction prohibiting any interference with the quiet enjoyment and right of user over the suit land by the Plaintiff.
 4. The Defendant denied the Plaintiff's claim and vide the statement of defence dated the 1/10/2019 and filed on the 2/10/2019. She admitted that she purchased a portion of one acre from the Plaintiff at the consideration of Kshs 470,000/- and was put in possession of the land in 2015 which possession she has enjoyed todate. In addition, she buried her daughter Jane Nyambo Kihura in the month of May 2017. She denied trespass and averred that the Plaintiff was charged for malicious damage to her crops in a Criminal Court.
 5. Upon hearing the suit, the lower Court delivered its Judgment on the 17/5/2021 in favour of the Plaintiff and allowed prayers Numbers a, b, c, d, & e of the Plaintiff.

The appeal

6. Aggrieved by the said Judgement the Appellant proffered this appeal vide a Memorandum of Appeal dated 2/6/2021 against the Respondents on the grounds that the Learned Magistrate erred in law and in fact in;
 - a. failing to find that the Plaintiff's suit was purely based on alleged illegality and had no plausible cause of action.
 - b. failing to find that the Plaintiff had not proved ownership of the suit land either through a certificate of grant and or evidence on the deceased assets as petitioned in succession cause No 217 of 2016.
 - c. failing to sustain the evidence by the County Land Adjudication and Settlement officer confirming that the suit land has long been transferred to one Moses Karogo and hence the Plaintiffs claim is unsustainable.
 - d. By shifting the burden of proof to the defendant before the Plaintiff had satisfactorily discharged the same.



- e. Failing to appreciate the Plaintiffs conduct both through his pleadings and his evidence and thereby assisting the Plaintiff in gaining an irregular and unfair advantage extremely against the doctrine of estoppel and equity.
 - f. And by the Judgement in issue negated privity of contract and expressly and irregularly awarded the subject matter to the Plaintiff.
 - g. In wishing away a fundamental piece of evidence in that the defendant's daughter is interred on the subject matter, a fact not denied by the Plaintiff
 - h. ignored the defendant's submissions to her detriment.
7. The Appellant sought the following orders;
- a. The appeal be allowed and the Judgement of the trial Court delivered on the 17/5/2021 be set aside and overturned with costs to the Appellant.
 - b. Any other relief as the Court may deem just to grant.

The written submissions

8. The parties elected to canvass the appeal by way of written submissions which I have read and considered.
9. The firm of Njugi B.G & Company Advocates filed written submissions on behalf of the Appellant. The learned counsel ably detailed the pleadings of the parties in the trial Court leading to the impugned Judgement, grounds of appeal as well as the prayers sought.
10. On whether the trial court erred in failing to find that the respondent's suit was based on an alleged illegality with no justifiable cause of action, the Appellant submitted that she adduced evidence that she purchased the suit land from the respondent for the sum of Kshs 470,000/- on various dates between May 2015 and January 2016. She took fault with the respondent's averment that he never sold the land and if he did he rescinded the same in 2016. That the Respondent dealt with the land after the demise of his father in 1994. It was submitted that the Respondent led the Appellant to believe that the Respondent had the capacity to sell the land hence the agreements of sale entered into between the months of May 2015 and Jan 2016 to her detriment. That the Respondent did nothing to stop her from utilising the land until the year 2019 when he filed suit for eviction.
11. Quoting the provisions of section 120 of the *evidence Act* the Appellant stated that the Appellant avers that the Respondent is now estopped from denying the existence of the interest accrued from the agreement of sale and the transaction as a whole. The section states as follows;
- “When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing.”
12. The doctrine of estoppel was relied on as enunciated in the case of *Serah Njeri Mwabi Vs John Kimani Njoroge* (2013) eKLR as follows;
- “the doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”



13. It was submitted that the conduct of the Respondent does not endear him to equity seeing that he has come to equity with unclean hands. The case of *Caliph Properties Limited Vs Barbel Sharma & Anor* (2015) eKLR was relied in support of the proposition.
14. With respect to grounds Nos 2 and 4 of appeal that is to say whether the trial court erred in failing to find that the Respondent had not proved ownership of the suit land, the Appellant submitted that the Respondent failed to produce any documents of ownership to support his claim. Put it differently he did not show a title or title abstract in the name of Njoroge deceased. She submitted that the copy of certificate of grant of administration alongside the letter from the ministry of lands does not corroborate his claim of ownership of the suit land. That the letter from the Ministry of Lands show that the deceased sold the land to one Moses Karongo in 1996, a fact that is fallacious given that the deceased died in 1994. She faulted the trial Court for failing to interrogate this glaring fact. Interalia the Respondent did not exhibit the confirmation of grant in which the suit land is cited as one of the assets of the estate.
15. Quoting section 107 & 109 of the *Evidence Act*, the Appellant submitted that there was no evidence to proof that the subject matter belonged to the Respondent's father arguing that the Respondent relied on mere assertions and conjecture in his pleadings.
16. That the trial Court placed a higher premium on the Respondent's submissions with respect to the ownership of the suit land and yet submissions cannot take the place of evidence. The holding in the case of *Daniel Toroitich Arap Moi & Anor Vs Mwangi Stephen Mureithi & Anor* (2014) eKLR was relied upon in support of the supposition.
17. Relying on the case of *Kanyungu Njogu Vs Daniel Kimani Maingi* (2000) EKLR the Appellant submitted that it is trite that the standard of proof in civil cases is on the balance of probabilities as follows;

“When the court is faced with the two probabilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.”
18. Flowing from the above the Appellant submitted that the burden of proof could not have shifted to the defendant before the Respondent had satisfactorily discharged the same.
19. On grounds No 3 of the appeal, the Appellant faulted the Court for not enjoining Moses Karongo suo moto who pursuant to the letter of the County Land Adjudication officer could have acquired an interest in the land way back in 1996. That the said Moses Karongo was a necessary party to enable the Court adjudicate the matter in controversy effectually and completely.
20. On the issue of negating privity of contract, the Appellant submitted that it is never the business of the Court to rewrite agreements but to enforce them. In the case of *Jeremiah Mucheru Ndibui vs David Gichure* (2019) the Appellant relied on the proposition that a party cannot run away from the terms of the agreement and that it is trite that a Courts function is to enforce contracts that the parties have freely entered into and not to rewrite them. The Hon trial Court was faulted for disregarding the authenticity of the agreements as presented in evidence by the Respondent. That it is not clear whether the absence of the parcel number in the agreement negated the terms of the same.
21. That the Respondent did not show proof that the signature on the documents did not belong to him and yet the impugned signature is similar in all respects to the signature of the Respondent on the pleadings placed before the Court by the Respondent.



22. The Appellant submitted that the intention of the parties to contract with each other and convey an interest in land to the Appellant cannot be disregarded in the face of clear and untainted intentions. Moreover, there was no evidence tendered to support rescission of the contract by the Respondent.
23. It was submitted that the Appellant's daughter was buried on the suit land in May 2017 without any objection from the Respondent. The parties, it was submitted knew each other well to the extent of the Appellant paid for the medical bills for the Respondent's wife Njoki on behalf of the Respondent.
24. The Respondent through the law firm of Njoroge Kugwa & Co Advocates opposed the appeal and submitted that the suit land belongs to the father of the Respondent. The Appellant is in occupation of the suit land without any consent and permission of the estate of the deceased. The Respondent did not sell the land to the Appellant. That at no time has the Respondent claimed the land to be his but instead presented two documents to wit; the grant of letters of administration in the estate of his deceased father and a letter from the District Land Adjudication Settlement Officer (DLASO) showing that the land belongs to the deceased. For that reason, the Respondent did not need to prove ownership as he did not plead it. That the Respondent denied selling a portion of the property to the Appellant on the grounds that he had no capacity to do so. That the issue of transfer of the land to a third party did not form part of the pleadings of the Respondent. That it is misleading to state that the land was sold to Moses Karongo, a party that was not enjoined to the suit. In any event the Appellant did not file a counterclaim to the suit.
25. Further the Respondent submitted that it was the case of the Appellant that she was a purchaser and so fell on her to prove that fact to the Court. It is the Appellant that shifted the burden of proof to herself and failed to discharge the said burden.
26. That there was no privity of contract between the parties and neither has the Plaintiff been awarded the land as the same is still subject of succession in the estate of his deceased father. There was no evidence laid before the Court that he sold the land, was paid the purchase price nor put the Appellant in possession.
27. On the issue of the internment of the Appellants daughter on the land, the Respondent was of the firm view that internment does not confer proprietorship of the land to the Appellant and that it is his resistance that led to his arraignment in Court. He relied on the case of *Oyunge Barnabas Ratemo & 3 Others vs Charles Oteki Rioba & Anor* (2022) eKLR where the Court stated as follows;

“I must warn the parties herein that by allowing or disallowing the burial of the deceased on the suit land it should not be seen as an attempt to legitimize the ownership of the suit property by any of the parties. For the avoidance of doubt, I am not called upon to determine land rights respecting the Plaintiff's family members. Such a time would arise. By determining the burial place of the deceased, I have not determined any ownership rights respecting the parcel of land known as L.R. NO. 9346/2 presently in dispute. That would have to await appropriate proceedings at full trial. I hope the Application dated 7/3/2022 was not brought with the aim of trying to settle the ownership dispute of the parcel of land known as L.R. NO. 9346/2 or distribution of the same through a burial dispute.”
28. That the Appellant remains a trespasser and the interment of a body on the land does not confer any ownership in the land to the Appellant at all.



The duty of the Court as an Appellant Court of 1st instance

29. I am guided by the persuasive decision of Mr Justice Mativo in the case of *Bwire Vs Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) when he stated as follows;

“A first appellate is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and arrive at its own independent Judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle & another v Associated Motor Boat Co. Ltd.& others*). As was held by the Court of Appeal for East Africa in *Peters v Sunday Post Limited*: -{1968} EA 123. ²{1958} E.A. page 424. “It is a strong thing for an appellate Court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witnesses. An appellate Court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution; it is not enough that the appellate Court might itself have come to a different conclusion.”

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. The Judgment of the appellate Court, must, therefore, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate Court. While reversing a finding of fact the appellate Court must come into close quarters with the reasoning assigned by the trial Court and then assign its own reasons for arriving at a different finding. This would satisfy the Court hearing a further appeal that the first appellate Court had discharged the duty expected of it. See *Santosh Hazari vs. Purushottam Tiwari (Deceased)* by L. Rs {2001} 3 SCC 179.

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. In the first appeal parties have the right to be heard on both questions of law as also on facts and the first appellate Court is required to address itself to all issues and decide the case by giving reasons. While considering the scope of section 78 of *Civil Procedure Act*, a Court of first appeal can appreciate the entire evidence and come to a different conclusion.

30. Section 78 of the *Civil Procedure Act* provides as follows;

“Powers of appellate Court

- (1) Subject to such conditions and limitations as may be prescribed, an appellate court shall have power-
 - (a) to determine a case finally;
 - (b) to remand a case;
 - (c) to frame issues and refer them for trial;
 - (d) to take additional evidence or to require the evidence to be taken;



(e) to order a new trial.

(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”

31. Bearing in mind the above statutory duty I shall now reassess the evidence on record and make my own conclusions except that I must make allowance that unlike the trial Court, I did not see or watch the witnesses testify.

Analysis and determination

32. I can see three issues for determination in this appeal. That is to say; Firstly, whether there was a competent sale or put differently whether the Respondent had capacity to sell the deceased land to the Appellant; Secondly, whether the Respondent proved trespass on the part of the Appellant. Thirdly who meets the costs of the suit.

33. To start with are the undisputed facts. The Respondent is the legal administrator of the estate of the late Njoroge Matubia who died on the 7/7/1994 as per the death certificate dated the 25/8/1994. The grant of letters of administration in the estate of the late Njoroge Matubia were issued to the Respondent on the 7/11/2016 in Thika CMCC Succ Cause No 217 of 2016.

34. It is not in dispute that the Appellant is in possession of the land since 2016 or thereabouts. On account of the Appellant, by way of a purchasers right but on the account of the Respondent as a trespasser.

35. The Respondent’s cause of action in the trial Court was illegal trespass of his late father’s suit land by the Appellant in the months of May and September 2015. The Appellant denied the claim and averred that she purchased the land from the Respondent in 2015 at the sum of Kshs 470,000/- which amount was paid to the Respondent in instalments, took possession and has even buried her daughter on the suit land without any objection from the Respondent.

36. Who is the lawful owner of the land? This question is answered in the letter dated the 26/4/2016 addressed to the Chief Magistrate Court and authored by County Adjudication officer as follows;

“26th April 2016

The Chief Magistrate

Thika Law Courts

Re: Succession – Plot No. 28 Ithanga Phase V Settlement Scheme

The above quoted plot was offered to Njoroge Matubia who is deceased. The plot is fully paid for in this office but the area is not registered for Title processing.

Our office file shows that in 1996, the son Josphat Njoroge entered an agreement of sale with one Mr. Moses Karogo for an acre of the land for Kshs. 50,000/-. This is stated by some correspondences from Mr. Karogo and the then Division Officer Kakuzi Division. Josphat came to this office today and stated that they later sorted this out though our file has no documents on the later arrangement.

A letter from the local Chief to your Court implies that Mwangi Njoroge and Paul Wambua Ndunda are the dependants and they want to file a succession cause. I therefore refer them to your office with this letter.



W. Mwangi
County Land Adj. Settl. Officer
Kiambu/murang'a Counties”

37. From the above letter it is clear that the land belongs to Njoroge Matubia, deceased. There are allegations of the Respondent having sold one acre of the said land to one Moses Karongo, a third party who was not enjoined to the proceedings.
38. Was there a sale of land to the Appellant? The evidence of the Respondent and specifically paras 2-6 of his witness statement on record states as follows;
2. My deceased father became the owner of the suit property through a settlement scheme for which he paid up the entire amount and nothing is owed by his estate.
 3. At all material times during the lifetime of my deceased father and after his demise, I have been in occupation and use of the suit property up to date quietly, without any interference.
 4. On diverse dates between May and September of the year 2015, the Defendant purported to have bought from me an unknown size of property (believed to be one acre), to be excised from the suit property and for an unknown consideration.
 5. The Defendant in the same year entered into a portion of my land and began using it by farming and developing on it. The encroachment was done without my authority, consent and or permission or any colour of right and without any justification whatsoever.
 6. I have never sold any part of the suit property to the Defendant herein and any intended sale was rescinded by me late in the year 2016. I have never received any money in the name of consideration for the said sale, and neither have I attended any Land Control Board for consent on sale of the entire or portion of the above named property.
39. In cross examination, the Respondent stated that the land was sold to the Appellant by Agnes Njoki his ex wife and an Aunt to the Appellant. There are two things that persuade the Court that the Respondent was aware of some transaction involving the sale of the land. First is his sworn statement that he rescinded the sale in 2016 and secondly that the sale was made by his ex-wife. What was he rescinding, when and why?
40. The above statements suffice to show that indeed there was a sale transaction and this is the genesis of the root of the answer to the first question in issue which is whether the Respondent had the capacity to sale the land between May and June 2015. I have found that the owner of the land died in 1994 and the letters of grant of administration were only issued on the 7/11/2016 in favour of the Respondent.
41. Section 45 of the *Law of Succession Act* provides as follows:
- “(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - (2) Any person who contravenes the provisions of this section shall—
 - (a) be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and



- (b) be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

42. The effect of the above provision of the law is that the property of a dead person cannot be lawfully dealt with by anybody unless such a person is authorised to do so by the Law. Such authority emanates from a grant of representation and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.

43. Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. *In re Estate of M’Ngarithi M’Miriti* [2017] eKLR it was held that:

“.....it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the *Law of Succession Act*..... any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the *Law of Succession Act*. That is why the law has taken a very firm stance on intermeddling and has clothed the Court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

44. I have held before in other cases that the persons who may be guilty of intermeddling include the potential beneficiaries of the estate, administrators and even third-party purchasers as is the case in this instant suit.

45. In this case the Respondent in trying to sell the land prior to being appointed the legal representative of the estate of Njoroge Matubia lacked the legal capacity to do so and the act of selling giving possession to the Appellant amounted to intermeddling of the estate of his father. Equally the Appellant is guilty of intermeddling with the estate of a deceased person by purporting to acquire an interest taking possession and or bringing her next of kin on the land.

46. Flowing from the above I find that there was no valid sale (if any) between the Appellant and the Respondent and I need not discuss the validity and or otherwise of the sale agreements. Luckily for the Court the Appellant has alluded to the illegality of their dealings with the land and the Court takes that to be an admission and recognition by the Appellant that the sale was illegal invalid null and void. Moreover both parties are guilty of a criminal act of intermeddling in accordance with the Law of Succession.

47. Evidence was led by the Respondent that the estate of the late Njoroge Matubia has not been fully succeeded. There was no evidence of a confirmation of grant exhibited either. Neither was there leave of the Court to allow the Respondent to dispose the suit land as alleged by the Appellant. Effectively there was no seller (if any). The Respondent had no locus in law at all to sell the land to the Appellant.



48. The Court answered the 1st question in the negative.
49. The second issue is whether the Respondent proved trespass? This question underscores the role of a legal representative in law with respect to the estate of the deceased. One of the purposes of issuing the grant of letters of administration is to administer the estate according to the law and to render a just and true account whenever required to do so. In my view protecting the assets of the estate from intruders and trespassers is one of the roles of a legal representative.
50. The Respondent has established that the land belonged to his deceased father and that the same has been encroached by the Appellant without any color of right.
51. The *Trespass Act* defines:-
- “(1) Trespass as the act of any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.
- (2) Where any person is charged with an offence under Subsection (1) of this section the burden of proving that he had reasonable excuse or the consent of the occupier shall lie upon him.”
52. Having held that the Appellant acquired no title and her interaction with the land was as a mere intermeddler, I am persuaded that she has not proved any justiciable cause to remain on the land. Her remedies if any should flow from the Respondent as an individual.
53. Given the circumstances of the case I find that the Respondent has founded a case for trespass.
54. In the upshot I find the appeal has no merit. I also find that the trial Court did not err in the decision that it reached and therefore find no grounds to fault the learned trial Court.
55. The final orders
- a. The appeal lacks merit.
- b. Both parties having been found to have intermeddled with the property of the deceased, I order that each party to meet their own costs of the appeal.
56. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 13TH DAY OF APRIL, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Mr. Njugi for Appellant

Ms. Waigwa for Respondent

Court Assistants – Kelvin/Lilian

