



Fwamba v Musuungu alias Godwin Kituyi Musungu (Environment and Land Appeal E026 of 2022) [2023] KEELC 20341 (KLR) (26 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL E026 OF 2022
EC CHERONO, J
SEPTEMBER 26, 2023**

BETWEEN

PAUL KUTO FWAMBA APPELLANT

AND

**KEVIN KITUYI MUSUUNGU ALIAS GODWIN KITUYI
MUSUNGU RESPONDENT**

JUDGMENT

1. The Appellant, Paul Kuto Fwamba had filed a suit before the Principal Magistrate’s Court at Kimilili being PM-ELC NO E004 of 2020 seeking for the following orders;
 - a.
 - i. A declaration order restraining the defendant, his agents or servants from interfering with the boundary features, planting trees, erecting structures/damaging and/or committing acts of waste or in any manner whatsoever blocking the public Road between NQ BOKOLI/MUKUYUNI/1073 & 1074 at Sitirila area in Kuywa Location
 - ii. General Damages
 - (b) Costs of this suit
 - (c) Interest
 - (d) Any other relief this Honourable court may deem fit to grant.
2. The defendant/Respondent filed a statement of Defence dated July 20, 2022 as well as a Notice of Preliminary Objection. In the said statement of defence, the defendant is not objecting the jurisdiction



of the trial court to hear and determine the dispute. Instead, the Notice of preliminary objection raised the following grounds;

- a. That the Defendant lacks capacity to either prefer or defend suits on behalf of the estate of the deceased Musungu Khaukha.
 - b. That the subject parcel of land (LR NO BOKOLI/MUKUYUNI/1074) is registered in the names of the deceased Musungu Khaukha.
 - c. That the Defendant as sued is non-existent, since the said Kevin Kituyi Musungu remains a stranger.
 - d. That the suit was preferred pre-maturely before either preferring a citation cause to the deceased estate or Succession proceedings taking effect.
 - e. That the suit as presented is overly frivolous, vexatious and an abuse of the due process of the law.
 - f. That the Court can't issue orders in abeyance hence prudent that the entire suit be dismissed with costs.
3. The former suit proceeded with numerous interlocutory applications, mentions and directions. One of the interlocutory application is the Notice of Motion dated August 23, 2021 where the plaintiff was seeking to consolidate the former suit KIMILILI PMCC NO E4 OF 2020 with KIMILILI PMCC NO 39 OF 2020. That application was considered by the trial court rendered itself on August 19, 2021 in the following terms;
1. That the application dated August 23, 2021 is unopposed.
 2. That Kimilili Environment and land Case NO 39 of 2020 be consolidated with this suit as prayed.
 3. Costs in the Cause.
 4. That the Defendants are given 7 days to file their preliminary objection.
 5. That Mention on August 26, 2022 to confirm filing of the said preliminary objection and for further directions.
4. From the order consolidating the two suits as shown above, there is no direction on which of the two suits was could be the lead/running file and other pre-trial directions on how the evidence would be received/taken. It is to be noted from the extract of the record of appeal that the trial court had even directed the Bungoma County Land Surveyor to visit the scene and demarcate the road as between the 2 parcels of land BOKOLI/MUKUYUNI/1073&1074. The record further indicates that the said Bungoma County Surveyor, one Emmanuel Nasoma attended court on April 29, 2021 and gave oral evidence on the application of the plaintiff/appellant dated October 8, 2020.
5. The trial court record and part of the extract of this appeal indicates that a Notice of Preliminary objection raised by the respondent through the firm of M/s Jb Otsiula & Associates Advocates dated 27/8/2021 which objection, after consideration was dismissed by the trial Magistrate on October 21, 2021.



6. By another Notice of preliminary objection dated August 22, 2022, the Respondent through the firm of Jb Otsiula & Associates Advocates averred as follows;

“THAT the issue of resolution of the boundary dispute, demarcation and restoration of the common boundary between the suit properties LR NO BOKOLI/MUKUYUNI/1073 and 1074 respectively including determination of boundary features dispute as raised in the suit fall outside the jurisdiction of the court.”

Legal Analysis And Determination

7. I have considered the extract of the record of appeal and the submissions by the parties. I have also considered the Memorandum of Appeal and the applicable Law. This appeal arises from a Ruling by the trial Magistrate on a preliminary objection dated August 22, 2022 and delivered on October 12, 2022. The appellant was aggrieved by the Ruling by the trial Magistrate and preferred the present appeal raising 14 grounds which I now consolidate into three grounds as follows;

The learned Magistrate erred in law and fact in failing to notice the plaintiff’s application of consolidation of file ELC 39 OF 2020 dated 23/08/2021 with the matter herein and of court contempt filed under certificate of urgency dated 19/10/2020 not being heard and concluded.

8. The extract of this appeal indicates that the former suit PM-ELC NO.E4 was ordered consolidated with PM-ELC NO 39 OF 2020. No directions were taken by the trial Magistrate on how the two cases would be heard and how evidence would be received. I have also looked at the extract of the appeal and the original files in respect of the two consolidated cases and find that the trial magistrate only dealt with one case file being NO E4 of 2020. I also note from the extract of the appeal that following an application brought under certificate of urgency dated October 12, 2020 the trial Magistrate certified the same urgent and issued orders in the following terms;

1. That the application is certified as urgent.
2. That the Defendant/Respondent, his agents or servants are hereby restrained Temporarily from planting trees, erecting structures/damaging and/or committing acts of waste or in any manner whatsoever blocking the public road between L.R NO. BOKOLI/MUKUYUNI/1073 AND 1074 at Sitirila area in Kuywa Location pending hearing and determination of this application interparties.
3. The applicant to serve the Respondent within 3 days.
4. The Respondent to file and serve a replying affidavit within 7 days.
5. Mention on October 22, 2020 for further directions.”

9. The trial Magistrate even ordered Bungoma County land Surveyor to go to the scene and demarcate the road as between the two parcels of land BOKOLI/MUKUYUNI/1073 and 1074 with the assistance of the Area O.CS. These orders issued at interlocutory stage is a clear indication that the appellant had established an arguable claim and not a frivolous one.

10. When the trial Magistrate struck out the Appellant’s suit for want of jurisdiction, she failed to consider these issues in totality, particularly the interim orders and the viva-voce evidence by Bungoma County Land Surveyor. I agree that the trial Magistrate erred both in law and fact and her decision cannot therefore stand.



The matter raised by the plaintiff is a public road blockage entering his home and not boundary neither land dispute.

11. From the prayers sought by the appellant/plaintiff in the former suit, it is clear that the dispute relates to the blocking of a public and a declaration and an order restraining the Respondent/defendant from interfering with and committing acts of waste in blocking the said road. There is even a surveyor's report prepared after the county Surveyor visited the site. There are also letters by local administration officers contained in plaintiff's/appellant's list of documents confirming that the plaintiff/Appellant has a genuine claim which raises triable issues to proceed to the main hearing. An arguable claim need not succeed.

The Defendant initially raised preliminary objection dated 27/8/2021 and the court delivered Ruling on October 21, 2021 and it dismissed it with costs to the plaintiff.

12. The Defendant/Respondent filed a Notice of Preliminary objection dated August 27, 2021 and upon considering the rival arguments presented by the disputants, the trial Magistrate dismissed the same with costs on October 21, 2021. At page 10 of her ruling, the trial Magistrate appreciated the plaintiff's/Appellant's claim and observed in obiter as follows;

“ The issue before this court is a party allegedly blocking a road of access to parcel NO. BOKOLI/MUKUYUNI/1074 that is he has blocked the road between 42 BOKOLI/MUKUYUNI/1073 and 1074. The issue is not BOKOLI/MUKUYUNI/1074 encroaching into parcel NO BOKOLI/MUKUYUNI/1073. The issue is the blockage of the road so the suit should be instituted not against the administrator of the estate of the registered owner of land parcel NO. BOKOLI/MUKUYUNI/1074 but against the person/individual who actually blocked the road—“

13. From that Ruling, it is clear that the trial magistrate understood that the dispute in the former suit was not a boundary dispute but the blockage of access to a public road leading to the plaintiff's/Appellant's home/house. I am therefore satisfied that the trial Magistrate erred in law and in fact by dismissing the plaintiff's/Appellant's suit on grounds that the dispute was a boundary dispute and therefore lacked jurisdiction.
14. From my overall re-evaluation, re-analysis and re-consideration of the extract of the record of Appeal, I am satisfied this Appeal has merit and the same is hereby allowed as follows;
1. The order by the trial Magistrate issued on October 12, 2021 dismissing the former suit by the plaintiff/Appellant is hereby set aside.
 2. The said suit KIMILILI SPM-ELC NO E004 of 2020 is reinstated.
 3. The original court file is hereby remitted back to Kimilili Law Courts for hearing and determination by any authorized judicial Officer other than HON G Adhiambo.
 4. The costs of this appeal and the dismissal of the former suit shall be borne by the defendant/respondent
 5. Mention before the Senior Principal Magistrate/Head of Station, Kimilili Law Courts for directions on October 12, 2023.

READ, DATED DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 26TH SEPTEMBER, 2023



HON. E.C CHERONO

ELC JUDGE

In the presence of

1. Mr Mbugua for the Respondent
2. Appellant-absent
3. Joy C/A-present

