



**Ngugi v Mwai & another (Environment and Land Appeal E092 of 2021)
[2023] KEELC 20197 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20197 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E092 OF 2021**

JG KEMEI, J

SEPTEMBER 26, 2023

BETWEEN

DAVID NJEHIA NGUGI APPELLANT

AND

JOSEPH MUTUA THUKU MWAI 1ST RESPONDENT

ANASTACIA WANJIRU NJARARUHI 2ND RESPONDENT

*(Being an Appeal from the Judgment of Hon A.M. Maina, CM
in CMCC No 320 of 2012-Thika delivered on the 28/9/2021)*

JUDGMENT

1. This appeal arises from the suit filed in the lower Court on the 2/5/2012 *vide* CMCC No 320 of 2012. The 1st Respondent then Plaintiff sued the 2nd Respondent then Defendant for orders of injunction prohibiting her from blocking the access road to the Plaintiffs land. In addition, he sought orders of mandatory injunction directing her to make provision for an official access road as well as process the title for the Plaintiff forthwith.
2. It was the case of the Plaintiff that he purchased 1.5 acres out of parcel LR. NO 10874/22 held by the Defendant *vide* an agreement dated the 23/12/2008, paid part of the consideration leaving a balance of Kshs 55,000/-, took possession of the land and settled in. That the Defendant has closed the access road to his property an act which is illegal and has occasioned him loss and suffering.
3. The Defendant denied the Plaintiff's claim and contended that when she sold the suit land to the Plaintiff she pointed out the beacons of the land and also showed the Plaintiff the access road to the suit land. She denied allowing the Plaintiff to access his land through her own parcel of land. She added that the Plaintiff has an access to his land but is being threatened by a neighbor.



4. With leave of the Court the Defendant filed a third party claim against David Njehia Ngugi seeking orders that he vacates the suit land and replaces the beacons that he removed therein.
5. In his defence and counterclaim filed on the 14/8/15, the third party claimed that it is the Plaintiff and the Defendant that have trespassed onto his land parcel (Plot B) which borders that of the Plaintiff. In his counterclaim, he stated that he purchased the portion of land out of parcel 10874/72 from one Njoroge Kibiriri in 1987 and took immediate possession. Later in the month of March 2008 he purchased an additional parcel measuring 1.75 acres from the estate of the late Luka Njarahuhi Kamau, the husband of the Defendant. That it is this parcel that has been encroached by both the Plaintiff and the Defendant. Particulars of trespass were cited under para 12 of the defense and counterclaim. He sought the following orders;
 - a. An injunction prohibiting the Plaintiff and the Defendant either by themselves or their agents, their servants and or employees from interfering trespassing encroaching or altering the state of the third party's portion out of the larger parcel known as LR No 10874/22.
 - b. General damages.
 - c. Costs of the suit.
6. Upon hearing the parties, the trial Court rendered it Judgement as follows;

“I am satisfied on the material presented before me that the Plaintiff is the legal and rightful occupant of the suit property though yet to be issued with a title deed for the same by the Defendant. The third party claimed that both the Plaintiff and the Defendant had trespassed upon his land but he never testified in Court so both the Plaintiffs and the Defendants evidence remains uncontroverted.

In the absence of such challenge I am enjoined by law to take the Plaintiff and the Defendant on the basis of the documentary evidence they hold and produced in Court as exhibits that indeed it is the third party who has trespassed on the suit land and closed the rightful road of access with no justifiable cause. It is the third party who is the trespasser. His acts of encroachment are thus unlawful and illegal.

In summary I enter Judgment for the Plaintiff as against the Defendant in terms of prayer c of the plaint being that the Defendant is ordered to process the Plaintiffs title for the suit property immediately.

I also enter Judgement for the Plaintiff as against the third party in the following terms; a permanent injunction is hereby issued restraining the third party by himself his family agents servants and or any other persons whomsoever acting on his behalf from blocking the road access leading to the Plaintiffs suit property.”

7. It is this Judgement that has provoked the subject appeal by the third party, the Appellant herein on the grounds set out as follows;
 - a. The Learned trial Magistrate erred in law and fact by failing to consider the Appellants pleadings on record.
 - b. That the learned trial Magistrate erred in finding the Appellant was a trespasser and his acts of encroachment are unlawful and illegal.
 - c. That the learned trial Magistrate erred in law and fact by failing to consider the Appellants evidence that he had bought his land way back in the year 1987 and that the 2nd Respondent



was selling land to the 1st Respondent being aware that the Appellant was in occupation and that access road could only be provided by the 2nd Respondent.

- d. That the learned trial Magistrate erred in law and fact in making a decision incapable of being effected under the circumstances of the case.
8. Consequently, the Appellant sought the following orders;
- a. The appeal be allowed.
 - b. The proceedings Judgment and all consequential orders issued on the 28/9/2021 by the Hon Learned Magistrate be set aside and parties be allowed to offer all evidence in their possession.
 - c. Costs be granted.
9. The appeal was canvassed by way of written submissions. The Appellant filed his brief submissions on the 14/6/2023 while the Respondents failed to file written submissions despite being given additional time to so file by the Court.
10. The Appellant submitted that neither the Appellant nor the Respondents have titles to their specific parcels of land. That both parcels were hived out of the larger LR No 20874/22. In addition, he submitted that there was no material evidence placed before the Court to arrive at the conclusion that the Appellant had encroached onto the 1st Respondent's land. That the trial Court arrived at a decision incapable of being implemented. He added that though the learned trial Court had ordered a surveyor and the parties to visit the locus quo and file a surveyor's report, the same was not produced in Court to help the Court determine whether the Appellant had trespassed onto the land of the 1st Respondent.

Analysis and determination

11. The key issue is whether the appeal is merited.
12. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as 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”

13. With that in mind I shall now evaluate the evidence before me and draw conclusions accordingly.
14. It is not in dispute that the 1st Respondent purchased a portion of land measuring 1.5 acres out of the 1.75 acres that she inherited from her late Husband namely Luka Njararui Kamau. It is also not in dispute that the 1st Respondent is yet to obtain title for the 1.5 acres of land. According to the evidence led at the hearing the 1st Respondent has settled on the suit land.
15. My impression of the evidence led is that the three parcels of land are bordering each other. According to the agreement of sale dated the 3/5/2007 and 23/12/2008 the description of the 1.5 acres sold to the 1st Respondent was not indicated therein. However, two sketch maps were annexed showing the subdivision of the LR No 10874/22 which shows plots A- I. Plot B is 3.5 acres. This plot belonged to the late Luka Kamau and upon his death, the same was subdivided into two halves and given to his



- two wives in equal shares (1.75 acres each). The 2nd Respondent being one of the wives then sold 1.5 acres out of 1.75 ostensibly remaining with 0.25 acres. Evidence was led that the 2nd half being 1.75 acres was sold by the other wife of Luka Kamau to the Appellant. The second sketch map shows plots A and B but with no measurements and no demarcation nor narration of the position of the access roads to each parcel.
16. The case of the 1st Respondent is that the 2nd Respondent blocked the access road to his property. The 2nd Respondent denied the allegations and in turn blamed the Appellant for blocking the access road. It was her case that she showed the 1st Respondent the beacons and access to the suit land and it is the 2nd Respondent who is causing the problem. The Appellant in turn denied the allegations and averred that the Respondents have encroached on his land, uprooted trees, destroyed the fence and wasted the land. He argued that having purchased the land in 1987, the parties were aware of his occupation and more so the 1st Respondent having purchased his land later in 2008, it was upon the 2nd Respondent to provide for the access road to the Appellant and not him.
 17. Having considered the grounds of appeal, I find that they can safely be collapsed into one key question; whether the learned trial Magistrate failed to consider the Appellants pleadings and evidence on record.
 18. The starting point is the evidence adduced at the hearing. It is on record that upon the close of the 2nd Respondent's case on the 13/7/21 and in the course of the hearing the Appellant through his lawyer, Mr. Kugwa, voluntarily and without any prompting withdrew the Appellant's counterclaim. Consequently, his case against the Respondents stood withdrawn and was marked as such by the Court. In the same breadth the said learned counsel informed the Court that he was not presenting any witness for the Appellant's case and sought leave to rely on the pleadings and the witness statement on record. On objection by the Respondents counsels the Court declined to grant the request. Consequently, the Appellant failed to lead any evidence in Court and there was no evidence to be considered by the Court. The case of the 2nd Respondent against the Appellant was therefore not rebutted. It is trite that a witness statement can never be deemed as evidence. Evidence must be led tested through cross examination for it to have any evidential value.
 19. In the case of *David Sironga Ole Tukai v. Francis Arap Muge & 2 Others* Civil Appeal No. 76 of 2014 [2014] eKLR thus;

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”
 20. The Court finds that the Learned Magistrate did not err at all for the reasons that no evidence was placed before her. Pleadings on their own is not equivalent to evidence. Through pleadings each party formulate their case for the other side to know what they are facing and also for the Court to formulate the issues for determination.
 21. That said in line with the powers of this Court to evaluate the facts and make conclusions as to the soundness of the Judgment, the Court finds the following; that the 1st Respondent led evidence that



he sued the 2nd Respondent when the Appellant closed the access road to his parcel. In the same vein he stated as follows:-

“I bought 1¹/₄ acres of land. We did not take measurement of the land prior to the purchase. I was shown beacons. We never called the surveyor to show us the boundaries, but Anastacia showed me the boundaries and the beacons. She did not show me the title deed of the land. Anastacia is the one who showed me where to put up my house. At that time there was a temporary Church nearby. It was next to my parcel of land. Anastacia told me to access the plot from the left side. She told me that that was the entrance / exit of the plot. 2 years later the Church was expanded and a very big Church was put up. It occupied half an acre. It ended up encroaching onto my access road. The Church did not encroach onto my plot but it occupied part of the access road. Initially the Church had occupied ¹/₄ an acre. It has not occupied more than ¹/₂ an acre, which is above my plot. Problems began when my son known as Mwai started constructing a house in the plot. He put up a big house which occupied a bigger area than the one occupied by the temporary Church. The Church also expanded its building. The Church could not be moved and so we were accessing the plot through Anastacia’s land. After a while Anastacia told us to stop trespassing onto her land. I never approached the Church officials to ask them why the building had blocked the road. I was told by Anastacia that the Church had a ¹/₄ acre plot above my plot. That was true because there was even a Church temporary building in the plot. The Church even had my tap removed for allegedly being in the plot. The Church never showed me the land’s title deed. But Anastacia showed me the land’s plan. The surveyor went to the land in our presence. We were all there. The surveyor took measurements of the land and he compiled a report. I got a copy of the report, but I do not have it here. I do not recall his name. I have sued Anastacia. She showed me the access road but it was later blocked by the Church. The said report forms part of my exhibits (Pexh 3 identified). It is a sketch plan. I was sold a parcel of land labelled A. Njihia has taken my access road. He however did not do so maliciously, because he also bought land from someone else. Njihia took my access road. That was after he bought land from the buyer. I have no claim against Njihia, that’s why I never sued him. To date, I do not have a title deed to my land.”

22. From the above the Plaintiff stated that he had no claim against the Appellant which evidence is at cross purposes with his evidence in chief when he had accused the Appellant of blocking the access road. Similarly, whilst exonerating the Appellant, the 1st Respondent introduced a new party, the church as having encroached on the access road. It is not in dispute that the 1st Respondent failed to enjoin the church despite leave of the Court to do so.
23. The 2nd Respondent on the other hand stated that there is a road access to the 1st Respondent and added that there is no link between the 1st Respondent’s land and the access road.
24. The Court finds the evidence very convoluted and it is not clear how the Court arrived at the conclusion it did. The Court finds that the decision is not supported nor is it in tandem with the evidence on record. Of key importance is the survey report which does not appear to have been produced. It is on record that the Court ordered the parties to visit the land in the presence of the surveyor and file a report. The survey report was neither tabled nor the surveyor called to testify.
25. Flowing from the evidence it would appear that there is a third party who is likely to be prejudiced unless it is heard.



26. For the reasons above I find that justice will be served if the case is remitted for retrial by a different Magistrate other than Hon. A W Maina, Learned Chief Magistrate.
27. The Appellant having failed to tender evidence, he is condemned to pay the costs of the appeal.
28. Final orders for disposal
 - a. The suit case be and is hereby remitted retrial on priority basis.
 - b. The Judgement of the Court be and is hereby set aside in its entirety.
 - c. The costs shall be met by the Appellant in favour of the Respondents.
29. Orders accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF SEPTEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Appellant – Absent but served

Ms. Waweru HB Ms. Gachomo for 1st and 2nd Respondents

