



**Nzau v Nzau (Environment and Land Appeal 13 of 2020)
[2023] KEELC 20956 (KLR) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND APPEAL 13 OF 2020
CA OCHIENG, J
OCTOBER 23, 2023**

BETWEEN

SIMON MUEMA NZAU APPELLANT

AND

PAUL MUTISO NZAU RESPONDENT

(Being an Appeal from the Judgment of Machakos Chief Magistrate's Court in Civil Suit No. 493 of 2015 delivered on 6th April, 2020 by Hon. A.G. Kibiru (CM))

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated the 28th May, 2020 and filed on 4th June, 2020, the Appellant appealed against the Judgment of Hon. A.G. Kibiru, Chief Magistrate made on the 6th April, 2020 in Machakos CM Civil Suit No. 493 of 2015 between Simon Muema Nzau v Paul Mutiso Nzau. The genesis of this Appeal is the Judgment by Hon. A. G. Kibiru, Chief Magistrate where he dismissed the Appellant's suit.
2. The Appellant being dissatisfied with the whole of the said Judgment filed a Memorandum of Appeal dated the 28th May, 2020, which contains the following grounds:
 1. That the Learned Magistrate erred in Law and fact in failing to appreciate sufficiently or at all consider the evidence of the Appellant.
 2. That the Learned Magistrate erred in Law and fact holding that the suit is *res judicata*.
 3. That the Learned Magistrate erred in Law and fact by holding that the Respondent (Paul Mutiso Nzau) was a party in Machakos CMCC No. 300 of 1990.



4. That the Learned Magistrate erred in Law and fact in failing to appreciate sufficiently or at all consider the pleading and submissions of the Appellant.
5. That the Learned Magistrate erred in Law and fact in finding that the Appellant and Respondent had previously litigated over parcel of land No. Muvuti/Kaani/1611 over the same issues and the prayers raised in both suits.
6. That the Learned Magistrate erred in Law and fact when he failed to consider and appreciate the principles of *res judicata* as laid down by the law.
7. The Learned Magistrate erred in Law and fact in dismissing the Appellant's case which had been proven on a balance of probabilities.

Reasons Wherefore the Appellant prays for

- a. That this Appeal be allowed and the Honourable Court do set aside the judgement of the lower court.
 - b. That this Honourable Court do issue an order of declaration that parcel of land No. Muvuti/Kaani/1611 solely belongs to the Plaintiff.
 - c. That this Honourable Court do issue a permanent eviction order of the Defendant by himself, his family members, agents and/or his servants or anyone claiming under him from the Plaintiff's parcel of land No. Muvuti/Kaani/1611 measuring approximately 0.36 Hectares.
 - d. That this Honourable Court do issue a permanent injunction order restraining the defendant by himself, his family members, agents and/or his servants or anyone claiming under him from trespassing, entering, using, alienating, selling, disposing the Plaintiff's parcel of land No. Muvuti/Kaani/ 1611 measuring approximately 0.36 Hectares.
 - e. That this Honourable Court do award the Appellant damages of mesne profits of Kshs. 50,000 per year or as this court shall deem fit just from the year 2010 until vacant possession is delivered.
 - f. That this Honourable Court do award costs of this appeal and of the lower court to the Appellant herein.
3. The Appeal was canvassed by way of written submissions.

Submissions

Appellant's Submissions

4. The Appellant in his submissions insisted that the Learned Magistrate erred and misdirected himself in law and facts in failing to consider his pleadings, evidence and submissions. He contended that the Learned Magistrate erred in law and fact in holding that the lower court suit was *res judicata*. He explained that the lower court suit was based on trespass which arose in 2010. He argued that in 2002 there was no issue of trespass. He claimed that the Learned trial Magistrate relied on hearsay that there was previous litigation which related to land parcel number Muputi/Kaani/1611, hereinafter referred to as the 'suit land', and invited court to peruse Page 97 of the Record of Appeal. He explained that the fulcrum of the dispute in CMCC No. 976 of 2002 which the Respondent alluded to, revolved around issues of trust but the said case was dismissed in 2002. He reiterated that he had demonstrated by way



of title that he is the registered proprietor of the suit land and sought for protection of his proprietary rights. To support his averments, he relied on the following decisions: *ANM v PMN* [2016] eKLR and *Moses Mbatia v Joseph Wamburu Kihara* [2021] eKLR.

Respondent's Submissions

5. The Respondent in his submissions highlighted the Judgment of the lower court and insisted that the trial Court considered the evidence before it contrary to the Appellant's allegations. He argued that the Learned Magistrate did not err in holding that the suit was res judicata. He explained that the trial Court correctly found that there had been previous litigation relating to the suit land between the parties in this matter and the lower court matter, hence the matter was clearly res judicata. He contended that having paid the taxed costs of the previous suits being CMCC No. 300 of 1990 and CMCC No. 967 of 2002 (pleadings are in Pages 40 – 50 of Record of Appeal), there was no provision of the law that allows the suit to be heard on other matters by reopening it, through the lower court suit. Further, that in CMCC No. 967 of 2002, he was one of the Plaintiffs and the Appellant was the Defendant therein, while the subject matter was the suit land. He further submitted that the Appellant should have raised his issues in CMCC No. 967 of 2002 instead of filing the lower court suit. Further, that the Appeal was incompetent. He reiterated that failure by the Appellant to attach the Decree to the Record of Appeal rendered it fatal. To support his averments, he relied on the following decisions: *Ngugi v Kinyanjui & 3 Others* [1989] KLR 146; *Kamunye & Others v Pioneer General Assurance Society Ltd* [1971] EA 263; *Pop - In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich* [1990] KLR; *Rajwani v Roden* [1990] KLR; *Joel Bulinga Anyambe & 146 Others v Unga Group Limited* [2000] KLR; *Bwana Mohamed Bwana V Silvano Buko Bonaya & 2 Others* [2015] eKLR and *Chege v Suleiman* [1988] eKLR.

Analysis and Determination

6. I have considered the Memorandum of Appeal, Record of Appeal and rivalling submissions, the following are the issues for determination are:
 - a. Whether the Appeal is competent.
 - b. Whether the trial Magistrate was right in holding that the lower court suit was res judicata.
 - c. Whether the Appeal is merited.
 - d. Who should bear the costs of the Appeal.
7. As to whether the Appeal is competent.
8. The Respondent has argued that the instant Appeal is incompetent since the Appellant failed to annex a copy of the Decree in the Record of Appeal.
9. Order 42, Rule 13(4) (f) of the *Civil Procedure Rules*, 2010 provides that:
 - “(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial magistrate made at the hearing;



- d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- f. the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- i. a translation into English shall be provided of any document not in that language;
- ii. the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).”

10. While Section 2 of the *Civil Procedure Act* provides that:

“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within section 34 or section 91, but does not include—

- (a) any adjudication from which an appeal lies as an appeal from an order; or
- (b) any order of dismissal for default:

Provided that, for the purposes of appeal, “decree” includes judgment, and a judgment shall be appealable notwithstanding the fact that a formal decree in pursuance of such judgment may not have been drawn up or may not be capable of being drawn up.”

11. In the case of *Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others* [2015] eKLR, the Supreme Court held as follows at paragraph 41:

“Without a record of appeal, a Court cannot determine the appeal cause before it. Thus, if the requisite bundle of documents is omitted, the appeal is incompetent and defective, for failing the requirements of the law. A Court cannot exercise its adjudicatory powers conferred by law, or the Constitution, where an appeal is incompetent. An incompetent appeal divests a Court of the jurisdiction to consider factual or legal controversies embodied in the relevant issues.”

12. I have perused the Record of Appeal and note that although there is no Certified Copy of the Decree attached therein, there is a Judgment. I further note that the Appeal was admitted for hearing on 27th September, 2022. Further, that Order 42 Rule (13) (4) (f) of the *Civil Procedure Rules* cited above indicates that a party can annex the Judgment, Order or Decree being appealed from, and does not make it fatal if a party fails to annex a Decree. I note the Respondent has cited the Supreme Court decision which was clear that an Appeal is incompetent without the Record of Appeal but was not specific on the issue of the Decree alone. However, in this instance there is a Record of Appeal. In the circumstances, I find that since the Appeal was admitted and there is also a copy of the Judgment in the Record of Appeal, the said Appeal is indeed competent.



13. As to whether the trial Magistrate was right in holding that the lower court suit was *res judicata* and if this Appeal is merited.
14. The Appellant had filed a Plaint in Machakos Chief Magistrate’s Court ELC 493 of 2015, where he sought the following orders against the Respondent:
 - a. A declaration that parcel of land Muvuti/Kaani/1611 solely belong to the Plaintiff.
 - b. A permanent eviction order of the Defendant by himself, his family members, agents and/or servants or anyone claiming under him from the Plaintiff’s parcel of land No. Muvuti/Kaani/1611 measuring approximately 0.36 Hectares.
 - c. A permanent order restraining the Defendant by himself, his family member, agents and/or servants or anyone claiming under him from trespassing, entering, using, alienating, selling, disposing the Plaintiff’s parcel of land No. Muvuti/ Kaani/1611 measuring approximately 0.36 Hectares.
 - d. Damages of mesne profits at Kshs. 50,000 per year at this court shall deem fit just from the year 2010 until vacant possession is delivered.
 - e. Costs of the suit.
 - f. Interest on C and D above.
15. The Respondent filed a Defence including Counter-claim where he sought for the following Orders against the Appellant:
 - i. A declaration that title to land parcel number Muvuti/Kaani/1611, in the name of the Plaintiff be cancelled and/or revoked and the same registered in the name of the Defendant as the legal administrator of the estate of Nzau Kongu Mutiswa (deceased).
 - ii. A declaration that the Defendant has acquired adverse possession over land parcel number Muvuti/Kaani/1611, and land parcel number Muvuti/Kaani/1548.
 - iii. Costs of the Counterclaim and interests on the same.
 - iv. Any other or future relied the court may deem fit and just to grant.
16. After considering the evidence tendered by the witnesses, the trial Magistrate proceeded to dismiss both the Appellant’s suit as well as the Counter-claim on the ground that the matter was *res judicata*.
17. This being a first Appeal, the Court appreciates that it did not have a chance to directly obtain the evidence as tendered by the witnesses but will have to rely on the Record of Appeal as presented. See the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
18. I will hence analyze the proceedings in the Lower Court including the documents tendered before making a determination of the instant Appeal. PW1 Simon Muema Nzau (*Appellant*) confirmed being the proprietor of Muvuti/Kaani/1611 hereinafter referred to as the ‘*suit land*’ and produced a Certificate of Title issued on 12th July, 1999, to that effect. It was his testimony that the Respondent had forcefully trespassed on the suit land, planted trees thereon and declined to move out. In re-examination he confirmed there was a related case being CMCC No. 300 of 1990. DW1 Paul Mutiso Nzau claimed that the title to the suit land was awarded to the Appellant through a Court Order in CMCC No. 300 of 1990. In cross-examination, he clarified that the Appellant was granted land parcel number Muvuti/Kaani/1549 but he filed an Appeal No. 26 of 2011 (*later ELC 49/2017*) which was dismissed for want of prosecution. It was his testimony that Muvuti/Kaani/1548 was



auctioned. Further that subdivision of Muvuti/Kaani/1549 gave rise to Muvuti/Kaani/1611 but did not have documents to prove his averments. DW3 Boniface Kitua Nzau confirmed that the Appellant exchanged land with their father. He testified that the Appellant sub divided plot 1949 into two. Further, he took plot 1610 and forced them to move to the suit land where they live. In cross examination he confirmed parcel Nos. 1610 and 1611 were subdivisions of 1549. In re-examination he clarified that the Appellant and his father exchanged land in 1985 but they moved to the suit land in 1998. He further confirmed that in Civil Case No. 300 of 1990, parcel number 1549 was given to the Appellant.

19. From the evidence tendered in the Lower Court, the trial Magistrate proceeded to dismiss both the Appellant and Respondent's suit and I will highlight an excerpt from the said Judgment:

“The Plaintiff herein sued the Defendant and others in Machakos PMCC No. 300 of 1990, and a Decree was issued on the 2nd February, 1993, which required that the parcels of land adjudication No. 1133 and 1127 be resurveyed to confirm if the two were of equal size. The parties had exchanged the parcels, but there arose a dispute on the actual sizes. No evidence was presented to court to show whether the Decree was complied with...The Defendant herein, later filed Machakos CMCC No. 976 of 2002 seeking to have orders declaring that land parcel number Muputi/Kaani/1611 was held by the Plaintiff herein in trust for the benefit of the Plaintiff and should be transferred to him. It seems from the recorded that, that suit was struck out, and the Defendant moved to the High Court in HCCA No. 76 of 2011 at Machakos. The outcome of that Appeal has not been supplied to the Court. From the foregoing, it is manifest that there was previous litigation which related to the land parcel No. Muputi/Kaani/1611 between the parties in this matter. This suit is clearly res judicata. The Plaintiff ought to have raised his issues in the previous suit Machakos CMCC 976 of 2002 instead of instituting a new suit. Similarly the Defendant's counter-claim should have been addressed in the said suit.”

20. As per the Decree dated the 26th January, 1993 which was issued on 2nd February, 1993 in Machakos PMCC No. 300 of 1990 between Simon Nzau and Nzau Kongu and Others, which emanated from the Award of Arbitrators, that the trial Magistrate had alluded to, in the impugned Judgment, it stated that:

- “1. That the application by the Applicant/Plaintiff seeking judgement to be entered as per the award of arbitrators dated 20th January, 1992 is hereby allowed and judgement entered as per the Award as follows: -
- a. That the district surveyor Machakos District do measure and determine the size of each of the following plots namely Kaani Adjudication P/No. 1133 and Kaani Adjudication P/No. 1127 and if the plots are equal in size the matter to be deemed as closed as regards exchange and compensation to the Plaintiff but if the same are not equal and plot 1133 turns out to be bigger than 1127 the area to be indicated and the Defendants to compensate the Plaintiff with equivalent portion of their land.
 - b. That if (a) above is not possible as regards compensation the exchange of plot 1133 and 1127 to be reversed so that plot 1133 is registered in the name of the Plaintiff Simon Nzau and Plot No. 1127 in the name of the Defendants.”



21. It emerged in evidence in the Lower Court that Machakos CMCC 976 of 2002 had been struck out and the resultant Appeal being HCCA No. 76 of 2011 dismissed for want prosecution.
22. The doctrine of *res judicata* is set out in the [Civil Procedure Act](#) at Section 7 which stipulates *inter alia*:
“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”
23. On *res judicata*, the Court of Appeal in the case of [Uhuru Highway Development Ltd v Central Bank & Others](#), CA No. 36 of 1996 held that: -
“In order to rely on the defence of *res judicata*, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.”
24. In Suleiman [Said Shabbal v Independent Electoral & Boundaries Commission & 3 Others](#) [2014] eKLR, the Court of Appeal held that:
“To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
25. In Machakos PMCC No. 300 of 1990 which was between the Appellant and Nzau Kongu, John Nzomo Nzau & Lucas Wavata Nzau, the main issue in dispute was exchange of two parcels of land including determination of their sizes. While in the Lower court matter, the main issue in dispute was between the Appellant and Respondent wherein the Appellant claimed the Respondent trespassed on the suit land, declined to move therefrom and he sought orders of a permanent injunction, eviction orders as well as mesne profits. From the excerpt of the Lower Court Judgment and Decree that I have highlighted above including the proceedings I have analyzed, it is evident that Machakos CMCC No. 976 of 2002 and resultant Appeal were never conclusively determined as the first matter was struck out while the latter was dismissed for want of prosecution. Further, in CMCC No. 976 of 2002, there was no issue of trespass but the Respondent sought to be declared owner of the suit land through trust. The issue of trespass only arose in 2010 when the Respondent trespassed on the suit land, hence the said issue of trespass could not have been dealt with in CMCC No. 976 of 2002. It is my considered view that the lower court case did not fulfill the tenets of *res judicata* as the issue of trespass which was in issue had not been directly and substantially in issue in the former suit. Although, the matter involved the same parties as well as suit land, the Respondent had sought to be declared as owner of the said suit land by virtue of trust but those issues were not heard and finally determined by said court as the case was struck off on a technicality. I further find that the issues raised could not be easily discerned from the record as they were uncertain and unclear.
26. In the foregoing while relying on the legal provisions I have cited including the decisions quoted, I find that the Learned Magistrate hence erred in law and fact in holding that the suit between the Appellant and the Respondent was *res judicata* since CMCC No. 976 of 2002 nor the resultant Appeal were ever determined on merits. I further find that the Learned Magistrate erred by failing to fully adjudicate and determine the rights of the parties in the lower court suit, since he dismissed both the Plaintiff as well as the Defendant’s case.



27. On the issue of mesne profits, I note the Appellant never tendered any evidence to prove the same in the Lower Court, hence I will not award the same.
28. On the issue of costs, since the Appellant and Respondent are related, I will not make any order as to costs.
29. It is in that regard that I find the Appeal is merited and will allow it. I will proceed to make the following final Orders:
 - a. That the Judgment in Machakos CMCC No. 493 of 2015 delivered on 6th April, 2020 be and is hereby set aside.
 - b. A declaration be and is hereby issued that Land Parcel Number Muvuti/Kaani/1611 solely belongs to the Appellant.
 - c. An eviction order be and is hereby issued against the Respondent, by himself, his family members, agents and/or his servants or anyone claiming under him from the Appellant's parcel of land No. Muvuti/Kaani/1611 measuring approximately 0.36 Hectares after ninety (90) days from the date hereof.
 - d. That a permanent injunction be and is hereby issued restraining the Respondent by himself, his family members, agents and/or his servants or anyone claiming under him from trespassing, entering, using, alienating, selling, disposing the Appellant's parcel of land No. Muvuti/Kaani/1611 measuring approximately 0.36 Hectares.
 - e. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 23RD DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

