



Rukanga & another v Magondu (Environment and Land Appeal E028 of 2022) [2023] KEELC 21605 (KLR) (16 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21605 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT AND LAND APPEAL E028 OF 2022
JM MUTUNGI, J
NOVEMBER 16, 2023**

BETWEEN

REGINA WANJIRU RUKANGA 1ST APPELLANT

BEETHOVEN KINYUA RUKANGA 2ND APPELLANT

AND

NAHASHON WARUI MAGONDU RESPONDENT

(Being an Appeal against the Judgment and Decree of the Hon. P.M MUGURE, Principle Magistrate sitting in Wang'uru ELC Case No. 35 of 2019 and dated 18.10.2022)

JUDGMENT

1. The subject of this appeal is land parcel Rice Holding No. 3201 A, Wamumu Section W.2 measuring one (1) acre (suit property) that was originally owned by the 1st Appellant's husband (deceased) and father to the 2nd Appellant. From the proceedings of the lower court, the suit property was sold vide an auction to Judy Gachoka and Kennedy Murimi Njeru who subsequently sold it to the Respondent vide a sale agreement dated 28.03.2013.
2. By dint of a Complaint dated 21.06.2019, the Respondent herein sought for a permanent injunction to issue restraining the Appellants, their servants, heirs, legal representative or any person claiming under them from entering, remaining, using, cultivating, occupying or in any way from interfering with the suit property. He claimed that he was the legal and registered owner of the suit land and that the Respondent had trespassed in it. It is admitted in evidence that the previous owners acquired the land through the Order issued in Misc. Application No. 20 of 2012 at Embu, which was later set aside by the Order dated 11.07.2017. The essence of setting aside the Order in Misc. Application No. 20 of 2012, was to afford the 1st Appellant the right to be heard and the Trial Court did that by referring parties to the National Irrigation Board (NIB).



3. The Appellants jointly filed a defence dated 3.02.2020 where they denied the averments contained in the Plaint. They contended that the suit property was registered in the name of Joseph Kinyua Rukanga, and therefore they averred that they were entitled to occupy and use the suit property. The Appellants also stated that the matter had been heard and determined in Misc. Application No. 20 of 2012 at Embu.
4. In response, the Respondent filed a Reply to Defence dated 12.02.2020 and averred that the registration of the suit property, if at all, in the name of Joseph Kinyua Rukanga was done in breach of the Award by the Advisory Committee issued on 31.08.2016. He claimed that any changes effected on the suit property were done without any valid Court order and in contravention of the order issued in Misc. Application No. 20 of 2012. The Respondent argued that there had not been any Advisory Committee meeting that had approved any changes over the suit land and the changes alleged by the Appellants had been done fraudulently, without capacity and with intent to defeat justice.
5. The Respondent testified that the Appellants had been utilizing the suit land since 2018 and that he had been summoned by the DCIO Sagana and cautioned not to be on the land. In cross examination he admitted that National Irrigation Authority (NIA) called all the parties for a meeting in which the dispute between them was heard and an Award was issued in his favor. He stated that the Award by the Advisory Committee had not been challenged in any Court of law. He stated that he still had the license and tenant card to the suit property in his possession and that he had not been served with any Court order giving the Appellants ownership of the suit land and/or invited to any other meeting by the NIA respecting the resolution of any dispute.
6. The 1st Appellant in her testimony admitted to being on the land with her children and stated that she had done succession and had paid for it to the Advisory Committee. She produced a tenancy change form dated 24.07.2017 from the Scheme Manager of NIA which indicated that the deceased Joseph Kinyua Rukanga was the proprietor of the suit property. In cross examination, the 1st Appellant admitted that the Respondent bought the suit property from Judy and Kenneth, who had bought it from the auctioneers. She acknowledged that the Order in Misc. Application No. 20 of 2012 referred the parties to the NIA for the determination of the dispute. She confirmed that she was present at the meeting and maintained that she had the Court order that changed ownership of the suit property to her deceased husband but did not produce any order to the effect. She admitted that the Advisory Committee had not called her for the succession over the estate of her deceased husband and submitted that there had been no minutes for the transfer of land to Joseph Rukanga, her deceased husband. She admitted she did not have a tenant card and license in her deceased husband's name and there had been no proceedings cancelling the license and tenant card from the name of the Respondent to her husband's name.
7. By its Judgement dated 18th October 2022, the trial Court declared that the Respondent had demonstrated his case on a balance of probability and that he was the legal tenant of the suit property and issued a permanent injunction restraining the Appellants from entering, remaining, using, cultivating, occupying or in any way from interfering whatsoever with the suit property.
8. Aggrieved and dissatisfied with the decision of the Court, the Appellant appealed to this Court against the decision filed a Memorandum and Record of Appeal dated 10.11.2022 and 21.03.2023 respectively.
9. The Appellant's Memorandum of Appeal set out 7 grounds of appeal. The Appellants however in their submissions filed on 7/7/2023 urged the appeal under two heads being lack of jurisdiction of the trial Court encompassing grounds 1,2,3,4 and 5; and non-joinder of NIA in the proceedings as pleaded under ground 6 in the Memorandum of Appeal. The grounds are as follows: -



1. That the Learned Principal magistrate erred in law and fact in purporting to confer on herself jurisdiction over Rice Holding NO. 3201 A Wamumu Section W2, Property of the National Irrigation Authority contrary to the National *Irrigation Act* Cap 347 Laws of Kenya.
 2. The learned Principal Magistrate erred in law and fact in purporting to revoke the decision of the National Irrigation Authority as set out in the farmer's changes dated 24/07/2017 (Appellants exhibit No. 7) and letter from the Scheme Manager Mwea Irrigation scheme dated 14/05/2019 (Appellants exhibit No. 8)
 3. The learned Principal Magistrate erred in law and fact in failing to consider that the decision to register Rice Holding No. 3201 A Wamumu Section W2 in favour of the late JOSEPH KINYUA RUKANGA could only be challenged by way of Judicial Review Under Order 53 of the *Civil Procedure Act* Cap 21 Laws of Kenya.
 4. The learned Principal Magistrate erred in law and fact in failing to consider that the National Irrigation Board has the sole statutory mandate to manage, control, regulate and allocate land within the National Irrigation Schemes in Kenya.
 5. The learned Principal Magistrate erred in law and facts when she held that the Respondent was the legal tenant of the suit Rice Holding No. 3201 A Wamumu Section W2 and was therefore entitled to the orders he sought in the Plaint.
 6. The Learned Principal Magistrate erred in Law and fact in failing to consider that the National Irrigation Authority had not been enjoined as a party in the dispute.
 7. The Judgement was against the weight of the Judgement adduced.
10. The Appellants pray that the Court do set aside the judgment in Wang'uru PM'S ELC Case No. 35 of 2019 and dismiss the Respondent's claim in the lower court with costs to the Appellants. The Appeal was canvassed by way of written submissions.

The appellants filed their written submissions on 7.07.2023. The Appellant submitted the Trial Magistrate did not have jurisdiction to deal with issues pertaining to the ownership and occupation of the suit property. They further submitted that the ownership of the suit property was changed to the name of Joseph Rukanga by the Scheme Manager of the NIA and that if the Respondent was dissatisfied by that decision, the recourse available to him would have been to institute Judicial Review proceedings to challenge the decision of the NIA. The Appellants placed reliance on the case of FMM (suing on behalf of a minor DK) Versus National Irrigation Board and 2 Others(2020) eKLR to buttress this position. On the second issue, the Appellants submit that the Trial Magistrate erred in law and fact in making a finding against the NIA without giving it a right to be heard. They relied on the case of Progress Welfare Association of Malindi Kenya & 2 others Versus County Government of Kilifi Members & 5 Others Constitutional (2021)eKLR which held that a person should be afforded the right to be heard in the interest of administering justice fairly.

11. The Respondent filed written submissions dated 15.09.2023. The Respondent submitted that the Trial Magistrate had jurisdiction as he moved the lower Court for an order of permanent injunction. The Respondent further argued that he produced a tenant card as proof that he was the legal owner of the suit property. He submitted that his ownership of the suit property was confirmed by the Award made in his favour as per the minutes extract that was issued by the Advisory Committee meeting convened on 31.08.2016. It was his position that the said Award was still in force as it had not been reviewed or appealed against by the Appellants. He argued that the tenant card issued to him had not been revoked or cancelled by the issuing authority.



The Respondent maintained that the purported tenancy changes in favour of the Appellants were done fraudulently as there had not been any Advisory Committee meeting was been held to effect tenancy changes of the suit property. He argues that in making its decisions, the NIA was mandated by the law to follow due procedure. The Respondent relied on the Case of John Gichobi Karugumi Versus National Irrigation Board & 3 Others(2015) where the Court nullified a decision made by the 1st Defendant because it was made without affording the Applicant the right to be heard.

12. I have considered the record of appeal and the submissions of the parties and the issues that arise for determination in the appeal are as follows:-

1. Whether the Trial Magistrate had jurisdiction to entertain the suit in view of the provisions of the *Irrigation Act* 2019 that require disputes relating to allocation and management of plots within the Irrigation Settlement Scheme to be handled by the Disputes Resolution Committee established under the Act.
2. Whether the Trial Magistrate erred in law and fact in issuing a permanent injunction restraining the Appellants from entering, remaining, using, cultivating, occupying or interfering with the suit property in anyway.

13. This being an appeal of first instance, the Court is duty bound to appraise and re-evaluate the evidence in keeping with the principle enunciated in the Court of Appeal Case of *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123.

14. The Appellants raised the issue of jurisdiction in the Memorandum of Appeal and in their submissions. The matters raised in the Memorandum of Appeal and the Appellants written submissions broadly challenged the Learned Trial Magistrate's jurisdiction to hear and determine the matter before her under two limbs.

Firstly, that the Learned Trial Magistrate had no jurisdiction to decide on a matter reserved for the National Irrigation Authority (NIA) as the National *Irrigation Act* Cap 347(now the *Irrigation Act* 2019) Laws of Kenya has prescribed a mechanism for dispute resolution and appeals thereof, and secondly, that the Trial Magistrate lacked jurisdiction to entertain this matter as it had already been decided by the Scheme Manager through his letter dated 24.07.2017 and as such the recourse available to the Respondent would have been to institute Judicial Review against the decision of the National Irrigation Authority if he was aggrieved.

15. The Appellants contend that the Trial Magistrate erred in law and fact for finding that the Respondent was the legal tenant of the suit property and for issuing a permanent injunction against them. They submit that the Trial Magistrate did not have the jurisdiction to interfere with the license and occupation of the suit property.

16. In reference to the second limb, the Appellants submit that the decision to have the suit property revert to the deceased was made by the scheme manager on behalf of the National Irrigation Board and as such, the Respondent should have instituted Judicial Review against the authority.

17. In the Judgment the subject of this appeal, the Trial Magistrate found it peculiar that the suit property reverted to the deceased name without proper procedure being followed. The Trial Court noted that there were no minutes indicating that there had been an Advisory Committee meeting to make those changes. The Trial Court further noted that the Appellants did not have any proceedings to show that the Respondent's ownership of the suit property had been cancelled. The Learned Trial Magistrate observed that the best procedure would have been for the parties to maintain status quo as had been



advised by the Advisory Committee meeting held on 31.08.2016. and for the Appellants to pursue the option of Judicial Review before the High Court if they were aggrieved with the NIA decision.

18. It is trite that the NIA has the statutory mandate to manage, administer, regulate and allocate land within National Irrigation Schemes in Kenya. The dispute herein involved a rice holding which falls under the ambit of the *Irrigation Act*, 2019. The dispute resolution mechanisms are provided under Part VII of the Act which provides as follows: -

Part VII — Dispute Resolution

25. (1) Disputes related to irrigation and drainage scheme development, management, water allocations and delivery, financing, operation and maintenance and other matters shall be resolved within the Irrigation Water Users Association or at Irrigation Scheme level wherever possible. (2) Each association which is legally registered shall have a Dispute Resolution Committee that consists of at least three members selected by its governing body. (3) Decisions regarding any dispute contemplated under this section shall be made by the relevant Dispute Resolution Committee within thirty days of the hearing of the dispute in question.

26. Where the Water Users Association or at the Irrigation Scheme Level is unable to resolve a dispute, the same shall be referred to the Dispute Resolution Committee at the first instance to consider and determine the matter before the same is referred to Court.

In my view, the dispute herein is not one of Management, water allocations and delivery and neither is it for financing, operation or for maintenance. The Respondent's claim in the Lower Court was for a permanent injunction against the Appellants who had encroached in the suit property which he legally owned. His intent was to protect and preserve his property. In my view, the Respondent demonstrated sufficiently that he was the legal owner of the suit property by producing a tenant card dated 28.03.2013, licence no. 3201 dated 18.04.2013, minutes extract of the advisory meeting held on 31.08.2016 and the bundle of receipts that showed that he had been paying for the rice holding. In my view the Trial Magistrate certainly had jurisdiction to decide the matter as she did as the issue raised was of encroachment and trespass.

19. Given that the Trial Court is not a Superior Court, Section 26 of the Environment and *Land Act* gives Magistrate Courts jurisdiction to handle environment and land related disputes. Section 26 of the Environment & *Land Act* provides;

- (3) The Chief Justice may, by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.
- (4) Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle —
 - a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - b) Matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.
- (4) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court”.



Under Section 9 of the Magistrate's Courts Act No. 26 of 2015 the Magistrates Courts have jurisdiction to hear and determine Environmental and Land matters that fall under their pecuniary jurisdiction. Section 9(a) of the Act provides as follows:-

9. A Magistrate's Court shall –

- (a) in the exercise of the jurisdiction conferred upon it by Section 26 of the *Environment and Land Court Act* and subject to the pecuniary limits under section 7(1), hear and determine claims relating to –
 - (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, chores in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally.

20. There is no doubt therefore that the relief of permanent injunction sought by the Respondent herein was among those reliefs that the Trial Court could have issued. The suit did not relate to the functions that the NIA had mandate to handle under the Act such that the exhaustion doctrine would have precluded the trial Court from exercising jurisdiction in the matter. The Magistrates Court was properly seized of jurisdiction to hear and determine the suit before it.

21. As regard the second limb, it was the Appellants contention that the Respondent could only have moved the Court by way of Judicial Review to have the decision of the Scheme Manager set aside and that the trial Court had no mandate to deal with issues of license and ownership of the suit property as that is the sole prerogative of the NIA. The Appellants relied on the Case of FMM (suing on behalf of a minor DK) V National Irrigation Board & 2 Others (2020) eKLR to support their assertions. I have considered this case which was an application by the Plaintiff seeking for an equitable relief of a temporary nature restraining the Respondent from interfering with the suit land therein. The facts in that suit are distinguishable from the facts in instant case as in that case the Scheme Manager called for two arbitration committee meetings, wherein all parties were heard before the subdivision of the suit land was carried out. In that decision, this Court correctly found that the best recourse available to the Plaintiff therein would have been to institute Judicial Review proceedings against the Scheme Manager's verdict and struck out the application.

22. The Respondent herein chose to approach the trial court by way of a plaint for a permanent injunction. The evidence on record proved that he was the legal tenant of the suit property which the Trial Magistrate rightly held. He was not challenging the decision of the Scheme Manager, which in any event was illegal ab initio for failing to comply with Part VII of *Irrigation Act*, 2019. The Respondent sought to protect his suit property against the Appellants. This was within his right. The relief that the Respondent sought of permanent injunction could not be given by the NIA but by the Court.

23. It was the Appellants further submission that the Trial Magistrate erred in law and fact in giving a judgment against the NIA without affording it the right to be heard. They argued that the Court's Judgment interfered with the decision that had been made by the Scheme Manager of NIA and yet it had not been enjoined as a party in the trial suit and was unable to defend itself.



In my view, the dispute in the lower court was between the Appellants and the Respondent for a permanent injunction to issue against the Appellants as they were the ones who had encroached on the Respondent's suit property. It was admitted in evidence by the 1st Appellant that she lived in the suit property with her children. She also admitted that she did not have a tenant card and/or a license and also conceded that there were no proceedings or minutes of the Advisory Committee meeting that reverted the suit property to her deceased husband after it had been awarded to the Respondents. In making her determination, the Trial Magistrate correctly found that the suit property was owned by the Respondent as per the evidence before her and that she granted an order of permanent injunction as sought against the Appellants by the Respondent.

24. On evaluation of the grounds of Appeal and the Record of Appeal, I find no basis to fault the Learned Trial Magistrate on the Judgment. The Appellants Appeal lacks merit and the same is dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 16TH DAY OF NOVEMBER 2023.

J. M. MUTUNGI

ELC - JUDGE

