



**Mugo & another v Mugo (Environment and Land Appeal 1 of 2021)  
[2023] KEELC 22541 (KLR) (15 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 22541 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL 1 OF 2021  
A KANIARU, J  
NOVEMBER 15, 2023**

**BETWEEN**

**JOHN MUGO ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL KARIUKI MUGO ..... 2<sup>ND</sup> APPELLANT**

**AND**

**BENSON NYAGA MUGO ..... RESPONDENT**

*(Being an appeal against the judgement delivered on 14th January 2021 by Hon. Edwin N. Wasike Principal Magistrate at Siakago Law courts, in Siakago MCL&E No. 26 of 2019)*

**JUDGMENT**

1. This appeal arose from the Judgment of the lower court in Siakago MCL&E No. 26 of 2019 - Benson Nyaga Mugo v John Mugo & Samuel Kariuki Mugo delivered on 24/1/2021 by Hon Edwin N. Wasike, Principal Magistrate. The 1<sup>st</sup> & 2<sup>nd</sup> appellants – John Mugo and Samuel Kariuki Mugo – were the 1<sup>st</sup> & 2<sup>nd</sup> defendants while the respondent – Benson Nyaga Mugo – was the plaintiff. In the lower court the Respondent had sued the appellants seeking to have a caution lodged against the title to land parcel no. Mbeere/Mbita/2656 removed and for orders of permanent injunction against the defendants to be issued restraining them from in any manner interfering with the said land. The Appellants did not file any defence and therefore the matter proceeded for hearing undefended. The lower court heard the plaintiff's case and in its judgment found in favour of the plaintiff. That is what provoked this appeal.
2. A memorandum of appeal was filed on January 22, 2021 whose substance is as follows;
  1. The learned magistrate erred in law and fact in not appreciating that the appellant has an arguable case.
  2. The learned magistrate erred in law and fact in not recognizing that the appellant as the owner of the suit land he had all the proprietary rights over the suit land.



3. The learned magistrate erred in law and fact by not appreciating the peculiar circumstances of the matter that there was material concealment of facts by the respondent.
  4. The learned magistrate erred in law and fact by not observing the legal procedures in delivering the judgment.
  5. The learned magistrate erred in law and fact in not considering the appellants evidence over that of the respondents.
  6. The learned magistrate erred in law and fact in not appreciating the fact that in 1988 or 1989 the estate of the deceased was valued more than Kshs. 100,000 hence the court then had no jurisdiction.
  7. The learned magistrate erred in law and fact in not appreciating the fact that the respondents have no rights over the suit land hence arrived at an erroneous judgement.
3. The appellant then made the following prayers;
- a. The appeal be allowed
  - b. The judgement delivered on January 14, 2021 at Senior Principal Magistrate court at Siakago *vide* MCL& E suit no 26 of 2019 be set aside.
4. The appeal was canvassed by way of oral and written submissions. The Appellants submissions were filed on September 20, 2023 whereas the advocate for the Respondents submitted orally in court on September 20, 2023. The Appellants main contention in their submissions was that their case was not heard during trial and thereafter they gave an analysis of their case. The Respondent's advocate in his oral submissions faulted the Record of Appeal for being incomplete as filed as it lacked several documents contained in the lower court record. They also took issue with some of the documents contained therein (that is from page 51 to 59 of the Record of Appeal) as they said the same had been sneaked into the record of appeal as they were never part of the lower court record. They asked the court to reject the said documents and for the same to be struck out as the Respondent never got a chance to cross – examine on them.
5. Further, they submitted that the Appellants never filed a defence in the lower court despite being given a chance to do so. That on an application for leave to file the same, the same was rejected by court in a ruling that was delivered in open court and that that ruling has never been appealed. That on grounds 1,2, 3 and 5 of the Memorandum of appeal, it is clear that no defence was filed to demonstrate the issues in those grounds and that no evidence was availed in the lower court to demonstrate what they are faulting the court for. They submitted further that the Appellants were present when a hearing date for the suit was issued and that they never attended court to cross –examine the Respondents. They ask the court to dismiss the appeal with costs to the Respondent. They also claim that the lower court judgment or decree are not in the record of appeal. However I have looked at the said record and the judgment is part of the Supplementary Record of Appeal dated January 16, 2023.
6. I have considered the appeal as filed, the rival submissions, and the lower court record including the contested judgement. My duty as the first appellant court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle v Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo v Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.



7. From a consideration of the parties pleadings, submissions, the court record and the applicable law, the issue arising for determination is whether the appeal herein has merit.
8. According to the lower court record, the case herein was instituted by way of plaint dated April 12, 2019 and filed on the same date seeking for orders of permanent injunction against the Appellants and for a caution registered against the title to the suit land by the 1<sup>st</sup> Appellant be removed. The matter proceeded undefended as there was no defence filed by the Appellants. They attempted to seek leave to file the defence out of time but the same was denied vide a ruling delivered on 14.01.2021 and to date that ruling has not been appealed against. Non-contestation of that ruling was a fatal blunder or omission by the appellants.
9. It is trite law that he who alleges must prove. This claim proceeded undefended. However, the Respondent still bore the burden of proof which he ought to have discharged in order to succeed in his claim. The law regarding cautions is found in section 71 of the [Land Registration Act](#) which provides for persons who may register cautions as follows;
  1. A person who-
    - a. Claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;
    - b. Is entitled to a licence; or
    - c. Has made an application for a bankruptcy order against the proprietor of any registered land, lease or charge.
10. The court in determining whether to remove a caution or not has to balance the rights of both parties and consider what prejudice the removal of the caution will cause to the parties involved. The caution in this case was registered by the 1<sup>st</sup> Appellant claiming purchaser's interest in the suit land. The Respondent in his testimony testified that he is the owner of the land having bought it from the registered proprietor Esther Muthoni Njue. He produced documents in evidence to prove the same including a letter of consent from the Land Control Board and a transfer executed in his favour for the transfer of the suit land from the registered proprietor to him. He also testified that he has resided on the said land for 16 years and has developed it. He produced photographic evidence to prove the same. I agree with the trial court findings that in the absence of evidence to the contrary, the issue of ownership and possession remains uncontroverted. I therefore find that the Appellants have not given any justification as to why the said caution should remain in place as they have not demonstrated their interest in the suit land.
11. On whether the Respondent is entitled to an order of permanent injunction, it is important to appreciate that that kind of injunction is not interim or interlocutory. It is an injunction sought at the tail end of the case. It is meant to be part of the orders meant to resolve the dispute between the parties. It is meant to be an order of a final nature. I perceive this injunction to be in the class of Quia timet restraining orders. These restraining orders are normally granted where the infringement of the plaintiffs right is threatened but has not yet occurred. In the old case of *Fletcher v Bealey* [1885] 28 Ch. D.688, it was held that the plaintiff needs to show probability of future infringement and that the ensuing damage would be of a serious nature. The order can assume the nature of a perpetual, prohibitory, or even mandatory injunction.
12. Closer home, there is the case of [Watson Wabome Njuru v Co-operative Bank of Kenya Ltd](#): HCC No. 67 of 2006 [2010] eKLR where the court observed that before granting an order of permanent



injunction, the plaintiff must show first that he has a legal right to protect and secondly he must also show the probability of future serious injury.

13. In more recent jurisprudence, there is the case of *Wanyoike v Karanja*: ELC No. 18 of 2022 [2023] KEELC 16410 (KLR) which cited the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR. the court stated as follows:

“A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected ...”

14. In the matter at hand, the respondent is clear that the appellants had trespassed into the land and had started committing acts of wastage. It is necessary to appreciate that the parties are close family members. The respondent is apprehensive that the violation of his rights as owner of the land may be repeated in future. If such violation assumes the dimension of cutting of trees as the appellants are alleged to have done, or probably become forcible detainer, then the respondents apprehension seems to be real. There is also the likelihood of serious damage to the land or even to the person of the respondent himself or his workers.

15. It is for all these reasons that I find that an order of permanent injunction is also merited. The upshot, in light of the foregoing, is that the appeal before me is found to be unmeritous and I hereby dismiss it. Each side to bear its own costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 15<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**A.K. KANIARU**

**JUDGE**

In the presence of Ndolo Kalamu for respondent and appellant present in person.

Court Assistant: Leadys

Interpretation: English/Kiswahili

