



**Rombo v Manyala & another (Environment and Land Appeal
E039 of 2022) [2023] KEELC 22072 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22072 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E039 OF 2022**

E ASATI, J

DECEMBER 7, 2023

BETWEEN

SAITO YUIKE ROMBO APPELLANT

AND

PAUL OGWENO MANYALA 1ST RESPONDENT

DAVID OKOTH OCHIENG' 2ND RESPONDENT

*(Being an appeal from the ruling and order of the SPM's court at Nyando by
Hon. S. O. Temu delivered on 4th October 2022 in E&L case No. E049 of 2022)*

JUDGMENT

1. Vide the Memorandum of Appeal dated 26th October 2022, the Appellant, Saito Yuike Rombo, appealed to this court against the ruling dated 4th October 2022 by Hon. S.O Temu- SPM in Nyando SPM E & L Case No. E049 of 2022 (the suit). The appellant seeks for orders that: -
 - a. the Appeal be allowed.
 - b. the ruling and orders of Hon. Temu delivered in Nyando E& L Case No. E049 of 2022 on 4th October 2022 be set aside in entirety.
 - c. That the suit be placed before any other Magistrate other than Hon. S.O TEMU.
 - d. Costs of this appeal be borne by the 1st Respondent
2. The background of the appeal is that the 1st Respondent sued the appellant and the 2nd Respondent in the suit. The 1st Respondent's claim in the suit is that he is the registered owner of a parcel of land known as Kisumu/Muhoroni/1075 (the suit land). That in the month of March 2022 the Appellant and the 2nd Respondent unlawfully invaded the suit land and planted sugarcane. The 1st Respondent



therefore sought for orders of injunction, eviction and general damages against the Appellant and the 2nd Respondent.

3. Together with the plaint, the 1st Respondent filed a Notice of Motion application dated 20th July 2022 seeking for an order of temporary injunction restraining the appellant and the 2nd Respondent from alienating, cultivating or disposing of the suit land pending hearing and determination of the suit. The 1st Respondent also sought for an order for the OCS of the nearest police station to assist in enforcing compliance. The application was heard and ruling thereon delivered on 4th October 2022 allowing the application.
4. Dissatisfied with the Ruling, the appellant filed the present appeal on the grounds that:
 - a. The learned Magistrate erred gravely in law and fact by assuming jurisdiction to hear and determine the application and suit dated 20th July 2022 when the property Kisumu/Muhoroni/1078 is currently the subject of litigation in High Court in Nairobi in Succession Cause No. 257 of 2017: In The Matter Of The Estate Of George Omollo Rombo
 - b. The learned magistrate erred gravely in law and fact by purporting to restrain the appellant from alienating, cultivating or disposing of non-existent parcel number being Kisumu/MuhoronI/1075.
 - c. The Learned magistrate erred gravely in law and fact by completely disregarding the Appellant's duly registered proprietary rights over suit property Kisumu/Muhoroni/1578 by purporting to restrain her from accessing, occupying and utilizing her own land in violation of her rights as an absolute proprietor in violation of Article 40 of the Constitution the Land Act, 2012 and the Land Registration Act
 - d. The Learned Magistrate erred gravely in law and fact by purporting to make a definitive determination that the 1st Respondent is the alleged appropriate owner of Kisumu/Muhoroni/1075 through the Ruling dated 4th October, 2022 and in essence disposed of the entire suit without affording the Appellant a hearing in violation of Article 47 and 50 of the Constitution to wit;
 - e. The Learned Magistrate held that the said Land belonged to her and she had lawfully sold it to the Plaintiff herein Paul Ogweno Manyala who is registered owner and hence the one that had the express authority to use it and /or lease it if he so wished
 - f. The learned Magistrate held that if the 2nd Defendant desires to continue using the Land he must have any agreement with the owner who is registered, that is the Plaintiff
 - g. The Learned Magistrate erred gravely in law and fact by giving a contradictory Ruling to wit; on the one Hand the Magistrate held that the Plaintiff was the Legitimate owner of the suit property and on the other Hand the Honorable Magistrate held that the Appellant would address her claim of ownership over the very same suit property during the full hearing of the suit
 - h. The Learned Magistrate erred gravely in law and fact by purporting to make a definitive finding that the 1st Respondent is the alleged owner of Kisumu/Muhoroni/1075 in an interlocutory application over a non-existent property being property number Kisumu/Muhoroni/1075
 - i. The Learned Magistrate erred gravely in law and fact by giving a myopic interpretation of what possession and occupation of Land is by limiting the interpretation to mean being resident in the Property



- j. The Learned Magistrate erred gravely in law and fact by referring to non-existent parties and facts in her ruling
 - k. The Learned Magistrate erred gravely in law and fact by showing outright bias against the Appellant by completely disregarding and failing to take into consideration her evidence on the one Hand and taking the 1st Respondent's Affidavit evidence as gospel truth in the absence of a viva voce hearing
5. Directions were given on 19th April, 2023 that the Appeal be argued by way of written submissions. In compliance, written submissions dated 14th July 2023 were filed by the firm of Donex Juma Advocates for the Appellant. Similarly, written submissions dated 13th September 2023 were filed on behalf of the Respondent by the firm of Peter M. Warindu & Co Advocates.

Issues for determination

6. The grounds of appeal form the issues for determination in this appeal.

Analysis and determination

7. This being a first appeal, this court reminds itself of the obligation it has as a first appellate court in respect to the appeal herein. The court is under an obligation to reconsider the evidence, re-evaluate and analyze the same so as to arrive at independent conclusion and so determine whether the decision of the trial court was consistent with the evidence adduced. In doing this the court bears in mind that unlike the trial court, it has had no chance of seeing or hearing the witnesses first hand. In *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR the Court held that:

“ this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a 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.”

8. The first ground of appeal is that the trial magistrate erred in law and fact by assuming jurisdiction to hear and determine the application over the suit land when the said suit land is currently the `subject of litigation in High Court in Nairobi Succ Cause No. 257 of 2017 In the matter of the Estate of George Omollo Rombo. The Plaintiff shows that the suit land is land parcel known as Kisumu/Muhoroni/1075 which the 1st Respondent herein claims in the plaint to belong to him as the registered owner. Perusal of the appellant's statement of defence dated 22nd August, 2022 shows that there was no mention therein of the existence of a Succession cause in the High court where the suit land was the subject matter.

In paragraph 20 of the appellants Replying Affidavit sworn on 16th August 2022, the appellant stated:

“ That in any event the land known as Kisumu/Muhoroni/1578 is subject of a pending suit at the High court (Milimani) succession suit number 257 of 2017 in which I am the petitioner /Respondent”

And in paragraph 21, the appellant stated that under the circumstances the suit is sub judice and the court lacks jurisdiction to entertain and determine it.



9. In respect of this, the trial court found that as per the green card produced in court there was no evidence that land parcel No. 1075 was ever sub-divided. The trial court proceeded to grant the temporary injunction prayed for.

10. It has been submitted on behalf of the appellant in this appeal that jurisdiction is key and without it the court cannot move. The appellant relied on the case of *Samuel Kamau Macharia and Another v Kenya Commercial bank Limited and 2 others* (2012) eKLR Where it was held that;

“A courts’ jurisdiction flows from either the constitution or Legislation or both. There’s a court of law can only exercise jurisdiction conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

That since land parcel No. Kisumu/Muhoroni/1578 which emanated from Kisumu/Muhoron/1075 was a subject in a Succession cause in the High court this effectively put to question the jurisdiction of the trial court on grounds of sub-judice under section 7 of the *Civil Procedure Act*.

11. It is clear from these submissions that the land that was the subject matter of the cause in the High court was No. Kisumu/Muhoroni/1578. According to the appellant that land was a resultant parcel after sub-division of the suit land parcel No. Kisumu/Muhoroni/1075. But according to the 1st Respondent, the suit land had never been sub-divided so as to create parcel No. 1578 or any other parcel at all. The trial court, relying on the copy of register (Green card) believed the version of the 1st Respondent and proceeded to hear and determine the application before it.

12. In ground 2 of the appeal, the court is being invited to determine whether prima facie, the suit land in the plaint exists. The appellant faults the trial court for purporting to restrain the appellant from alienating, cultivating or disposing of a non-existent parcel number being Kisumu/Muhoroni/1075. To their pleadings before the trial court, both the appellant and the 1st Respondent annexed documents of ownership of land. The appellant exhibited, inter alia, a mutation to show that land parcel No. 1075 was sub-divided to create new parcels and a title deed for No, 1578. The 1st Respondent exhibited title deed to parcel No.1075 and a copy of register (greed card) for the same land.

The duty of the court was to determine which set of documents was authentic. This is a duty that will be exhaustively accomplished at the end of the suit after hearing the evidence.

But for the purpose of dispensing the application for temporary injunction before it, the trial court had to determine, prima facie, which documents were authentic and the court relied on the green card to do this. The green card showed that land parcel No. 1075 has never been sub-divided and that the same still exists and shows that the land is in the name of 1st Respondent. No other green card was so up to the date of the ruling, placed before the trial court to controvert the contents of the green card produced by the 1st Respondent.

13. The grounds for grant of a temporary injunction as set in the case of *Giella –v- Cassman Brown* are, inter alia, demonstration of a prima facie case with a probability of success.

I find that by production of the green card, the 1st Respondent demonstrated a prima facie case with a probability of success hence satisfying a condition for grant of temporary injunction.

14. Grounds 3 to 6 of the appeal fault the trial court for making final orders in an interlocutory application. I have read the order made by the trial court, it reads;

“I thus do allow the application dated 20th July 2022 in terms of prayer 3 pending the hearing and determination of this suit, there be an order of temporary injunction restraining



the Defendants/Respondents herein either by themselves, their agents, employees, relatives and/or any other person deriving authority from them from alienating, cultivating or disposing the applicants land parcel No. Kisumu/Muhoroni/1075”

This in all interpretations, in my view, is a temporary order for a defined period namely; pending the hearing and determination of the suit.

15. I find that the trial court did not err in its findings and decision. I find no reasons to interfere with the ruling dated 4th October 2022. The appeal is dismissed. As the suit is still pending hearing and determination before the trial court let each party bear own costs. The lower court file be returned to the trial court forthwith for expeditious hearing and disposal of the suit.

Orders accordingly.

JUDGEMENT DATED AND SIGNED AT KISUMU AND DELIVERED THIS 7TH DAY OF DECEMBER, 2023 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Manyonge holding brief for Juma for the Appellant.

No appearance for the Respondents.

