



REPUBLIC OF KENYA



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Gituro v Njeri; Thuo (Interested Party) (Environment and Land Appeal E088 of 2021) [2022] KEELC 3046 (KLR) (23 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3046 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E088 OF 2021**

BM EBOSO, J

MAY 23, 2022

BETWEEN

GITURO KAHUGI GITURO APPELLANT

AND

NANCY WAIThERA NJERI RESPONDENT

AND

JOYCE WANGARI THUO INTERESTED PARTY

(Being an Appeal arising from the Ruling and Order of the Chief Magistrate Court at Kiambu by Hon Wilson Rading, Senior Resident Magistrate, delivered on 12/10/2021 in Kiambu MCE & L Case No 25 of 2020)

JUDGMENT

Background

1. This appeal arose from a ruling rendered on 12/10/2021 in Kiambu Chief Magistrate Court E & L Case No 25 of 2020 by Hon Wilson Rading. A brief background to the appeal is that, through a plaint dated 30/6/2020, the respondent in this appeal, Nancy Waithera Njeri, sued the appellant contending that she [respondent] was the registered proprietor of land parcel number Githunguri/Kanjai/2914, having acquired the land from one Grace Njeri Wachira. She alleged that the appellant had encroached onto the said parcel of land and had declined the District Land Surveyor's suggestion to ascertain the boundaries of their respective parcels of land. Consequently, she sought, among other reliefs, a permanent injunction restraining the appellant against entering, or trespassing on land parcel number Githunguri/Kanjai/2914.
2. The appellant responded to the suit through a defence and counterclaim dated 26/8/2020. He put the respondent to strict proof of ownership of parcel number Githunguri/Kanjai/2914 in terms



of its location and size as stipulated in the division and distribution of property pursuant to the Certificate of Confirmation of Grant issued in Succession Cause No 504 of 1987 relating to the estate of Kahugi Gituro. It was the appellant's case that the respondent was unlawfully occupying parcel number Githunguri/Kanjai/2916 physically and on the ground, mistakenly believing the same to be Githunguri /Kanjai/2914.

3. By way of counterclaim, the appellant contended that he was the lawful beneficial and absolute registered proprietor of land parcel number Githunguri/Kanjai/2916. It was his case that both parcel number Githunguri/Kanjai/2914 and parcel number Githunguri/Kanjai/2916 were subdivisions out of land that belonged to the late Kahugi Gituro. He alleged that the respondent had, in June 2020, unlawfully entered into and taken possession of parcel number Githunguri/Kanjai/2916. Consequently, he sought, among other reliefs, a permanent injunction restraining the respondent against occupying land parcel number Githunguri/Kanjai/2916.
4. In addition to the above pleadings, four applications were presented to the trial court. These were: (i) an interlocutory application dated 30/6/2020, through which the 1st respondent sought a permanent injunctive order restraining the appellant against encroaching or trespassing on parcel number Githunguri/Kanjai/2914; (ii) a parallel interlocutory application by the appellant, dated 26/8/2020, through which the appellant sought a permanent injunctive order restraining the respondent against remaining on or continuing in occupation of parcel number Githunguri/Kanjai/2916; (iii) an application by the appellant dated 14/1/2021, seeking contempt orders against the respondent; and (iv) an application by Joyce Wangari Thuo, seeking to be joined in the suit as an interested party.
5. The learned magistrate subsequently rendered the impugned ruling on 12/10/2021. He designated himself in the impugned ruling as "Deputy Registrar". Secondly, in the formal order which was extracted and signed by the learned magistrate, he designated himself as "Senior Resident Magistrate." Thirdly, the said formal order contained two additional defendants: (i) The District Land Registrar, Kiambu; and (ii) The District Land Surveyor, Kiambu. It is not clear at what point or on which application the two additional defendants were joined to the suit.
6. In the impugned ruling, the learned magistrate admitted Joyce Wangari Thuo as an interested party. Secondly, he allowed the respondent's application dated 30/6/2020 and directed that costs of the application were to abide the outcome of the main suit. Further, he adopted the County Surveyor's Report dated 13/1/2021 in the following terms:

" 38 Being an expert report, the same is hereby adopted by this honourable court."

7. Aggrieved by the impugned ruling, the appellant brought this appeal advancing the following verbatim grounds:
 - 1) The learned judge [sic] erred in law and fact in conferring jurisdiction on himself to adjudicate on the matter whose substratum is pending before the High Court of Kenya Nairobi Succession Cause Number 504 of 1987 in the matter of the Estate of Kahugi Gituro (deceased) and is under preservation order.
 - 2) The learned judge [sic] erred in law and fact in finding that the respondent a stranger to the estate is lawfully on the suit premises inspite of pending proceedings in High Court Succession Cause Number 504 of 1987 in the matter of the Estate of Kahugi Gituro that predate the proceedings in ELC 25 of 2020 Kiambu.
 - 3) The learned judge [sic] erred in law and fact and failed to appreciate the superiority of the jurisdiction of the High Court Succession Court in its Probate and Administration role and



completely ignored the significance of the High Court order dated 5th November, 2018 preserving the Estate of Kahugi Gituro (deceased) in High Court Succession Cause Number 504 of 1987 (Nairobi).

- 4) The learned judge [sic] misunderstood his role at an interlocutory stage of the proceedings and made final orders of rectification of Mutation Forms and Registry Index Map without hearing the parties and effectively determining the suit and rendering any further proceedings an exercise in futility.
 - 5) The learned judge [sic] erred in law and fact in ordering rectification of Mutation Forms and Registry Index Map contrary to the provisions of the [Land Registration Act](#).
 - 6) The learned judge [sic] erred in law and fact in ordering rectification of Mutation Forms and Registry Index Map when the same is not a prayer sought by the Respondent.
 - 7) The learned magistrate erred in law and fact in defying the High Court order dated 5th November, 2018 issued in Succession Cause Number 504 of 1987 the subdivision/distribution of the Estate of the deceased under Certificate of Confirmation is stayed/halted. Any sale, subdivision, disposal, transfer of assets that comprise of deceased's estate is halted and status quo be maintained pending hearing and determination of instant application interpartes.
 - 8) The learned judge [sic] erred in law in disregarding the succession proceedings in High Court Succession Cause Number 504 of 1987 by ignoring the preservation order therein and sitting on appeal against an order issued by a court of higher/superior jurisdiction.
 - 9) The learned trial magistrate erred in law and in fact and misdirected himself by failing to consider submissions made before him by the defendant and reached an erroneous conclusion thereby occasioning a miscarriage of justice.
 - 10) The ruling and orders made are not maintainable in law.
8. The appellant urged the court to set aside the impugned ruling and issue the following orders:
- a) The appeal be allowed.
 - b) The orders made on the 12th October 2021 in ELC 25 of 2020 Kiambu be vacated.
 - c) The status quo on the suit lands ante 5th November, 2018 be maintained and observed pursuant to the High Court Order dated 5th November 2018 and issued in Nairobi Succession Cause 504 of 1987 in the matter of the estate of Kahugi Gituro preserving the estate of Kahugi Gituro pending the hearing and determination of Succession Cause 504 of 1987 before the High Court of Kenya Nairobi.
 - d) There be stay of proceedings in ELC 25 of 2020 Kiambu pending the hearing and determination of the proceeding in the High Court Succession Cause Number 504 of 1987 (Nairobi).
 - e) A temporary injunction issue against the respondent restraining her from intermeddling in estate property and remaining on or continuing in occupation of any of the suit lands be it Githunguri/Kanjai/2914 or Githunguri/Kanjai/2916 and against alienating, construction, interfering and trespassing on the said suit lands pending the hearing and determination of Succession Cause 504 of 1987 in the matter of the estate of Kahugi Gituro.



- f) A temporarily injunction issue against the respondent restraining her from remaining on or continuing in occupation of any of the suit lands be it Githunguri/Kanjai/2914 or Githunguri/Kanjai/2916 and from alienating, constructing, interfering or trespassing on the said suit lands pending the hearing and determination of this application interpartes.
- g) A permanent injunction do issue restraining the respondent whether by herself or her servants and/or agents or otherwise howsoever from intermeddling with estate property and from remaining on or continuing in occupation of any of the suit lands be it Githunguri/Kanjai/2914 or Githunguri/Kanjai/2916 and/or alienating, engaging in construction, interfering and trespassing upon the said parcels.
- h) The appellant be awarded costs of this appeal plus interest at court rates.
- i) Any further or other alternative order as the just of the case may require to be made.

Submissions

9. The appeal was canvassed through written submissions dated 2/12/2021, filed by the firm of Ameka & Company Advocates. Counsel consolidated ground numbers 1, 2., 3, 7 and 8 into a single issue – whether the lower court had jurisdiction to proceed with the case given that there was a High Court order preserving the estate of the late Kahugi Gituro. Counsel contended that the lower court ought to have put on hold any activities that touched on sale, subdivision, disposal or transfer of the assets of the estate of the late Kahugi Gituro. Counsel argued that the lower court ought to have downed its tools until the succession cause is finalized. Counsel submitted that the respondent’s activities amounted to intermeddling in the assets of the estate of the late Kahugi Gituro contrary to the provisions of Section 45 of the *Law of Succession Act*. It was the position of counsel that the lower court ought to wait for the resolution of the pending issues in the succession cause before exercising jurisdiction.
10. On the question as to whether the learned magistrate misunderstood his role at the interlocutory stage of the proceedings and proceeded to issue final orders, counsel submitted that parties were yet to lead evidence in support of their respective cases. Counsel faulted the learned magistrate for ordering rectification of the registers without affording the parties the opportunity to probe the surveyor’s report and examine the surveyor. Counsel further faulted the lower court for not making any finding on the appellant’s parallel application for injunction. Further, counsel faulted the lower court for issuing an order that contained parties who had not been joined to the suit.
11. The respondent filed written submissions dated 14/12/2021 through the firm of Njehu Ndirangu & Company Advocates. Counsel for the respondent submitted that the preservatory order issued by the High Court in Succession Cause No 504 of 1987 lapsed upon the expiry of twelve months in tandem with the provisions of Order 40 rule 6 of the *Civil Procedure Rules*.
12. On whether the learned magistrate misunderstood his role at the interlocutory stage, counsel for the respondent submitted that the learned magistrate did not err in directing that the mutation forms and the registry index maps be rectified as recommended by the surveyor’s report. Counsel argued that the learned magistrate properly ordered the surveyor to visit the suit properties to determine the boundaries. Counsel argued that the jurisdiction to determine boundaries is vested in the Land Registrar and that the learned magistrate properly adopted the report of the surveyor. Counsel urged the court to dismiss the appeal.



Analysis and Determination

13. I have considered the record of appeal, the grounds set out in the memorandum of appeal, and the parties' rival submissions. I have also considered the relevant legal frameworks and jurisprudence. This is an interlocutory appeal. Parties to this appeal did not agree on a common set of issues that fall for determination in the appeal. Counsel for the appellant condensed several grounds in the memorandum of appeal into thematic issues. I will, in the circumstances, dispose the appeal based on the key
14. The principles upon which a first appellate court exercises jurisdiction are well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013)eKLR in the following words:

“As a first appellate court, our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.
15. The above principle was also emphasized in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR in the following words:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of *Kenya Ports Authority vs Kustron (Kenya) Limited* 2000 2EA 212.”
16. The appellant condensed ground numbers 1, 2, 3, 7 and 8 into a single issue. He similarly condensed ground numbers 4, 5 and 6 into a single issue. I will make brief sequential pronouncements on the two key issues in the order in which they were canvassed.
17. The first issue is whether the learned magistrate erred in exercising jurisdiction in the dispute. The appellant faults the learned magistrate for exercising jurisdiction in the face of an order issued by the High Court on 5/11/2018 in Nairobi High Court Succession Cause No 504 of 1987. The said order reads as follows:

“4 THAT the subdivision/distribution of the estate of the deceased under certificate of confirmation is stayed/halted. Any sale, subdivision, disposal, transfer of assets that comprise of deceased's estates is halted and status quo be maintained pending hearing and determination of instant application.”
18. What emerges from the record of the lower court is that both the respondent and the appellant presented parallel claims to the magistrate court and invited the magistrate court to adjudicate those claims. The respondent's claim was contained in her plaint. The appellant's claim was contained in his counterclaim. Similarly, both parties invited the court to exercise interlocutory jurisdiction to grant permanent injunctive orders at the interlocutory stage. Neither of the two substantive parties to this appeal made a formal application to the magistrate court challenging its jurisdiction. They both happily invited the court to exercise jurisdiction. The appellant was fully aware of the status quo order he is relying on but elected to invite the court to exercise jurisdiction and grant him a permanent injunction at an interlocutory stage. I do not, in the circumstances, think this particular limb of the ground of appeal is bonafide.



19. Further, it is not lost to this court that the High Court has supervisory jurisdiction over magistrate courts. If the appellant held the view that the proceedings giving rise to this appeal ought to have been stayed on account of the order of the High Court in the Succession Cause, the proper procedure was to file a formal application for stay of proceedings. The two appropriate fora where the appellant would be entitled to file and canvass the application for stay of proceedings are either the magistrate court seized of the suit or the High Court seized of the Succession Cause. I do not think it is proper for the appellant to ignore those redress avenues; invite the magistrate court to exercise jurisdiction; and subsequently come to this court to challenge his own activities in the magistrate court. For the above reasons, I do not find merit in the above limb of the appeal.
20. The second key issue falling for determination in this interlocutory appeal is the question as to whether the learned magistrate misunderstood his role at the interlocutory stage of the proceedings when he made orders of rectification of mutation forms and registry index maps. The position of the appellant is that the learned magistrate erred. The position of the respondent is that the learned magistrate acted in tandem with the requirements of Section 18 of the [Land Registration Act](#).
21. It is clear from the respondent's plaint and from the appellant's counterclaim that the dispute which the two parties presented to the Magistrate Court for determination was a boundary dispute. Section 18(2) of the [Land Registration Act](#) expressly precludes courts against entertaining actions or other proceedings relating to boundary disputes of registered lands unless the boundaries have been determined by the Land Registrar. Section 18(3) of the Act empowers the Land Registrar to conduct proceedings and receive evidence for the purpose of making determinations in boundary disputes. Did the learned magistrate comply with the provisions of Sections 18 and 19 of the [Land Registration Act](#)? In my view, he did not. Given that what was before him was a boundary dispute, the learned magistrate ought to have downed his tools and referred the boundary dispute to the Land Registrar for determination in accordance with the provisions of Sections 18 and 19 of the [Land Registration Act](#). The court would be seized of jurisdiction only after the Land Registrar has made and issued a determination on the boundary dispute. For the above reason, this court is of the view that the learned magistrate misunderstood his role when he opted to exercise jurisdiction in a boundary dispute without a determination by the Land Registrar.
22. It does also emerge from the impugned ruling that the learned magistrate proceeded to issue final orders relating to rectification of the mutation forms and the registry index maps without a prayer to that effect and without conducting a proper trial. What the magistrate was seized of were interlocutory applications. He should not have proceeded to issue final orders at that stage.
23. For the above reasons, this appeal succeeds partially. The ruling of the magistrate court will be set aside and will be substituted with an order staying the proceedings in the magistrate court, pending the determination of the boundaries of the suit properties by the Land Registrar within the framework of Section 18 of the [Land Registration Act](#). Parties shall bear their respective costs of this appeal.

Disposal Orders

24. In the end, this appeal is disposed as follows:
 - a) The Ruling and Orders rendered on 12/10/2021 by Hon W Rading, Senior Resident Magistrate, in Kiambu CMC E & L Case No 25 of 2020 are hereby set aside and are substituted with an order staying proceedings in the said suit until the boundaries of the parcels of land in the said dispute are determined by the Land Registrar within the framework of Section 18 of the [Land Registration Act](#).



b) Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF MAY
2022**

B M EBOSO

JUDGE

Court Assistant: Ms Lucy Muthoni

