



**Wangai v Hunja (Environment & Land Case E010 of 2021)  
[2022] KEELC 2386 (KLR) (16 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2386 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE E010 OF 2021**

**YM ANGIMA, J  
JUNE 16, 2022**

**BETWEEN**

**ESTHER WANJIRU WANGAI ..... APPELLANT**

**AND**

**CHARLES MURIITHI HUNJA ..... RESPONDENT**

**JUDGMENT**

1. This is an appeal against the ruling and order of Hon. S.N. Mwangi (SRM) dated May 18, 2021 in Nyahururu CM ELC No E001 of 2021 – Charles Muriithi Hunja v Esther Wanjiru Wangai. By the said ruling the trial court dismissed the appellant’s notice of motion dated February 12, 2021 for an injunction and other interim orders pending the hearing and determination of the suit. The Respondent was awarded costs of the application.

**B. BACKGROUND**

2. The material on record shows that vide a plaint dated December 21, 2020 the respondent sued the appellant before the Chief Magistrate’s court seeking a permanent injunction restraining her from interfering with his quiet enjoyment and possession of his parcel of land known as Title No. Laikipia/ Marmanet/1743 (parcel 1743) including the quarry therein. He also prayed for costs of the suit and any other relief the court may deem fit to grant.
3. The respondent pleaded that he was the registered proprietor of parcel 1743 which he acquired from the appellant’s late husband for valuable consideration in 1997. He further pleaded that sometime in March, 2020 the Appellant had, without any lawful justification, laid a claim to a portion of 1¼ acres out of parcel 1743 on which he operated quarry.
4. The appellant filed a defence and counterclaim dated February 12, 2021 in response to the suit. By her defence she admitted the respondent’s ownership of parcel 1743 but denied that the portion of 1¼ acres on which the respondent operated a quarry was part and parcel thereof. It was further pleaded



that the respondent was claiming a bigger portion than the 1½ acres which he had purchased from her late husband. It was her further defence that she had been wrongly sued in her personal capacity since she was not the one who had sold parcel 1743 to the respondent.

5. By her counterclaim the appellant pleaded that when her late husband sold parcel 1743 to the respondent she left out a portion of 1½ acres which was a disused quarry which the Respondent was wrongly claiming to be part of his land. It was further pleaded that the respondent was illegally carrying on quarrying activities for gain on the said portion of land. The appellant consequently prayed for the following reliefs in the counterclaim:
  - a. An order of eviction against the plaintiff ordering him to vacate the parcel of land belonging to the estate of the late Leeford Wangai Waruimbo.
  - b. A permanent injunction restraining the plaintiff, his family, kin, agents, employees or anyone claiming under the plaintiff from trespassing upon, ingressing into, quarrying, cultivating, selling or in any other manner interfering with the defendant's quiet possession of the parcel of land belonging to the estate of the late Leeford Wangai Waruimbo.
  - c. General damages for trespass.
  - d. Mesne profits.
  - e. Costs of the suit.
  - f. Any other or further relief that the Honourable court may deem fit to grant.
6. Upon filing the defence and counter-claim the appellant also filed a notice of motion dated February 12, 2021 under sections 3 & 3A of the [Civil Procedure Act](#) (cap 21), Order 40 of the [Civil Procedure Rule 2010](#), and all other enabling provisions of the law seeking the following orders:
  - a. Spent
  - b. Spent
  - c. That the District Surveyor Laikipia be ordered to carry out a survey of land Title No. Laikipia/Marmanet/1743 and file a report in court.
  - d. That upon filing of the surveyor's report in court the Honourable court be pleased to visit the disputed parcel of land.
  - e. That pending the hearing and determination of this suit the plaintiff herein either by himself, his servants, employees and or anyone acting under him be barred from carrying out quarrying activities on the disputed parcel of land formerly forming part of Land Title No Laikipia/Marmanet/307.
  - f. That the plaintiff does provide an account of all the funds he has received from the quarrying activities on the disputed parcel of land.
  - g. That the plaintiff's suit be dismissed for being fatally defective and bad in law.
  - h. That costs of this application be provided for.
7. The material on record shows that the respondent filed a replying affidavit sworn on March 18, 2021 in opposition to the application whereas the appellant filed a further affidavit in response thereto. The said application was canvassed by the parties through written submissions. By a ruling dated and delivered on May 18, 2021 the trial court held that the appellant had failed to satisfy the principles for



the grant of an interim injunction against the Respondent. The court further held that the Appellant had also failed to make out a case for the grant of the other interim orders sought in the application. Consequently, the trial court dismissed the said application with costs to the Respondent.

### **C. THE GROUNDS OF APPEAL**

8. Being aggrieved by the said ruling and order, the appellant filed a memorandum of appeal dated May 26, 2021 raising the following 7 grounds of appeal:
  - a. That the learned trial magistrate erred in law and fact by failing to make a finding that the respondent's suit is fatally defective and bad in law.
  - b. That the learned trial magistrate erred in law and fact by failing to make a finding that the appellant cannot be sued in her own name in matters relating to the estate of her late husband.
  - c. That the learned trial magistrate erred in law and fact by failing to order the District Surveyor Laikipia to carry out a survey of land title number Laikipia/Marmanet/1743 despite the Respondent having conceded to the same.
  - d. That the learned trial magistrate erred in law and fact by declining to issue an order of injunction on account of the fact that the Respondent is the owner of the contested parcel of land.
  - e. That the learned trial magistrate erred in law and fact by failing to appreciate that the respondent's claim is one of adverse possession and which the trial court has no jurisdiction.
  - f. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the respondent has conceded that the contested parcel of land does not belong to him.
  - g. That the learned trial magistrate erred in law and fact by dismissing the appellant's application despite the weight of evidence and the authorities cited by the Appellant.
9. As a result, the appellant sought the following orders in the appeal:
  - a. That the appeal be allowed and the ruling and order of the trial court dated May 18, 2021 be set aside.
  - b. That an order be made allowing the appellant's notice of motion dated February 12, 2021 as prayed.
  - c. That the appellant be awarded costs of the appeal and the application before the trial court.

### **D. DIRECTIONS ON SUBMISSIONS**

10. When the appeal was listed for directions it was directed that the appeal shall be canvassed through written submissions. The parties were granted timelines within which to file and exchange their respective submissions. The record shows that the appellant's submissions were filed on February 24, 2022 whereas the Respondent's submissions were filed on March 28, 2022.

### **E. THE APPLICABLE LEGAL PRINCIPLES**

11. It is evident from the material on record that the orders sought by the appellant in her notice of motion dated February 12, 2021 were discretionary in nature. It was within the discretion of the trial court to grant or to decline the orders. Such discretion has, of course, to be exercised judiciously.



12. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the court of appeal summarized the principles as follows:
- a. The power of a court in an application for an interlocutory injunction is discretionary.
  - b. The court of appeal may only interfere with the exercise of a court's judicial discretion where it is satisfied that:
    - i. The judge misdirected himself in law; or
    - ii. That he misapprehended the facts; or
    - iii. That he took into account considerations of which he should not have taken account; or
    - iv. That he failed to take account of considerations of which he should have taken account; or
    - v. That his decision, albeit a discretionary one, was plainly wrong.

#### **F. THE ISSUES FOR DETERMINATION**

13. Although the Appellant raised 7 grounds in her memorandum of appeal, the court is of the opinion that the appeal may be determined by resolution of the following 5 issues:
- a. Whether the trial court erred in law in failing to dismiss the Respondent's suit summarily.
  - b. Whether the trial court erred in law in dismissing the Appellant's prayer for an interim injunction.
  - c. Whether the trial court erred in law in dismissing the Appellant's prayer for an account.
  - d. Whether the trial court erred in law in failing to grant the Appellant's prayer for the District Surveyor Laikipia to carry out a survey of parcel 1743.
  - e. Who shall bear costs of the appeal.

#### **G. ANALYSIS AND DETERMINATION**

- a. Whether the trial court erred in law in failing to dismiss the respondent's suit summarily.
14. The court has considered the material and submissions on record on this issue. The appellant contended that she had been wrongfully sued in her personal capacity over the disputed portion of 1½ acres which she contended belonged to the estate of her late husband. It was her submission that the only person who was authorized to handle such dispute is the legal representative of the deceased owner. It was her further submission that, in any event, it was her deceased husband who was the vendor of parcel 1743 hence the Respondent should have sued her in a representative capacity.
15. The respondent, on the other hand, contended that he had no claim or issue against the estate of the Appellant's late husband. He contended that the vendor sold and transferred parcel 1743 to him as agreed hence he had no issue with his estate. It was his contention that it was the appellant who was the wrongdoer by wrongfully claiming the disputed portion of 1½ acres holding the quarry. The respondent contended that the said portion was part and parcel of parcel 1743 hence appellant was the right party to be sued since she was the one who had threatened his quiet enjoyment and user of that portion of land.
16. Although the trial court did not directly determine this issue the court is of the opinion that whether or not the appellant was properly sued in her personal capacity depends on whether the disputed portion



of 1½ acres belongs to the respondent or the estate of the appellant's late husband. That is really one of the primary issues for determination in the suit which is pending before the trial court. There was no evidence before the trial court upon which the court could have determined right away that the quarry in dispute belonged to either the Respondent or the estate of the Appellant's late husband. That was really an issue for trial and the trial court could not be expected to strike out or dismiss the Respondent's suit summarily without the benefit of a trial.

b. Whether the trial court erred in law in dismissing the appellant's prayer for an interim injunction.

17. The court has considered the material and submissions on record on this issue. The appellant faulted the trial court for finding that she had failed to demonstrate the principles for the grant of an interim injunction as enunciated in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358. The Appellant has not demonstrated that the trial court misdirected itself in law or misapprehended the facts. It has not been demonstrated that it took into account irrelevant factor or that it failed to take into account some relevant factors. There is also no material on record to demonstrate that the trial court was plainly wrong.

18. The trial court could not be faulted for finding that the appellant had failed to establish a prima facie case with a probability of success. In paragraph 13 of the appellant's written submissions dated February 23, 2022 it was submitted, inter alia that:

“The trial court ought to have issued an order to have the disputed parcel(s) of land surveyed and a report filed in court. Without a surveyor's report, there is absolutely no way the plaintiff can prove his case against the appellant. The appellant cannot also prove her counter-claim against the appellant(sic).”

It is thus clear that the Appellant appreciated all along that in the absence of a surveyor's report she could not possibly prove her counter-claim against the Respondent.

c. Whether the trial court erred in law in failing to grant the appellant's prayer for the District Surveyor Laikipia to carry out a survey of parcel 1743.

19. The court has fully considered the material on record on this issue. The court has noted that the trial court did not directly address this issue in its ruling and no reasons were given for declining the order. The court is of the opinion that although the trial court had a discretion in allowing or declining the order, it did not exercise its discretion judiciously in declining the order. The court has arrived at this conclusion because of a lack of analysis of this prayer and lack of reasons for declining the same. It is evident from the nature of the dispute before the trial court that a surveyor's report would be very crucial for resolution of the dispute. The court is further of the opinion that a government surveyor was the one who was best placed to deal with the dispute in the circumstances. In the premises, the court finds merit in this ground of appeal.

d. Whether the trial court erred in law in dismissing the appellant's prayer for an account.

20. It is evident from the pleadings and material on record that the gist of the dispute between the parties was whether the quarry in question fell within the respondent's parcel 1743 or whether it formed part of the estate of the Appellant's late husband. In the absence of a determination of that issue it would be premature to make an order for the Respondent to account for the proceeds of the quarrying activities on the disputed portion of land. Since the Appellant had prayed for mesne profits in her counterclaim, she would be sufficiently covered in the event that her counterclaim is successful at the trial. The court, therefore, finds no merit in this ground of appeal.



- e. Who shall bear costs of the appeal.
21. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to section 27 of the *Civil Procedure Act* (cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. Since the appellant has succeeded in only one aspect out of the several prayers which were sought before the trial court, the court is of the opinion that she is not entitled to costs of the appeal. Each party shall bear his own costs of the appeal. The court is further of the opinion that costs of the notice of motion dated February 12, 2021 before the trial court shall be costs in the cause.

## H. CONCLUSION AND DISPOSAL

22. The upshot of the foregoing is that save for prayer for re-survey of parcel 1743 the court finds no merit in the Appellant's appeal. Accordingly, the court makes the following orders for disposal of the appeal:
- a. The ruling and order of the trial court dated May 18, 2021 in Nyahururu CM ELC NO E001/2021 is hereby set aside in the limited manner as specified hereunder:
- i. The Appellant's notice of motion dated February 12, 2021 is hereby allowed in terms of order No.3 thereof only.
- ii. The District/County Surveyor Laikipia County shall, with notice to all concerned proprietors, re-survey and establish the boundaries of all the parcels which are sub-divisions of Title No. Laikipia/Marmanet/307, that is, Parcel Nos 1742, 1743 and 1744 and file a report before the trial court within 60 days from the date hereof.
- b. The rest of the prayers sought in the notice of motion dated February 12, 2021 are hereby declined with costs in the cause.
- c. Each party shall bear his own costs of the appeal.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYAHURURU THIS 16TH DAY OF JUNE, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Kamwaro for the Appellant

Ms. Wanjiru Muriithi for the Respondent

CA- Carol

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**Y. M. ANGIMA**

**JUDGE**

