



**Situma v Situma (Environment and Land Appeal 4 of 2020)
[2022] KEELC 14437 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 14437 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 4 OF 2020
EC CHERONO, J
OCTOBER 31, 2022**

BETWEEN

RICHARD KHAOYA SITUMA APPELLANT

AND

PATRICK WANYONYI SITUMA RESPONDENT

*(Being an appeal from the judgment of Hon G.Adhiambo P.M
dated 17.02.2020 in Kimilili CMCC ELC NO.47 of 2018)*

JUDGMENT

Introduction

1. This appeal arises from the decision by Hon GAdhiambo PM dated February 17, 2020 being SPMCC No 47 of 2018 (hereinafter referred to as the former suit) at Kimilili. The appellant who was also the plaintiff *vide* a plaint dated April 4, 2018 had sued the respondent/defendant for an injunction order restraining him and/or his agents and/or servants from committing waste or doing any development on the suit property LR No Bungoma/Tongaren Scheme/520
2. The defendant did not file a statement of defence but it was directed that a similar suit where the appellant/defendant had filed his defence and counter-claim date April 23, 2018 being ELC Case No 70 of 2017 (Bungoma) be transferred and consolidated with the former suit and treated as his defence and counterclaim to the respondent's/plaintiff's claim.
3. The hearing of the former suit commenced on June 20, 2019 and was concluded on November 14, 2019. After judgment was delivered in favour of the plaintiff/respondent on February 17, 2020, the defendant/appellant was dissatisfied and preferred the present appeal on March 2, 2020 on the following grounds;



1. The honourable magistrate erred in law in entertaining the plaintiff's claim as the same was *resjudicata*
2. The entire judgment was against the preponderance of evidence adduced by both parties
3. There was no justification for eviction and permanent injunction orders against the appellant

1. The Hon Magistrate Erred in Law in Entertaining the Plaintiff's Claim as the Same was Res-judicata

4. Res-judicata is jurisdictional issue which goes to the root of a suit and is taken as a preliminary point before any other business of the court. Ordinarily, res-judicata is raised either in the pleadings or by giving the opposite party notice of intention of raising such objection. From the defence and counter-claim in ELC case No 70 of 2017, the defendant/appellant at paragraph 7 averred as follows;

"7. Paragraph 7 is denied. There was a dispute involving the same parties over the same subject matter in Kitale Senior Resident Magistrates Court in land case No 7 of 1984 in which the plaintiff was the defendant and the defendant was plaintiff. This matter is res-judicata."

5. At paragraph 6 and 7 of his witness statement dated the same date which he also adopted in his testimony, the defendant/appellant reiterated his averment and stated as follows;

"6. In 1981 he attempted to remove me. I went to Kitale Senior Resident Magistrate's Court and filed a suit against him. It was Kitale SRMC Land Case No 7 of 1984. The case was referred to elders. The elders awarded me 3 acres. Their award was adopted by the court.

7. The plaintiff did not appeal. I took the proceedings of the case to the Survey Office in Bungoma who demarcated the 3 acres that I had been given. The 3 acres were given a separate title-No Bungoma/tongaren/576. The plaintiff's portion was given the No Bungoma/tongaren/575. I have been on the Land occupying the 3 acres since then up to now. The plaintiff's assertion in paragraph 4 of his plaint that I have trespassed onto the land and that I am temporarily settled on one acre is a lie."

6. During the hearing of the defence case, the defendant/appellant referred to proceedings of a purported case in Kitale as indicated in his witness statement being SRMCC No 7 of 1984. However, he did not produce the same in evidence. The defendant/appellant did not call the court administrator in charge of Kitale Law courts to produce the purported court but only attempted to produce a mutation form which was successfully objected to by the advocate for the plaintiff/respondent. The trial magistrate could not have considered the issue of res-judicata since it was not raised as a preliminary point or during the hearing of the former suit. I find that the trial magistrate properly directed himself to the law and the facts in her decision which was presented by the parties.

2. The Entire Judgment was Against the Preponderance of Evidence Adduced by the Parties.

7. I have looked at the extract of the record and the impugned judgment. It is clear beyond any adventure that the learned trial magistrate considered the evidence adduced by both the plaintiff/respondent and the defendant/appellant and their witnesses. She also framed issues arising from the pleadings which she evaluated, analysed and determined in accordance with the law. The appellant made a general



allegation against the trial court without pointing any part of the evidence the trial magistrate failed to consider.

3. There was No Justification for Eviction and Permanent Injunction Orders Against the Appellant.

8. The trial magistrate in her judgment framed 4 issues for determination as follows;

1. Who is the registered proprietor of the land parcel No Bungoma/tongaren/520
2. Whether the registered proprietor of the said parcel of land is the absolute owner
3. Whether the defendant has trespassed onto the suit land
4. Whether the plaintiff is entitled to the counterclaim

9. At page 29 of the impugned judgment, the trial magistrate observed as follows;

“The plaintiff has proved that he is the absolute proprietor of the suit land that is Bungoma/Tongaren/520 and there is not indication or the register that the defendant is apart proprietor. He lives in the suit land just as a licensee that is the brother of the registered proprietor of the land. -----The defendant evidence does not prove any registrable interest in the aforesaid parcel of land. I therefore order that the defendant Richard Khaoya Situma be evicted from the said land parcel N Bungoma/tongaren/520 and further do issue orders of permanent injunction restraining the defendant from trespassing into the said suit property Bungoma/tongaren/520 in future.”

10. From the extract of the impugned judgment, the trial magistrate clearly analysed and evaluated the evidence and gave reasons for her decision. It is clear from her analysis that the plaintiff had proved that he is the absolute registered proprietor of the suit property land parcel No Bungoma/tongaren/520. I am satisfied that the impugned judgment delivered by the trial Magistrate is based on evidence and the law.

11. After determining that the plaintiff/respondent was the absolute registered proprietor of the suit land parcel No Bungoma/tongaren/520, the trial magistrate was justified in granting the reliefs sought to protect his rights as a proprietor under the law.

12. From my re-consideration of the extract of the record, it becomes irresistible that this appeal has no merit and the same is hereby dismissed with costs to the respondent. Orders accordingly

READ SIGNED AND DELIVERED VIRTUALLY THIS 31ST DAY OF OCTOBER, 2022

HON. E.C CHERONO

ELC JUDGE

In the presence of;

1 Mr Wamalwa R H/B for Kakhula

2 Mr Maloba H/B for Sichangi

3 Joy C/A

