



**Arithi v Mutai (Environment and Land Appeal E013 of 2020)
[2022] KEELC 13647 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13647 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E013 OF 2020**

CK NZILI, J

OCTOBER 19, 2022

BETWEEN

GIDEON MUCHUI ARITHI APPELLANT

AND

WILSON MUTAI RESPONDENT

*(Being an appeal from the ruling in ELC Case Number 22 of 2020 in the
Principal Magistrates Court at Tigania Hon. G. Sogomo delivered on 3.12.2020)*

JUDGMENT

1. The appellant who was the defendant before the primary court has appealed against the order made on December 3, 2020 granting the respondent interim orders of injunction pending the hearing and determination of the suit and at the same time disallowing his application seeking to discharge or set aside the interim orders made on June 3, 2020.
2. He has preferred 29 grounds summarized that the trial court erred in:- failing to find that based on the facts, evidence and the law that the conditions for the grant of temporary orders of injunction had not been met; ignoring the appellant's pleadings, supplementary affidavits, submissions, list of authorities and the law; relying on Njuri Ncheke proceedings and decisions in a selective manner; favoring and relying solely on the respondent's documents which were replete with errors and lacking probative value; failing to consider the subject matter was pending in a superior court as Petition No 16 of 2016; misapplying the decision in Court of Appeal No 129 of 2005; misapprehending the suit property as regards Mbwaa "A" & Mbwaa "1"; and lastly failing to appreciate it was the appellant in actual possession and not the respondent.
3. This being a first appeal the court is mandated to rehear, rehearse and re-evaluate the lower court record and come up with independent findings as to facts and law in line with Order 42 Rule 32



Civil Procedure Rules and Section 78 of the Civil Procedure Act. See Abok Janes Odera t/a AJ Odera & Associates vs John Patrick Machira T/A Machira & Co Advocates (2000) eKLR.

4. Before the trial court, the respondent by a plaint dated May 25, 2020 averred he was the registered owner of Parcel LR No 1926 Mbwaa I Adjudication Section measuring approximately 10 acres. He sued the appellant for trespass and destruction of property, forceable detainer and illegal harvesting of rocks and ballast without his consent or approval.
5. He sought for a permanent injunction stopping any trespass and or interference with the boundaries or preventing him from quiet possession and occupation thereof and a secondly an order stopping the District Land Adjudication and Settlement Officer from subdividing or interfering with the suit land pending hearing and determination of the suit.
6. The plaintiff was accompanied by a list of witnesses' statements and documents namely a confirmation letter of ownership from Subcounty Land and Settlement Officer Tigania West dated August 9, 2016, a sale agreement dated March 15, 2006, a Njuri Ncheke letter, chiefs' letter and a judgment in Tigania Civil Case No 124 of 2007.
7. Alongside the plaint, the respondent filed an application dated May 25, 2020 seeking for interim orders of injunction with a supporting affidavit of Wilson Mutua attaching the confirmation letters, sale agreement, Njuri Ncheke letter dated September 27, 2006, chiefs letter dated October 2, 2006 and copy of judgment in 124/12 marked as annexures WM 1 – 4 respectively. The trial court granted interim orders. Due to Covid 19 pandemic the court directed the interpartes hearing would be the first Thursday after the lifting of the Covid 19 restrictions.
8. The appellant filed a replying affidavit sworn on June 24, 2020 stating that he owned Parcel No 1926 Mbwaa A which was not surveyed at all but was customary land which had been under various out of court settlement endeavors all recognizing his rights as evidenced by letters from the Njuri Ncheke council of elders dated November 1, 2019, August 29, 2011 and May 10, 2011 which he attached as annexures marked GMA 1 (a) and (b) which is a recognized alternative dispute resolution mechanism under Article 159 of the Constitution.
9. The appellant averred his ownership had also been recognized by Peter Karani by a letter dated January 15, 2020 attached as GMA "2" who had recanted any or all claims by his family and the seller of the land namely Clement M'Murongo Rukanga to the respondent.
10. Further he said that on July 18, 2016 the Meru ELC Petition No 16 of 2016 stopped the issuance of new numbers or dealings in Mbwaa A Adjudication Section hence any letter of ownership issued after that date particularly the one by the respondent dated August 9, 2016 was a nullity, conferring no ownership rights to anybody. He attached the orders and the Court of Appeal as annexure marked GM A "3" and "7" respectively.
11. The appellant stated the sale agreement attached did not describe or demonstrate the previous ownership of the land and that the identity card attached and reflected in the sale against was different as well as the acreage. He averred the respondent was a perpetual fraudster which he had complained about by his letter dated March 14, 2018 to the Office Director Public Prosecution attached as GM "4".
12. The appellant denied that he was not a party to Tigania CC No 124 of 2007 which subject matter was different being Parcel No 1179 from the unsurveyed land herein hence the a was misleading the court. That the only matter pending was petition no 16 of 2016 where he had applied to be joined as a party as per annexure GMA "5" where the suitland fell under and its orders affected this suit. That the respondent had made a claim of malicious damage in the same parcel and he was charged in CR Case No 1 408/2008 Tigania which was dismissed. He attached copies of judgments both in the Lower



- Court and in appeal Meru as GMA “8”. That the application was based on falsehoods, non-disclosure of material facts and ought to be dismissed and the interim orders discharged.
13. The appellant also filed an application dated June 24, 2020 seeking for the setting aside of the interim orders granted on June 3, 2020 and for a stay of the proceedings or dismissal of the suit dated May 25, 2020 on the grounds on the face of the application and contained in an affidavit by Gideon Arithi on the even dates. He attached the same annexures as in the replying affidavit aforementioned as numbers GM “1” – 6 respectively. The main grounds of the application were pendency of Meru Petition No 16 of 2016, superior orders forestalling the adjudication in the subject adjudication section, non-disclosure of material facts and procurement of interim orders irregularly, fraudulently and unlawfully.
 14. The respondent filed a replying affidavit sworn on September 28, 2020 denying that the appellant was the owner of the suitland. He stated that Meru Petition No 16/2016 had given specific orders and did not nullify the already issued parcel numbers but talked of future numbers and that the Court of Appeal orders had been overtaken by events after a consent was signed and parcel numbers issued thereafter, among them his parcel number. He attached as copy as WK “1”. Further the respondent stated the appellant was a star witness in Tigania CC No 124/2007 as PW III going by the annexed judgment marked WK “2” hence he was contradicting himself by turning around to be an owner. Additionally, he averred there have been pending criminal cases as per attached bond to attend court and Occurrence Book number attached as WK (a) – (e) hence it was not true that the appellant was law abiding citizen and was the one infringing on his ownership rights.
 15. The respondent filed a supplementary affidavit sworn on September 28, 2020 attaching the pleadings in Tigania SPM CC No 124 of 2007 and stated the process of adjudication was still ongoing and though halted by the process until the internal mechanism were exhausted, he remained the recorded owner.
 16. By a further supplementary affidavit sworn on October 7, 2020, the appellant reiterated the contents of his supporting affidavit and averred the confirmation of ownership had mislabeled the land he had been in occupation of the land which was yet to be surveyed or demarcated to warrant any issuance of any parcel numbers and more so after the orders in Petition No 16/2016 and the Court of Appeal.
 17. Parties filed written submission dated October 27, 2020, November 11, 2020, for the appellant and November 10, 2010 for the respondent which the trial court considered and dismissed the appellant’s application and confirmed the interim orders of injunction pending hearing and determination of the suit.
 18. Pursuant to Order 42 Rule 16 of the *Civil Procedure Rules*, parties canvassed this appeal through written submissions dated July 4, 2022 and July 1, 2022 respectively.
 19. The appellant relied on his application dated June 24, 2020 annexures thereto (page 437 – 501), replying affidavits dated May 25, 2020, annexure thereto (page 377 – 436), supplementary affidavit dated October 7, 2020 and annexures thereto (pages 300-321) and written submissions and authorities on pages 183 – 299)
 20. As to prima facie case, the appellant submitted the trial court relied on a letter for confirmation of ownership, sale agreement, chief’s letters, court proceedings in Tigania and Njuri Ncheke proceedings to make a finding that the respondent had established ownership of the suit land.
 21. The appellant maintained since demarcation in Mbwaa A Adjudication Section had been stayed by an order of a superior court, such letter lacked weight and further the alleged seller and the sale agreement lacked material details which could not be wished away as per Article 159 2 (d) of the *Constitution* and



- Section 72 of the [Interpretation and General Provisions Act](#) (Cap 2 laws of Kenya). Reliance was placed on [Diamond vs Ham enterprises Ltd and 2 others](#) (2020) HCGC 119 (November 2, 2020).
22. On the Njuri Ncheke proceedings, the appellant submitted a superior court had made a decision which under Article 159 (2) of the [Constitution](#) had more weight as held in [Njuri Ncheke supreme council of Ameru elders \(suing through its Officials and Others vs Linus Kathera & 4 others\)](#) (2018) eKLR.
 23. The appellant submitted going by the decision on [North west \(K\) Ltd vs KDIC & Keysian Auctioneers](#) (2019) ekLR, [Caliph Properties Ltd vs Barbel Sharma & another](#) (2015) eKLR that no *prima facie* case had been established by the respondent to warrant an injunction since courts of law do not create rights and interests in land for parties but only affirm rights that must be exact and accruing to a party.
 24. On irreparable harm, the OB reports supplied by the respondent disclosed neither the disputants nor the nature of disputes or the outcome of investigations so as to show any loss or injury if the status quo was not preserved.
 25. The appellant submitted the trial court erred in law and fact by assigning the suit property, unique qualities of location, geography, availability and sentimentality based on no evidence at all and misapplied the case law of [Highway Dynamics Ltd Vs Delamere Flats Ltd](#) (2020) eKLR.
 26. On balance of convenience, the appellant submitted based on David J Halton, [Commentary and Cases on the Law of Trust and Equitable Remedies](#) 10th Edition (pg 835 RCA) the respondent had no sufficient proprietary base to trace any of his alleged assets so as to be granted injunctive orders.
 27. Regarding stay of proceedings under Section 6 [Civil Procedure Act](#), due to Petition No 16 of 2016 and which was determined only on January 19, 2022 and given the area was governed by the [Land Adjudication Act](#) (Cap 284), the suit herein could not have been sustained without a consent and as per Sections 30 thereof such proceedings ought to have been stayed or terminated as held in [Aviation and Airport Services Workers Union \(K\) vs Kenya Airport Authority and Another](#) (2014) eKLR.
 28. On the doctrine of ripeness and exhaustion it was submitted the trial court failed to apply it as submitted at page 207 – 08 of the record of appeal for the suit offending the [Land Adjudication Act](#) and relying on [Speaker of National Assembly Vs James Njenga Karume](#) (1992) eKLR and [Johnson Mburunga & another vs Mathew Nabea & 20 others](#) (2022) eKLR.
 29. Relying on [Patrick Waweru Mwangi & another vs HFCK](#) (2013) eKLR & [Patricia Eunnete Chuma & another vs KCb Ltd](#) (2007) eKLR the appellant submitted he who comes to equity must do equity and must also come in good faith. However, in this suit the respondent's conduct going by suspicious documents on the alleged ownership did not warrant him any equitable orders.
 30. On misapprehending the suitland by implying Mbwaa 1 and Mbwaa^A were distinct adjudication sections, the appellant urged the court to find the two are used interchangeable but unfortunately the trial court categorized them as distinct entities.
 31. Lastly the appellant urged the court guided by [Makube vs Nyamaro](#) (1983) eKLR to find this a suitable case where there was no evidence, the court misapprehended the evidence in acting on wrong principles and or on misdirection on material respects and proceed to overturn the decision.
 32. The respondent urged the court to find he had demonstrated a *prima facie* case unlike the appellant, over his ownership rights inspite the minor discrepancies in the sale agreement.
 33. Relying on [Ann Wambui Ndiritu vs Joseph Kiprono Ropkoi & another](#) (2005) 1EA 334 and Sections 109 and 112 of the [Evidence Act](#), the respondent submitted the appellant did not prove the land was



- customary land and that there had been a referral to Alternative Dispute Resolution of the matter by the court.
34. Concerning the implications of Petition No 16/2016, the respondent submitted his parcel number. was issued prior to the court orders of July 18, 2016 and only the confirmation letter came late though the order did not nullify previously issued parcel numbers.
 35. About the discrepancies in the sale agreement, the respondent submitted that they were minor, curable and did not affect his ownership unlike the appellant who had not stated the nature of his alleged land and merely appeared as a caretaker in the Tigania Case No 124/2007.
 36. Therefore, based on the facts before the trial court the respondent had shown a legal right capable of protection as held in *Kenleb Cons Ltd vs New Gatitu Service Station Ltd and another*.
 37. On irreparable loss, the respondent guided by *Kitur vs Standard Chartered Bank and 2 others* (2002) eKLR submitted since he has been in occupation with permanent houses and was going to suffer more unlike the appellant. Further and as regards the balance of convenience, the respondent guided by *Paul Gitonga Wanjau vs Gathuthi Tea Factory Co Ltd & others* (2016) eKLR submitted he was more deserving of the injunction.
 38. Submitting on the Njuri Ncheke proceedings and the acknowledgment receipts, the respondent said both lacked substance and probative value and if anything solidified his claim over the suitland. The respondent submitted the trial court considered the implications of Petition No 16/2016 and the Court of Appeal No 129 of 2005 and arrived at the right decision. Lastly, the respondent submitted that there was nothing wrong in the trial court categorizing the suitland as of unique social economic fabric qualities going by the reasoning in *Notco Mbsa Ltd & another vs Halima Bakari Ramadhama* Civil Appeal No 158 of 1992.
 39. The issues for my determination having gone through the pleadings, the applications, replying affidavits and annexures, grounds of appeal and the written submissions are:
 - i. If the trial court had jurisdiction to entertain the suit.
 - ii. If the appellant had a valid defence and claim against the respondent.
 - iii. If the trial court considered and correctly applied the law to the pleadings, facts and evidence.
 - iv. Whether the orders in the Court of Appeal No 127 of 2005 and Petition No 16 of 2016 barred the trial court from entertaining the suit.
 40. The primary document in this matter is the plaint dated May 25, 2020 where the respondent described the suitland as Parcel No 1926 Mbwaa I Adjudication Section falling under Cap 284 Laws of Kenya. He sought for exparte injunction against the appellant from trespassing into the suitland and another order restricting the District Land Adjudication and Settlement Officer from subdividing or interfering with the suitland until the matter was heard and determined.
 41. As to evidence of ownership, the respondent attached a confirmation letter dated August 9, 2016 stating that parcel was situated in Mbwaa I Adjudication Section.
 42. Given the land was said to be under an adjudication section it was expected of the respondent to comply with the provisions of the *Land Adjudication Act*, seek and obtain a consent to sue under Section 30 of the *Land Adjudication Act*, and or the *Land Consolidation Act*, in absence of which the trial court lacked jurisdiction to entertain the suit.



43. Secondly and as a collateral to the issue of jurisdiction, the trial court was drawn to the Court of Appeal order and Petition No 16/2016 which had implications on whether or not the trial court ought to have downed its tools.
44. The trial court should have made further inquiries about Mbwa 1 and Mbwa "A" adjudication sections since the status of the suitland went to the jurisdiction of the court.
45. In *Boniface Waweru vs Meru Njuri Ncheke & another* supra the court held jurisdiction was everything while *in the matter of Interim Independent Electoral Commission* (2011) eKLR the Supreme Court of Kenya said assumption of jurisdiction by a court in Kenya is a subject regulated by the *Constitution*, Statute and principles laid out in judicial precedents.
46. Jurisdiction can only flow from law. Further in *Dodhia vs National & Grindlays Bank Ltd* (1970) EA 195 the court held a system of law requires a considerable degree of certainty and uniformity which will not exist if courts were free to arrive at a decision without regard to previous decision of its own. The court held the principle of stare decisis was of outmost importance in the administration of justice and had to be adhered to.
47. In *Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others* (2013) eKLR the court held adherence to precedent should be the rule and not the exception.
48. The trial court in this matter was informed of a higher court seized of matters touching on the adjudication section and a similar order from the Court of Appeal. In the two orders the issue of whether the land was under adjudication was being raised.
49. In *NBK Ltd vs Wilson Ndolo Ayah* (2009) eKLR 762 it was stated that a decision of the Court of Appeal was binding on a High Court whether one agrees with it or not and the lower court has no discretion about it.
50. In *Tobias Achola Osindi & 13 others vs Cypriano Otieno Ogalo and 6 others* (2013) eKLR the court held under Section 30 of Cap 284 without consent letters by a land adjudication officer, a court cannot entertain a suit over land falling within an adjudication section.
51. In this matter the respondent never disclosed if the adjudication section had become final in all aspects under Section 29 (3) of the *Land Adjudication Act*. At the time the suit was filed. The respondent could escape the requirement for a consent to sue and in particular regarding his land which he described as Parcel LR No 1926 Mbwa 1 or Mbwa A Adjudication Section.
52. In *Reuben Mwongera M'itelekwa vs Paul Kigea Nabea* (2014) eKLR, the court held the requirement of a consent before a suit is filed was a statutory requirement and not a mere technicality, without which a court should not entertain such a suit.
53. Further, under Section 8 (1) of the *Land Consolidation Act*, it is provided that a court should not recognize a suit from an adjudication area unless there is a prior consent in writing from an adjudication officer.
54. In *Samuel Kamau Macharia & another vs KCB Ltd & 2 others* (2012) eKLR, the Supreme Court of Kenya held that a court of law cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law and that an issue of jurisdiction goes to the very heart of the matter for without it the court cannot entertain any proceedings.
55. In this matter, the respondent's own pleadings acknowledge that the suitland was under an adjudication section. Whether or not the same was stayed by the Petition No 16 of 2016 or continued



out of a consent from the Court of Appeal in 127 of 2005 did not change the fact that the land fell under an adjudication section. That being so the respondent ought to have obtained a consent of the adjudication officer prior to filing the suit.

56. In *Benjamin Okwaro Estika vs Christopher Anthony Ouko & another* (2013) eKLR the Court of Appeal held before a court could be clothed with jurisdiction to hear a case in respect of a dispute arising out of an adjudication section, Section 30 (a) of *Land Adjudication Act* had to be complied with.
57. Having found that the trial court lacked jurisdiction to entertain the suit in the first instance, it follows therefore that the orders issued on June 3, 2020 and later by a ruling on December 3, 2020, were made without jurisdiction. The same amounts to nullities and are hereby set aside.
58. The upshot is the appeal herein has merits and is allowed. The court makes the following orders:
1. The respondent's plaint dated May 25, 2020 and the application for injunctions of the even date are hereby struck out.
 2. The orders issued on June 4, 2020 and confirmed by the ruling delivered on December 3, 2020 are hereby vacated.
 3. Each party to bear its own costs since the appellant had not filed any defence in the lower court or raised the issue of jurisdiction before the trial court and in his appeal.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 19TH DAY OF OCTOBER, 2022

In presence of:

C/A: Kananu

Thuranira for appellant

Mr. Kaume for respondent

HON. C.K. NZILI

ELC JUDGE

