



REPUBLIC OF KENYA



KENYA LAW
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**Mwangi v Njaria (Civil Suit E015 of 2021)
[2022] KEELC 13564 (KLR) (19 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
CIVIL SUIT E015 OF 2021
LN GACHERU, J
OCTOBER 19, 2022**

BETWEEN

ESTHER MUTHONI MWANGI PLAINTIFF

AND

SAMUEL MAINA NJARIA DEFENDANT

JUDGMENT

1. By a Plaint dated June 2, 2021, the Plaintiff has sought for Judgement against the Defendant for the following orders;
 - a. A permanent and perpetual injunction restraining the Defendant, his servants, agents and/ or anyone claiming through or under him from trespassing, encroaching onto, wasting, damaging and in any manner whatsoever intermeddling with LOC. 19/Gacharage-ini/2994.
 - b. Damages (particulars to be supplied on or before the hearing)
 - c. Costs of this suit and interest
 - d. Such other relief the Honourable Court may deem fit to grant
2. The Plaintiff averred that she is the Administrator of the Estate of Arthur Ikua Gioche, who is the registered proprietor of the suit land. That the Defendant without any color of right has gained illegal ingress onto the suit land and has carried out such acts that amount to intermeddling with the Estate of the deceased.
3. The Defendant filed his Statement of Defence on the November 26, 2021, and denied all the Plaintiff's averments. The Defendant claimed that the Plaintiff is a Co-Administrator of the estate of Arthur Ikua Gioche. He contends that the suit land is divided into two portions, with the first measuring 6.12Ha, registered in the name of John R Gathaiya, the Plaintiff's Co-Administrator and the other one measuring 6.13Ha, is registered in the joint names of the Co-Administrators. He further averred that



he cut down trees, but on the property belonging to John R Gathaiya, and which he did not require the Plaintiff's consent. He also denied the jurisdiction of this Court and maintained that he has not interfered with the estate of Arthur Ikua Gioche.

Plaintiff's Case

4. PW1 Esther Muthoni Mwangi, adopted her witness statement dated February 24, 2022, as her evidence in chief. Equally she produced the documents contained in the list of documents as exhibits. She added that she is the wife of Arthur Ikua Gioche. She further stated that the suit property is divided into two portions, with John Gathaiya Gioche owing 6.12Ha, while 6.13Ha, is jointly owned by herself and John Gathaiya Gioche in trust for the estate. She confirmed that there is a clear demarcation of the two portions, but the Defendant, oblivious of the boundaries has entered into the portion of land measuring 6.13Ha.
5. On cross examination, PW 1 testified that the land measures 12.55ha, and further testified on how the portions are registered in the proprietorship section of the title deed. She insisted that the Defendant acts of intermeddling occurred on land portion belonging to the deceased. It was her further testimony that she planted the trees and she never allowed the Defendant to cut them down. However, she was not aware whether John Gathaiya allowed the Defendant to cut down the trees. It was her additional testimony that she planted the trees after her husband died, and which trees she planted on the land portion of John Gathaiya, and thus she expected to be informed when the trees were cut.
6. On cross-examination, she confirmed the land is divided into two portions and even though there are no beacons, there is a terrace.

Defence Case

7. DW1 Samuel Maina Njaria adopted his witness statement dated February 3, 2022, as evidence in chief and also produced the list of documents filed as exhibits. He testified that he fell down the trees planted on John's portion of land which he did with the consent of the said John.
8. It was his further testimony on cross examination that he fell the trees on the portion of land that belongs to John. He informed this Court that he bought the land from **John** and took immediate possession, though he did not involve a surveyor during the purchase.
9. On re-exam, he explained that he was cutting down the trees for the reason that it was causing the river to dry up.
10. DW2 John Gathaiya Macharia adopted his witness statement dated February 23, 2022, as evidence in chief.
11. On cross examination, he testified that he sold his portion of land to the Defendant and even though the title deed has not been cancelled, the information on how the land was owned is contained in the Green Card.
12. In re-exam, he informed the Court about the proceedings in the Succession Cause and also explained that the matter is still pending due to fraud perpetrated by the Plaintiff, who attempted to reduce his entitle from 24 acres to 15. He added that he planted the trees in 2006, and he allowed the Defendant to cut down the said trees.
13. The parties filed and exchanged Written Submissions.
14. The Plaintiff submitted that the Defendant is guilty of intermeddling with the estate of the deceased. She asserted that the Valuation Report indicated that the trees were on the portion of land that forms



part of the estate. Reliance was placed on the cases of *Veronica Njoki Wakagoto(deceased)* (2013)eKLR, and *Re Estate of M'Ngarithi M'Miriti* (2017) eKLR, where the Courts examined the meaning of intermeddling and its provisions under Section 45 of the *Law of Succession Act*.

15. On Mesne profit, the Plaintiff submitted that the Defendant being guilty of trespass ought to pay Kshs 96,000/= as elaborated in the report by Upcountry Valuers.
16. The Defendant filed his written submissions and raised five issues for determination by this Court. On the issue of locus standi, he submitted that despite the matter having been heard, but not determined yet, it was proper to raise it at the submissions stage.
17. On jurisdiction of this Court to determine the suit, the Defendant submitted that the High Court is the Court vested with powers under Section 47 of the *Law of Succession Act* and Rule 73 of the *Rules* established thereunder, to hear disputes touching on the estate of a deceased person. He also submitted that the High Court has jurisdiction to grant an injunction as was expressed by the Court in *Floros Piezzo & Another vs Giancarlo Falasconi* (2014) eKLR, where the Court found that Rule 73, of the *Succession Rules* reserved the succession Court's inherent powers to issue injunctions.
18. Furthermore, he submitted that this Court cannot determine the issue of boundaries as it is a reserve of the Land Registrar.
19. The Defendant also submitted that the Plaintiff did not adduce any evidence to support his claim of intermeddling. In submitting that the Defendant has not intermeddled, he relied on a litany of cases and retained that the Defendant had authority to cut the trees.
20. On the issue of injunction, the Defendant cited a number of cases to demonstrate that the Plaintiff has not met the threshold for the grant of an injunction. In submitting so, he added that the order of permanent injunction cannot issue since the suit property is also owned by the Defendant and the orders if granted would be unfair and unjust to him.
21. On mesne profit, the Defendant submitted that the Plaintiff cannot seek profit on what belongs to the Defendant. He added that neither valuation the Valuation Report was produced before this Court nor did the Plaintiff specifically plead the damages. In the end, he urged this Court to dismiss the suit with costs.
22. A perusal of a title deed produced before this Court as evidence by both parties informs this Court that the suit land measures 12.255ha, and is jointly registered in the name of John R Gathaiya Macharia, John Gathaiya Gioche and Esther Muthoni Mwangi. From the proprietorship section of the Title Deed, it is evident that 9.87Ha, belongs to John R Gathaiya Macharia, while 2.423Ha is jointly owned by John Gathaiya Gioche and Esther Muthoni Mwangi as Administrators of the Estate of Arthur Ikuu Gioche.
23. It is also evident that the suit property was subject to proceedings in Nyeri High Court No 172 of 2011, between the Plaintiff herein and one John R Gathaiya Macharia alias John Gathaiya Gioche and also a Succession Cause.
24. From the Defendant's submissions, the Succession Cause Nairobi HC Succession Cause No 1713 of 2006, is now Murang'a High Court Succession Cause No 736 of 2013, which this Court was informed is still pending. There is an admission by parties that the Plaintiff and John Gathaiya Gioche are Co-Administrators of the estate of Arthur Ikuu Gioche.
25. The Plaintiff moved this Court citing interference of the estate of Arthur Ikuu Gioche by the Defendant. She accused the Defendant of cutting down trees on the deceased's land and also averred that such acts amounted to trespass which ought to be sanctioned by this Court.



26. The Defendant challenged the jurisdiction of this Court to determine the issue on two fold.
27. Firstly, he argues that the High Court is vested with jurisdiction to determine disputes surrounding the estate of a deceased person, and specifically on intermeddling. Secondly, he claims that the Plaintiff's claim borders on issues of boundary disputes that can only be determined by the Land Registrar as per Sections 18 and 19 of the [Land Registration Act](#).
28. Before this Court can determine the suit, it is important to first establish whether it is clothed with the right jurisdiction to hear the suit.
29. It is trite law that issues of jurisdiction should be determined at the first instance. This was well elucidated by the celebrated case of [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) (1989) where the Court held:

Jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a Court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given." (emphasize mine)

30. The Court of Appeal in Civil Appeal No 244 of 2010:- [Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service](#) [2019] eKLR, extensively determined the issue of jurisdiction and held:

Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the Court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself."

31. The jurisdiction of this Court is founded under Article 162(2)(b) of the [Constitution](#) and it draws its power from Section 13 of the [Environment and Land Court Act](#).
32. In [Samuel Kamau Macharia v Kenya Commercial Bank & 2 Others](#), Civil Appli No 2 of 2011, the Supreme Court observed that:

A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation."

33. The predominant issue is on intermeddling, and this Court has been called upon to find that the Defendant trespassed onto the land of the deceased and committed acts of intermeddling. The jurisdiction of this Court as per Section 13 of the [Environment and Land Court Act](#) is to:



34. In exercise of its jurisdiction under Article 162(2)(b) of the *Constitution*, the Court shall have power to hear and determine disputes—
- a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.
35. On the other hand the High Court has jurisdiction under the *Law of Succession Act* to: ascertain the assets of a deceased person, to determine the beneficiaries and distribute the estate of the deceased. Section 47 of the *Law of Succession Act* empowers the High Court to entertain applications on disputes under the *Law of Succession Act*.
36. Though Order 40, is one of the orders not applicable in the succession proceedings, the Court of Appeal in *Floris Piezzo & Another v Giancarlo Falasconi* (2014) eKLR, rightly stated;
- we are of the same view that Section 47 of the Act gives the Court all-embracing powers to make necessary orders, including injunctions where appropriate to safeguard the deceased’s estate. This section must be read together with Rule 73 of the *Probate and Administration Rules* which further emboldens Court’s jurisdiction to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. We would imagine such orders would also include injunctive orders.”
37. This Court is vested with the power to hear disputes relating to land use and occupation. The facts as framed in the Plaintiff’s claim touches on intermeddling, which emanates from alleged acts of trespass. She has not in any way challenged the Defendant’s ownership of the suit land. There is no evidence that was placed before this Court to show how the land was sub-divided as shown in the proprietorship section of the title deed. It is also not clear whether the land was surveyed or not. However, from the evidence on record, this Court can make an inference that there is a distinction in occupation of the suit land.
38. This Court cannot assume the testimonies of the Defendant’s witnesses that the suit land was bought by the Defendant from John Gathaiya, even though there is no sale agreement to buttress this assertion. What underlies the issue of trespass is ownership of land, which this Court has the jurisdiction to determine. This Court agrees that the High Court has the power to determine issues of intermeddling. While the High Court as found above has the power to issue an injunction to preserve the estate of Arthur Ikua Gioche, this Court retains the power to determine disputes on use and occupation of the land.
39. The Defendant submitted that the Land Registrar ought to determine this issue as it is on boundary disputes. Respectfully, this Court does not agree with the Defendant. The issue raised is trespass and not boundary dispute. It follows therefore that this Court has the jurisdiction to determine this suit.
40. Having established so this Court shall move to determine
- i. Whether the Plaintiff is entitled to the prayers sought.



- ii. Who shall bear the costs of the suit.

i. Whether the Plaintiff is entitled to the prayers sought.

41. The Plaintiff contends that the Defendant has trespassed onto her portion of land and should thus be enjoined. Section 3 (1) of the Trespass Act, Cap 294 provides that:

Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

42. The Court in Municipal Council of Eldoret v Titus Gatitu Njau [2020] eKLR, when determining an issue of trespass considered the following findings;

43. In M’Mukanya v M’Mbijiwe (1984) KLR 761, the ingredients of the tort of trespass were revisited by this Court and restated as follows:

“trespass is a violation of the right to possession and a Plaintiff must prove that he has the right to immediate and exclusive possession of the land which is different from ownership (See Thomson v Ward, (1953) 2QB 153.”

44. Further, in Winfield & Jolowicz on Tort, Sweet & Maxwell, 19th Edition at page 428 states as follows:

Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.” [Emphasis supplied].”

45. What comes out of these definitions is that the owner of the land must consent, without which one will be found to have trespassed. The Plaintiff testified that the Defendant cut down trees without her permission and added that she planted the trees after the death of her husband. However, it was her testimony that the trees were on the side of John Gathaiya, and that she expected John Gathaiya, to inform her when the trees were cut. Admittedly, she testified that she knows the boundary between the two portions of land.

46. There was no evidence to controvert the Defendant’s testimony that he acquired the suit property from John Gathaiya, who is the registered proprietor of a section of the land. DW2 testified that he gave the Defendant permission to cut down the trees. As it is therefore, the Defendant had the authority to fell the trees. Whether John Gathaiya, was to seek permission to transact with the land is an issue that could be determined in the Court that affected the entry in the proprietorship section. The effect of that registration gave the said John Gathaiya absolute rights over the property and unless the contrary has been proven, ownership over the portion was absolute and he could thus do such an act as he wished including permitting the cutting of trees.

47. To this end, this Court finds and holds that the Plaintiff has not established the ingredients of trespass against the Defendant.



48. It is on the premise of trespass that the Plaintiff sought for an order of permanent and perpetual injunction against the Defendant. The Court hereinabove has already found that the Plaintiff has failed to establish her claim for trespass as against the Defendant. Therefore, the Court finds that the prayer for injunction cannot be issued and must therefore fail.
49. It is the finding of this Court that the Plaintiff has failed to demonstrate that she is deserving of the prayers sought and proceeds to dismiss the Plaintiff's claims dated June 2, 2021 and filed on June 3, 2021.

(iii) Who should bear the costs of the suit?

50. Section 27 of the *Civil Procedure Act* gives this Court the discretion to make such orders as to costs. This Court will exercise such power in favour of the Defendant herein and proceeds to award costs to the Defendant.
51. Having now carefully considered the pleadings herein, the available evidence, and the rival Written Submissions, the Court finds that the Plaintiff has failed to prove her case against the Defendant herein on the required standard of balance of probabilities.
52. Consequently, the Plaintiff's suit is dismissed entirely with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF OCTOBER, 2022.

L GACHERU

JUDGE

In the presence of; -

Joel Njonjo – Court Assistant

Ms Waititu for the Plaintiff

Ms Mikwa H/B for Gitonga for the Defendant

L GACHERU

JUDGE

October 19, 2022

