



Mbiyu v Githuku (Suing as the legal representative of the Estate of Raphael Nguugi Githuku) (Environment and Land Appeal E058 of 2022) [2024] KEELC 5184 (KLR) (4 July 2024) (Judgment)

Neutral citation: [2024] KEELC 5184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E058 OF 2022**

**JG KEMEL, J
JULY 4, 2024**

BETWEEN

JAMES MBIYU APPELLANT

AND

SAMUEL GITHUKU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF RAPHAEL NGUUGI GITHUKU) RESPONDENT

*(Appeal from the Judgement of Hon C K Kisiangani,
PM rendered on the 16/6/22 in MCEL NO E098 of 2021)*

JUDGMENT

1. This Appeal arises from the Judgement of Hon C K Kisiangani, PM rendered on the 16/6/22 in MCEL NO E098 of 2021.
2. In the trial Court the Respondent filed suit against the Appellant vide a plaint dated the 6/7/21 seeking interalia orders of permanent injunction restraining the Respondent and his servants' agents from entering, erecting any structures or in any way interfering with the Respondent's use and enjoyment of the land namely Plot No M-10 (suit land), eviction, damages for trespass, and interest thereon. It was the Respondent's case that the suit land belongs to his deceased father and that the Appellant had without any cause trespassed onto it and erected structures thereon blocking his access to the suit land. He sued the Appellant as an administrator of the estate of his father Raphael Ngigi Githuku.
3. The Appellant on the other hand resisted the claim of the Respondent vide his statement of defence dated the 8/11/21 and contended that the Respondent has no locus to bring the suit, his structures are erected on an open space within the road reserve and not the suit land and urged the Court to dismiss the plaint.



4. Upon hearing the parties the trial Court entered Judgement in favour of the Respondent as prayed. The learned trial Magistrate found that the Respondent had proved his case hence the Judgement in his favour.
5. It is this Judgement that has triggered the current appeal on the following grounds;
 - a. That the Learned Trial Magistrate erred in law and in fact in ordering for eviction of the Appellant from property known as Residential Plot No. M-10 in total disregard of clear and undisputed facts that the Appellant is not in occupation of land parcel No. Residential Plot No. M-10.
 - b. That the Learned Magistrate erred in law and facts by not considering the Registered Index Map from the Survey of Kenya that clearly showed that land parcel number Residential Plot No. M-10 is not demarcated on the ground therefore as the area is marked as a public ground / road reserve.
 - c. That the learned trial Magistrate erred in law and facts by not considering the fact that the initial dispute filed by the Respondent and determined by the reports constantly filed at Kihunguro Police Station solely touched on a boundary dispute and not trespass as pleaded in the application.
 - d. That the trial Magistrate failed to appreciate the fact that since the Respondent land is not demarcated on the ground and the fact that there is no evidence tendered to prove trespass by the Appellant the order issued is subject to abuse and anarchy by the Respondent.
 - e. That in totality of all the circumstances of the case and evidence on record, the findings and conclusions of the learned Judge are not supported by both law and evidence on record and as a result the Judge came to a Judgment which is clouded in contradiction, assumption and conjectures.
6. Consequently, the Appellant sought the following orders;
 - a. That the Appeal herein be allowed and the Judgment at Ruiru MCE & L Case No. E098 of 2021 dated 16th June, 2022 be set aside.
 - b. That the costs of this Appeal be borne by the Respondent.
 - c. That this Honourable Court be pleased to issue further orders and or directions that it may deem just.
7. At the election of the parties, the appeal was canvassed through written submissions.
8. Counsel for the Appellant submitted that the Appellant produced a Registry Index Map (RIM) showing the area in dispute is a road reserve. That the Respondent admitted in cross examination that the area is on a road reserve and that his property is yet to be demarcated. The Appellant further contends that if any notice was to be issued to him, it would be by the County Government of Kiambu or the Kenya Railways and not the Respondent. He was categorical that none of the stated institutions have raised any issue with his structures which he avers are on an open space within the road reserve.
9. Counsel for the Appellant further submitted that to the extent that the Respondent failed to proof any encroachment on the suit land, the learned trial Magistrate erred in allowing the Respondent's claim in the Judgement and urged the Court to reverse the same with a dismissal.



10. As to whether trespass was proven, Counsel for the Respondent submitted that the Appellant admitted to being in occupation of the suit land and he cannot now turn around and deny the same on appeal. That the Appellant's structures are blocking the access to the suit land and thus interfering with his right of enjoyment of the property. It was further submitted that even if he is on the road reserve the Court has power to remove him so as not to abet or condone an illegality on a party who has conceded to trespass and further to protect public land from trespassers, the Appellant included.
11. The Appellant was faulted for failing to vacate the suit land despite discussions leading to an agreement to vacate coupled with his admission that he has erected illegal structures on the suit land. The Court was urged to dismiss the appeal.

Determination

12. As a first appellate Court, this Court has a duty to examine matters of both law and facts and subject the whole of the evidence to a fresh and exhaustive scrutiny, before drawing a conclusion from that analysis. The Court has however to bear in mind the fact that it did not have an opportunity to see and hear the witnesses first hand. This duty is enunciated by Section 78 of the Civil Procedure Act which espouses the role of a first appellate Court which is to: '..... re-evaluate, reassess and re-analyze the extracts of the record and draw its own conclusions.'
13. Besides, that duty has been affirmed in numerous decisions of the superior Courts. Notably in the case of *Selle & Another v. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was pronounced thus:

“ ... this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”
14. Having considered the appeal in its entirety, the trial Court record, the rival submission and all the material placed before me the key issue for determination is whether the appeal is merited. To break it down further the Court is being called upon to make a finding whether the Respondent proved trespass and whether in the main the trial Court erred in its findings and lastly costs of the appeal.
15. To answer the first question, the Court will assess the evidence led in the trial Court. The Respondent led evidence on trial and stated that the Appellant had constructed in front of the suit land preventing him from accessing and developing the said suit land. In addition, that he had encroached partially into a portion of 5 feet of the suit land without his consent.
16. In response the Appellant led evidence that he carries out business in a structure erected on an open space within the road reserve and not the suit land. That when the Respondent notified him to vacate he reported the matter to the local police station where they were advised to keep the peace and get a surveyor to identify the beacons. That he obtained a RIM from Survey of Kenya that showed no encroachment at all, a position that was confirmed by the Chairman of Githunguri Ranching Company Limited (GRCL).



17. The learned trial Court had this to say on this question;

“The other issue for determination is whether or not the Defendant has encroached the Plaintiff’s land and whether he has blocked his entrance. Having looked at the defence and the evidence of DW1, the Defendant herein, he has admitted that the Plaintiff had approached him earlier in regards to him moving his business from where it ow in from of the Plaintiff’s land and that they had agreed with the Plaintiff that incase he needs him to move, he should give him a notice in advance. He also told the Court that the Plaintiff told him to move his business on but they he did not move it because the Plaintiff had not placed beacons on the land as they had agreed. With this admission therefore, the Defendant cannot start claiming otherwise. I find that the Plaintiff has proven his case on a balance of probabilities that the Defendant has blocked his entrance onto the suit land, inasmuch as he is in a road reserve, he has no right to block the entrance into the suit land herein since the Plaintiff has a valid claim over the suit property.”

18. It is trite that he who asserts has an equal duty to proof. Further the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side. In this case therefore the burden of proof lay with the Plaintiff to show on a balance of probability that the Appellant trespassed onto the suit land.

19. Under Section 3(1) of the *Trespass Act*, a trespasser is defined as 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.

20. *Blacks Law Dictionary* defines trespass as the wrongful entry on another’s real property. Clark & Lindsell on Torts at page 923 defines trespass as any unjustifiable intrusion by one person upon the land in possession of another.

21. In the case of *John Kiragu Kimani v. Rural Electrification Authority* (2018)eKLR the Court stated that the onus is on the Plaintiff to proof that the defendant invaded his land without justifiable reason.

22. In the case of *Cecilio Murango Mwenda & 6 Others v. Isaac Kimathi Ikunga* [2019] eKLR the Court stated as follows:-

“In the present circumstances, I find that the actions of the defendant should not be considered as trespass. This is because the property itself is not properly defined on the ground in order to conclude that a particular party breached another party’s rights. Trespass has to be an unjustifiable intrusion and in the present case, the justification seems to be the uncertainties of the boundaries. At this stage, the Land Registrar would need to first make a determination and undertake reparation so that the boundaries can be ascertained in order for one party to claim an ascertainable encroachment by another. Therefore, the issue of trespass is not ripe at this moment.”

23. It is not in dispute that the suit land belongs to the Respondents deceased’s father. It is also not in dispute that the suit land is yet to be registered according to the evidence led by the Respondent before the Court. It is not difficult to pick out the inconsistency of the Respondent’s case in the trial Court. I say so because the claim of the Respondent as anchored in the plaint was for trespass and that the Appellant had erected structures on the suit land. At the trial the Respondent led evidence that the Appellant erected structures in front of the suit land thus blocking his entry and development of the suit land. He added that the Appellant had encroached on a portion of 5 feet of the suit land. The onus



was on the Respondent to proof the encroachment to the extent of 5 feet or such length and breadth of trespass on the suit land. It is on record that both parties produced maps of the area however the burden was on the Respondent to call a surveyor to adduce evidence as to the trespass. This was not done. Consequently, the Respondent failed to discharge the burden of proof on his claim.

24. The trial Court therefore erred in holding that the Appellant was a trespasser while no evidence was tabled before it in support of trespass.
25. Costs follow the event and the Appellant having been successful in its appeal, I see no reason to deny him costs on appeal as well as in the suit.
26. In the end I find that the appeal has merit. It is allowed.
27. Consequently, the final orders for disposal are as follows;
 - a. The appeal be and is hereby allowed and the Judgement in MCEL No 098 of 2021 -Ruiru rendered on 16/6/22 be and is hereby set aside.
 - b. Costs of the appeal and the suit in the trial Court are in favour of the Appellant.
28. Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 4TH DAY OF JULY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Mwaura for the Appellant

Respondent – Absent – Judgment date taken in their presence.

Court Assistants – Phyllis

