



REPUBLIC OF KENYA



**KENYA LAW**  
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**Joseph Kamau Kahungu v Peter Macharia Wangai (Environment and Land Appeal 5 of 2018) [2020] KEELC 925 (KLR) (29 October 2020) (Judgment)**

*Joseph Kamau Kabungu v Peter Macharia Wangai [2020] eKLR*

Neutral citation: [2020] KEELC 925 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL 5 OF 2018**

**CM KARIUKI, J  
OCTOBER 29, 2020**

**BETWEEN**

**JOSEPH KAMAU KAHUNGU ..... APPELLANT**

**AND**

**PETER MACHARIA WANGAI ..... RESPONDENT**

*(Arising from the judgment delivered by Hon. Chief Magistrate (D K Kimei) on behalf of Hon. Senior Resident Magistrate (R Amwayi) in the Nakuru CMCC No.1280 of 2005)*

**JUDGMENT**

1. This is an appeal arising from the judgment of Honourable R. Amwayi Senior Resident Magistrate in Nakuru CMCC No.1280 of 2005 delivered on 21<sup>st</sup> September 2016 by the Hon. D K Kemei Chief Magistrate on his behalf. By the judgment the Court decreed the plaintiff, the Respondent in this appeal as the lawful owner of plot No.7 Kamwago Farmers Company Limited and issued a permanent injunction restraining the defendant, the appellant in the appeal, his agents and/or servants from entering, remaining in, or in any way interfering with the plaintiff's quiet possession and use of the plot. The court also awarded the respondent KShs.80,000/= as general damages for trespass and the costs of the suit.
2. The brief facts of the suit before the lower court were that the Respondent filed a suit by way of plaint where he claimed he was the owner of plot No.7 Kamwago Farmers Company Limited measuring approximately 1.25 acres. He further averred that the appellant owned plot No.6 in the same company and was his neighbour. The Respondent further averred that on or about 29<sup>th</sup> April 2005 the appellant staked ownership claims of the plot No.7 Kamwago Farmers Company Ltd which the Appellant claimed lawfully belonged to him. The Respondent claimed that the Appellant denied him access to his plot as he had erected a wire fence around both plot No.7 and 6. The Respondent in the suit



- before the lower court sought a declaration that he was the lawful owner of plot no.7 Kamwango Farmers Company Limited and an order of permanent injunction against the Appellant restraining the appellant from in any manner interfering with the respondent's quiet possession of the suit land.
3. The Appellant filed a defence whereby he denied the Respondent was the owner of plot No.7 Kamwango Farmers Company Ltd. The appellant averred he had erected the wire fence around his lawful property. The appellant further contended the lower Court lacked the jurisdiction to hear the matter and/or grant the reliefs sought by the Respondent by virtue of the provisions of Section 3 of the Land Dispute Tribunals Act No. 18 of 1990 and gave notice to raise a preliminary objection record shows that the Appellant indeed took the preliminary objection but the Court on 3<sup>rd</sup> May 2006 made ruling dismissing the preliminary objection.
  4. The suit was heard before Hon. Amwanyi Resident Magistrate. The plaintiff/Respondent and one other witness testified in support of the respondent's case while in support of the appellant's case two witnesses testified though the appellant himself did not testify. After hearing the parties the learned trial magistrate rendered a judgment in favour of the plaintiff/respondent and the defendant/respondent being aggrieved by the judgment has appealed to this court and by the memorandum of appeal dated 21<sup>st</sup> October 2016 filed on 22<sup>nd</sup> October 2016 listed 9 grounds of appeal. The grounds of appeal fall under two Clusters. The 1<sup>st</sup> to 4<sup>th</sup> ground of appeal challenge the jurisdiction of the learned Senior Magistrate's Court to hear and determine the matter. The appellant contends that the Magistrates Court did not by virtue of Article 162 (2) (b) of the Constitution that established the Environment and Land Court, have jurisdiction to entertain, hear and determine the suit. The Appellant's contention was that it was the Environment and Land Court established under the Environment and Land Court Act, pursuant to Article 162 (2) (b) of the Constitution that had the jurisdiction to hear and determine the matter.
  5. Grounds 5 to 9 challenge the integrity of the judgment having regard to form and content and further challenge the learned trial magistrate's evaluation of the evidence arguing that on the basis and proper evaluation of the evidence, the judgment the learned trial Magistrate reached was not justified. The appellant contended the judgment did not conform with the provisions of Order 21 Rules 4 and 5 of the Civil Procedure Rules and further was delivered outside the period of 60 days provided under Order 21 Rule 1 of the Civil Procedure Rules. The Appellant further contended the learned trial magistrate awarded the Respondent damages when no damages were pleaded and/or sought in the reliefs.
  6. The Appeal was canvassed by the parties by way of written submissions as directed by the Court. Both parties filed their submissions.
  7. This being an appeal of first instance, the Court is obliged and indeed under a duty to re-evaluate the evidence adduced before the lower Court to satisfy itself whether or not the learned trial magistrate reached a just decision. The role of a Court on a first appeal was well enunciated in the Court of Appeal case of *Selle & Another -vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123 where the Court stated the guiding Principle as follows:-

“...this Court is not bound necessarily to accept the findings of facts 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 this Court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect”



8. Further in the case of Makube –vs- Nyamuro (1983) KLR 403 the Court of Appeal stated:-
- “A Court on appeal will not normally interfere with the findings of fact by a trial Court unless it is based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching a conclusion”.
9. In the case of Kiruga -vs- Kiruga & Another (1988) KLR 348 the Court further restated the principle in the Makube -vs- Nyamuro case ( supra) thus:-
- “An appeal Court cannot properly substitute its own factual findings for that of a trial magistrate unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong”.
10. The above referred to decision succinctly set out what the role of an, appellate court is when considering a matter on appeal particularly a first appeal as in the instant matter. To contextualize the evaluation of the evidence it is necessary to set out the evidence, albeit, briefly.

### **The Evidence of the parties**

11. The Respondent’s case ( Plaintiff in the Court below) was that he was an original shareholder of Kamwago Farmers Company Ltd where he fully paid for shares that entitled him to be allocated plot No.7 in the company’s parcel of land. The Respondent produced in evidence various receipts that he was issued by the company towards share subscription. He produced a share certificate dated 2<sup>nd</sup> November 1990 as PEX2 which he stated qualified him to be allotted a plot measuring 1 ¼ acres. He stated he was allocated and shown plot No.7 after he completed payment for the share and after he paid the requisite survey fees in 2005. The company vide a letter dated 5<sup>th</sup> April 2005 addressed to the respondent affirmed he had been allocated plot No. 7 and invited the Respondent to liaise with the surveyor to be shown the plot The content of the letter was as follow:-

“Mr. Peter M Wangai

Re: PLOT ALLOCATION

Your plot number as per survey plan is no.7.

As you have paid the survey fee in full, you are hereby advised to call on him on 24<sup>th</sup> April 2005 and be shown your plot.

Yours faithfully

James Wainaina

Company Secretary

12. The Respondent in his evidence explained that the plot he balloted was plot No.400 but after survey it became plot No. 7. He stated this was the plot he took possession of and cultivated only for the appellant to invade the plot and destroy his crops which precipitated the institution of the suit in the lower court.
13. The Respondent called one Joseph Ndungu Kanyiha ( PW2) who was the Chairman of Kamwago Farmers Co. Ltd as his witness. PW2 confirmed that the respondent was a shareholder of the company and that he appeared in the register of members of the Company. He affirmed the company’s plots were surveyed and that the Respondent’s plot was No.7 while the Appellant also had several plots including



plot No.6 ( which incorporated 3 plots) and plot Nos.36 and 48. The witness stated the respondent was an original shareholder while the Appellant bought shares from other shareholders which qualified him to be allocated plots in the company. PW2 was emphatic that as per the company's register, plot No.7 was allotted to the Respondent and the Respondent was the rightful owner of the same. Pw2 availed an abstract of the members register indicating the plot allocation (PEX 15) that showed the Appellant held 3 plots under plot No.6 and was shown to hold plot No.36 and 48 as per the register while the respondent was shown to be the owner of plot No.7.

14. As per the record the Appellant does not appear to have given any oral evidence. The record indicates one Esther Wanjiru Njambi and Job Kamau Ndungu testified as DW1 and DW2 respectively on behalf of the Appellant. DW2 testified that the Appellant bought a plot that was bordering her plot No.32 in Kamwago Farmers Co. Ltd. She stated the plot the Appellant bought was from one Kigatui and it was plot No.5 and that the Appellant had been cultivating on the plot. The witness did not know the respondent and she did not know whether the plot the Appellant bought was plot No.7.
15. DW2 Job Kamau Ndungu stated he was the treasurer of the Company. In his evidence he testified that the Appellant had purchased members shares and that as a result he had 4 plots Nos.310,5,7 and 309. The witness however appeared to contradict himself as he in his evidence still maintained plot No.7 belonged to Amos Kamui Gachuki. Although he affirmed the Respondent was in the register of members he did not say if he was allocated any land.

#### **Analysis and determination.**

16. My own independent assessment and analysis of the entire evidence on record shows that both the Appellant and the Respondent were indeed members of Kamwago Farmers Co. Ltd. The Appellant became a member through purchase of shares from members whereas the Respondent was an original shareholder having purchased his shares directly from the Company. As observed earlier in this judgment the appellant's appeal is two pronged. Grounds 1 to 4 challenge the lower Court's jurisdiction to hear and determine the matter while ground 5 to 9 of appeal challenged the trial magistrate's analysis of the evidence and his findings of fact and the law which the appellant argued resulted in the learned trial magistrate reaching an erroneous decision.
17. The appeal was argued by way of written submissions. The appellant by his brief submissions on the issue of jurisdiction raised in grounds 1,2,3 and 4 of the Memorandum of Appeal urged the Court to find that the lower court lacked jurisdiction to handle the matter. The Appellant in the ground of Appeal in support of the assertion that the trial court lacked jurisdiction placed reliance on Articles 162 (2) (b) and 169 (1) (d) of *the Constitution*, and section 13(2) of the *Environment and Land Court Act* 2011. Article 162 (2) (b) of *the Constitution* establishes the Environment and Land Court while Article 169 (1) of *the Constitution* establishes the subordinate courts. Section 13(2) of the *Environment and Land Court Act*, 2011 outlines the jurisdiction of the Environment and Land Court. It provides as follows: -
  - (2) 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.

18. The record shows the appellant had by his defence under paragraph 6 denied the lower Court had jurisdiction to hear and determine the matter by virtue of the provisions of section 3 of the Land Disputes Tribunals [Act No.18 of 1990](#) and indeed took a preliminary objection on the point which was overruled and the matter proceeded to trial. The trial Magistrate in his ruling on the preliminary objection held that the suit raised the issue of ownership of plot No.7 Kamwago Farmers Co. Ltd which fell outside the scope of the jurisdiction of Tribunal under section 3(1) of the Land Disputes Tribunals Act, 1990. Section 3(1) of the Land Disputes Tribunals Act provides as follows:-

3.

- (1) Subject to this Act, all cases of a Civil nature involving a dispute as to :-
  - (a) the division of, or determination of boundaries to land including land held in common.
  - (b) a claim to occupy or work land; or
  - (c) trespass to land, shall be heard and determined by a Tribunal established under section 4.

19. The respondent vide prayer (a) of the plaint inter alia sought to be declared as the lawful owner of plot No.7 Kamwago Farmers Co. Ltd and for a permanent injunction restraining the appellant from entering or in any manner interfering with the respondent's possession and use of the suit property. Quite clearly the Tribunal had no jurisdiction under section 3(1) of the Act to determine ownership and I am therefore in agreement with the learned Trial Magistrate that the matter fell outside the scope of the Tribunal to determine under the Act.

20. The appellant by the memorandum of Appeal grounds 1,2,3 and 4 revived the issue of jurisdiction of the lower court save that in the present instant the Appellant's position is that the lower Court had no jurisdiction and that it was the ELC that had the jurisdiction by virtue of Articles 162 (2) (b) of [the Constitution](#) and section 13(2) of the ELC Act. As I have held hereinabove the Tribunal established under the Land Disputes Tribunals Act, 1990 lacked jurisdiction to hear and determine the matter, meaning therefore the magistrates Court had jurisdiction to hear and determine the dispute. The suit before the lower Court was instituted in 2005, before the Kenya Constitution 2010 was promulgated on 27<sup>th</sup> August 2010. The Environment and Land Court was not established until 2011 following the enactment of the ELC Act. The inaugural judges of this court were not appointed until the 1<sup>st</sup> of October 2012 and were not sworn into office until 5<sup>th</sup> November 2012. Before the ELC was operationalized the Magistrates Court continued to exercise jurisdiction in all land matters where they had jurisdiction .

21. Section 30 of the [Environment and Land Court Act](#) provided a transitional provision in the following terms:-

30. Transitional provisions

- (1) All proceedings relating to the environment or to the use and occupation and title to land pending before any Court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and



Land Court established under this Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar.

(2) The Chief Justice may, after the Court is established, refer part-heard cases, where appropriate, to the Court.

22. The Hon Chief Justice vide Gazette Notice No.5178 dated 25<sup>th</sup> July 2014 issued Practice Directions to regulate proceedings before the Environment and Land Court and other Courts and under direction 8 it was provided as follows:-
8. Magistrates Courts shall continue to hear and determine all cases relating to the environment and the use and occupation of, and title to land (whether pending or new) in which the Courts have the requisite pecuniary jurisdiction. All proceedings pending before the Magistrates Court, having been transferred thereto from the defunct District Land Disputes Tribunal, shall continue to be heard and determined by the same courts.
23. The hearing of the present matter commenced before Hon E Ominde, PM in 2006 proceeded before Hon H O Barasa, RM in 2011 before being finalized by Hon Amwayi, SRM who rendered the judgment the subject of the present appeal in 2016.
24. Without more and having regard to the ELC Act, transitional provisions and the ELC practice directions, I would have no hesitation in holding that the Magistrate's Court was properly seized of jurisdiction and that the grounds of appeal challenging the jurisdiction of the lower Court are without merit and I dismiss the same.
25. On the evidence tendered before the trial Magistrate it is evident the respondent owns one plot in Kamwago Farmers Co. Ltd which was allocated to him by virtue of being an original shareholder of the Company. The evidence established that indeed the respondent paid all dues that he was supposed to pay to the company for the allotment of the plot. He paid the survey fees and was issued a letter by the company indicating his plot was No.7 and that he could be showed the same by the company surveyor which was apparently done. The Chairman of the Company who testified confirmed the respondent's plot was plot No. 7. Although no authentic survey map was tendered in evidence to establish the actual location of plot No.7 the evidence pointed to the respondent rather than the appellant having been allocated plot No.7. Two contradictory members registers of the company and the plot allotment were referred to during the trial. Pw2 the chairman of the Company referred to a register of members that indicated plot No.7 belonged to the Respondent while the Appellant owned plot No. 6 and plot Nos 36 and 48. DW2 Job Kamau Ndungu referred to another register of members which indicated plot no.7 belonged to one Amos Gachuki. The register he referred to was not authenticated and it was not clear where it originated from as it was not certified by the Company.
26. The appellant from the record of the evidence did not give any evidence and it is not recorded why he never testified. He was therefore not cross examined. The witnesses who testified on behalf of the appellant did not adduce any evidence that showed the Appellant was the owner of plot No.7 claimed by the Respondent. On the evidence adduced before the lower Court, I am satisfied that the learned trial magistrate was justified to find and hold that plot No.7 belonged to the respondent and that he was entitled to an order of injunction restraining the appellant from interfering with the respondent's use and possession of the plot. The learned trial magistrate in my view properly evaluated the evidence and reached the correct findings on the basis of the evidence.
27. The Respondent had not prayed for damages for trespass and there was no basis to award damages. Parties are usually bound by their pleadings and the court will not grant a relief or order that is



not sought . The learned trial magistrate thereof erred in awarding general damages for trespass. I accordingly set aside the award of general damages of Kshs.80,000/=.

28. The net result is that subject to the order setting aside the award of general damages for trespass of Kshs.80,000/= the appeal is without any merit and is dismissed. As the appellant has succeeded partially in his appeal. I order that each party bears their own costs of the appeal.

29. Orders accordingly.

**JUDGMENT DATED SIGNED AND DELIVERED AT NAKURU VIRTUALLY THIS 29<sup>TH</sup> DAY OF OCTOBER 2020.**

**J M MUTUNGI**

**JUDGE**

