

**IN THE COURT OF APPEAL
AT NYERI**

(CORAM: M'INOTI, KANTAI & ALI-ARONI, JJA.)

CIVIL APPEAL NO. 142 OF

2017 BETWEEN

**MUNYUKO GICHANGA.....APPELLANT
AND
PAUL NDERITU GITURO.....RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at Nyeri
(Sergon, J.) dated 23rd September 2017*

in

HCCC No. 2 of 2000

JUDICIARY

JUDGMENT OF THE COURT

1. The **respondent, Paul Nderitu Gituro**, filed a suit against the **appellant, Munyuko Gichanga**, in the High Court of Kenya at Nyeri for trespass to the property known as **LR No. Mahiga/Munyange/839 (the suit property)**, which he pleaded was at the material time registered in his name. He further pleaded that the suit property was a subdivision of **LR No. Mahiga/Munyange/266 (the original title)**, which was registered in 1958 in the name of his deceased father, **Gichiga Kabiru**.

2. Upon the death of the deceased, a Certificate of Confirmation of Grant to his estate was issued, directing subdivision of the original title into six parcels, which were inherited by different beneficiaries of the deceased. The respondent was awarded the suit property, while the appellant got **LR No. Mahiga/Munyange/840**.
3. Prior to the Certificate of Confirmation of Grant, the appellant had erected buildings and developments on the part which ultimately became the suit property and was registered in the name of the respondent. The respondent pleaded that after registration of the various parcels in the names of the beneficiaries, he erected a fence between his property and that of the appellant, but the appellant pulled it down, and despite demand, the appellant refused to vacate the part of the suit property that he had occupied.
4. By way of remedies the respondent prayed for general damages for trespass to land; eviction of the appellant from the suit property; **Kshs. 7,000** being cost of replacing the fence destroyed by the appellant; costs of the suit and interest.

5. The appellant filed a defence dated 22nd June 2000 in which he denied that the respondent was the registered owner of the suit property or that the various properties were transmitted to beneficiaries of the deceased as pleaded by the respondent. He averred that the succession cause to the estate of the deceased was never completed. He further denied having any developments on the suit property, having pulled down a fence erected by the respondent, or having been requested by the respondent to remove developments thereon. Accordingly, he urged the court to dismiss the suit with costs.

6. **Sergon J.**, heard the suit, with the respondent testifying on his own behalf while the appellant testified on his own behalf and called one witness. The gist of the appellant's evidence was that the original title was registered in the name of the deceased and upon his demise, there were succession proceedings to his estate, which ultimately resulted in a consent order and a certificate of confirmation of grant dividing the original title among six beneficiaries of the deceased, including himself and the appellant. While the respondent got the suit property, the appellant got the

adjoining parcel, **LR**

No. Mahiga/Munyange/840, and both of them were issued with their title deeds.

7. After obtaining their titles, the respondent requested the appellant to move from the suit property, but he declined and removed a fence that the respondent had erected between the two properties. The respondent produced in evidence the green card for the original title, the consent order pursuant to which the original title was divided into six parcels, the mutation forms, and the titles to his and the appellant's parcels. On cross-examination, he informed the court that the succession matter was completed and that the appellant had trespassed on the suit property since 1999.
8. On his part, the appellant testified that the original title was divided as stated by the respondent, but contended that he did not participate in the subdivision and did not agree with it. He filed an application for revocation of the grant issued to the respondent and another in respect of the estate of the deceased; the parties recorded the consent order dividing the original title into six parcels; and the application for revocation of the grant was withdrawn. The

appellant, however, claimed

not to have known that the application was withdrawn, but he admitted that the suit property was registered in the name of the respondent while **LR No. Mahiga/Munyange/840** was registered in his name. He also admitted having removed the fence and beacons because there was no order to erect them, and there was a boundary dispute. He added that he was charged with a criminal offence, but he was acquitted. It was also his position that he would not move out of the suit property without a court order.

9. The evidence of **Charles Nderitu (DW2)** was along the same lines as that of the appellant.
10. By a judgment dated 23rd September 2017 and the subject of this appeal, the High Court found in favour of the respondent and awarded him **Kshs. 10,000** as damages for trespass, **Kshs. 7,000** as costs for re-erecting the demolished fence; an order directing the appellant to give the respondent vacant possession of the suit property within 30 days and in default the appellant to be evicted; and costs of the suit.
11. The appellant was aggrieved and lodged this appeal

founded on four grounds of appeal in which he contends that the High

Court erred by failing to evaluate and consider the evidence that was adduced; by directing the appellant to give the respondent vacant possession of the suit property without any justification; by failing to consider that the appellant was left out of the subdivision process of the original title; and by awarding the respondent **Kshs. 7,000.00** for re-erecting the demolished fence yet the appellant was acquitted by the Othaya Resident Magistrates Court in a criminal case arising from the demolition.

12. On the date scheduled for the hearing of the appeal, neither the appellant, nor the respondent had filed submissions as directed by the Court. After making an unsuccessful application for adjournment, the appellant's learned counsel, **Mr. Ombongi**, informed the Court that he would rely on his submissions in the High Court.
13. In the High Court, as far as is relevant to the appellant's grounds of appeal, the appellant contended that he applied for revocation of the grant issued to the respondent and another because it was obtained secretly in a bid to disinherit him. As regards the consent order

under which the parties

agreed that the original title be divided into six parcels and that the application for revocation of the grant be withdrawn, the appellant argued that he was “cornered” and manipulated by the respondent to withdraw his application. He contended that the respondent’s trespass suit was a mere decoy in the scheme to disinherit him.

14. It was also the appellant’s submission that the boundary between the suit property and **LR No. Mahiga/Munyange/840** was disputed. He added that the tea bushes and trees on the suit property were planted by the deceased, not by himself. In his view, the fact that he was acquitted in the criminal case showed that he had not committed any trespass. It was also his view that the respondent’s case was based on vendetta rather than any genuine grievance.
15. **Mr. Wachira**, learned counsel for the respondent made brief oral submissions opposing the appeal. He contended that the respondent had proved his case to the required standard and that the appellant was heard but did not adduce any evidence to undermine the respondent’s case. It was contended that

the respondent's evidence proved trespass on the part of the appellant and that the appellant admitted to having destroyed the appellant's fence and uprooting the beacons. Counsel urged the Court to dismiss the appeal.

- 16.** We have carefully considered this appeal, which is a first appeal in respect of which we are required to reappraise and analyse the evidence adduced in the High Court and come to our own independent conclusion. Because we do not have the advantage of the trial judge of hearing and seeing the witnesses as they testified, we are also required to make due allowance for that fact. (See **Seascapes Ltd v. Development Finance Co. of Kenya Ltd.** [2009] KLR 384.

17. A review of the evidence on record supports the respondent's contention that the original title was registered in 1958 in the name of the deceased. Upon the death of the deceased, the respondent and **Charles Nderitu (DW2)** applied and obtained a grant of letters of administration in **Nyeri SRMC Succession Cause No 237 of 1989**. On 13th November 1996 the appellant then filed **Nyeri HC Misc. App. No. 123 of 1996**, seeking

the revocation of the grant. On 12th March

1998 the parties entered into a consent order before **Osiemo,**

J. and agreed to subdivide the original title into six parcels, to be transferred to the beneficiaries of the deceased, among them the appellant and the respondent.

18. The terms of that consent order were as follows, in the pertinent part:

i. "By consent (the) grant issued to Paul Nderitu Gituro and Charles Nderitu Gichaga be amended as follows:

ii. The grant be issued to Paul Gituro to hold on behalf of himself and his brothers and Charles Nderitu to hold on behalf of his brothers.

iii. The parcel of land Mahiga/Munyange/266 be distributed and shared as follows:

iv. i) Paul Nderito Gituro 1 acre

v. ii) Samuel Wairiuko Gituro 0.8 acres

vi. iii) Stephen Gichaga Gituro 0.8 acres

vii. iv) Peter Ndirangu Gituro 0.8 acres

viii. v) Charles Nderitu Gichaga 1.65 acres

ix. vi) Munyuko Gichaga 1.65 acres

Each party to get his own title after subdivision.

Each party to bear his own costs.

The application dated 13.11.96 is

hereby withdrawn.”

19. The record shows that when the consent order was recorded, the appellant was duly represented by his advocate, **Mr. Gachiri Kariuki**. There is no evidence on record that the appellant, who was then a serving police officer, ever applied to set aside the consent order or appealed against it.
20. After the recording of the consent order, the original title was divided into six parcels and titles thereto issued to the beneficiaries listed in the consent order. The appellant got **LR No. Mahiga/Munyange/840**, while the respondent took the suit property, **LR No. Mahiga/Munyange/839**. Accordingly, when the appellant attempts to disown the consent order, or claims that his application for revocation of the grant was not withdrawn and that the succession proceedings are still pending, he is clearly not telling the truth.
21. It has been held consistently that a consent agreement, judgment or order is binding on the parties to it and that the court will not interfere with it save on the same grounds as it would with a contract. In **Brooke Bond Liebig (T) Ltd v. Mallya** [1975] EA 266, the former Court

of Appeal for Eastern Africa held that:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

Similarly, in **Wasike v. Wamboko** [1988] eKLR, this Court reiterated as follows:

“It is now settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out.”

22. In this appeal, the appellant did not challenge the consent order, which has been implemented and title deeds issued to various beneficiaries. It is too late in the day for him to claim that he was “cornered”, whatever that may mean. We also do not see how the appellant can allege that the consent order and the respondent’s trespass suit were a decoy to disinherit him, when under the consent order, he was awarded a parcel that was bigger than that of the respondent.
23. The appellant admitted having destroyed the fence erected by the respondent and did not proffer any good reason why he continued to occupy the suit property,

which was awarded to

the respondent, other than asserting that he can only move pursuant to a court order. The appellant's acquittal in a criminal case for an offence arising from the destruction of the fence does not preclude him being found liable in a civil claim. The burden of proof in the two types of cases are very different. We note too that in this case, the appellant did not even produce the judgment in the criminal case to establish the circumstances under which he was acquitted. In short, it was no answer for the appellant to say that he could not be found liable for destroying the fence, having been acquitted in a criminal case arising from the same facts.

24. In **Muiruri & 2 Others v Blaetermann & Another** [2024]

KECA 1160 (KLR), this Court held as follows on the issue:

“To our mind, the mere fact that a person is acquitted in a criminal charge based on facts which, if proved, may give rise to criminal culpability as well as civil liability, does not necessarily absolve him from civil liability. This must be so because the standard of proof in a criminal case is beyond reasonable doubt while, in civil cases, the standard is much lower being on a balance of probabilities.”

25. Having carefully considered this appeal, we find it totally bereft of merit and dismiss the same with costs to the respondent. It is so ordered.

Dated and delivered at Nyeri this 6th day of March, 2026.

K. M'INOTI

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**JUDGE OF
APPEAL**

S. ole KANTAI

.....
**JUDGE OF
APPEAL**

A. ALI-ARONI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original*

Signed
DEPUTY REGISTRAR