



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**CIVIL APPEAL NO. 45 OF 2013**

**FREDRICK MUNENE MUTHII.....APPELLANT**

**VERSUS**

**WAGATWE MURAGE.....1<sup>ST</sup> RESPONDENT**

**JAMES MURAGE.....2<sup>ND</sup> RESPONDENT**

**BERNARD MWANGI MURAGE.....3<sup>RD</sup> RESPONDENT**

***(BEING AN APPEAL AGAINST THE JUDGMENT OF P. NDITIKA THE SENIOR PRINCIPAL MAGISTRATE AT KERUGOYA IN SRM CIVIL SUIT NO. 382 OF 2004 DELIVERED ON 11<sup>TH</sup> OCTOBER, 2007)***

**JUDGMENT**

The Respondents herein WAGATWE MURAGE (1<sup>st</sup> Respondent), JAMES MURAGE 2<sup>nd</sup> Respondent and BERNARD MWANGI MURAGE (3<sup>rd</sup> Respondent) suing as the plaintiffs had filed Kerugoya Senior Resident Magistrate Civil Case No. 382 of 2004 against the Appellant FREDRICK MUNENE MUTHII (as the defendant) seeking judgment against him in the following terms:-

- a. ***A permanent injunction restraining the appellant by himself, agents, servants and/or representatives from***
- b. ***entering and committing acts of trespass namely erecting poles, digging holes and transmitting power lines across the Respondents parcel of land namely MUTIRA/KIRUNDA/535 – 537 and also interfering with the said land parcels in any way whatsoever.***
- c. ***The Land Registrar to rectify the register of both land parcel No. MUTIRA/KIRUNDA 535 – 537 and MUTIRA/KIRUNDA/144 so as to reflect the proper position.***
- d. ***The costs of the suit.***
- e. ***Any other relief that this Honourable Court may deem fit and just to grant.***

The Respondents case was that the 1<sup>st</sup> Respondent was the registered proprietor of land parcel No. MUTIRA/KIRUNDA/535 while the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents were the registered proprietors of land parcels No. MUTIRA/KIRUNDA/536 and 537 respectively while the appellant was the registered proprietor of land parcel No. MUTIRA/KIRUNDA/110 and that the appellant had dug holes and erected poles across the Respondents land for purposes of transmitting power. It was the respondents case also that the appellant had in the process interfered with the boundaries to their land.

The appellant filed a defence in which he stated that he is the registered proprietor of land parcel

No. MUTIRA/KIRUNDA/1567, 1565 and 1566 and that land parcel No. MUTIRA/KIRUNDA/144 is non-existent. He however denied all the allegations adding that the trial Court did not even have jurisdiction to deal with a case of trespass to land and the suit was therefore an abuse of the Court process.

The case was heard by the late P.T. Nditika Senior Resident Magistrate who, after hearing the parties and their witnesses, delivered a judgment on 11<sup>th</sup> October 2007 in which he found that the respondents had proved their case on a balance of probability and entered judgment for them as prayed in their plaint.

Aggrieved by that judgment, the appellant filed this appeal pursuant to leave granted by the late Khaminwa J. on 19<sup>th</sup> May 2008 and raised the following grounds:-

1. ***That the learned magistrate erred in law and in fact by giving a judgment against the weight of evidence.***
2. ***That the learned magistrate erred in law and in fact by failing to dismiss the 2<sup>nd</sup> and 3<sup>rd</sup> respondents case with costs having held that they had no cause of action against the appellant.***
3. ***That the learned magistrate erred in law and in fact by holding that the 1<sup>st</sup> respondent had proved her case on a balance of probability although she did not adduce sufficient evidence in support of her case.***
4. ***That the learned magistrate erred in law and in fact by rejecting the appellants defence without giving reasons for doing so.***
5. ***that the learned magistrate erred in law and in fact by failing to hold that he had no jurisdiction to entertain a case of trespass involving agricultural land.***
6. ***That the learned magistrate erred in law and in fact by failing to evaluate the appellant's evidence.***
7. ***That the learned magistrate erred in law and in fact by failing to hold that land parcel No. MUTIRA/KIRUNDA/144 allegedly registered in the names of the appellant was non-existent.***
8. ***That the learned magistrate erred in law and in fact by failing to appreciate that neither the surveyor nor the Land Registrar produced any map or report to prove that the appellant had encroached onto the respondents land.***

The appellant therefore prayed for orders allowing the appeal by setting aside the judgment of the subordinate Court and substituting it with an order dismissing the respondents case with costs.

Being a first appeal, this Court has the power to examine and re-evaluate the evidence and the findings of fact by the trial Court in order to determine whether the conclusion arrived at should stand. However, this Court will not lightly differ from the findings of fact of the trial Court which had the benefit of seeing and hearing the witnesses and will only interfere with them if they are based on no evidence or if the trial Court is shown demonstrably to have acted on wrong principles in reaching the findings that it did – see **PETER VS SUNDAY POST 1968 E.A 424** and also **JABANE VS OLENJA 1986 K.L.R 661.**

I have considered the record herein and the submissions of both P.M. Kahiga advocate for the appellant and A.P. Kariithi advocate for the respondents. As indicated, the respondents claim in the subordinate Court was that the appellant had trespassed onto their land by “***erecting poles, digging holes and transmitting power lines across the plaintiff's parcel of land***”. The respondents also sought an ***order directing the*** Land Registrar to rectify the register of both land parcel No. MUTIRA/KIRUNDA/535 – 537 and MUTIRA/KIRUNDA/144 so as to reflect the proper position.

In grounds 2 and 3 of the Memorandum of Appeal, the appellant takes issue with the trial magistrate for failing to dismiss the respondents' case yet they had not adduced sufficient evidence. There is merit in these grounds of appeal. In the trial Court, the 1<sup>st</sup> respondent testified as the 1<sup>st</sup> plaintiff and his evidence was quite brief and so I will quote it. He said:-

***“My name is Wagatwe Murage. I come from Kamuru in Kirunda Sub-location. I have a shamba that I gave to my son. The title is mine. I cannot recall my neighbour. I know Mithamo. I cannot remember having gone to Nyeri. I have come to Court because of my land. I come because Karunda wants to take the land. Karunda is Muthamo’s son”.***

Clearly that short testimony fell short of proving the allegations levelled against the appellant. The witness may have been elderly and unable to express himself. Indeed the trial magistrate made the following comments:-

***“COURT: The plaintiff is unable to understand most of the things”***

A party that files a case in Court seeking some reliefs from another must at least adduce some evidence that, on a balance of probability establishes a case against the other party. This witness did not achieve that threshold.

On his part, the 2<sup>nd</sup> respondent JAMES MURAGE testified as PW4 and said it was his mother’s (1<sup>st</sup> plaintiff’s) land that was being encroached. He testified as follows:-

***“My mother complained because there was electric post. I decided to join with (sic) the suit as my mother was disturbed. My land was not encroached. I would like the Court to issue permanent injunction. I would like the electric posts to be removed”***

When he was cross-examined by the then advocate for the appellant Mr. Magee he said:-

***“My mother is also a plaintiff. It is our mother who is supposed to sue. There is an electric post in 535. The post was put by K.P.L.C Company.”***

And on his part, the 3<sup>rd</sup> respondent BERNARD MURAGE who testified as PW3 said as follows:-

***“I have come to complain because of a post that was put in the shamba without permission ..... It was not the first time K.P. and Lightening Co. The Company should have borrowed permission from the owner”***

In his impugned judgment, the trial magistrate had this to say about the 2<sup>nd</sup> and 3<sup>rd</sup> respondents:-

***“It will be noted that the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs ought not to have brought the matter to Court. The 1<sup>st</sup> plaintiff however has a case (sic) of action”.***

Given the evidence adduced by the respondents in the trial Court, it is not surprising that in ground 1 of the grounds of appeal, the trial magistrate is faulted, and rightly so, for giving a judgment against the weight of the evidence on record.

Clearly there was no evidence upon which the trial magistrate could proceed to find, as he did, that the plaintiffs had proved their case. Grounds 1, 2 and 3 of the grounds of appeal must be up-held.

In ground 4, it is stated that the trial magistrate erred in law and in fact by rejecting the appellant’s defence without giving reasons for doing so. As I have already found above, the 1<sup>st</sup> respondent hardly gave any evidence while the 2<sup>nd</sup> and 3<sup>rd</sup> respondents conceded that the posts were erected by a third party the Kenya Power and Lighting Company which was not enjoined in these proceedings. And what was the appellant’s response to that evidence? His evidence was equally brief and is worth repeating. He said:-

***“My name is FREDRICK MUNENE MUTHIE. I am not FRANCIS. I am a farmer as well as a Civil servant. I know the plaintiff. I own parcel No. MUTIRA/KIRUNDA/1567. I do not own MUTIRA/KIRUNDA/144. I have not encroached parcel number MUTIRA/KIRUNDA/535 – 537. I have never heard (sic) any***

***dispute with the plaintiff save for the present matter. I have electricity on the land. I did not erect the post. It was done by KPL Company. I deny the claim against me. I would like the suit to be dismissed with costs”***

In light of that denial taken together with the admission by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents that the posts were erected by a third party the Kenya Power and Lighting Company, it is difficult to understand why the trial Court could have found, as it did, that appellant ought to be permanently enjoined “***from entering and committing acts of trespass namely erecting poles, digging holes and transmitting power lines across the plaintiffs parcels of land***” which was one of the remedies sought in the plaint. There was clearly no basis upon which that remedy could have been founded. In any case, the appellant said in his testimony that he already had power installed. What else was then to injunct? It is common knowledge that the erection and installation of power lines is the preserve of the service provider who only seeks the consent of the land owners through which the power lines traverse. There is no doubt that the appellant was non-suited in this case.

In ground 5, the appellant faults the trial Court for exercising jurisdiction that it did not have with respect to the claim about rectifying the register of both land parcels No. MUTIRA/KIRUNDA/535 – 537 and MUTIRA/KIRUNDA/144. Under Section 21 of the now ***repealed Registered Land Act*** which was the law at the time of the dispute, a Court is prohibited from entertaining any dispute relating to boundaries of registered land unless the boundaries have been determined. It is clear from the evidence of CYRUS MUTHIKE the Land Registrar Kirinyaga that this had not been done and so the trial Court was precluded from assuming jurisdiction. And if the dispute related to a boundary dispute as Mr. Kariithi counsel for the respondents told the Court on 28<sup>th</sup> February 2007 (see page 51 of the Record of Appeal), then the provisions of the then ***Section 3 (3) of the Land Disputes Tribunal Act*** took this matter from the jurisdiction of the Court to that of the Land Disputes Tribunal.

Ultimately therefore, there is considerable merit in this appeal which I allow and set aside the judgment of the trial magistrate and substitute it with an order dismissing the respondents’ case. The appellant shall have the costs both in this Court and the Court below.

It is so ordered.

**B.N. OLAO**

**JUDGE**

**26<sup>TH</sup> FEBRUARY, 2016**

Judgment delivered this 26<sup>th</sup> day of February 2016 in open Court.

Appellant present in person

1<sup>st</sup> Respondent absent – deceased

2<sup>nd</sup> Respondent present

3<sup>rd</sup> Respondent present.

Right of appeal explained.