



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Macharia & 7 others v Mugo & another (Civil Appeal 73 of 2014)  
[2023] KECA 208 (KLR) (24 February 2023) (Judgment)**

Neutral citation: [2023] KECA 208 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 73 OF 2014  
DK MUSINGA, K M'INOTI & KI LAIBUTA, JJA  
FEBRUARY 24, 2023**

**BETWEEN**

**WILLY WANYOIKE MACHARIA ..... 1<sup>ST</sup> APPELLANT  
DANIEL MWANGI MUGO ..... 2<sup>ND</sup> APPELLANT  
ONESMUS NG'ANG'S MUGO ..... 3<sup>RD</sup> APPELLANT  
MACHARIA MUGO ..... 4<sup>TH</sup> APPELLANT  
DANIEL MUTHOGA MACHARIA ..... 5<sup>TH</sup> APPELLANT  
SIMON MUGO MACHARIA ..... 6<sup>TH</sup> APPELLANT  
MWANGI WANYOIKE MACHARIA ..... 7<sup>TH</sup> APPELLANT  
WANYOIKE MACHARIA ..... 8<sup>TH</sup> APPELLANT**

**AND**

**DANIEL NG'ANG'A MUGO ..... 1<sup>ST</sup> RESPONDENT  
BETH NJAMBI NJOROGE ..... 2<sup>ND</sup> RESPONDENT**

*(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Msagha, J.) dated 12th March 2010 in 2 HCCC. No. 656 of 2001)*

**JUDGMENT**

1. This appeal arises from the judgment of the High Court of Kenya at Nairobi (Msagha, J.) dated 12<sup>th</sup> March 2010. The two respondents, Daniel Ng'ang'a Mugo and Beth Njambi Njoroge, are the children of Gathokore Mugo (Deceased) who at the material time was the registered owner of the property known as LR No. Loc. 3/Mukuria/150 (the suit property). On 24<sup>th</sup> April 2001, the two respondents



filed a suit in the High Court against the appellants for trespass and prayed for an order for eviction of the appellants, general damages and costs of the suit.

2. On 3<sup>rd</sup> July 2001, the appellants filed a joint defence in which they denied that the respondents were entitled to possession of the suit property because High Court Succession Cause No. 585 of 1985 pertaining to the estate of the deceased was still pending hearing and determination. It is apt to point at this stage that on 16<sup>th</sup> June 2004 the High Court confirmed the grant in the succession cause and, on 4<sup>th</sup> August 2004, the respondents were registered as absolute proprietors of the suit property. They were issued with a titled deed to the suit property on 18<sup>th</sup> August 2004.
3. On 25<sup>th</sup> May 2004, the respondents applied to strike out the appellants' defence on the ground that it did not disclose a reasonable defence, and was otherwise an abuse of the process of the court. On 21<sup>st</sup> July 2005, Ojwang, J. (as he then was), allowed the respondents' application and struck out the appellants' defence. Thereafter, the suit was set down for formal proof.
4. Although the appellants' counsel was duly served with a hearing notice, he did not appear for the formal proof. The record shows that at the formal proof, the court was informed that the 2<sup>nd</sup> respondent was no longer interested in the suit, and the same was therefore prosecuted by the 1st respondent. By a judgment dated 12<sup>th</sup> March 2010, the High Court allowed the respondents' suit with costs and ordered eviction of the appellants from the suit property after one month. He however found that the claim for damages for trespass had not been proved, and accordingly, dismissed the same.
5. On 4<sup>th</sup> October 2010, the appellants filed an application in the High Court for stay of execution of the judgment of 12<sup>th</sup> March 2010, and to set aside the said judgment. That application was heard and dismissed by the High Court on 16<sup>th</sup> December 2010. The record also shows that, on 22 November 2006, the High Court (Rawal, J., as she then was), had already dismissed in the succession cause the appellants' summons for revocation of the confirmed grant dated 16<sup>th</sup> June 2004.
6. The appellants were aggrieved and lodged the appeal now before us against the judgment of 12<sup>th</sup> March 2010. On her part, the 2nd respondent belatedly filed a notice of cross-appeal on 16<sup>th</sup> January 2022, some eight years after the lodging of the appeal, purporting to fault the learned judge who had granted the very orders she had sought in her suit with the 1st respondent.
7. In their memorandum of appeal, the appellants fault the learned judge for failing to find: that they had statutory, legal and equitable trust and overriding interest in the suit property; that they were in occupation of the suit property; that the 2<sup>nd</sup> respondent had no locus standi to file, prosecute or sustain a claim against them; and that, as offsprings of the deceased, they had statutory, legal and equitable trust and overriding interest in the suit property. They also contended that the learned judge erred by granting orders that were neither pleaded nor sought, and by failing to appreciate and apply established legal principles.
8. All these grounds were expounded by the appellants learned counsel, Mr. Odawa, in his written submissions dated 16<sup>th</sup> January 2022, and during his oral highlights at the hearing of the appeal. We shall not belabour those submissions because the bulk is totally irrelevant to the appeal before us. For example, counsel took precious time canvassing alleged errors in the ruling striking out the appellants' defence, which is not the subject of this appeal. He took more time introducing matters of the succession dispute, which are issues that the appellants can only raise in that court or in an appeal from the decision of the succession court. He contended that the High Court ought not to have proceeded in the absence of the appellants because they were not personally served with the hearing notice, forgetting that they had an advocate on record and, in any event, their application to set aside the judgment on that very ground was dismissed vide a ruling date 16th December 2010, which is



not the subject of this appeal. Even though aware that the appellants' defence was struck out, counsel nevertheless referred to it copiously and insisted that the case should have been listed for hearing, not formal proof.

9. The only relevant ground to this appeal that the appellants argued was that the judgment of the learned judge was not supported by the respondents' pleadings, the contention being that the learned judge found that the respondents were the registered proprietors of the suit property, whilst that was not their claim as pleaded.
10. For his part, the 1<sup>st</sup> respondent opposed the appeal vide his brief written submissions dated 16th January 2023. The thrust of those submissions is that the appellants' defence having been struck out and the appellants having failed to appear for formal proof, there was no defence to the respondents' claim. It was contended that the appellants cannot raise in this appeal issues that they had raised in the defence that was struck off. Accordingly, the 1<sup>st</sup> respondent urged us to dismiss the appeal with costs.
11. The 2<sup>nd</sup> respondent filed a notice of intention to act in person on 16<sup>th</sup> January 2022, the same day she filed her notice of cross-appeal. Incidentally that is the same day that the appellants filed their submissions. The filings both by the appellants and the 2<sup>nd</sup> respondent are on the same day, script, font and format. Things fell in place when at the hearing of the appeal, Mr. Odawa applied to come on record for the 2<sup>nd</sup> respondent. Counsel indicated that he was now acting for her in other matters. The Court drew his attention to the fact the he could not simultaneously act for the appellants and a respondent, yet he was in this very appeal specifically attacking the 2<sup>nd</sup> respondent as lacking locus standi. It was unethical and the conflict of interest was palpable. The 2<sup>nd</sup> respondent appeared briefly on-line but she was not audible. After waiting for her for about 15 minutes, the Court proceeded with the appeal on the basis that she was not supporting the appeal.
12. The 2<sup>nd</sup> respondent's cross-appeal, for all intents and purposes, is a replica of the arguments of the appellants. She contends that the appellants were not served personally for formal proof. She irregularly raises issues that were raised in the struck off defence, as well as issues before the succession court and others issues which are not before us in this appeal. We shall not say more on it because what we have said about the bulk of the issues raised by the appellants applies with equal force to the cross-appeal.
13. Having carefully considered the appellants' memorandum of appeal, the judgment of the High Court and their submissions, the only ground worthy reflecting upon is the contention that there was disparity between the judgment and the respondents' case as pleaded and that the learned judge granted remedies that were not applied for. Mr Odawa's submission was that the learned judge erred in holding that the respondents were the proprietors of the suit property, yet in the plaint they had pleaded that the suit property belonged to the deceased rather than to themselves. Counsel contended that without amendment of the pleadings, the court could not have made the finding it did.
14. With respect, this is a clear misrepresentation of the pleadings and the judgment. In paragraphs 4 and 5 of the plaint, the respondents pleaded that they were respectively the heir and administratrix of the estate of the deceased and entitled to possession of the suit property. It is trite that an action in trespass is not necessarily by the owner of the property, but by the person entitled to possession. By the time the suit was heard by way of formal proof, the respondents had already been registered as proprietors of the suit property following confirmation of the grant by the succession court. That evidence was produced before the learned judge, who concluded thus:

As observed earlier, the defence of the defendants (appellants) was struck out and therefore the evidence of the plaintiff (1<sup>st</sup> respondent) in these proceedings remains uncontroverted. The hearing notice was served upon the advocates on record for the defendants, but they



did not appear. I watched the 1<sup>st</sup> plaintiff give evidence in these proceedings and observed his demeanour. I am persuaded that all he told the court was the truth and has established his pleading as against the defendants.

15. We do not perceive any error or disjunction between the pleadings and the judgment. The registration of the respondents as proprietors of the suit property, the fact of which was not contested, did not negate the respondent's case as pleaded so as to require amendment of the pleadings. If anything, their registration as proprietors coupled with possession strengthened the case for eviction of the appellants who, before the learned judge, had no defence to the respondents' claim.
16. For all the foregoing reasons, we find absolutely no merit in this appeal and dismiss it with costs to the 1<sup>st</sup> respondent. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2023**

**D. K. MUSINGA (P.)**

.....

**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

