



**M’itunga & 3 others v M’ikiunga & 3 others (Environment and Land Appeal
E048 of 2022) [2024] KEELC 4776 (KLR) (12 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4776 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E048 OF 2022**

**CK NZILI, J
JUNE 12, 2024**

BETWEEN

**MUTHOMI M’KIUNGA M’ITUNGA 1ST APPELLANT
JACOB MUGAMBI 2ND APPELLANT
JOSEPH MWITI 3RD APPELLANT
PHINEAS GITONGA 4TH APPELLANT**

AND

**M’RIMBERIA M’IKIUNGA 1ST RESPONDENT
M’MUKIRA KIUNGA 2ND RESPONDENT
GERVASIO MBOGORI 3RD RESPONDENT
JOHN M’ETHARA M’IKUNGA 4TH RESPONDENT**

*(Being an appeal from the judgment delivered on
18.8.2022 in ELC 62 of 2020 by T.M Mwangi – SPM)*

JUDGMENT

1. The appellants, who were the defendants at the lower court, had been sued by the respondents as the plaintiffs for trespass, infringement of rights to property, and denial of the user of LR No’s. Kiirua/Ruiriri/6368 – 6371, as the resultant subdivisions of LR No. Kiirua/Ruiriri/330 initially owned by their late father, M’Kiunga M’Raria. They prayed for a declaration that the appellant were trespassers to the suit parcels of land and for a permanent injunction.
2. The appellants denied the claim through a statement of defense dated 28.8.2020, terming their occupation of the initial suit land as lawful and in line with the grant in HC Meru Succession Cause No. 195 of 2003. They averred that the suit was bad in law, defective and an abuse of the court process.



3. At the trial, M'Rimbere M'Kiunga testified as PW 1. Relying on his witness statement dated 29.7.2020 as his evidence in chief, PW 1 told the court that the 1st appellant and all the respondents were children of the late M'Kinyua M'Raria, who was the owner of LR No. Kiirua/Ruiru/330, while the 2nd, 3rd & 4th appellants were the children of the 1st appellant.
4. PW 1 said that after their father passed on, he filed Meru High Court Succession Cause No's. 195 of 2003, and a grant was issued subdividing the land equally among the five beneficiaries, resulting in LR No. Kiirua/Ruiru 6368, 6369, 6370, 6371 & 6372 in favor of the 2nd, 3rd & 4th respondents and the 1st appellant, respectively.
5. PW 1 testified that after the subdivisions, the 1st appellant refused to occupy his rightful share LR No. Kiirua/Ruiru 6372, but instead, together with the 2nd – 4th appellants, occupy portions cutting across all the respondent's decreed parcels of land and have erected structures and toilets thereon. He termed the said acts as unlawful and as a denial of the beneficiaries' rights to occupy peacefully and to quietly enjoy possession. In support of the claim, PW 1 produced a demand notice dated 22.2.2020, certificates grant LR No. 6368 – 6371, search certificate, limited grant as P. Exh No. 1, 2, 3 (a) – (d), 4 (a) – (d) and (5), respectively, M'Mahira Kiriga testified as PW 2 and adopted a witness statement dated 29.7.2021 as his evidence in chief associating himself with the testimony of PW 2.
6. In cross-examination by Mr. Kiara Kimathi, advocate for the appellant he stated that he had another shamba in Ruiru, and therefore, he was not being evicted from the suit parcels of land except to be told to move into his portion LR No. 6372.
7. DW 2 clarified that the 1st appellant was his young brother who, instead of moving into his portion, was on PW 1's land.
8. Gelasio Mbogo testified as PW 3 and relied entirely on his witness statement dated 29.7.2020 as his evidence in chief. He told the court that the 2nd appellant, as soon as the 1st appellant was occupying his parcel of land; hence, there was need for the court to order that he vacates his land. Rinah Mukuru testified as PW 4 and adopted her witness statement dated 29.7.2020 as her evidence in chief. As a wife of the late John M'Ethuru M'Kiunga and a sister-in-law of PW 1, 2, and (3), she told the court that the 3rd appellant had erected a building on her portion of land, hence denying her right of ownership PW 3 urged the court to grant orders.
9. Muthomi M'Kiugu M'Itunga testified as DW 1. He confirmed the respondents as his brothers while the appellants were his children. After admitting his witness statement as his evidence in chief filed on 13.5.2022, DW1 told the court that the land in dispute belonged to him after his late father gave him. He said all his siblings acquired land, namely Gelvasio at Raichu No. 278; M'Rimbere parcel No. 526 Nchoroiboro; M'Mukiri parcel No. 42 Tutua; M'Ithara Parcel LR No. 244 Ruiru/Rwarera and M'Kiunga – Kiirua/Ruiru/330.
10. DW 1 said that he was the last born in the family and after his father died, he sought and obtained a chief's letter to file the succession cause and that his brother M'Rimbere was aware of it, for he had settled him temporarily on his land.
11. DW 1 said that the grant was issued and confirmed whereby he shared the land with his son. He termed his brother's claim as an afterthought, for initially, they had no interest in his land or challenged the same during the confirmation of the grant.
12. Again, DW 1 said that his brothers, later on, went to court without involving him and were issued with another grant that they used to subdivide his land. He said that the respondents should vacate his land and stop harassing his peaceful occupation for each of them has land elsewhere and was only



- interested in his land whose value has appreciated. DW1 further said that they have been destroying or damaging his crops and other properties. He produced a copy of the confirmed grant dated 22.4.2005, order dated 18.4.2005, and a grant dated 22.7.2003 as D. Exh No. (1), (2) & (3) respectively.
13. In the cross-examination, DW 1 said that the court had made an order that they share the land equally with the respondents; otherwise, he was not present in court on the day of the alleged confirmation or distribution. He said that he was not aware if D. Exh No. (1) was revoked. DW 1 also told the court he had land LR No. 695 Ruiru/Rwarera, though his son was in occupation of LR No. 330 measuring 2 acres since the entire land belongs to him as bequeathed by his late father.
 14. Jacob Mugambi, Joseph Mwititi and Phineas Gitonga testified as DW 2 and DW 3 and 4, confirming to the court that they were born, grew, and live on parcel LR No. 330 where they have constructed their residences and have been tilling the land. DW 2 denied that the suit land was subdivided into five portions by the court; otherwise, he was aware of a Succession Cause No. 145 of 2003.
 15. Further, DW 2 said that the land at Ruiru Rwarera was Parcel No. 698 belonged to his mother. Similarly, DW 2 told the court that after the land was subdivided into five portions, they challenged the decision in court. DW 4 confirmed that he lived on the land claimed by the 1st respondent, while DW 3 lived on the land claimed by the 4th respondent.
 16. After the close of the defense, the trial court granted the orders sought by the respondents. Aggrieved by decree, the appellants filed a memorandum of appeal dated 26.8.2022. The appellants fault the trial:
 - i. Failing to properly analyze the evidence on record, hence arriving at the wrong decision.
 - ii. Allowing the claim that was not proved.
 - iii. Failing to find that the parties were relatives, they were entitled to occupy and possess the suit land.
 - iv. For deciding the case against the weight of the available evidence.
 17. With leave of court, parties canvassed the appeal through written submissions dated 15.4.2024 and 12.4.2024, respectively, which the court has considered.
 18. An appellate court of the 1st instance is mandated under Section 78 of the *Civil Procedure Act* to re-analyze and re-assess the record of the court below to come up with independent findings on facts and law while giving credit to the trial court, which had the benefit of seeing and hearing the witness testify. See *Selle & another v associated motor Boat Co. Ltd* (1968) EA *Gitobu Imanyara v Attorney General* (2016) eKLR.
 19. In this appeal, the respondents' claim was based on trespass to land, infringement of the right to use and occupy the land, denial of user rights, and illegal occupation of the land. The respondents prayed for a declaration that the appellants were trespassers on LR No's. Kiirua/Ruiru/6368, 6369, 6370, and 6371 and for a permanent injunction.
 20. Trespass is a violation of the right to possession, and a plaintiff must prove that he has the right to immediate and exclusive possession of the land, which is different from ownership. See *Municipal Court of Eldoret v Titus Gatitu Njau* (2020) eKLR.
 21. Section 3 & 5 (1) of the *Trespass Act* provide that any person who enters into or upon property in possession or occupation of another with intent to commit an offense or annoy or to intimidate commits a tort of trespass. See *KPLC v Ringera* (2022) KECA 104 (KLR) (4th February 2022) (Judgment).



22. To prove trespass, a plaintiff must establish ownership of the suit property and, secondly, invasion or occupation of the land without any justifiable cause. See *Charles Ogejo Ochieng v Geoffrey Okumu* (1995) eKLR and *Michael Gaiko Ngure & another v Peter Njoroge Kinyanjui* (2022) eKLR.
23. In this appeal the respondents produced a demand notice, corrected certificate of confirmed grant dated 29.9.2014, title deed issued on 16.3.2017 for LR No. Kiirua/Ruiri/6368, 6369, 6370, 6371 and copies of official searches. A survey map was also a filed in a further list of documents dated 22.6.2021. Showing the locality of the suit parcels of land. In the statement of defense dated 28.8.2020, the appellants, in paragraph 5, pleaded that their occupation of the LR No. Kiirua/Ruiri/330 was lawful and is in accordance with the grant in High Court Meru Succession Case No. 195 of 2003 grant. There were no pleadings attacking the title deeds held by the respondents on account of fraud, illegality, irregularity, or procurement through a corrupt scheme. To sustain their defense or justification for being on the land, the respondents relied on D. Exh No. (1), a confirmed grant dated 22.4.2005 an order dated 18.4.2005 and a grant dated 22.7.2003.
24. Looking at the grant and confirmed grant of the appellants' vis a vis the rectified grant and corrected grant by the respondents, it is evident that the respondent's evidence that the earlier grant and confirmed grant irregularly obtained by the 1st appellant was revoked and replaced by the court on 29.9.2011 and through an order dated 10.2.2012 in Meru HC Succession Cause No. 195 of 2003.
25. Additionally, the respondents produced a title deed, which under Section 25 of the *Land Registration Act* is to be taken as *prima facie* evidence of ownership in the absence of contrary evidence. The appellants, in my view, were unable to impeach the titles to the suit land held by the respondents and also show any justifiable reason why they should remain on the suit lands. In my considered view, the trial court, given the facts and evidence tendered and the law, arrived at the correct conclusion and cannot be faulted.
26. The upshot is that I find no merits in the appeal being dismissed with costs. The appellants are directed to hand over vacant possession in line with Section 152 – A- F of the *Land Act* after 90 days from the date hereof; otherwise, they shall be evicted at their own cost or expense after the expiry of the notice in full compliance with the law on eviction upon expiry of the said notice.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 12TH DAY OF JUNE, 2024

In presence of:-

C.A Kananu

No appearance

HON. C K NZILI

JUDGE

