



REPUBLIC OF KENYA



**Maina v Njoya & 5 others (Environment and Land Appeal
1 of 2019) [2024] KEELC 5485 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5485 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 1 OF 2019**

**JO OLOLA, J
JULY 26, 2024**

BETWEEN

MARY WANGUI MAINA APPELLANT

AND

REV. DR. TIMOTHY MURERE NJOYA 1ST RESPONDENT

ANNE GATERE KAMOTHO 2ND RESPONDENT

WAHETO WACHIRA KAMOTHO 3RD RESPONDENT

NYINA WA NGUGI 4TH RESPONDENT

GAKONYO KAMOTHO 5TH RESPONDENT

MWIHAKI THUA 6TH RESPONDENT

*(Being an Appel from the Judgment and Decree of Hon. P. Mutua Senior Principal
Magistrate, Delivered on 4th December, 2018 in Nyeri CMCC No. 116 of 2005)*

JUDGMENT

1. This is an Appeal arising from the Judgement of the Honourable P. Mutua, SPM delivered on 4th December 2018 in Nyeri CMCC No. 16 of 2005.
2. By a Plaint dated 23rd February 2005, Rev. Dr. Timothy Murere Njoya (the 1st Respondent) had sought Judgment against the Appellant herein jointly with the 2nd to 6th Respondents for:-
 - a. A permanent and perpetual injunction restraining the Defendants, their servants, agents or employees or anybody else whatsoever acting for or through them remaining, entering, trespassing or in any way interfering with the parcel of land known as LR. No. Muhito/ Thiha/324 in Mukurweini, Nyeri;



- b. A mandatory injunction compelling the Defendants, their servants, agents or employees to forthwith vacate and remove themselves from the Plaintiff's parcel of land known as LR. No. Muhito/Thiha/324 in Mukurweini, Nyeri;
 - c. An eviction order to issue against the Defendants to vacate the parcel of land known as LR. No. Muhito/Thiha/324 in Mukurweini, Nyeri;
 - d. Mesne profits;
 - e. Interest on (d) above;
 - f. Costs of the suit; and
 - g. Any other or further relief this Honourable Court may deem fit to grant.
3. The basis of those prayers were the 1st Respondent's contention that pursuant to a Certificate of Confirmation of Grant issued in 1997, he had become the registered and absolute proprietor of the suit property. It was the Appellant's case that despite his ownership thereof, the Appellant herein had illegally and without any reasonable cause encroached on, intermeddled and interfered with the suit property and had constructed a hut thereon. In addition, the 1st Respondent accused the appellant of authorizing and/or allowing the other Respondents to cultivate and trespass on the suit property.
 4. Both the Appellant as well as the 2nd to 6th Respondents who were jointly sued as the Defendants failed to either enter appearance or file any pleadings in the Lower Court. The matter therefore proceeded by way of formal proof.
 5. Having heard the testimony of the 1st Respondent and the evidence adduced before the court, the Learned Trial Magistrate was persuaded that the 1st Respondent had proved his case on a balance of probabilities and proceeded to issue an order of injunction restraining the Appellant and the other Respondents from remaining in, entering, trespassing or in any way interfering with the suit property.
 6. In addition the court directed all those who had encroached the land to vacate the same within 30 days failure to which an eviction order would issue against them. The 1st Respondent was also awarded Kshs. 100,000/- as nominal damages for trespass as well as the costs of the suit.
 7. Aggrieved by the said determination, Mary Wangui Maina (the Appellant herein) moved to this court on 3rd January 2019 and lodged a Memorandum of Appeal of even date urging this court to vary and/or set aside the said Judgment on the grounds that:-
 1. The Learned Magistrate erred in law and in failing to give the Appellant an opportunity to cross examine the Plaintiff;
 2. The Learned Magistrate erred in law in failing to give the Appellant an opportunity to participate in the proceedings either personally or through her Advocate;
 3. The Learned Magistrate erred in law and in fact in granting the injunction orders, nominal damages and ordering an eviction notice; and
 5. The Learned Magistrate erred in law and in fact in failing to consider the submissions by the Appellant's Advocate.
 8. This being a first Appeal, this court is mandated to re-evaluate the evidence placed before the Trial Court as well as the Judgment and to proceed to arrive at its own independent Judgment on whether or not to allow the Appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the



opportunity of seeing and hearing the witnesses first hand. {See *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* [1968] EA 123}.

9. I have accordingly carefully perused both the Record of Appeal as well as the impugned Judgment. I have similarly perused the submissions and authorities placed before the court by the Learned Advocates representing the 1st Respondent. I was unable to find any submissions filed by the Appellant.
10. By a Plaint instituted in the Lower Court dated 23rd February 2005, the 1st Respondent had sued the Appellant jointly with five (5) other individuals cited in this Appeal as the 2nd to the 6th Respondents seeking for an order of a permanent injunction to restrain them from remaining in, entering, trespassing upon or in any manner dealing with all that parcel of land known as LR. No. Muhito/Thiha/324 situated in Mukurweini in Nyeri County (the suit property).
11. The 1st Respondent had also sought orders of mandatory injunction and for the eviction of the six individuals from the suit property. In addition, the 1st Respondent had prayed for mesne profits on account of what he had described as trespass to his property by the 6 individuals.
12. From the material placed before the court, it was apparent that the suit as against Mwihaki Thua cited as (the 6th Respondent) was withdrawn on 4th May 2005. It was also apparent that during the proceedings held before the Trial Court on 5th April 2005, Anne Gatere Kamotho, Waheto Wachira Kamotho, Nyina wa Ngugi and Gakonyo Kamotho (cited in these proceedings as the 2nd to 5th Respondents) were recorded as having agreed to vacate the suit premises, whereupon the court granted them two weeks to vacate. That essentially rendered this suit as one between the 1st Respondent herein who was the Plaintiff and the Appellant herein who then remained as the sole Defendant.
13. It was the 1st Respondent's case that the Appellant herein had illegally and without any reasonable cause encroached and intermeddled with the suit property where she had not only proceeded to build a hut but had also invited the other individuals who had been sued alongside her to enter and cultivate without the authority of the Respondent.
14. As it turned out, the Appellant though served neither entered appearance nor did she file any defence in answer to the Respondent's pleadings. Upon hearing the Respondent's testimony and the evidence adduced at the trial, the court was persuaded that there was merit in the Respondent's case and it proceeded to make a raft of orders in its Judgment delivered on 4th December 2019, in favour of the Respondent.
15. On 3rd January 2019, feeling aggrieved by the said Judgment, the Appellant instituted this Appeal urging the court to set aside the Judgment on the basis of some five (5) grounds. In my considered view, those grounds can be reduced into three (3) grounds as follows:-
 - i). Whether the Trial Court failed to give an opportunity to the Appellant to participate in the proceedings and to cross examine the Respondent;
 - ii). Whether the Learned Magistrate failed to consider the Appellant's submissions; and
 - iii). Whether the Learned Magistrate erred in granting the orders of injunction, nominal damages and eviction of the Appellant.
16. As already observed hereinabove, the Appellant did not file any pleadings in the Lower Court. From a perusal of the Record, the matter was in the absence of any pleadings on her part, fixed for formal proof. When the suit came up for hearing, on 13th November 2018, the Appellant appeared in court



in the presence of one Ms. Murefu Advocate. When the matter was called up, the said Advocate asked the court to grant an adjournment on account that she was not ready for the hearing.

17. As it turned out, the said Advocate had not filed any documents in court and as the court rightfully observed, she was not on record and therefore had no audience before the court. There was no Appeal that was preferred against that order of the court and the related refusal to grant an adjournment on the said day.
18. The Record reveals, that following the dismissal of the application for adjournment, the Respondent proceeded to testify and to close his case.
19. As it were, there are procedures which regulate the trial process and which guide when a party can file documents and what an Advocate who wishes to represent a party ought to do prior to the trial and for him/her to be granted audience by the court. There was no evidence that the Appellant had complied with such procedures as at the time the matter had come for trial. As was stated in [Lalji Bhimji Shangari Builders & Contractors –vs- City Council of Nairobi](#) [2012] eKLR:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of Procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

20. In the matter herein, it was evident that the suit had been filed some 13 years before the date of the hearing and that the Appellant had been represented by a number of Advocates who apparently had not seen it fit to follow the laid down procedures. One could not therefore fault the Trial Magistrate for the refusal to grant an adjournment on the date the matter was scheduled for hearing and more so, where the person purporting to address the court was not properly on record.
21. At Grounds 3 and 5 of the Memorandum of Appeal, the Appellant has faulted the Learned Trial Magistrate of failing to consider her submissions and thereby occasioning an injustice. Unfortunately, for the Appellant, that contention is again, not supported by the Record before me. I have had occasion to peruse the Judgment that is the subject matter of this Appeal. At Paragraphs 9 and 10 of the Judgment (Page 243 of the Record), the Learned Magistrate observed as follows:-
 9. The 1st Defendant’s Advocate had notice of appointment on 20/11/2018 and also filed written submissions. It is submitted that that the suit was barred as 12 years had lapsed and the first defendant had acquired title by adverse possession.
 10. Now two things defeat that submissions;
 - a. Limitation of time cannot be relied on as a defence unless specifically pleaded. See [Achola & Achola –vs- Irungu & Another](#) [2004] KLR 462 and [Lulu Dry Cleaners Ltd & Another – vs- Kenya Industrial Estates & Another](#) [2005]eKLR 97.
 - b. Limitation of time was not pleaded. Indeed the first defendant filed no pleadings.”
22. Arising from the foregoing, it is evident that the Learned Trial Magistrate did clearly take into consideration the Appellant’s submission before arriving at the Judgment. The mere fact that the court did not find the submissions persuasive cannot be, with respect, a ground of Appeal and that ground must therefore collapse.



23. Finally, it was the Appellant’s position that the Learned Trial Magistrate had erred in granting the orders of injunction, for payment of nominal damages and for her eviction from the suit property. In the absence of any submissions filed on the part of the Appellant, it was rather difficult for this court to discern the reasons for the Appellant’s dissatisfaction with those orders.
24. As it were, in granting the order of injunction, the court did not seem to me to have granted them out of the blues. At Page 245 of the Record, the Learned Trial Magistrate gives the rationale for arriving at the said decision. At Paragraphs 13 and 14 of the Judgment, the court stated as follows:-
 13. The plaintiff is registered as the absolute and indefeasible owner of the land. The title carries with it legal possession which entitles the Plaintiff to possession against all other parties that have shown no better title than that..... The defendants are therefore trespassers to the land.....; and
 14. The Plaintiff has a valid title and therefore is entitled to both ownership and possession of the suit land. No person then without authority of the Plaintiff should have any right to enter therein. An injunction can and should issue to stop further trespass by the trespasser....”
25. Again at Paragraph 17 of the Judgment the Learned Trial Magistrate has given a basis for the grant of the nominal damages citing authorities on the basis of which the court awarded the sum of Kshs. 100,000/=. It is trite law that the owner of land is entitled to nominal damages occasioned to the owner by the trespass and I was therefore also unable to see the basis for this ground of Appeal.
26. In the premises, I was not persuaded that there was any merit in this Appeal. I dismiss the same with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 26TH DAY OF JULY, 2024.

In the presence of:

Ms. Nduta Kamau holding brief for Dr. Kamau Kuria for the Respondent.

No appearance for the Appellant.

Court Assistant: Michael

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J. O. OLOLA
JUDGE

