



**Isamu v Munyoki (Environment and Land Appeal 1 of 2023)
[2024] KEELC 6235 (KLR) (22 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 6235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL 1 OF 2023**

LG KIMANI, J

JULY 22, 2024

BETWEEN

MUNYOKI ISAMU APPELLANT

AND

KANGUTU MUNYOKI RESPONDENT

*(Being an appeal from the Judgment of the Senior Resident Magistrate
Hon. John Aringo on 26th January 2023 in Kyuso PMELC E009 of 2022)*

JUDGMENT

1. Before the Court is an Appeal from the Judgment of the Senior Resident Magistrate Hon. John Aringo delivered on 26th January 2023 in Kyuso PMELC E009 of 2022. The Memorandum of Appeal dated 16th February 2023 sets forth eighteen grounds of appeal. In summary, the Appellant states that the trial court erred in considering irrelevant factors and failing to consider the appellant's evidence that he bought land from the respondent's relatives who now want the land back. He challenged the trial court's judgement claiming that the court considered a repealed law and failed to consider and analyse the evidence, pleadings, and prayers before the court. He accused the trial court of failing to record all proceedings especially that of the Appellant. The appellant faulted the trial court for failing to find that the respondent trespassed, fenced his land, extended the boundary and interfered with his land. The Appellant also stated that the Trial Magistrate erred in not viewing the suit land.
2. The Appellant further stated that the Trial Magistrate showed open bias against the Appellant by failing to give him a fair hearing and failing to consider the trespass on the suit land No. 62-Kaiviria Adjudication Section, which he states belongs to him.
3. The Appellant also stated that the Trial Magistrate failed to consider that he had overriding interests in the suit land and that he had incurred expenses when buying the suit land from the Respondent and his relatives, ignoring his defence. He faulted the court for failing to call key witnesses who had



- advised the Appellant to remove the fence which was put up on the suit property by the respondent. He claimed that the trial court failed to consider that the respondent had his own parcel of land Plot No.3922 Kaiviria Adjudication Section and that the Appellant had bought Plot 62 Kaiviria Adjudication Section and failed to consider the ownership of the said parcels of land.
4. Lastly, the appellant states that the learned Magistrate erred in law and fact by failing to consider whether the land adjudication officer fixed the correct boundary between the appellant and the respondent and his relatives and consider whether the respondent and his relatives had interfered with the appellant's boundary and extend the same to the Appellant's parcel of Land P/No.62 Kaiviria Adjudication Section.
 5. The suit before the trial court was instituted by the Respondent through the plaint dated 27th May 2022. The Plaintiff claimed to be the registered owner of Land Parcel 3922-Kaiviria Adjudication Section which he acquired through inheritance from his late father Muthengi Katu. He accused the defendant of trespassing onto the suit land by grazing and cutting down Indigenous trees and despite reporting the matter to the chief, all efforts towards amicable settlement have been thwarted by the defendant. The plaintiff prayed for a permanent injunction to restrain the defendant from interfering with his quiet possession of Land Parcel 3922-Kaiviria Adjudication Section.
 6. In his defence, the Appellant herein denied trespassing onto the Plaintiff's land and stated that his parcel of land was Plot no.62-Kaiviria Adjudication Section, which he bought from the plaintiff's brothers, one Kimanzi Muthengi and Peter Kyalo Nguna in the year 2017 before demarcation started. He stated that the parcel had permanent boundaries which were made by the Kyuso Lands officers during demarcation and that the plaintiff was present during the transaction of purchase of the suit land.

Summary of evidence before the Trial Court

7. PW 1 Kangutu Muthengi kicked off the hearing, adopting his witness statement filed on 30th May 2022. He testified that he was the owner of Plot 3922-Kaiviria Adjudication Section as per adjudication records. He acquired the land from his father and stated that he sued the defendant for attempting to grab his land whose number he acquired after the survey. He noted that the defendant had bought land from his younger brother and later claimed that his land cut into the defendant's land.
8. After reporting the dispute to the Police DCI office, they were sent to the lands office, where they were directed to pay a cost to map out the land and the two parties were to share the cost but the defendant did not pay his part. The Plaintiff stated that the Chief Mivukoni location and a land adjudication officer confirmed from the map that his land was demarcated correctly and the defendant's land boundary was clear. After this visit, the plaintiff states that he put up a fence but the defendant removed the fence and started grazing on his land. Upon reporting the matter again, he was issued with a letter to go to court.
9. PW 2 Daniel Musyoki Nguna filed his statement that he is the Plaintiff's uncle and confirmed that the plaintiff is the owner of the suit land as per the records from the Land and Adjudication Officer-Kyuso, which land he inherited from his late father by the name of Muthengi Katu. He also stated that the defendant claims ownership of the land by grazing and destroying the same despite the land being confirmed as belonging to the Plaintiff.
10. PW 2 confirmed that he knew the defendant, who bought land from Kimanzi Muthengi and his portion was drawn and demarcated properly and a boundary was put up, but the defendant brought the fence down a second time.



11. PW 3 Nzenge Maluki testified in the plaintiff's case. In his witness statement filed on 29th August 2022, he stated that he is the Plaintiff's cousin and confirmed that the plaintiff is the owner of the suit property whose ownership the defendant started claiming in the year 2021. The chief and the land adjudication officer confirmed the land belongs to the plaintiff that the defendant is now grazing, destroying and claiming ownership of.
12. DW 1 Munyoki Isamu, the defendant, stated that he was once informed at work that he was being called by the Plaintiff that he crossed the land boundary but that he did not know what the issues were. He stated that he bought land from Kimanzi Muthengi in 2013 and the land is now known as Land Parcel 62 Kaviria Adjudication Section. That during the transaction, the plaintiff is the one who received the money which he paid to the vendors and the plaintiff has therefore brought this case in bad faith since he has never encroached on his land.
13. Upon cross-examination, he stated that he uses Land Parcel 62 which he bought and is different from the Plaintiff's land which is already fenced.
14. Judgment was delivered on 26th January 2023 where the trial court found that the plaintiff had established that Plot 3922-Kaiviria Adjudication Section was demarcated to him by producing the letter from the Land Adjudication and settlement officer dated 23rd May 2022 confirming this. The trial magistrate noted that during adjudication, boundaries are well delineated and the defendant should not have continued with acts of trespass. The Trial court was satisfied that the plaintiff had proven his case on a balance of probabilities and granted the permanent injunction in terms of prayer (a) of the Plaint and further awarded damages for trespass and acts of waste at the sum of Kshs.50,000/= and costs of the suit.

The Hearing of the Appeal

15. Both parties in the appeal appeared for the hearing of the appeal in person. The appellant stated that he bought the land in dispute from the Respondent's brother and has evidence of the sale though he has no title to the land since it is undergoing adjudication. He also accused the respondent of trespassing onto his land and obtaining a portion of it while he had his land.
16. The Appellant acknowledged the adjudication is complete and that both parties have been demarcated as owners over their respective portions. He also stated that the chief removed the fence which had been put up by the respondent on the boundary.
17. The respondent on the other hand refuted the appellant's claim stating that he instituted the suit in the trial court after the appellant sold a parcel of land to him, before the commencement of adjudication. The Appellant has a different parcel of land and his boundaries were confirmed and adjudicated as such. After he was allocated his parcel number, he fenced the land and later, the Appellant claimed that the land belonged to him.
18. The respondent denied bringing the case before the chief and stated that it was the DCI office who invited the land officer who later confirmed. He testified that he paid Kshs.14,000/= after the Appellant failed to pay the Ksh.7,000/= he was required to pay for confirmation of boundaries. The Lands officer gave him a summons to invite the area chief to the land and he was present when the land officer confirmed that the land belonged to him. The respondent stated that after the resolution of the dispute, he fenced the land but two weeks later, the appellant destroyed the fence. He denied that it was the chief who destroyed the fence as the appellant claimed. He found the Appellant's children grazing cattle on the land and reported the matter to the lands office. He was given a letter to file a case which he proceeded to do before the trial court.



Analysis and Determination

19. The role of an appellate court is to re-examine the evidence at trial and come up with its own conclusions while keeping in mind the findings of the trial court. In the case of *Selle & Another v Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

20. The court has considered the grounds of appeal set out in the Memorandum of Appeal, the record of appeal and submissions by the parties. It is the court's considered opinion that the grounds of appeal may be summarized and considered as issues for determination as follows;

1. Whether the Learned Trial Magistrate erred in law and fact and failed to properly consider and analyze the evidence before him and thereby granted the plaintiff's prayer of a permanent injunction plus damages of Ksh.50,000/= for trespass.
2. Whether the learned Magistrate was biased against the Appellant and thus arrived at a wrong finding.

21. The Respondent's claim before the trial court was based on trespass to his land known as parcel No. 3922-Kaiviria Adjudication Section which he states he inherited from his father Muthengi Katu (Deceased) and was adjudicated in his name. On the other hand, the Appellant denied trespassing onto the said land, stating that he has his parcel known as parcel No.62 Kaiviria Adjudication Section which he bought from the respondent's brother, Kimanzi Muthengi in the year 2013 and that the respondent is the one who has hived off a portion of his land.

22. Section 3 (1) of the *Trespass Act*, defines trespass as follows;

“ Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

23. The Court in the case of *M'Mukanya v M'Mbijiwe* [1984] KLR 761 stated that:

“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 *Thomson v Ward*, [1953] 2QB 153.”

24. The Respondent relied on the letter from the Land Adjudication and Settlement Office in Kyuso dated 23rd May 2022 which confirms that Plot No.3922 Kaiviria Adjudication Section is surveyed and demarcated under his name as the sole owner, has no pending case and is awaiting processing of title. The Respondent also stated in his evidence that when he lodged his complaint to the DCI office at Kyuso, the Land Adjudication Officer one Bernard Milgo confirmed to the DCIO that the land belonged to him. The respondent testified that the chief Mivukoni Location one Kasyoka together with the land Adjudication officer went to the ground and confirmed that the land belonged to him. This evidence was not directly traversed by the defendant



25. The court has considered the consensus that the land subject matter of this suit No. 3922-Kaiviria Adjudication Section is owned by the respondent and the land parcel No. 62-Kaiviria Adjudication Section owned by the appellant and they were within an adjudication Section. There is also consensus that there is no dispute/case currently pending before the land adjudication office and any other adjudication dispute resolution process between the appellant and the respondent. This was also confirmed by the letter from the Land Adjudication Officer letter dated 23rd May 2022.
26. It is trite law that land under adjudication is the subject of the *Land Adjudication Act* Cap 284 Laws of Kenya which is “An Act of Parliament to provide for the ascertainment and recording of rights and interests in Trust land and for purposes connected therewith and purposes incidental thereto”
27. Section 13 (1) of the *Act* provides for the pointing out of boundaries for persons claiming land and states as follows;
- “Every person who considers that he has an interest in land within an adjudication section shall make a claim to the recording officer, and point out his boundaries to the demarcation officer in the manner required and within the period fixed by the notice published under section 5 of this *Act*.”
28. Section 15 of the *Act* provides as follows concerning the setting of boundaries;
- “Subject to any general or particular directions given by the adjudication officer, the duties of the demarcation officer within an adjudication section are
- a. to demarcate or cause to be demarcated—
 - i. the boundaries of each separate piece of land, whether claimed by an individual or by a group: Provided that where the boundary of a piece of land is already demarcated by a physical feature it need not be determined whether the exact line of the boundary runs along the centre of the feature or along its inner or outer side;
 - ii. the boundaries of all land which is entirely free from private rights, or the private rights in or over which have been relinquished in favour of the county council;
 - iii. the boundaries of all land which has been set apart under the *Constitution*; and
 - b. to submit to the committee any boundary dispute which he is unable to resolve.”
29. From the foregoing provisions of the law, the court concludes that the boundaries between the two parcels of land mentioned in this suit were pointed out by the parties in accordance with the said provisions of the law. As provided under Section 15 (b), if there was a dispute over the boundaries involving the suit parcels of land during demarcation the same ought to have been referred to the lands committee for determination.
30. As stated earlier, when the dispute herein was referred to the various offices, the Land Adjudication Officer and the area chief went to the suit land and confirmed that the parcel of land No. 3922-Kaiviria Adjudication Section was owned by the Respondent and pointed out the boundaries.



31. It is the finding of the court that the boundary was indeed pointed out for a 2nd time to the parties and the dispute was addressed and resolved by the lands office which was responsible for the adjudication process. It seems that the Appellant was not satisfied with the outcome confirming the boundaries.
32. The Respondent's witnesses during the trial Daniel Munyoki Nguni and Nzwenge Maluki confirmed that the dispute between the parties herein led to confirmation of the boundaries and that the respondent put up a fence which the Appellant brought down.
33. In the court's view, the respondent proved on a balance of probabilities that he was the owner of land parcel No. 3922- Kairivia Adjudication Section and was thus entitled to immediate and exclusive possession of the land. In the court's further view, the respondent proved that the boundary between his parcel of land and the one belonging to the Appellant had been pointed out to the parties and the Respondent had put up a fence. The court further finds that the appellant pulled down the fence and trespassed onto the respondent's land in what he claims to have been part of his land parcel 62- Kairivia Adjudication Section. The court thus finds that the appellant was guilty of trespass onto the respondent's land and the trial court did not err in making the said finding.
34. It is the court's further finding that the trial court properly considered and analyzed the evidence before him and did not show any bias against the appellant.
35. The other issue that arises in the judgement of the trial court is the award of damages for trespass of Ksh.50,000/= . Looking at the plaint the court notes that there was no prayer for general damages pleaded by the Plaintiff. The Court of Appeal in the case of *Lamba v National Social Security Fund & another* (Civil Appeal E168 of 2021) [2023] KECA 124 (KLR) (3 February 2023) (Judgment) held that:

“It is trite law that courts can only grant orders that have been prayed for in the pleadings, or make appropriate orders as it deems fit if need arises in the cause of a trial. Indeed, where a court has proceeded to grant a relief not contained in prayers in the pleading or not regularly sought by a party expressly or by implication, appellate courts have had no hesitation in annulling or overturning orders granting such reliefs.”
36. The exercise of judicial discretion in an appeal was discussed in *Price and Another v Hilder* [1996] KLR 95 quoted by Aburili J in the case of *Ojwang v Kara & another* (Civil Appeal E097 of 2023) [2024] KEHC 3131 (KLR) (28 March 2024) (Judgment) as follows:

“In considering the exercise of judicial discretion, as to whether or not to set aside a Judgment the court considers whether in the light of all the facts and circumstances both prior and subsequent and of the respective merits of the parties, it would be just and reasonable to set aside or vary the Judgment. The court will not interfere with the exercise of discretion by an inferior court unless it's satisfied that its decision is clearly wrong, because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters it should have taken into consideration and in doing so arrived at a wrong decision.”
37. In the circumstances of this case, the court considers the decision of the trial court to award general damages not pleaded in the plaint was clearly wrong and the decision ought to be set aside.
38. In the court's view, the appeal herein has merit to the extent of the award of general damages in the sum of Kshs 50,000/= and the court hereby sets aside the award. The appeal against the finding of the trial court on trespass is found to have no merit.



39. The final order of the court is as follows;

1. The appeal against the judgement of Senior Resident Magistrate Hon. Aringo dated 26th January 2023 in Kyuso PMELC No. E009 of 2023 is found to have no merit and the same is dismissed to the extent that it challenges the issuance of orders of a permanent injunction in terms of prayer (a) of the plaint. The finding of the trial court on this issue is upheld.
2. The appeal is found to have merit and the same is allowed on the award of general damages in the sum of Kshs 50,000/= . The award of Kshs. 50,000/- general damages is hereby set aside
3. Each party will bear the respective costs of this appeal.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF JULY, 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgment read in open court and virtually in the presence of-

Musyoki Court Assistant

Munyoki Isamu AKA John Munyoki Muthengi ID No. 2280XXXX present in person

Kangutu Munyoki AKA Kangutu Muthengi ID No. 376XXXX present in person

