



**Kathuva v Munyoki (Land Case Appeal 4 of 2023)  
[2024] KEELC 5419 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5419 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
LAND CASE APPEAL 4 OF 2023**

**LG KIMANI, J**

**JULY 18, 2024**

**BETWEEN**

**MBINGU MAITHYA KATHUVA ..... APPELLANT**

**AND**

**KANYOLU MUNYOKI ..... RESPONDENT**

*(Being an Appeal from the Judgment of the Learned Principal  
Magistrate P.M Mayova sitting at Mutomo in Mutomo Principal  
Magistrate's Civil Suit Number 47 of 2018 delivered on 29.6.2021)*

**JUDGMENT**

1. Before the Court is an Appeal from the judgment of the Mutomo Principal Magistrate Hon. P. M. Mayova in Civil Suit Number 47 of 2018 delivered on 29<sup>th</sup> June 2021. The Memorandum of Appeal sets forth the following grounds:

1. That the Learned Magistrate erred in law and facts by basing his judgment on land ownership and in particular invoking Section 30 of the Law of Adjudication Act, Cap 284 Laws of Kenya when in fact that was not the issue before him.
2. That the findings of the learned trial magistrate were against the weight of the evidence adduced which amounted to a miscarriage of justice on the part of the Appellant.

The Appellant prays that the appeal be allowed and the judgment of the subordinate court delivered on the 29<sup>th</sup> June 2021 be set aside and substituted with an order allowing the appellant's claim with costs.



### **Summary of the case before the Trial Court**

2. The appellant was the plaintiff before the trial court. He instituted the suit by a plaint dated 28<sup>th</sup> November 2018 where he averred that the defendant trespassed onto his parcel of land without his consent and damaged several trees and burnt charcoal.
3. The Plaintiff reported the matter to the chief's office who gave him a letter to visit the District Office in Ikutha and the damage caused was assessed at Ksh. 846,612/= by the District Forest Officer Ikutha. The Plaintiff's claim against the defendant therefore was for the recovery of Ksh. 846,612/= being the cost of damage by the defendant on his land.
4. The Defendant filed a statement of defence denying the allegations in the plaint and stating that on the contrary, it is the plaintiff who has been trespassing into his land using various government agencies whom he misleads with the motive of grabbing the land.
5. His defence was that the plaintiff does not own any land in the neighbourhood and he has been working on his own land and had not trespassed onto the Plaintiff's land.

### **Summary of evidence before the trial court**

6. During the hearing, PW1 Mbingu Maithya Kathuva, the plaintiff, gave evidence and adopted his witness statement where he had stated that he comes from the Maluma location, Ikutha sub-county and that the defendant is his neighbour. He claimed that on 10<sup>th</sup> June 2016, the defendant trespassed onto his land without his consent and caused damage by cutting trees and burning charcoal. The damage was assessed by the District Forestry Officer.
7. The Plaintiff testified that the suit land belonged to him and that he had the allocation booklet, but the title deeds had not been issued. Upon cross-examination, he was shown a letter from the Assistant Chief Munguni sub-location dated 24<sup>th</sup> July 2020 but denied ever seeing the said letter. He also acknowledged that he had not obtained consent from the land officer to file the suit.
8. PW 2 Jackson Kalando, the area chief of Maluma Location, identified the parties as belonging to his area of jurisdiction and neighbours who have a dispute over a parcel of land. After adjudication, all of them were given a letter from the land's office telling them to maintain the status quo. Before the survey, the plaintiff was the occupant of the said land and it was allocated to the plaintiff before the survey. He further stated that the defendant came onto the land after the survey and started cutting trees and was warned to stop but did not heed this. He also stated that they gave them time to agree on compensation but this did not happen. He also mentioned another case where the defendant had done the same on another individual's parcel of land.
9. On cross-examination, PW 2 stated that the parties have been residents of his area for a long time and forwarded to them a letter from the land's office dated 13<sup>th</sup> June 2018 telling them to wait for the land office's verdict. He stated that he had not investigated the issue in dispute because they did not honour his summons to his office. He also stated that the assessment was done in his absence.
10. PW 3 Jacob Kongo Joseph testified and stated that he works at Kenya Forestry Service in charge of Ikutha and Mutomo and that he was representing an officer known as J.K Ikianya who prepared the assessment report but was transferred to Kisumu. He stated that the report was written for the plaintiff and the assessment showed that many trees had been cut. He valued the damage and presented the report as plaintiff's exhibit 2.



11. On cross-examination, he stated that the report does not show who was present during the assessment nor that ownership was established. He also acknowledged that the assessment report does not show who cut the trees.
12. DW 1 Kanyolu Munyoki the defendant testified and adopted his witness statement filed on 13<sup>th</sup> January 2021 in which he stated that a dispute over ownership and boundaries between his land and the plaintiff's land has been in existence for many years and that the same was addressed by the area chief, who advised them to maintain status quo as they awaited a resolution from the adjudication office.
13. He stated that the parties and another person named Ndunga Soo were issued with the same land parcel number. Sometime around or before June 2018, he had complained of the plaintiff's interference with a demarcated parcel to the District Adjudication and Settlement Officer who requested the area chief to investigate the matter.
14. The defendant denied trespassing into the Plaintiff's land to cut any trees or burning any charcoal and stated that they have been maintaining the status quo and every party has continued to use portions that they had been occupying and using before adjudication set in. The defendant adopted his bundle of documents as evidence.
15. Judgment was delivered by the trial court on the 29<sup>th</sup> of June 2021 where the court found that there was evidence of an existing land ownership dispute between the plaintiff and the defendant and that the area is an adjudication section. The trial court found that the plaintiff did not seek consent from the lands office under Section 30 of the *Land Adjudication Act*. Since the plaintiff failed to obtain this consent, the court found that it lacks the jurisdiction to determine the matter and since the evidence on record could not assist the court to determine the ownership, the matter of trespass and damage of trees could not be determined. The learned trial magistrate dismissed the suit for lack of merit

#### **The Appellant's Submissions**

16. Counsel for the appellant submitted that the learned trial Magistrate erred in finding that the area had fallen under adjudication thus making the dispute a land ownership suit when the issue was a claim for damages. Counsel also noted that there was no notice of preliminary objection on the jurisdiction of the court and the court declared that it lacked jurisdiction on its own.
17. Regarding ground number two, it is submitted that the trial magistrate completely ignored the evidence of the appellant and delved into matters not before him.
18. The appellant's view is that the trial magistrate erred in fact and law in disregarding to determine the appellant's claim as filed and proven in evidence and urged this court to set aside the judgment of the lower court and enter judgment for the appellant as prayed in his plaint.

#### **The Respondent's submissions.**

19. Counsel for the respondent submitted that the respondent denied the plaintiff's claim and raised the issue of land ownership, showing through evidence that the land fell under an adjudication area and that both parties were claiming ownership of the land, which dispute the land adjudication officials had not settled.
20. The Respondent submitted that the appellant's claim of damage could not be sustained before land ownership was determined & the trial court was right in its findings. He further stated that before any claim touching on land could be maintained, the consent of the Land Adjudication Officer was



mandatory. The respondent concluded that the appeal was devoid of merit and should be dismissed with costs to the respondents.

### **Analysis and Determination**

21. The role of an appellate court was stated in the case of *Gitobu Imanyara & 2 others v Attorney General* [2016] e KLR, where the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High 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 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 allowances in this respect.”

22. The court has considered the grounds of appeal as raised in the Memorandum of Appeal, the record of appeal submissions by Counsel for the parties and the nature of the claim before the trial court. The court has also considered the findings and judgements of the trial court.

### **Ground 1: That the Learned Magistrate erred in law and facts by basing his judgment on land ownership and in particular invoking Section 30 of the Law of Adjudication Act, Cap 284 Laws of Kenya when in fact that was not the issue before him.**

23. The trial court considered the fact that all the parties to the dispute admitted that there existed a dispute over ownership of land between the plaintiff, the defendant and others over the use and occupation of the suit land. This was confirmed by PW1, the area chief, who confirmed that the parties had been advised to maintain the status quo until the dispute would be determined by the Ministry of Lands. This position was confirmed by letters produced in evidence by the defendant
24. The trial court relied on the letter dated 6<sup>th</sup> August 2015 produced by the defendant which shows that the area where the land in dispute is located was declared an adjudication section. The trial court thus found that since the appellant did not seek and obtain the consent of the Land Adjudication Officer under Section 30 of the *Land Adjudication Act*, the court had no jurisdiction to determine the suit before it.
25. The Appellant challenged this finding stating that the learned Trial Magistrate erred in finding that the area had fallen under adjudication and thus made a land ownership suit when the issue before the court was a claim for damages for destruction of trees. Counsel for the Appellant also noted that there was no notice of preliminary objection on the jurisdiction of the court yet the court declared that it lacked jurisdiction on its own.
26. Counsel for the respondent submitted that even though the appellant's claim was for recovery of damages he filed a defence and denied the said claim and raised the issue of ownership. He stated that he had proved through evidence that the land fell in an adjudication area and that both parties were claiming ownership of the land. He further averred that the dispute had not been settled by the land adjudication officials. The respondent's submission is that the appellant's claim of tree damage could not be sustained before land ownership was determined and the trial court was right in its findings. He maintained that before any claim touching on land could be made, the consent of the Land Adjudication Officer was mandatory.
27. It is not in dispute that the area where the suit land is located is under adjudication. Section 5 2(b) and (d) of the *Land Adjudication Act* CAP 284 provides that upon declaration of an area as an adjudication section, the *Land Adjudication Act* provides a forum and procedure for the ascertainment and



recording of rights and interests in community land and such rights and interests are to be ascertained in accordance with the Act. Section 5 of the Act provides for the establishment of adjudication sections and ascertainment and recording of interests in land and states;

“(b) shall declare that interests in land within the adjudication section will be ascertained and recorded in accordance with this Act;

d. may require any person making a claim to point out to the demarcation officer or to demarcate or assist in the demarcation of the boundaries of the land in which he claims to be interested or to clear any such boundaries or any other line in the manner and before a date fixed by the demarcation officer..”

28. It is also not in dispute that the plaintiff did not obtain consent to file the suit from the Land Adjudication Officer under section 30 of the Act. The said section states;

“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29 (3) of this Act.”

29. The Court of Appeal in the case of *Bhaijee & another v Nondi & another (Civil Appeal 139 of 2019)* [2022] KECA 119 (KLR) (18 February 2022) (Judgment) found that:

“Therefore, at the time of inception of the suit, no consent had been granted by an adjudication officer, and the trial Judge erred in finding that such consent existed. The lack of consent rendered the said suit and the entire proceedings thereunder a nullity. It is also notable that under section 30(4) of the *Land Adjudication Act*, the orders given in such proceedings are subject to any appeal process and determination, and we hereby find the said orders given by the ELC to be null and void ab initio. In *Macfoy vs United Africa Co Ltd* [1961] 3 All ER 1169, Lord Denning held as follows as regards the effect of a null and void act:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.....”

30. The issue for determination is whether the dispute at hand, being a claim for recovery of damages arising out of claimed trespass to the plaintiff’s land and destruction of trees, required the consent of the Land Adjudication Officer under Section 30 of the *Land Adjudication Act* before being filed in court.

31. The Black’s Law Dictionary defines trespass to mean;

“In the strictest sense, an entry on another’s ground, without a lawful authority, and doing some damage, however inconsiderable, to his real property.”



32. 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.
33. 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.”
34. The court above further quoted *Winfield & Jolowicz on Tort*, Sweet & Maxwell, 19th Edition page 428 as follows:
- “Trespass to land, like the tort of trespass to goods, consists of interference with possession. Mere physical presence on the land does not necessarily amount to possession sufficient to bring an action for trespass. It is not necessary that the claimant should have some lawful interest in the land. This is not to say that legal title is irrelevant, for where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession. More generally, in the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land.”
35. From the foregoing, it is clear that the appellant in making a claim based on trespass was asserting that he has the right to immediate and exclusive possession of the suit land. He was also asserting that the respondent entered onto the suit land without lawful authority, or reasonable excuse. In the present case, the appellant pleaded that the respondent trespassed onto his parcel of land. During the hearing, the plaintiff asserted that he had evidence that he owned the suit land.
36. Further, as stated in *Winfield & Jolowicz on Tort*, where the facts leave it uncertain which of several competing claimants has possession, it is in him who can prove title that can prove he has the right to possession.
37. In the present case the question of ownership is yet to be ascertained through the land adjudication process. It is thus difficult for the appellant to assert ownership rights where such ownership is under dispute and yet to be determined and thus prove trespass to his land.
38. Section 30 of the *Land Adjudication Act* prohibits a party from instituting a suit and also prohibits the court from entertaining any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final. From the definition of trespass and the authorities cited above, it is the court's view that the interest in the land referred to under section 30 of the *Land Adjudication Act* means ownership or possessory rights that a person (natural or juridical) holds in the land under dispute.
39. In the court's view, the appellants were required to obtain the consent of the Land Adjudication Officer to bring the claim to court. It is the finding that the trial court did not err in finding that in the circumstances of this case, he lacked jurisdiction to entertain the suit in absence of the consent.
40. The Appellant further claimed that the issue of jurisdiction was not before the trial court. Contrary to the said assertion, the court is of the view that the issue was raised in the defendant's witness statement and the documents filed in court and the trial court was under an obligation to consider the same.



**Ground 2: That the findings of the learned trial magistrate were against the weight of the evidence adduced which amounted to a miscarriage of justice on the part of the Appellant.**

41. The evidence adduced by the appellant before the trial court included an assessment report which indicated that he had suffered damage to trees amounting to Ksh. 846,612/=. However, the report did not indicate which parcel of land the damage occurred and did not confirm ownership of the land where the damage occurred. As expressed above, the offence of trespass is committed in violation of another's property rights, which rights the Appellant did not prove that he possesses.
42. The defendant produced before the trial court correspondence indicating there was an existing land ownership dispute between the parties. Letters from the Chief dated 9<sup>th</sup> February 2016 and from the Land Adjudication and Settlement Department, Mutomo District dated 13<sup>th</sup> June 2018 refer to the dispute between the parties herein ordering them to maintain the status quo to allow the adjudication officers to give their determination. As found earlier, the court is not satisfied that trespass could be proved in this case unless the appellant showed that his interests in the land had been ascertained.
43. In the court's view the appellant did not provide sufficient evidence to support his claim having re-evaluated and re-considered the evidence adduced before the trial court and having further considered the law of trespass to land and the provisions of the Land Adjudication Act, the court finds that the Trial Court did not err in dismissing the appellant's suit.
44. Consequently, this court finds that this appeal lacks merit and the same is hereby dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 18<sup>TH</sup> OF JULY, 2024.**

**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Judgement read in open court and virtually in the presence of;

Musyoki - Court Assistant

M/S Kiilu holding brief for J. M. Muinde for the Appellant

M/S Kiama for the Respondent

