



**Mulwa v Ngunanga (Environment and Land Appeal 3 of 2023)  
[2024] KEELC 5373 (KLR) (18 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5373 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 3 OF 2023**

**LG KIMANI, J**

**JULY 18, 2024**

**BETWEEN**

**JUSTUS MUTHUI MULWA ..... APPELLANT**

**AND**

**BONIFACE KILONZI NGUNANGA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the Learned Senior  
Principal Magistrate sitting in Kitui CMCC No.490 of 2015 Justus Muthui  
Mulwa Vs Boniface Kilonzi Ngunanga dated 10/3/2022 M. Kasera SPM)*

**JUDGMENT**

1. This appeal is from the judgment and decree of the Senior Principal Magistrate Hon. M. Kasera in Kitui CMCC No.490 of 2015 delivered on 10<sup>th</sup> March 2022. The Memorandum of Appeal sets forth the following grounds of appeal:
  1. The Learned Trial Magistrate erred and misdirected herself in law by writing a ruling in a case that was fully heard instead of a judgment.
  2. The Learned Senior Principal Magistrate erred and misdirected herself in law when she failed to find that the Respondent had not obtained consent from the Appellant as an Administrator in respect of Land Parcel No. Mutonguni/Kauwi/1270. Any dealing with the said Land amounted to trespass upon private land and the Appellant was entitled by law to enforce by suit the said cause of action.
  3. The Learned Senior Principal Magistrate erred and misdirected herself in law when she failed to find that the Respondent was an intermeddler on Land Parcel No. Mutonguni/Kauwi/1270 and was liable to be dealt with under the provisions of the relevant law.



4. The Learned Senior Principal Magistrate erred and misdirected herself in law when she failed to find that the Administrator of the Estate is a personal representative of the deceased for all purposes of the grant and that the property of the deceased vests in him and that not even a beneficiary of the estate can interfere with the same without the consent of the said Administrator.

The Appellant prays that the ruling and order of the Learned Senior Principal Magistrate be set aside and judgment be entered as prayed in the Plaint together with costs before the trial court and this appeal.

2. The Appellant herein was the Plaintiff before the trial court where he filed a Plaint dated 26<sup>th</sup> October 2015. He averred that the suit property land parcel No. Mutonguni/Kauwi/1270 was registered in the name of Peter Mulwa Nzau (Deceased) whose estate he was administering.
3. He claimed that the defendant entered the suit land without his authority and consent and has been destroying vegetation, clearing bushes cutting down trees and uprooting sisal plants.
4. The plaintiff averred that the acts of the defendant amount to intermeddling with the estate of the deceased in contravention of Section 45(2) of the *Law of Succession Act*. He therefore prayed for an injunction restraining the defendant from entering and trespassing on and intermeddling with the suit property.
5. The defendant filed his statement of defence denying the contents of the plaint and stated that he is a close neighbour to the plaintiff and the plaintiff's brothers and has never entered the suit property nor done any of the acts that the plaintiff accused him and further stated that the plaintiff's brothers are the ones who commit the said acts.

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

6. Hearing of the suit began with PW 1 the Plaintiff who stated that the suit land is registered in the name of Peter Mulwa Nzau (Deceased) who was his father and whose estate he administers. He produced the grant of letters of administration as evidence.
7. He stated that he had sued the defendant for cultivating, clearing vegetation, destroying bushes and cutting down trees on the suit land without his consent and authority. In particular, the defendant destroyed a sisal plantation meant for commercial purposes. The Plaintiff stated that he wrote a demand letter to the defendant and reported the matter to the police.
8. On cross-examination, the plaintiff stated that one of his brothers later joined him as co-administrator and that they all have a right to use their father's land but have farms in different places from the suit land. He also stated that they are yet to obtain a confirmation of the grant. He also noted that the defendant used to be one of his father's tenants and still now pays rent to his brothers.
9. PW 2 Dennis Kathini testified that he knows the plaintiff as well as Peter Mulwa (Deceased) who was his grandfather, the owner of Land Parcel No. Mutonguni/Kauwi/1270 where he also lives. The witness confirmed that the plaintiff has been tilling a large portion of the land and planting maize using a tractor. He further stated that he provides casual labour for pay to the defendant such as weeding.
10. Upon cross-examination, PW 2 stated that the plaintiff is his uncle but the defendant is not his relative. He denied knowledge that the plaintiff would like to inherit the entire of his grandfather's land.
11. For the defence, DW 1, Boniface Kilonzi Ngunanga the defendant testified and adopted his witness statement in which he stated that he is a businessman in Kabati town, operating a cereals shop. The



plaintiff and his brothers are close neighbours and were close to their father, Peter Mulwa Nzau and the shop that he operates in Kabati was rented to him by the plaintiff's father.

12. He stated that every season he has arrangements with the plaintiff's brothers Muinde Peter Mulwa, John Mulwa, Ngindu Mulwa and Paul Mulwa where he is hired to plough, plant, cultivate and harvest crops on the suit parcel of land on credit. He further stated that he takes the cereals to his shop, takes account of all his expenses deducts them and pays the plaintiff's brothers the rest of the price of the produce.
13. He did this even during the lifetime of their father who had given each of his sons a portion of the subject parcel of land. He stated that the plaintiff has not been happy with this arrangement because he does not like his brothers' doing well and intends to frustrate this service and his brothers.
14. He also stated that the plaintiff is indeed the holder of the grant of letters of administration intestate but that his brothers filed a protest and sought to be joined with one Muinde Peter Mulwa now a co-administrator.
15. DW 1 mentioned that the plaintiff has also purported to issue a notice to vacate his shop when he dutifully pays rent without the consent of the other beneficiaries and his view is that this suit is not well-intentioned but is a witch hunt to frustrate his brothers. The defendant also adopted his bundle of documents as evidence before the court.
16. On cross-examination, DW 1 stated that he has used the suit land since 2015 but that they did not sign a lease agreement
17. Regarding the suit land, the defendant stated that the plaintiff and his brothers have been using, farming cultivating the same during the life of and after the death of their father. On re-examination, he stated that he does not use the suit land but only ploughs for the plaintiff's brothers.
18. DW 2 Muinde Peter Mulwa adopted his witness statement in which he stated that he was the plaintiff's brother and that the plaintiff unilaterally filed a succession case for the grant of letters of administration. The witness later filed a caveat and protest on learning of this and he was joined as a co-administrator.
19. He and his brothers have been using, farming and cultivating the suit land during the lifetime and after the death of their father and they have been hiring the defendant to plough their portions of land with the understanding that, after the harvest, they would sell part of the produce to the defendant and he would deduct his expenses and pay them the difference.
20. The witness testified that the defendant was their close neighbour and a close friend of their late father. He noted that the defendant would only cultivate the portions that he and his brothers were shown by their father to occupy and possess. His view is that this case was filed by the plaintiff only to scare away the defendant because he helps them to farm on a large scale with a tractor and they get good money from selling the surplus.
21. On cross-examination, he stated that the plaintiff's grant of letters of administration was cancelled and he was made co-administrator. The plaintiff has a large portion of land which he cultivates.
22. The trial court judgment was delivered on 10<sup>th</sup> March 2022, where the court found that it indeed had the jurisdiction to grant an injunction under Order 40 of the Civil Procedure Rules but that the plaintiff had failed to prove the trespass on the part of the defendant and dismissed the suit with costs to the defendant.



## **Appellants' submissions**

23. Counsel for the Appellant submitted that at the time of filing the suit, the appellant was the sole administrator of the estate of Peter Mulwa Nzau and that the acts of the defendants' trespass and intermeddling were not denied, noting that the defendant only stated that he was authorized by the Appellant's brother DW 2 to enter the suit land.
24. Submitting on ground 1 of the Memorandum of Appeal, the appellant stated that the trial court erred in law in delivering a ruling instead of a judgment while the suit was fully heard. Counsel quoted section 25 of the Civil Procedure Act and Order 21 Rule 1 of the Civil Procedure Rules, stating that a decree cannot be extracted from a ruling.
25. On ground 2, it is submitted that the appellant was the sole administrator of the estate of Peter Mulwa Nzau (Deceased) when he filed the trial court suit and that under Sections 79 and 82 of the Law of Succession Act, the property of the deceased vests in the administrator. Counsel for the appellant stated that the appellant had a cause of action when the respondent trespassed into the suit property.
26. On ground 3, the appellant submitted that the respondent was an intermeddler and that the fact that he was allowed by DW 2 to till the land does not absolve him of this because DW 2 was not an administrator at the time. Counsel quoted Section 45(1) of the Law of Succession Act on the intermeddling and relied on the case of Kakamega High Court Succession Cause No. 263 of 2002 where the court held that any transaction entered into with a person who is yet to be appointed administrator over estate assets would be null and void.
27. Counsel for the appellant relied on the holding in the cases of:

Philister Anyango Okoth-vs Wilson Otieno Odadi (2017) eKLR Francis Musyoki Kilonzo-vs-Vincent Mutua Mutua Mutiso (2013) eKLR In the estate of Veronica Njoki Wakagoto NBI HCC P&A 1974 of 2008
29. The Appellant submitted that his suit was well founded and that he is entitled to judgment as prayed in the plaint and prays that an order be made setting aside the judgment of the trial court and allowing this appeal with costs.

## **The Respondent's Written Submissions**

28. Counsel for the Respondent submitted that the appellants and his brothers are the sons of Peter Mulwa Nzau (deceased) who is registered as owner of the suit land parcel Mutonguni/Kauwi/1270 and that the deceased had assigned each son their specific portions where they have been in occupation, use and possession. The Appellant's brothers had an arrangement with the Respondent since the lifetime of the deceased and after to help them plough their portions of the land using his tractor and with harvesting. He claims that the Appellant admitted that his brothers have a right to use the land.
29. The Respondent highlighted that he has never entered or worked on the land of his own right or his own invitation but was always invited by the Appellant's brothers. Counsel submitted that since there was no dispute as to the appellant's brothers' right to the suit property the respondents had a right to hire and employ labour, pointing out the evidence of DW 2 Muinde Peter Mulwa, who confirmed the reason for the Respondent's occasional presence on the suit land. The Respondent noted that no law nor order barred the Appellant's brothers from accessing, farming or even using any portion of the suit land in as much as the Appellant was the sole administrator of their father's estate at the time.



30. The Respondent relied on the definition of trespass as was given in the case of Rhoda Skiilu v. Jianxi Wayer and Hydropower Construction Kenya Ltd (2019) eKLR where section 3(1) of the [Trespass Act](#) was quoted as well as the definition of an innocent trespasser in Black's Law Dictionary as one who believes he has a right to enter another's land.
31. The respondent concluded that the appellant's brothers had a right to hire labour or workers without the administrator's permission as they did not require his permit to occupy the land in the first place.
32. As to the issue of writing a ruling instead of a judgment, it was submitted that it was a small issue of wrong titling and a reasonable mistake that could be excused.

### **Analysis and Determination**

33. The role of an appellate court was stated by the Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424].

“The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

- i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;
  - ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and
  - iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”
35. The court has considered the grounds of appeal as stated in the Memorandum of Appeal, the record of appeal and submissions by counsel for the parties. The court proposes to deal with ground 1 of the appeal and consolidate grounds 2, 3 and 4 and deal with them together.  
On ground 1, counsel for the Appellant submitted that the trial magistrate headed her decision as a ruling instead of a judgment having heard the suit and was due for judgment. Counsel relied on the provision of Section 25 of the [Civil Procedure Act](#) which provides that;

“The court, after the case has been heard, shall pronounce judgment, and on such judgment a decree shall follow.”

34. Order 21 Rule 1 of the Civil Procedure Rules provides that:

“In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates. Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment.”

35. From the court record, it is indeed true that the suit was heard by way of oral evidence and the decision delivered ought to have been in the form of a judgment, but was headed as a ruling. The court is of the opinion that the trial court decision did not amount to a ruling just because it was headed as such. The learned trial magistrate analyzed the pleadings, evidence adduced at the trial and the case as a whole and came to a finding that effectively concluded the case.



36. Article 159(2)(d) provides that:

In exercising judicial authority, the courts and tribunals shall be guided by the following principles:-

(d) justice shall be administered without undue regard to procedural technicalities;

40. Further to this, Section 99 of the Civil Procedure Act provides for the amendment of judgments, decrees or orders and states that;

“Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties.”

37. This court thus directs that the decision of the trial court Senior Principal Magistrate sitting in Kitui CMCC No.490 of 2015 Justus Muthui Mulwa Vs Boniface Kilonzi Ngunanga dated 10/3/2022 M. Kasera SPM be amended to and titled “Judgement” in place of “Ruling”

On Grounds 2, 3 and 4 the court confirms that the subject matter of the suit was Land Parcel No. Mutonguni/Kauwi/1270 and was registered in the name of Peter Mulwa Nzau (Deceased) as was confirmed by the certificate of official search produced in court. The Appellant filed the suit claiming that the respondent trespassed onto the suit land without his authority and consent as the sole administrator of his father’s estate, which amounts to intermeddling with the estate of the deceased.

38. Section 45(1) of the Law of Succession Act CAP 160 provides that:

“Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.”

39. The Appellant argues that all the property of the deceased was vested in him and that he was the only one who could give authority to the defendant to deal with the suit land and not his brother DW 2 as he was not yet co-administrator at the time of filing suit. He relied on Section 79 of the Law of Succession Act which provides that:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

40. The Appellant also relied on his mandate as administrator to file a cause of action as an administrator under Section 82(a) of the Act which provides that:

“Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;”

41. On the 2<sup>nd</sup> ground of appeal, it is indeed true that at the time of filing the suit, the appellant, as the personal representative of the estate of the deceased was initially the personal representative of the



deceased for all purposes of that grant as provided under Section 79 of the Law of Succession Act. The Court also finds that the respondent did not seek or obtain the consent of the appellant in carrying out any of the activities carried out on the suit parcel of land. However, as will be discussed later, for purposes of the present suit was the consent of the appellant required for purposes of the respondent's activities on the suit land?

42. In the case of *Re Estate of M'Ngarithi M'Miriti* [2017] eKLR it was held that:

“Whereas there is no specific definition provided by the Act for the term intermeddling, it refers to any act or acts which are done by a person in relation to the free property of the deceased without the authority of any law or grant of representation to do so. The category of the offensive acts is not heretically closed but would certainly include taking possession, or occupation of, disposing of, exchanging, receiving, paying out, distributing, donating, charging or mortgaging, leasing out, interfering with lawful liens or charge or mortgage of the free property of the deceased in contravention of the Law of Succession Act. I should add that any act or acts which will dissipate or diminish or put at risk the free property of the deceased are also acts of intermeddling in law. I reckon that intermeddling with the free property of the deceased is a very serious criminal charge for which the person intermeddling may be convicted and sentenced to imprisonment or fine or both under section 45 of the Law of Succession Act. That is why the law has taken a very firm stance on intermeddling and has clothed the court with wide powers to deal with cases of intermeddling and may issue any appropriate order(s) of protection of the estate against any person.”

43. The question for determination is whether the respondent was guilty of trespass to the suit Land Parcel No. Mutonguni/Kauwi/1270 and/or intermeddling with the said land. 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.”

44. 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.”

45. 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.”



46. The respondent contended that the appellant's brothers are the ones who were residing on and had possession and occupation of parts of the suit land during the lifetime of their father and were still in possession at the time the suit was in place. He contended that he had arrangements with the said plaintiff's brothers where every season he was hired to plough, plant, cultivate and harvest crops on the suit parcel of land on credit and that he would take the cereals to his shop and thereafter take account of all his expenses, deduct them and pay the plaintiff's brothers the rest of the price of the produce.
47. That he did this during the lifetime of the father to the plaintiff and his brothers who had given each of his sons a portion of the subject parcel of land. He stated that the plaintiff has not been happy with this kind of arrangement because he does not like his brothers' doing well and intends to frustrate this service and his brothers.
48. The position that the father to the appellants had given his children portions of the land to occupy was not delved by the appellant. This was also supported by DW1 Muinde Peter Mulwa, the plaintiff's brother, who testified that together with his brothers they had been using, farming and cultivating the suit land during the lifetime and after the death of their father. DW 1 also confirmed that they have been hiring the defendant to plough their portions of land with the understanding that, after the harvest, they would sell part of the produce to the defendant and he would deduct his expenses and pay them the difference. The said witness stated that the defendant would only cultivate the portions that he and his brothers were shown by their father to occupy and possess. His view is that this case was filed by the plaintiff only to scare away the defendant because he helps them to farm on a large scale with a tractor and they get good money from selling the surplus.
49. Further, the evidence of PW2 Dennis Mwinzi Kathini confirmed that he lives on the suit land as do the brothers and sisters of the appellant and that they were all entitled to reside on and use the said land as beneficiaries of the estate of the deceased Peter Mulwa Nzau.
50. From the foregoing analysis of the evidence adduced before the trial court and the law, this court also satisfied that the respondent used to carry out seasonal farming activities on the portions of the suit land that had been assigned to the plaintiff's brothers by their deceased father. It is also clear that this was at the instance of the plaintiff's brothers and it happened both during and after the lifetime of their deceased father. The offences of trespass and intermeddling with the property of the deceased estate both deal with elements of illegal possession and occupation of land.
51. The court therefore finds and holds that during his lifetime, the deceased had ceded possession use and occupation of parts of the suit land to his children including the plaintiff, DW 2 and others. The court is satisfied that some of the sons of the deceased used the services of the respondent to plough, plant, cultivate and harvest crops and thereafter pay them after selling the produce. In the circumstances, it cannot be said that the estate of the deceased as represented by the plaintiff as administrator had possession and occupation of the entire suit land as claimed.
52. With the deceased having ceded possession of parts of the suit land to the appellant and his brothers, the court finds erroneous the argument that the deceased's estate had an immediate and exclusive possession of the land as is required to prove the tort of trespass and the offence of intermeddling with the estate of a deceased person.
53. The Court thus finds that the trial magistrate did not err in finding that the appellant did not prove the offence of trespass. The court further finds that the appellant did not prove the offence of intermeddling with the property of the estate of the deceased and dismissing the suit.
54. The final orders of the court are:



1. This appeal succeeds only to the extent that the decision of the Senior Principal Magistrate M. Kasera SPM sitting at Kitui in CMCC No. 490 of 2015 Justus Muthui Mulwa Vs Boniface Kilonzi Ngunanga dated 10/3/2022 be amended and titled “Judgement” in place of “Ruling”
2. Grounds 2,3 and 4 of the appeal are found to have no merit and the same are hereby dismissed.
3. Each party will bear their own costs of the appeal.

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

**L. G. KIMANI**

**JUDGE ENVIRONMENT AND LAND COURT**

The Judgement is read in open court and virtually in the presence of-

Musyoki Court Assistant

M/S Kiama holding brief for Kalili for the Appellant

M/S Amihanda holding brief for Kilonzi for the Respondent

