



REPUBLIC OF KENYA



**M'mboroti & 3 others v Mboroti & 3 others (Environment and Land Appeal  
E017 of 2023) [2024] KEELC 5395 (KLR) (17 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5395 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND APPEAL E017 OF 2023**

**CK NZILI, J**

**JULY 17, 2024**

**BETWEEN**

**ERASTUS KATHURIMA M'MBOROTI ..... 1<sup>ST</sup> APPELLANT  
JOTHAM KIOGORA M'MBOROTI ..... 2<sup>ND</sup> APPELLANT  
JOEL MEME M'MBOROTI ..... 3<sup>RD</sup> APPELLANT  
BENJELINA MWOMBUI M'MBOROTI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**SILAS MUTHAURA MBOROTI ..... 1<sup>ST</sup> RESPONDENT  
FRANCIS KIAMBI M'MBOROTI ..... 2<sup>ND</sup> RESPONDENT  
DOUGLAS MBURUGU ..... 3<sup>RD</sup> RESPONDENT  
DAVID KIMATHI ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal from the judgment of Hon. J Njoroge – (CM)  
delivered on 22.2.2023 in Meru CM ELC No. E009 of 2021)*

**JUDGMENT**

1. The appellants were sued at the lower court by the respondents for trespass into L.R No's. Kiirua/ Kiirua/1631 & 1628. They sought declaratory orders that the land parcels belong to them, eviction, general damages for trespass, and a permanent injunction restraining them from any interference with the suit parcel of land.
2. Through a defense and counterclaim dated 1.10.2021, the 1<sup>st</sup> & 2<sup>nd</sup> appellants denied the alleged trespass. The 1<sup>st</sup> & 2<sup>nd</sup> appellants averred that they were born and brought up on their father's land L.R No. Kiirua/Kiirua/128, measuring approximately 5.1 ha, whose initial owner was M'Mborothi



- M'Murithi, a common patriarch who had two households, the respondents as the first one while the appellants belonged to the second household.
3. The appellants averred that they established their houses on the suit land with the express consent or authority of their father until he passed on in 2015. It was averred that on 11.4.2013, the respondents, without knowledge of the patriarch and themselves, stealthily and maliciously subdivided the initial land into five portions, namely L.R No's. Kiirua/Kiirua 1628 – 1632 and transferred them to the respondent's members of family. The appellants averred that the subdivisions and transfer were subject to their overriding and inherent interest, the land being ancestral in nature and still under their occupation. The appellants averred that their household had filed Meru CMC ELC No. 144 of 2015, originally Meru H.C ELC No. 221 of 2013, against the respondent's household on account of fraud, which was dismissed.
  4. By way of a counterclaim, the four appellants herein, as the plaintiffs in the counterclaim, sued the respondents herein as the defendants in the counterclaim for breach of customary or ancestral trust regarding the five subdivisions of land alluded to above. They asked the court to declare the subdivisions as part of the ancestral land held in trust for them by the respondents and a permanent injunction.
  5. By a reply to the defense and defense to the counterclaim, the 1<sup>st</sup> & 2<sup>nd</sup> respondents averred that it was their late father who voluntarily, freely and lawfully subdivided the suit land into five portions during his lifetime and intervivos, transferred part of it to them and gave the land at Kiirua Nkando to the appellant which they, unfortunately, refused to go and occupy but instead continued trespassing into their share namely L.R No. Kiirua/Kiirua/1631 and 1628, which did not form part of the ancestral land. The 1<sup>st</sup> and 2<sup>nd</sup> respondents denied the alleged trust or breach thereof, terming the suit as bad in law for being filed without leave, for misjoinder, and res judicata in view of the earlier suit.
  6. There is no evidence from the lower court record that the 3<sup>rd</sup> and 4<sup>th</sup> appellants entered an appearance or filed a statement of defense to the counterclaim filed against them.
  7. At the trial, Silas Muthaura Mboroki, Francis Kiambi M'Mboroki and Humphrey Muuta M'Mukira testified as PW 1, 2 & 3, respectively. Relying on witness statements dated 9.8.2021 & 25.3.2022, respectively, they told the trial court the late M'Mborothi M'Murithi had two wives, namely; Grace Ciomathenge and Benjalina Mwombui M'Mboroti. PW1 & 2 said that their father, together with the first wife, acquired land at Marinya "a" Ruibi area measuring 12 ½ acres, later registered as L.R No. Kiirua/Kiirua/128, which remained in the late father's name until 5.11.2012, when the deceased summoned all his children for a family meeting in the presence of the area headman, assistant chief and shared his land among the children.
  8. PW1 said that the deceased eventually attended a land control board meeting at Kiirua, obtained requisite land control board consents to effect his wishes, subdivided his land into five portions and gave the 1<sup>st</sup> & 2<sup>nd</sup> appellants land measuring 9 acres in Kiirua Nkando, which they had been tilling the land since the 1990s.
  9. Subsequently, PW 1 said that he obtained his title deed for L.R No. 1631 in 2013. PW 1 & 2 said that their father willingly and consciously subdivided and transferred the land to them but the 1<sup>st</sup> and 2<sup>nd</sup> appellants refused to hand over vacant possession and instead unsuccessfully sued in Meru ELC No. 144 of 2015. PW 1 produced copies of the register for L.R.NO. Kiirua/Kiirua/128, 1631, 1628, 373; judgment in Meru ELC No. 144 of 2015 minutes dated 15.11.2012 and a letter to OCS dated 20.8.2016 as P. Exh No. 1-7, respectively.



10. PW 1 said that the land in L.R No. Kiirua/Kiirua/473 for the 2<sup>nd</sup> house was never subdivided in the meeting held in the presence of the 2<sup>nd</sup> appellant after the rest boycotted it. He said his late father had a right to subdivide the land. PW 2 confirmed that he was the owner of L.R No. 1628, while L.R No's.1630 & 1631 went to PW 1, 1632 & 1629 to Douglas Mburugu and his sister's son, David Kimathi. PW 2 said that his stepmother has been living on the 1<sup>st</sup> respondent's land since 1970.
11. PW 3, as the assistant chief Milunya Sublocation, confirmed the contents of the family meeting minutes dated 5.11.2013. He said that the two wives of the deceased lived on L.R No. Kiirua/Kiirua/128, while it was only the 2<sup>nd</sup> house that utilized the land in Kiirua/Nkando, PW 3 confirmed that the deceased directed the 2<sup>nd</sup> house to move to Nkando land. He said that the deceased was mentally fit during the meeting and that it was only after his death that the respondent's built houses on the land.
12. Joel Meme Mboroti, Jotham Kiogora M'Mboroti and Benjelina Mwombui M'Mboroti testified as DW 1, 2 & 3. Relying on witness statements dated 1.3.2022, they told the court that on 24.8.2016, the deceased summoned a family meeting to express his wishes over L.R No. Kiirua/Kiirua/128 & 373, his ancestral or family land. DW 1 said that it was resolved at the family meeting that each household would get six acres out of L.R. No.128, as per a copy of the minutes. He said that his late father was elderly and left out the 1<sup>st</sup> and 2<sup>nd</sup> respondents to implement the wishes on behalf of the entire family.
13. DW 1 said that in November 2012, the first house leveled malicious accusations against his mother of witchcraft as an excuse to disinherit them. DW 1 also said that after conducting an official search to establish the status of the title registers, they were shocked to learn of the illegal entries. DW 1 produced the minutes and green card for L.R No's Kiirua/Kiirua/128, 373, and 1258 as D. Exh No. 1-4 respectively. He urged the court to cancel the subdivisions.
14. In cross-examination, DW 1 said that he was not privy to the meeting held in 2012 but confirmed that in CMCC No. 144 of 2015, the court found that this late father had a right to make the subdivisions and effect the transfers. However, DW 1 said that after 2010, his father was mentally unstable; hence, his bother abused the trust bestowed upon him to implement the late father's wishes.
15. DW 2, while associating with the evidence of DW 1, told the court that his mother was not given a share of L.R No. 128, yet that was where she lived. Similarly, he said that after subdivisions of his land, the deceased was left with 1 ½ acres out of L.R No. 128, where he was eventually buried. DW 2 confirmed attendance during the meeting of 2012, chaired by PW 3 and an area surveyor. DW 2 also confirmed that he did not appeal against the judgment in CMCC No. 144 of 2015. He Similarly confirmed that they started buildings after 2015 on L.R No. 128.
16. DW 3, on her part, told the court that she had lived on L.R No. 128 together with her six children and those of the 2<sup>nd</sup> wife. DW 3 said that there was no succession case that had been filed regarding the estate of the deceased husband, though PW 1 had a title deed for the land which was supposed to be shared between the two houses. Instead, DW 3 said the 1<sup>st</sup> respondent breached the trust and shared the land for the 1<sup>st</sup> house only. D.W. 3 confirmed that though a meeting took place in the presence of PW 3, the same was not about land sharing but on witchcraft allegations. Similarly, DW 3 also confirmed that she had previously sued the 1<sup>st</sup> respondent.
17. The appellants, by an amended memorandum of appeal dated 17.4.2023, fault the lower court's judgment on the basis that:
  - i. Whereas it is not disputed that the 1<sup>st</sup> – 3<sup>rd</sup> appellant were born and bred on L.R No. Kiirua/Kiirua/128 and have subsequently established their household there and the 4<sup>th</sup> appellant was



married and settled on the said land with effect from 1976 till to date, the trial court erred in finding there were no overriding interests on the suit land.

- ii. It failed to appreciate that there was customary trust, and by issuing eviction orders, it breached the concept of intergenerational equity.
  - iii. It failed to appreciate that the appellants and the respondents had equal birth rights and neither of them could evict the other from the land they had all been occupying since birth without determining their respective interests in the estate of the deceased father.
  - iv. It erred in law and fact by failing to appreciate the fact that it was the government that had allocated the deceased the land for settlement, use and occupation by his family land; hence, the appellants were stakeholders and hence were held in a fiduciary.
18. With leave, parties agreed to canvass the appeal by way of written submissions due by 6.7.2024.
  19. The respondents relied on written submissions dated 2.7.2024. It was submitted that the registration of the two parcels of land in favor of the 1<sup>st</sup> & 2<sup>nd</sup> respondent was a gift *intervivos* subject to no customary or ancestral trust since the initial land was acquired by the late patriarch in 1964 as an allocation from a settlement scheme hence had no intergenerational ties.
  20. The respondents submitted that the land transactions occurred during the lifetime of the initial owner, who had been unsuccessfully sued on account of fraud by the appellants, and the decision was not appealed against. Reliance was placed on *A.G. of Uganda vs Awadh Omar & others* (2013) eKLR.
  21. The respondents, relying on the doctrine of approbation, deprivation and election, submitted that the appellants after losing in the former suit, are estopped in law from stating in their case and or departing in their pleadings from the same facts otherwise the appeal was not only an afterthought but also an abuse of the court process. Reliance was placed on *Scarf vs. Alfred George Jardine* (1881 – 1882) 7 App CAS P. 345 & 357 *Republic vs ICPAK exparte Mundia Njeru Gateria* (2010) eKLR.
  22. The mandate of this court in exercising the power of appeal is set out under Section 78 of the [Civil Procedure Act](#). It involves re-evaluating, re-assessing and reviewing the lower court record and coming up with independent findings on facts and the law while giving credit to the lower court, which has the advantage of observing the demeanor and hearing the witnesses firsthand. See *Selle vs Associated Motor Boat Co. Ltd* (1968) 123 E.A, *Gitobu Imanyara & others vs AG & others* (2016) eKLR.
  23. Having reviewed the lower court record, the following issues call for my determination:
    - a. If the suit before the trial court was *res judicata* and an abuse of the court process.
    - b. If the appellants proved the existence of a customary trust and its breach.
    - c. If the 3<sup>rd</sup> & 4<sup>th</sup> respondents were properly impleaded and joined in the suit at the lower court.
    - d. If the 3<sup>rd</sup> & 4<sup>th</sup> respondents were served with any summons to enter an appearance and hearing notice for the counterclaim?
    - e. If the appeal has merits.
  24. The primary pleadings before the trial court were the plaint dated 7.8.2021 which related to the 1<sup>st</sup> & 2<sup>nd</sup> respondents as the primary plaintiffs and the 1<sup>st</sup> & 2<sup>nd</sup> appellants as the primary defendants. In the statement of defense dated 1.10.2021, the 3<sup>rd</sup> and 4<sup>th</sup> appellants were introduced as the 3<sup>rd</sup> & 4<sup>th</sup> plaintiffs to the counterclaim alongside the 1<sup>st</sup> & 2<sup>nd</sup> appellants, wherein they introduced the 3<sup>rd</sup> & 4<sup>th</sup> respondents and defendants to the counterclaim.



25. The plaintiffs to the counterclaim signed an authority dated 1.10.2021 to authorize the 2<sup>nd</sup> appellants herein to plead on their behalf. A counterclaim is a stand-alone suit. It fails or stands on its form. In the lower court record, this court finds no evidence that summons to enter appearance was filed, signed and served upon the 3<sup>rd</sup> & 4<sup>th</sup> respondents alongside the counterclaim.
26. The reply to the defense and defense to counterclaim dated 1.10.2021 was filed by the 1<sup>st</sup> & 2<sup>nd</sup> respondent's lawyers on record. There was no entry of appearance by the said law firm to represent the 3<sup>rd</sup> & 4<sup>th</sup> respondents. Similarly, if the 3<sup>rd</sup> & 4<sup>th</sup> respondents were not listed as witnesses in the primary suit, they did not participate in the hearing of the counterclaim. There is no evidence of service with summons to enter an appearance or hearing notices by the persons who joined them to the suit.
27. The appellants have before this court amended the memorandum of appeal to include the 3<sup>rd</sup> & 4<sup>th</sup> respondents as well as the 3<sup>rd</sup> and 4<sup>th</sup> appellants. There is no evidence that the appellants served the 3<sup>rd</sup> & 4<sup>th</sup> respondents with the amended memorandum of appeal. Failure to file, extract, and serve summons to enter appearance under Order 5 of the Civil Procedure Rules renders the suit or counterclaim void and nullity ad initio. There cannot be an existing suit or counterclaim as held in Leonard Njogu vs Barclays Bank of Kenya & another (2014) eKLR where summons to enter an appearance are omitted.
28. Evidence of service of summons is generally made through an affidavit of service. There is no evidence that the 3<sup>rd</sup> and 4<sup>th</sup> respondents entered appearance to the counterclaim after service with a summons to enter appearance. See PCK vs Luandar & 2 others (2004) 1KLR 359. The critical role of summons to enter appearance cannot be gainsaid. Summons to enter appearance is what informs a defendant of the suit and invites him to defend it. See Equatorial Commercial Bank Ltd vs. Mahanson (K) Ltd (2012) eKLR. Summons to enter appearance cannot, therefore, be overlooked. On that score alone, the counterclaim by the appellant against the 3<sup>rd</sup> and 4<sup>th</sup> respondents was dead on arrival.
29. Even if there was a regular counterclaim, could it have been sustained in view of the previous suit, namely Meru CMCC ELC No. 144 of 2015? P. Exh No. (5) shows that the 3<sup>rd</sup> & 4<sup>th</sup> appellants were the plaintiffs suing the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> respondents herein as defendants in the former suit. The prayers were for cancellation and reversion of title deeds L.R No. 1628 & 1632 to L.R No. 128. The issues set out for determination by the trial court on page number 4 of the judgment, among other things, included whether there was customary trust or overriding interest under section 301 of Registered Land Act Cap 300 (retired) and or breach of promise by the deceased father. In paragraphs 17 – 42 of the judgment, the trial court exhaustively addressed its mind on customary trust.
30. Res judicata aims at putting finality to suits and avoiding vexing a party twice on a determined matter or issue to finality by a court of competent jurisdiction. In Wandua & others vs Egoji Estates Ltd & another E & L Civil Suit No. 103 of (2020) (2024) KEELC 1416 (KLR) (14<sup>th</sup> March 2024) (Ruling), the court cited John Florence Maritime Services Ltd & Another vs CS Transport and Infrastructure & others (Petition No. 17 of 2015) (2021) KESC 3 a (KLR) (Civ) (6<sup>th</sup> August 2021) (Judgment), that res judicata was a judicial device on the finality of court decisions and once a judgment becomes conclusive matters so decided cannot be re-opened by the same parties and covers not only points that parties were required to bring on board, but also every point which properly belonged to the subject of litigation.
31. In this appeal, the addition of new parties or new causes of action ostensibly to defeat the doctrine of res judicata by giving a fresh cosmetic facelift to the same exact suit or cause of action between the same parties, as held in Njangu vs Wambugu (2004) eKLR, cannot escape scrutiny under Section 7 of the Civil Procedure Act. I find the counterclaim was res judicata and an abuse of the court process.



32. Having arrived at the said findings, and given that D.W. 1, 2 & 3 admitted that they never appealed against the judgment dated 8.4.2020, were the 1<sup>st</sup> & 2<sup>nd</sup> appellants justified to hang onto the land belonging to the 1<sup>st</sup> & 2<sup>nd</sup> respondents? Did the 1<sup>st</sup> & 2<sup>nd</sup> respondents prove entitlement to eviction, permanent injunction, and general damages for trespass?
33. Trespass is unjustified entry, and occupation of the land of another trespass is actionable per se. Prove of trespass is through ownership and illegal entry by another person. In *KPLC & another vs Ringera & others* (2022) KECA 104 (KLR) (4<sup>th</sup> February 2022) (Judgment), the court said that, since liability for the alleged trespass was not in dispute and since trespass was continuing for the benefit of the appellant to the exclusion of the respondents, a relief for general damages was inevitable.
34. In this appeal, the title deeds held by the 1<sup>st</sup> & 2<sup>nd</sup> respondents are not under attack on account of illegality fraud or obtaining through corrupt means. Since the issuance of the title deeds in favor of the 1<sup>st</sup> & 2<sup>nd</sup> respondents the appellants remained on the suit as unwanted persons and as trespassers. It does not matter what they were there with the permission of their late father and mother. The appellants failed to challenge the decision of their late father before he passed on. They opted not to sue him between 2013 and 2015, when the entries were made to the register and before he passed on.
35. Meru CMCC No. 144 of 2015 was filed on 12.8.2013. The appellants did not join him later in the suit. There was no court process initiated to have the deceased declared mentally unfit on account of sickness or old age. The appellants waited until their late father passed on to enforce the alleged customary trust, fraud, and promissory estoppel against their step-brothers. The claim based on fraud was time-barred. The other limbs of the claim were res-judicata. My finding is that the trial court was in order to allow the claim and dismiss the counterclaim.
36. The upshot is that the appeal has no merits. It is dismissed with costs to the respondents.

**DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 17<sup>TH</sup> DAY OF JULY, 2024**

In presence of

C.A Kananu

Miss Kerubo for the appellant

Miss Mukaburu for the respondents

**HON. C K NZILI**

**JUDGE**

