



REPUBLIC OF KENYA



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**Mutegi v Mitirithu Company Ltd & another (Environment and Land Appeal
E052 of 2021) [2024] KEELC 7381 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7381 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E052 OF 2021
MD MWANGI, J
OCTOBER 29, 2024**

BETWEEN

EVERLINE NJERI MUTEGI APPELLANT

AND

**MITIRITHU COMPANY LTD & ANOTHER & ANOTHER & ANOTHER &
ANOTHER & ANOTHER & ANOTHER RESPONDENT**

JUDGMENT

1. This appeal was initiated by way of the Memorandum of Appeal dated 27th July, 2021. It is an appeal from the judgment and decree of Hon. P. Muholi (Mr.) Principal Magistrate, dated 30th June 2021, in the Chief Magistrate's Court at the Milimani Commercial Courts, Civil Suit No. 2263 of 2012. The Appellant listed 8 grounds of appeal in the Memorandum of Appeal. She prays that the judgment and decree in Milimani Chief Magistrate's Court, civil case No. 2263/2012 be set aside and be substituted with an order dismissing the said case. She further prayed that the 1st Respondent be condemned to pay the costs of this appeal and of the suit in the lower court.
2. The Appellant challenged the decision of the Magistrate's Court on amongst other grounds that the Learned Magistrate erred in law when he made orders directing parties to gather more evidence post-judgment. The Appellant asserted that the Hon. Magistrate made orders directing that a survey be done and orders of eviction to issue without resorting to court to test veracity of the survey findings.
3. It is the Appellant's position that the Hon. Magistrate failed to appreciate that his jurisdiction ended with his delivery of the judgment and that he had no powers in law to make orders whose effect were to postpone the judgment. It was the Appellant's view that the Learned Magistrate's orders had the effect of justifying and filling gaps in the 1st Respondent's case turning his judgment to an opinion whose execution depended on a future event that the court had no control over. The Learned Magistrate, according to the Appellant left the work of making the final decision on the matter to surveyors who were not under his control, thereby ceding his judicial function to third parties.



4. It was the Appellant's argument that the Learned Magistrate further directed that the Appellant bears the costs of gathering the evidence. It is the Appellant's case therefore that the Learned Magistrate failed to make conclusive findings on the issues before him and arising from the parties' pleadings. Further, he failed to dismiss the 1st Respondent's case despite holding that the 1st Respondent had not proved his case on a balance of probabilities.

Court's Directions

5. The court's directions were that the appeal be canvassed by way of written submissions. The Appellant and the 1st Respondent complied and filed their respective submissions. I have had the opportunity to read the submissions which form part of the record of this court.

Determination

6. The law is well settled on the duty of the 1st Appellate court.
7. As Mativo J (as he then was) stated in the case of *Mursal & Ano vs Manese (suing as the legal administrator of Dalphine Kanini Manesa)*{2022} (Civil Appeal E20 of 2021) KEHC 282 (KLR)(6 April 2022) (Judgement),

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and 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.”

8. The same position was enunciated in the case of *Selle & another -vs- Associated Motor Boat Co. Ltd & others* (1968) E.A 123, where the court stated that:

“... 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 a 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.”

9. I have taken time to keenly read the pleadings in the original suit and the impugned judgment which was delivered on 30th June 2021.
10. In the said judgment, the Learned Magistrate, after analyzing the pleadings and evidence adduced framed three issues for determination, namely;
 - i. whether the Plaintiff is the legal owner of the subject property,
 - ii. whether the subject property is the same property where the 2nd Defendant resides and has constructed;
 - iii. whether the Plaintiff is entitled to the reliefs sought.
11. On the first issue, the Learned Magistrate found that the Plaintiff was the registered owner of the subject property.



12. On the 2nd issue, the Learned Magistrate held that the orders as sought by the Plaintiff cannot be granted until the true boundaries are determined so as to determine which part of the 2nd Defendant's property encroaches on the subject property. This was after stating that a boundary dispute ought to be determined first by the Land Registrar before the parties can move to court to seek further orders. In the circumstances, the Learned Magistrate ordered that the Plaintiff's suit, against the 2nd Defendant, be stayed pending the exercise of the order (ii) viz,
 - “ That the Land Registrar with the help of an opposite surveyor, is ordered to conduct a fresh survey and any other exercises necessary to determine the boundaries of the subject property LR No. 209/10920 situate within the City Council of Nairobi, within Nairobi area, within a period of six (6) months and the costs therefrom be shared by the parties.”
13. The Learned Magistrate further ordered that the status quo be maintained pending completion of the exercise.
14. The Learned Magistrate's last order was that after the conduct of the exercise, if any part of the 2nd Defendant's property is found to have encroached into the Plaintiff's property, the Plaintiff' suit, against the 2nd Defendant, shall succeed in terms of prayer (a), (b) and c). Each party was to bear its own costs.
15. The 1st Respondent in his plaint dated 3rd May 2012 had sought judgment against the Defendants (the Appellant and the 2nd Respondent in the appeal) jointly and severally for;
 - a. A mandatory injunction
 - b. An eviction order
 - c. The OCS Embakasi Police Station to supervise the eviction and provide the requisite security.
 - d. Mesne profits for loss of user
 - e. Costs of this suit
 - f. Interest on (d) and (e) above at court rates.
 - g. Any other or further relief deemed fit by the Honourable Court to grant.
16. The Learned Magistrate in his judgment did not make a determination on the prayer for mesne profits; neither did he dismiss it nor make a finding whether that it had succeeded. He simply left it hanging without any directions.
17. From my analysis of the pleadings filed, the 1st Respondent's cause of action from my reading of the Plaint was trespass to land against the Defendants. The Plaintiff at paragraph 3 to 7 of its plaint elaborated on its complaint against the Defendants. It asserted that on diverse dates, the Defendants had without any justifiable cause, permission and or license from the Plaintiff as the registered proprietor, encroached and or entered into the Plaintiff's property and continued to do so, encroach and or enter. The Defendants had further caused to be erected on the subject property, illegal structures without justifiable cause, permission and or license from the Plaintiff. The encroachment and or entry by the Defendants is trespass which has denied the Plaintiff use of its property.
18. This narration in the plaint explains the Plaintiff's prayer for mesne profits as well as the ones for mandatory injunction and eviction.



19. The Appellant’s statement of defence as correctly analyzed by the trial court denied the 1st Respondent’s allegations of ownership of the suit property. The Appellant further denied trespassing onto the Plaintiff’s land. The Appellant’s assertion was that she had constructed on her own land which she had bought way before the 1st Respondent became the proprietor of the subject property. She was categorical that her houses were not built in the 1st Respondent’s property. She therefore denied and averred that the 1st Respondent was not entitled to the orders sought.
20. From an analysis of the pleadings, the Plaintiff’s cause of action as I earlier on stated was trespass to land. That is the issue that was before the trial court. It is the issue that the court should have considered and determined. The dispute between the parties was clearly demarcated by their pleadings. It was not a boundary dispute. As the Court succinctly stated in the case of IEBC & ano vs Stephen Mutinda Mule & 3 others (2014) eKLR, the agenda for the trial is set by the parties themselves by their pleadings.
- “The Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any enquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by their pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.”
21. The issues then that the court was supposed to determine in my view were;
- Whether the Plaintiff (1st Respondent) had proved his claim of trespass against the Defendants;
 - Whether the Plaintiff was entitled to the reliefs sought, i.e. (mandatory) injunction, eviction order and mesne profits); and
 - Whether the Plaintiff was entitled to the costs of the suit.
22. It was not the business of the court to advise or direct the Plaintiff how to conduct its case. A court of law must remain a neutral arbitrator of the dispute between the parties before it.
23. It is surprising that a decree was issued emanating from the inconclusive judgment of the court. From the original file of the proceedings before the trial court, a decree was extracted and issued on 8th June 2023. This was clearly and outrightly erroneous.
24. Under Section 2 of the *Civil Procedure Act*, a ‘decree’ is defined to mean,
- “The formal expression of an adjudication which so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit.”
25. The judgment of the trial court did not conclusively determine the rights of the parties in regard to all the matters in controversy in the suit. The conclusion was dependent on the outcome of the survey exercise that was to be conducted after the delivery of the judgement.
26. To say the least, the judgement by the trial court did not comply with the provisions of Order 21 rule 4 and was a sham. It renders the entire trial before the court a mistrial.
27. The trial court in any event upon finding that the dispute before it was a boundary dispute should have halted writing and delivering its judgement to await the outcome of the determination by the Registrar. Section 18(2) of the *Land Registration Act* is categorical that the court shall not entertain any action or other proceedings relating to disputes as to the boundaries of registered land unless the boundaries



have been determined in accordance with the section. The determination under the section (by the Registrar) is a condition precedent; not condition subsequent.

28. Consequently, the appeal by the succeeds. I hereby set aside in its entirety the judgment delivered on 30th June 2021 by Hon. P. Muholi (Mr.) Principal Magistrate and the decree thereof in Milimani Chief Magistrate's Civil Case NO. 2263/2012 (Mutithuru Co. Ltd – vs- George Okoth & Celestine Njeri) and order a new trial before any other Magistrate other than Hon. P. Muholi (Mr.) principal Magistrate.
29. Since the Learned Magistrate made the decision to refer the matter to the Land Registrar on his own volition without inviting the parties to express their views on the issue, none of the parties is to blame and as such none will be condemned to pay the costs of this appeal.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF OCTOBER 2024

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kassimu for the Appellant

N/A by the Respondent

Court Assistant: Yvette

M.D. MWANGI

JUDGE

