



REPUBLIC OF KENYA



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**Kibare v Mmbihi (Environment and Land Appeal E014 of 2023)
[2024] KEELC 13438 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

E ASATI, J

NOVEMBER 14, 2024

BETWEEN

SAMMY ONZERE KIBARE APPELLANT

AND

HANNINGTON GAVALA MMBIHI RESPONDENT

*(Being an appeal from the judgement and decree of the Hon. M. Ochieng
PM in Hamisi PMC MCEL Case No. E002 of 2022 dated 10/11/2023)*

JUDGMENT

Background

1. A brief background to the appeal herein is that the appellant was the plaintiff in Hamisi SPMC E &L Case No. 2 of 2022 (the suit) where he had sued the Respondent herein over a parcel of land known as Tiriki / Shamakhokho /1256 (the suit land) measuring approximately 0.07 Hectares or thereabouts. The appellant brought the suit as a personal representative of one Thomas Kibare Kisambaya, deceased. The plaintiff's claim was that the deceased who was his father was at all material times the registered proprietor of the suit land. That since June 2019, or thereabouts, the Respondent trespassed onto the suit land, took possession and is carrying on business of a bar, restaurant and accommodation facilities thereon. The appellant sought for orders of permanent injunction, eviction, damages, mesne profits and costs of the suit.
2. In response to the appellant's claim the Respondent had filed a written Statement of Defence dated 16th January 2021 denying the claim. The defendant averred that the business on the suit premises was registered in the joint names of the deceased and the Respondent with 50% /50% share capital wherein the deceased gave the land while the Respondent invested in the storeyed building and other structures at a cost of Kshs 2 million.



3. The record of appeal shows that the suit was heard before the trial court which vide the Judgment dated 10th November 2023 found that the appellant had failed to prove his case on a balance of probabilities and dismissed it with costs.

The appeal

4. Aggrieved by the Judgment, the appellant filed the present appeal vide the Memorandum of Appeal dated 4th December 2023. The grounds of appeal as contained in the Memorandum of Appeal are that
 - a. the honourable court erred in law and in fact by erroneously viewing the pleadings and failed to appreciate that the whole suit was about ownership and occupation of the land.
 - b. the honourable court erred in law and in fact by failing to appreciate the whole evidence on record as well as the evidence presented before it by witnesses which evidence was uncontroverted as to who the registered owner of the suit property is.
 - c. the honourable court erred in law and in fact in dismissing a suit that was proved on a balance of probabilities without examining the additional facts presented in submissions.
 - d. the honourable court erred in law and in fact by disregarding the documents presented in evidence
 - e. in all the circumstances of the case, the decision of the learned Magistrate cannot be supported in law and ought to be set aside.
5. The appellant prayed that the judgment be set aside, and be substituted with an order allowing the appellant's case therein. He also prayed for an order that costs be borne by the Respondent.

Submissions

6. The appeal was canvassed by way of written submissions pursuant to directions given on 13/6/2024. It was submitted on behalf of the appellant that although 5 grounds of appeal were raised in the Memorandum of Appeal, the appeal turns on one main ground namely; whether the trial court erred in law and fact by failing to appreciate that the whole suit was about ownership and occupation of the land and not about partnership which was the basis upon which the court dismissed the claim Counsel submit that for a prima facie case to suffice, the appellant needs only prove that he is entitled to possession at the time of the suit.
7. Counsel relied on the case of M'Mukanya -vs- M'Mbijiwe (1984) KLR 761 where the court stated that in a tort of trespass to land the plaintiff must prove that the defendant entered on the property when it was in his possession. That he must show that he had the right to immediate and exclusive possession. That he does not need to prove damage.
8. Counsel submitted further that the tile deed and the certificate of official search showed that the land belonged to the deceased. That the appellant is the personal representative of the deceased. That under section 79 of the *Law of Succession Act* all property of the deceased vests in the appellant as the deceased's personal representative. That at the time of filing the suit, it was the appellant who had the right to possess the suit land exclusively of any other person.
9. That the court did not offer reason as to why it found that the claim for trespass was not established on a balance of probabilities. Counsel relied on the case of *County Government of Narok -Vs- British Pharmaceuticals Limited (Civil Appeal No. 20 of 2020)* (2022) KEHC 10127 KLR (12 may 2022)



Judgment, where it was held that a decision devoid of reasons is hollow and cannot be said to determine the dispute effectively and effectually.

10. That the trial court found that there was no partnership and went ahead to state that it had no jurisdiction to determine the issue of partnership. That the only conclusion was that the appellant was entitled to exclude any other person who did not have lawful claim. That even if some form of partnership had been proved, the death of the deceased rendered the partnership dead. Counsel relied on the provisions of section 27(a) and (c) and of the Partnership Act. Counsel submitted that by the time of the suit there was no partnership.

No submissions were filed for the Respondent.

Analysis and determination

11. This being a first appeal, the court reminds itself of the duty to re-examine and analyze the evidence placed before the trial court with a view to arrive at its own independent conclusion. See section 78 of the *Civil Procedure Act* and *Selle & another vs Associated Motor Boat Company Ltd & Another (1968) IEA 123*) where it was held that a court handling a first appeal is not necessarily bound to accept the findings of fact and law by the court below but has a duty to re-examine the evidence placed before the trial court.
12. The issue for determination herein as framed by the appellant in his submissions is whether or not the trial court erred in law and fact by failing to appreciate that the whole suit was about ownership and occupation of land and not about partnership which was the basis upon which he court dismissed the claim.
13. The appellant pleaded that the Respondent trespassed onto the suit land in June 2019 or thereabout. He stated in his witness statement that his father one THOMAS KIBARE KIDAMBAYA, deceased, was the registered owner of the suit land That in his lifetime, the deceased constructed a one-storeyed building on the suit land in which he (deceased) operated business known the QUNU VILLAGE consisting of a bar, restaurant and accommodation, which business he operated until his death. That when he died, the Respondent unlawfully entered onto the land, occupied the building and began to run the business as though it was his own. That the Respondent claimed to have been in a partnership with the deceased. That the Respondent demanded to be paid Kshs 2,000,000/= so as to move out. That the Respondent's occupation of the property amounted to intermeddling with the estate of the deceased.
14. The Respondent's evidence was that he was not a trespasser on the land but a partner of the deceased operating business that they co-owned with the deceased. To prove this the defendant produced certificate of registration of the business name KUNU VILLAGE as exhibit D.1 Memorandum of Association and Bank statement.
15. I have carefully examined the oral and documentary evidence placed before the trial court; the submissions made herein and the record of appeal generally. I have keenly read the judgment of the trial court.
16. The question before the trial court was whether or not the Respondent had trespassed onto the suit land. The issue of partnership was only introduced by the defendant as part of his defence to the appellant's claim.
17. There was no dispute that the suit land was up to the time of the proceedings in the trial court the property of the deceased. The copy of title deed and certificate of official search produced by the appellant proved this. The same was also admitted by the Respondent.



18. There was also no contest that the appellant was the administrator of the estate of the deceased hence competent to file the suit on behalf of the estate of the deceased and seek redress against whomever the estate considered as a trespasser.
19. It was not denied that the Respondent had entered the suit land and carried out business. But while the appellant claimed that the entry was without lawful authority or any colour of right and therefore an act of trespass, the Respondent contended that the entry was not an act of trespass because according to him (Respondent): -KUNU VILLAGE as a business name was registered in the joint names of the deceased and the Respondent on a 50:50 share capital. the deceased's contribution to the partnership/ business was the suit land in its undeveloped state. the Respondent invested in the storeyed building and other structures on the suit land at a cost of Kshs 2 million. the deceased and the Respondent were jointly running the business and operating a joint account. the Respondent was in possession when the deceased passed on and would not have closed the business. The defendant was therefore lawfully on the suit land
20. The burden of proof under the provisions of sections 106 to 109 of the *Evidence Act* as correctly observed by the trial court was with the appellant to prove his case. Apart from the documents of title already referred to herein, the appellant also produced a Grant of Letters of Administration intestate to prove that he was the personal representative of the deceased. He also produced other documents namely; Alcoholic Drinks License dated 31/7/2017 from the County Government of Vihiga. It shows that the license was given to the deceased, Thomas Kibare, alone for the business name of Kunu Village. The name of the Respondent was not on the license. He also produced Application for the grant or renewal of Alcoholic Drinks Wholesale or Retail License dated 20/11/2017 which was done by the deceased alone and for the business known as KUNU VILLAGE, Clearance Certificate from the Ministry of Health dated 10/5/2018 was issued to the deceased alone for the business name of QUNU VILLAGE.
21. In totality the name of the Respondent does not appear in any of the documents produced by the appellant.
22. The Respondent did not produce a partnership agreement to prove the existence of the partnership between himself and the deceased and the terms of the partnership. He produced no evidence that he had spent Kshs 2,000,000/= in the construction of the one storeyed building and other structures on the suit land. He further produced no evidence that as at the time of the death of the deceased, he (Respondent) was in possession of the suit land operating business and hence would not have closed down the business. There is no evidence that the suit land was the deceased's contribution to the joint business.
23. The Respondent produced certificate of registration of business dated 8/6/2017 for registration of a business name known as KUNU VILLAGE. The certificate shows that the business was situate at Ground 7 Mbale Town, Plot No, 1645, Kakamega Vihiga District, Vihiga Centre P.O Box 2990- 50310 VIHIGA. Though the proprietors were indicated to be the Respondent and the deceased, there is nothing in the certificate connecting the suit land to the registration. There is no evidence that the business location was moved from Plot No. 1645 Vihiga Town to the suit land herein.
24. The bank statement produced by the Respondent shows that the transactions were being done by KIDAMBAYA. It does not have the name of the Respondent at all. A reading of the Judgment shows that the trial court did find that ownership of the property was not disputed but proceeded to observe that the Respondent wished to be included as a creditor in the estate of the deceased and concluded that the issues of whether the suit property could be considered partnership property could not be



determined by the trial court since the Respondent claimed that he had invested about Kshs 2,000,000/ = which amount was outside the pecuniary jurisdiction of the court under the Partnership Act.

25. Having re-examined the evidence, this court finds, with respect to the trial court, that its findings were erroneous. The court mixed up the issue of succession, the provisions of the Partnership Act and the case of trespass before it.
26. All documents availed before the trial court showed that the business on the suit land was being run solely by the deceased.
27. The decision of the trial court to dismiss the suit was therefore erroneous. Though as held by the Court of Appeal in the case of Farah Awad Gullet vs CMC Motors Limited [2018]eKLR that;

“we are also reminded that we should be slow in moving to interfere with a finding of fact by a trial court unless it was based on no evidence, or based on a misrepresentation of the evidence or the judge had been shown demonstrably to have acted on a wrong principle in reaching the findings he/she did.”
28. in the present case the court has reason to interfere with the findings and decision of the trial court.
29. As to what orders the appellant was entitled to, the appellant testified on cross-examination that he had taken over the premises, had taken the licence for 2023 together with his sister had been running the business. An order of eviction will in the circumstances be superfluous.
30. The court finds that the appeal has merit and hereby allows it in the following terms:
 - a. The judgement of the trial court is hereby set aside and replaced with a judgement in favour of the appellant for:
 - i. An order of permanent injunction restraining the Respondent either by himself, servants, agents and/or employees from trespassing on that parcel of land known as Tiriki / Shamakhokho /1256 and occupying the premises erected thereon or carrying on or operating business of a bar, restaurant and lodging or any other business on the said parcel, or otherwise interfering with the plaintiff's occupation and possession of the entire land or any portion thereof.
 - ii. Costs of the suit.
 - b. Costs of the appeal.Orders accordingly.

JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED THIS 14TH DAY OF NOVEMBER, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Ajevi: Court Assistant.

Oduor for the appellant.

Malanda for the Respondent.

