Kilila v Waita & 7 others (Environment and Land Appeal 29 of 2022) [2025] KEELC 515 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELC 515 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ENVIRONMENT AND LAND APPEAL 29 OF 2022

A NYUKURI, J

FEBRUARY 12, 2025

BETWEEN

DOMINIC MULINGE KILILA ..... APPELLANT

AND

JOSHUA WAITA ..... 1ST RESPONDENT

KITHEMBE NZIOKA ..... 2ND RESPONDENT

RUTH MULI ..... 3RD RESPONDENT

NDULEVE LUKA ..... 4TH RESPONDENT

RAEL KIKUNDA ..... 5TH RESPONDENT

MBOLU NDWIWA ..... 6TH RESPONDENT

NGANDA MASAI ..... 7TH RESPONDENT

TIMOTHY ..... 8TH RESPONDENT

(Being an appeal from the Judgment of Hon. Anne Nyoike, Principal Magistrate, delivered on 20th July 2022 in Machakos CMC ELC Case No.63 of 2019)

JUDGMENT

Introduction

1. This appeal was filed by Dominic Mulinge Kilila challenging the judgment of Honourable Anne Nyoike, Principal Magistrate delivered on 20th July 2022 in Machakos CMC Case No. 63 of 2019. In the impugned judgment, the trial court dismissed the appellant's (plaintiff's) claim on the basis that the appellant herein failed to demonstrate that the respondents (defendants in the lower court) had trespassed on his land.

Background

2. By a plant dated 4th June 2019 the plaintiff stated that he was the registered proprietor of the parcel of land known as Kivaa/Kyondoni/488 (suit property) and that on 20th February 2019, the defendants in a group with others trespassed on the suit property, cut down the fence and trees and began to harvest sand from the suit property. That despite the plaintiff's complaints to the authorities, nothing has been done to rectify the situation. Therefore, the plaintiff sought the following orders from court;

    A. Permanent injunction to issue restraining the defendants jointly and severally either through their agents, servants or anyone claiming under them from trespassing, illegal sand harvesting, harassing damaging and alienating in any manner whatsoever interfering with the plaintiff's quiet use, possession and enjoyment of all that parcel of land known as Kivaa/Kyondoni/488.

    B. General damages for trespassing, destruction and compensation from the mesne profit of sand harvesting

    C. costs of this suit

3. In their defence dated 11th July 2019, the defendants denied the plaintiff''s claim and stated that they were formed into a group known as Kindaruma Riparian Community. They averred that although the plaintiff is the registered proprietor of the suit property, they were harvesting sand from Kamunyu River which is a public resource and not owned by anyone whatsoever as the plaintiff's land does not reach the limit of 30 meters from the edge of the said river. They stated that they were harvesting sand with the necessary permits from Kengen Kenya Limited and maintained that they were wrongfully sued as the case ought to have been filed against Kindaruma Riparian Community. They sought for the dismissal of the plaintiff's suit.

4. The suit was heard by way of viva voce evidence. The plaintiff presented three witnesses while the defendant presented one witness.

Plaintiff's evidence

5. PW 1 was Dominic Mulinge Kilila, the plaintiff in the case. His evidence was that he was the registered proprietor of the suit property and that in February 2019, the defendants trespassed thereon, destroying his fence, cutting down his trees and started harvesting sand for sale to third parties without his consent and knowledge. He stated that although he reported the matter to the area chief, nothing was done and therefore the defendants continued to threaten him and to take away sand from his land. He maintained that the defendants have caused wanton destruction on his land. In cross examination he stated that his land borders the land owned by Kengen Kenya Limited and that River Kamunyu is a seasonal river which is about 30 meters wide. He also stated that he did not engage the services of the county surveyor. In re-examination, he stated that river Kamunyu passes through his land and that it is Kengen who allowed the defendants to have entry into his land.

6. PW2 was Joyce Ndinda Mulinge, the wife of the plaintiff. Her evidence supported the plaintiff's case. She stated that they have developed the suit property with 2500 and 150 mango and orange trees respectively and that their land borders Kamunyu river on one side and a parcel of land on the other side of the river is owned by Kengen Company Limited. She also stated that in February 2019, the defendants trespassed on their land cutting down trees harvesting sand and destroying the fence without their consent. That despite reporting to the authorities, nothing was done and therefore the defendants have threatened them and continued to destroy their land.

7. PW3 was Mark Muchomba Mutoria, the Assistant County Surveyor, Machakos County. He testified that he visited the suit property and prepared a report dated 16th July 2021 which he produced as an exhibit. In his report, he found that there was no trespass or encroachment on the suit property and that the sand was being harvested from a seasonal river called Kamunyu. Further that the plaintiff's land is 15.21 hectares and not 17.60 hectares and therefore the area which was shown to have had sand harvested does not belong to the plaintiff. His testimony was that the suit property borders parcel Kivaa/Kyondoni/508 and Kengen. According to him, there is a river that passes on the edge of the suit property and also passes through Kengen's Land. He also stated that Kengen's land and the suit property are separated by Kamunyu River. Further that he used the handheld GPS to pick the coordinates, the survey map of the area and google map to prepare the map of the land which was attached to his report. He averred that the Kengen land was not surveyed and its records is not in their office. On cross examination, he stated that River Kamunyu does not pass through the suit property and that the boundary between the suit property and Kengen's land is River Kamunyu. That approval for sand harvesting must be done by Kengen. He stated that the boundary on the suit property which were Euphorbia trees were intact when he visited the suit property and that at the time of his visit, the parties herein and a representative of Kengen were present. He stated that the sand in River Kamunyu does not belong to the plaintiff. That marked the close of the plaintiff's case.

Defendants' evidence

8. DW1 was Patrick Nzioka Kithembe, the 2nd defendant. He conceeded that the suit property belongs to the plaintiff and that the plaintiff has put up a home on the same, but denied allegations of trespass made against the defendants. He stated that it was true that the plaintiff's land borders Kamunyu river but insisted that none of the defendants had trespassed onto the plaintiff's land or destroyed the fence or cut down his trees or scooped sand from the suit property. According to him, the defendants have been harvesting sand from Kamunyu river bed and not from the plaintiff's land. He denied threatening the plaintiff or destroying the plaintiff's land. On cross examination, he stated that the defendants harvested sand with the consent of Kengen. That marked the close of the defence case.

9. Upon hearing the suit, the learned trial magistrate found that the plaintiff had not proved that the land upon which sand was harvested belonged to the plaintiff and therefore dismissed the plaintiff's suit with costs to the defendants.

10. Being aggrieved with the learned trial Magistrate's decision, the appellant who was the plaintiff before the lower court, appelaed against the trial court's judgment vide a Memorandum of appeal dated 18th August 2022, citing seven grounds of appeal as follows;

    A. That the learned Magistrate erred in law and fact by failing to appreciate and consider the fact that the plaintiff proved his case on a balance of probabilities.

    B. That the learned Magistrate erred in law and fact by failing to appreciate and consider holistically the evidence adduced by the appellant who was the plaintiff at the trial.

    C. That the learned Magistrate erred in law and fact by failing to test the evidence of the surveyor against all other evidence adduced as there were contradicting facts between his written report and his oral evidence.

    D. That the learned Magistrate misdirected herself on the finding that the appellant who was the plaintiff was not entitled to mesne profits as a result of the defendants' acts of illegal sand harvesting.

E. That the learned Magistrate misdirected herself on the finding that the appellant who was the plaintiff was not entitled to general damages for trespass and destruction of property as a result of the defendants' illegal acts.

F. That the learned Magistrate misdirected herself on the finding that the plaintiff introduced a new issue by relying on the provisions of Article 69 of *the Constitution*, the National Environment Management and Coordination Act and the Sand Harvesting guidelines 2007 in his submissions.

G. That the learned Magistrate erred in law and in fact by failing to appreciate and keenly consider the fact that the defendants did not have a permit from the National Environmental Management Authority nor an Environmental Impact Assessment Report allowing them to harvest sand on the suit land.

11. Consequently, the appellant sought for the following orders from this Honourable Court;

a. That the appeal be allowed.

b. That the judgment delivered on 20th July 2022 at the Chief Magistrates Court at Machakos vide ELC CASE No. 63 of 2019 be set aside.

c. That costs of the appeal and the lower court suit be awarded to the appellants.

d. Any further relief that this honorable court deems fit to grant to the appellant.

12. The appeal was disposed by way of written submissions and on record are the appellants submissions dated 8 December 2023 and the respondents' submissions dated 7th October 2024.

Appellant's submissions

13. Counsel for the appellant submitted that this court being a first appellate court has the role of reviewing the pleadings, proceedings and evidence on record and to determine whether conclusions made by the trial court should stand. In that regard, reliance was placed on the case of Abok James Odera t/a A.J. Odera and Associates v John Patrick Machira t/a Machira and Company Advocates [2013] e KLR.

14. Counsel argued that it was clear that the appellant was the absolute and indefeasible owner of the suit property as demonstrated by the title deed produced. Counsel referred to Article 40 of *the Constitution* of Kenya and section 24 (a) of the *Land Registration Act* as well as Section 3 of the *Trespass Act* and argued that by destroying the appellant's trees and fence, the respondents had trespassed on the suit property and interfered with the appellant's ownership.

15. Reliance was placed on the case of M'Mukanya v M'Mbijiwe [1984] KLR 761 for the proposition that trespass is a violation of the proprietor's right to possession. Counsel argued that the trespass by the respondents affects the appellant's rights and privileges including his right to possession, quiet and peaceful occupation and use of his property.

16. On general damages for trespass, counsel relied on the case of Philip Ayaya Aluchio v Crispinua Ngayo [2014] e KLR and argued that the appellant is entitled to general damages for trespass which is a measure of the value of the land before and after trespass. Further reference was made to the case of Ephantus Mwangi & Another v Duncan Mwangi [1982 to 1988] 1 KAR 278. Counsel argued that this court should award general damages for trespass by the respondent.

17. Counsel faulted the decision of the learned trial Magistrate arguing that she did not consider that the appellant proved his case on a balance of probabilities as the appellant was the absolute and indefeasible

owner of the suit property as shown by the original title deed produced in court. Counsel also faulted the court's finding that the issue as to whether the respondents had complied with the National Environment Management and Coordination Act and the Sand Harvesting Guidelines of 200 7 did not arise in the pleadings of the parties as those issues were fundamental in the determination of the appeal. Counsel submitted that those laws are to ensure sustainable utilization of the sand resource and proper management of the environment and that in this case, the land that was being trespassed upon was not designated as a harvesting area but land under trespass.

18. The court was referred to the case of Odd Jobs v Mubia [1974] EA 476 for the proposition that where an issue does not flow from pleadings, a court may base its decision on unpleaded issue where it appears from the trial that the issue has been left to the court for decision.

Respondents' submissions

19. Counsel for the respondent submitted that the burden to prove the claim rested on the appellant who was the plaintiff before the trial court. Reliance was placed on the case of Evans Nyakwana v Cleophas Bwana (2015) e KLR in support of the argument that section 107 of the *Evidence Act* places the burden of proof on the plaintiff.

20. It was also argued for the respondents that evidential burden rests on the person who alleges existence of the alleged fact as provided for in the *Evidence Act*. On what amounts to proof on a balance of probabilities, counsel referred to the case of William Kabogo Gitau v George Thuo & 2 Others (2010) 1 KLR and submitted that it means that a party should persuade the court at 51% as opposed to 49%.

21. Regarding the question of trespass, the court was referred to section 3 (1) of the *Trespass Act*, and the cases of Maina Kabuchwa v Gachuma Gacheru (2018) e KLR and Trendsetters Tyres Ltd v John Wekesa Wepukhulu (201) e KLR. Counsel submitted that trespass is the unlawful interference with another's property without consent of the owner. While supporting the findings and conclusions made by the trial court, counsel submitted that the trial court took into account the entire evidence on record before arriving at its findings as the court analyzed the evidence of the joint surveyor which showed that the property upon which the respondents harvested sand did not form part of the appellant's land.

22. Counsel also relied on the case of Raila Amolo Odinga & Another v IEBC & 2 Others (2017)e KLR and submitted that a party is bound by his pleadings and that the issue of whether the respondents' sand harvesting complied with the Environment Management and Coordination Act and the Sand Harvesting Guidelines 2007 was not raised as an issue in the plaint and cannot be made an issue.

Analysis and determination

23. The court has carefully considered the appeal, submissions made and the entire record. The role of this court as a first appellate court is to re-analyze, re-evaluate and re-assess the evidence on record and make its own independent conclusions bearing in mind that it did not have the advantage of having heard or seen the witnesses, and therefore make do allowance for that.

24. Having considered the pleadings and evidence on record, it is clear that this appeal raises two issues, namely;

    a. Whether or not the trial court was right in disregarding the issue raised in the submissions and not in the pleadings being whether the respondents' sand harvesting complied with environmental laws including EMCA and Sand Harvesting Guidelines of 2007.

    b. Whether or not the site of the respondents sand harvesting is part of the parcel of land known as Kivaa/ Kyondoni/ 488.

25. When the appellant filed his suit before the trial court his complaint was one, which is that he is the owner of the suit property and that the respondents were unlawfully and without his consent trespassing and harvesting sand thereon. The respondents did not deny harvesting sand in the vicinity of the appellant's land, but maintained that they harvested sand in River Kamunyu and not on the suit property.

26. Therefore, the issue as to whether the respondents complied with environmental laws including EMCA and Sand Harvesting Guidelines of 2007 was not an issue arising from the parties' pleadings and evidence. Issues for determination arise from pleadings and not submissions. In my view, submissions are not a substitute for pleadings as they are mere persuasions and must as a matter of proper practice, align with the pleadings and evidence. This ensures fair hearing and avoids trial by ambush which may occasion injustice as the other party may not be able to by way of submissions adequately respond to factual matters raised in submissions.

27. In the case of Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another [2014]e KLR the court stated as follows;

> Submissions cannot take the place of evidence....submissions are generally parties' "marketing language" each side endeavoring to convince the court that its case is the better one . Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.

28. Similarly, in the case of Erastus Wade Opande v Kenya Revenue Authority & Another, Kisumu HCCA No. 46 of 2007, the court held as follows;

> Submissions simply concretize and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided.

29. As the appellant's grievance before the trial court was whether the extraction of sand was on his land, and not whether the same was in accordance with Environmental laws, the dispute having only raised the question of trespass and violation of proprietary rights and not environmental questions, I agree with the findings of the trial court and I find and hold that, that court was right in declining to interrogate the issue as to whether sand harvesting by the respondents was in compliance with EMCA and Sand Harvesting Guidelines of 2007. Therefore, that ground of appeal fails.

30. On whether the appellant proved that the site of sand harvesting was the suit property, section 107 of the *Evidence Act* places the burden of proof in a case on the plaintiff, while section 109 places evidential burden of a fact on the person who alleges existence of such fact.

31. In the instant case, it is not disputed that the appellant is the registered proprietor of the suit property. While the appellant accused the respondents of interfering with his property without his consent by among other illegalities, harvesting sand therefrom; the respondents on their part have not denied harvesting sand within the vicinity of the suit property but their defence was that the location of sand harvesting was not on the appellant's land. Therefore, the appellant was under duty to demonstrate that the site where the respondents harvested sand was part of the suit property. To prove that, it was necessary that expert evidence on location of the area of trespass is presented. Therefore, the relevant expert evidence was a surveyor's report. At the filing of the suit before the lower court, no such report was filed by the appellant. However, parties agreed for a joint report to be done, and the joint report was prepared by the County surveyor Machakos. The County surveyor also attended court and gave oral evidence. In his findings, the surveyor concluded that where the sand harvesting was being done was

not part of the suit property but was on the River Kamunyu. That evidence was not controverted and the appellant did not present a contrary report nor shake the surveyor's evidence in cross examination.

32. While the court is not bound by an opinion of an expert, it ought to consider the expert's evidence together with the other evidence and not in exclusion as expert evidence does not trump other evidence. In assessing the weight to be given to expert evidence, the court should be cautious and consider such evidence in the context of all other evidence presented at trial and the circumstances of the case, including the possibility of such evidence being biased in favour of the instructing party or the same being objective despite the instructing party being one of the parties. Hence, what the court should keep in mind while dealing with expert evidence is that expert evidence should not trump all other evidence; the court ought to consider all evidence including expert evidence before making any findings; expert evidence should not be considered in a vacuum but should be considered together with other evidence; the quality of reasoning of the expert should be considered and where there are conflicting expert opinions the court ought to test them against the background of all the other evidence in the case which it accepts so as to decide which expert opinion is to be preferred.

33. In the case of *Stephen Wangóndu v The Ark Limited High Court Civil Appeal No. 2 of 2014*, the court discussed the place of expert evidence as follows;

> Firstly, expert evidence does not "trump all other evidence." It is axiomatic that judges are entitled to disagree with an expert witness. Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed framework or formula, against which actions are then to be rigidly judged with a mathematical precision.
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> Secondly, a judge must not consider expert evidence in a vacuum. It should not therefore be "artificially separated" from the rest of the evidence. To do so is a structural failing. A court's findings will often derive from an interaction of its views on the factual and the expert evidence taken together. The more persuasive elements of the factual evidence will assist the court in forming its views on the expert testimony and vice versa. For example, expert evidence can provide a framework for the consideration of other evidence.
>
> Thirdly, where there is conflicting expert opinion, a judge should test it against the background of all the other evidence in the case which they accept in order to decide which expert evidence is to be preferred.
>
> Fourthly, a judge should consider all the evidence in the case, including that of the experts, before making any findings of fact, even provisional ones

34. Having considered the findings made by the trial court, it is clear that the trial court took into account the expert evidence of the surveyor alongside other evidence on record. On whether the court was right to consider expert evidence of the surveyor in making its decision, it is the view of this court that as the issue in question was whether the sand harvesting site was within or without the appellant's land, the question being that of location, expert evidence on location was necessary. There was oral evidence of the parties on that issue and therefore the surveyors report was additional evidence and hence the trial court was right to consider it. It was the appellant's own evidence that River Kamunyu at times broke its banks, flooding into his land whenever it was flooded. That means that the said river is not part of the appellant's land. Having considered the trial court's findings and considering that the surveyor's report was rational and consistent with oral evidence on record, I find and hold that although the trial court was not bound by the surveyor report, it rightly took into account the findings in that report the same having been based on relevant facts.

35. Having considered the evidence on record it is my view that the appellant failed to present contrary evidence to the reliable evidence of the surveyor to prove that the site of the respondents' sand harvesting was part of his land. That being the case I agree with the findings of the trail court that the appellant was unable to prove his case on a balance of probabilities. Having failed to prove ownership of the disputed site of the respondents' sand harvesting, the appellant failed to prove trespass. It therefore follows that the appellant could not be entitled to damages for trespass or mesne profits. Consequently, I find and hold that the trial court was right in dismissing the appellant's claim.

36. In the end, I find no merit in this appeal, which I hereby dismiss with costs to the respondents.

37. It is so ordered

DATED, SIGNED AND DELIVERED AT KAKAMEGA VIRTUALLY THIS 12TH DAY OF FEBRUARY, 2025 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Kilonzi for the appellant

Mr. Mwongeli for the respondent

Court Assistant: M. Nguyai