



**Etyang & 2 others v Javan (Environment and Land Appeal E003 of 2023)  
[2024] KEELC 13937 (KLR) (17 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13937 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA  
ENVIRONMENT AND LAND APPEAL E003 OF 2023  
EC CHERONO, J  
DECEMBER 17, 2024**

**BETWEEN**

**MARTIN ETYANG ..... 1<sup>ST</sup> APPELLANT**

**SARAH SIMIYU ..... 2<sup>ND</sup> APPELLANT**

**JOYCE CHAMUNA ..... 3<sup>RD</sup> APPELLANT**

**AND**

**SAUL WALUKANA JAVAN ..... RESPONDENT**

*(Being an appeal arising from the Judgment and decree delivered by Hon. G. ADHIAMBO (PM) in Kimilili ELC No.21 of 2019 delivered on 18/01/2023.)*

**JUDGMENT**

**Introduction.**

1. The Appellants herein were the defendants in the primary suit while the Respondent was the plaintiff therein. After hearing the parties, the trial Magistrate rendered herself on 18/01/2023 allowing the Respondent's suit. The impugned Judgment aggrieved the Appellants who preferred the current appeal.
2. The appeal seeks to quash and set aside the judgment and decree of the trial court and a declaration that all that land known as Elgon/Namorio/106 was lawfully allocated to the Appellants according to the acreage adopted by the Land District Tribunal and that the Respondent should desist from interfering with the Appellants' peaceful occupation and for the costs of the appeal.
3. In the impugned judgment, the trial magistrate granted orders of permanent injunction against the 1<sup>st</sup> and 2<sup>nd</sup> Appellants either by themselves, their servants and/or agents and or any other person claiming and or acting through them from interfering with the Respondents peaceful and quiet possession of land parcel no. Elgon/Namorio/106 measuring 1.2ha.



4. The Grounds of appeal as can be discerned from the Memorandum of Appeal can be summarized as follows;
- a. The learned trial magistrate erred in law and in fact when she failed to consider the decision of the Mt. Elgon Land Dispute Tribunal under MT. ELG LDT Case no. 1/96.
  - b. The learned trial magistrate erred in law and in fact when he overlooked the fact that the decision of the tribunal was adopted as judgment in Kimilili Land Case No. 10 of 2010.
  - c. The learned trial magistrate erred in law and in fact when he failed to be persuaded by the decision of the tribunal which was adopted as judgment in Kimilili Land Case No. 10 of 2010.
  - d. The learned trial magistrate erred in law and in fact when she allowed the respondents injunctive relief notwithstanding that he had failed to demonstrate sufficient cause to justify grant of such a relief.
  - e. The learned trial magistrate erred in law and in fact when notwithstanding her own well reasoned finding that the respondent did not have any right to work upon the suit property and that his claim was a sham and a fabrication, nevertheless gave him a platform through which to invade the suit land.
  - f. The learned trial magistrate erred in law and in fact when in his judgment took into account matters that were not canvassed in evidence to the prejudice of the appellants.
  - g. The learned trial magistrate erred in law and in fact when in his judgment he failed to take into account relevant materials that were placed before him and took into account irrelevant matters to the prejudice of the appellant.
  - h. The learned trial magistrate completely failed in her duty to sufficiently analyse the evidence before him as required before making a determination based on evidence.
  - i. The learned trial magistrate judgment was against the weight of the evidence on record.
  - j. The learned trial magistrate erred in law and in fact by failing to take into account the appellants submissions.

#### **Proceedings before the subordinate court**

5. In order to contextualise the basis of the present appeal, it is necessary to briefly set out the facts of the case before the subordinate Court.
6. The Respondent commenced the suit in the trial court by way of a plaint dated 24/04/2017 seeking the following orders;
- a. General damages.
  - b. A permanent injunction restraining the defendants whether by themselves, servants and/or agents and or any other person claiming and or acting through them from interfering with the respondents peaceful and quiet possession of land parcel no. Elgon/Namorio/106 measuring approximately 1.2ha.
  - c. Costs of this suit.
  - d. Interests at court rates on 1 and 3.



7. It was the plaintiff/Respondent's contention that he was the registered owner of land parcel no. Elgon/Namorio/106('the suit land') measuring approximately 0.21 ha and that the Defendants/Appellants had, without any colour of right entered into his property and started ploughing and planting crops thus, denying her the use of the land and occasioning damages.
8. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Appellants filed a joint statement of defence dated 14/11/2017 in which they denied the Respondent's claim in totality.
9. In support of his claim, the Plaintiff/Respondent testified as the sole witness.
10. PW1 Saul Walukena was referred to his witness statement dated 24/04/2017 which he adopted as his testimony-in-chief. He was also referred to his list of documents dated 24/4/2017 and 21/2/2020 which he produced in his evidence as P-Exhibit 1-9.
11. On cross-examination, he testified that he has instituted another suit against other individuals over the suit land and that he has also been to the Land Disputes tribunal. He testified that at the tribunal, the award was in favour of the complainants therein and that he was not aware that the said award had been adopted as an order of the court. He stated that in the tribunal, he was awarded 1acre, Nahashon -1acre, Gabriel Murunga- ½ acre on behalf of his father and Agnes Etyang was also given a portion.
12. He stated that he appealed against the award to the Provincial Appeals Committee at Kakamega. It was his evidence that the Appellants had not lived on the land since the year 2000. He stated that he had sued one Gabriel Murunga in a criminal case and that he is not aware that his conviction had been overturned on appeal. In re-examination, he stated that the people he had initially sued were not the Appellant and that they were not the parties in the tribunal case.
13. DW1 Gabriel Wamalwa Murunga Was also referred to his undated witness statement filed in court on 21/11/2019 which he adopted as his testimony-in-chief. He referred the court to a list of documents also filed in court on 21/11/2019 and produced as D-Exhibit 4-7. He testified that many cases had initially been filed regarding the suit land but the Land District Tribunal made the final decision which was adopted by the court. He testified that no appeal has ever been preferred against the said award and decree. He asked the court to grant an order issuing him with a title deed for the suit land.
14. DW2 Scholastica Sarah Simiyu Was referred to his witness statement dated 21/11/2019 which he adopted as his testimony-in-chief. He testified that he has ploughed and grown crops in the suit land since the year 2007 after Gabriel Murunga gave him a piece. He thereafter reiterated the testimony of Gabriel Wamalwa Murunga (DW1).
15. DW3 Aggrey Olwenya Jackton Was equally referred his witness statement dated 21/11/2019 which he adopted as his testimony-in-chief. He testified that he was the chief of Namorio Location and that he knows the suit land well. He testified that a portion of the suit land belongs to Gabriel Murunga who has leased out his share to Sarah Simiyu to farm. He testified that the Respondent has a share of the suit land which he purchased. He testified that he has never seen the 1<sup>st</sup> Appellant ploughing on the land.

### **Submissions on the appeal.**

16. When the matter came up for directions, the parties agreed by consent to canvass the appeal by way of written submissions. The Appellant filed his submissions dated 07/08/2024 while the Respondent did not file any submissions.
17. The Appellants begun by outlining the award of the Land District Disputes Tribunal. They cited the provisions of Section 3 (1) of the Land Disputes Tribunal Act 1990 Cap 303 A on the jurisdiction of the tribunal. They relied on the case of Florence Nyaboke Machani vs. Mogere Amosi Ombui & 2



Others Civil Appeal No. 184 of 2011 (2014)eKLR, Catherine Kitonny vs. Jonathan Muindi Dome & 2 Others (2019)eKLR, Speaker of National Assembly vs. Njenga Karume (2008) 1 KLR. They argued that the decree of the SRMC Kimilili Case No. 10 of 2010 is a valid court order which has not been overturned through a legal process provided by the law. The Appellants urged the court to allow this appeal as prayed.

### **Legal Analysis and Determination.**

18. I have read the Memorandum of Appeal, the Record of Appeal, written submissions filed by the parties and the court record generally and identify the following as the issues that emerge for determination:
  - a. Whether or not the respondent satisfied the grounds for grant of an order sought in the trial court.
  - b. Whether or not the trial court erred in allowing the respondents suit
  - c. What order to make on costs
19. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & Another vs Associated Motor Boat Co. Ltd.& others* (1968) EA 123 where it was stated as follows;

“... this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of 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. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally”
20. From the extract of the record, it is clear that the Respondent herein had sued Patrick Opoti, Mukunga Itome, Dismas Wamalwa and Nashon Wanyonyi in Bungoma CMCC 853 OF 1992 and a decree was issued in his favour on 08/08/1994. The record also indicates that an eviction order was issued dated 10/03/1994. There is also on record an order dated 14/04/200 declaring an initial order referring the above suit to the Land Dispute tribunal as null and void thereby setting it aside and declaring the matter as concluded. The Respondent also produced a charge sheet, proceedings and a judgment against one Gabriel Murunga for trespass where he was sentenced to two months' imprisonment. A letter dated 03/08/1999 from the Provincial Commissioner addressed to The District Commissioner was produced showing that the suit, having been concluded before the Bungoma Resident magistrate, could not thereafter be referred back to the Land Disputes Tribunal.
21. The Appellant produced a charge sheet, proceedings and judgment of a criminal case preferred by the Respondent against one Nahashon Emoti where the accused therein was discharged. Further, a judgment overturning the 2 months' conviction and imprisonment against one Gabriel Murunga was also produced. The Appellants also produced proceedings before the Mt.Elgon Land Disputes Tribunal where, by its award dated 30/07/1998, the Tribunal awarded the Respondent 1 acre, Nashon Ingoti 1 acre, Gabriel Murunga ½ acre and Agnes Etyang ½ acre.



**Whether or not the respondent established the grounds for grant of an order sought in the trial court.**

22. The Appellants argued that the trial court failed to consider the decision of Mt. Elgon Land Disputes Tribunal which was subsequently adopted in Kimilili Land Case No. 10 of 2010 thus the court reached an erroneous determination by allowing the Respondent's claim and issuing permanent injunctive orders against them.
23. It is trite that an order of a permanent injunction fully determines the right of the parties before the Court and is thus a decree of the court. A permanent injunction is normally meant to restrain the perpetual commission of an act by a party in order for the rightful and legitimate owner to enjoy the rights ensuing from such property as protected in law. I am persuaded by the holding of the High Court in the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR where the court held inter alia as follows:

“...A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected. A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties...”
24. In the present case and whilst the Respondent had sought for a permanent injunction against the Appellants restraining them from any form of interference on his proprietorship right to ownership, occupation, use, possession, enjoyment of the suit land, the Appellants claimed ownership of various portions basing their entitlement on an award by the Mt. Elgon Land Disputes Tribunal issued on 30/07/1998.
25. The record further reveals that the Respondent herein had sued Patrick Opoti, Mukunga Itome, Dismas Wamalwa and Nashon Wanyonyi vide Bungoma CMCC 853 OF 1992 and a decree was issued in his favour on 08/08/1994. An eviction order was also issued dated 10/03/1994. There is also an order dated 14/04/2000 declaring an initial order referring the above suit to the Land Dispute tribunal as null and void thereby setting it aside and declaring the matter as concluded. The Respondent also produced a charge sheet, proceedings and a judgment against one Gabriel Murunga for trespass where he was sentenced to two months' imprisonment. A letter dated 03/08/1999 from the Provincial Commissioner and addressed to The District Commissioner was also produced showing that the suit having been concluded before the Resident magistrate, Bungoma could not again be referred to the Land Disputes Tribunal.
26. The Appellant produced a charge sheet, proceedings and judgment of a criminal case preferred by the Respondent against one Nahashon Emoti where the accused therein was discharged. Further, a judgment overturning the 2 months' conviction and imprisonment against Gabriel Murunga was produced. The Appellants also produced proceedings before Mt. Elgon Land Disputes Tribunal where in its award dated 30/07/1998, the tribunal awarded the Respondent 1 acre, Nashon Ingoti 1 acre, Gabriel Murunga ½ acre and Agnes Etyang ½ acre.



27. Under Section 24,25 and 26 of the *Land Registration Act* 2012, the courts are mandated to consider a title document as prima facie evidence of ownership to land and a conclusive evidence of proprietorship to land and can only be challenged on grounds stipulated thereunder, that is to wit; fraud or misrepresentation, Illegality, unprocedurally or corrupt schemes. Among the rights to be enjoyed by a registered proprietor of any land is the right to peaceful and quiet enjoyment of the land he owns, in other words the rightful owner to the land has a right to possession, occupation and use of the land. In the present case, the title produced by the respondent shows that the suit land is registered in his name.
28. The Appellants on the other hand claimed a portion of the suit land basing their entitlement on an award by Mt.Elgon Land Disputes Tribunal in its award of 30/07/1998. From the revelation of the evidence by the parties as above, it is evident that indeed there have been various cases over the suit land involving various individuals both criminal and civil in nature. It emerges that the Respondent herein filed Bungoma CMCC 853 OF 1992 wherein eviction orders were issued on 10/03/1994 against Patrick Opoti, Murunga Itome, Dismas Wamalwa and Nahashon Wanyonyi. From the evidence as presented, a case before the Mt.Elgon Land Disputes Tribunal i.e case No.1 of 1996 ensued and an award was issued sharing the suit land amongst the Respondent, Nahashon Imoti, Gabriel Murunga and Agnes Etyang.
29. Again, the court in Bungoma CMCC 853 OF 1992 issued an order dated 14/01/2000 setting aside the award of the tribunal and declaring it as null and void for the reasons that the matter had been concluded. At this point, it is important to note that although the Appellants allege that the award of the Tribunal was adopted in Kimilili Land Case No. 10 of 2000, nothing has been placed before this court in support of this position. Section107 of the *evidence Act* states that;
- i. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
  - ii. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
29. Further, the court of appeal in the case *Mbuthia Macharia v Annah Mutua & Another* [2017] eKLR discussed the burden of proof and stated thus:
- (16) “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence? In this case, the incidence of both the legal and evidential burden was with the appellant.”
30. From the foregoing discussion, it is clear that the award of the tribunal, apart from having been set aside and declared null and void, was never adopted as an order of the court. Having said so, the Appellants case became shaky as they did not satisfactorily prove their entitlement over the suit land.

### **Whether or not the trial court erred in allowing the Respondent’s suit**

31. Having carefully evaluated the evidence adduced before the subordinate Court, I find no fault in the judgment of the Learned Trial Magistrate on the decision that She reached and find this appeal without merit.



**Which party bears the costs.**

32. It is generally agreed that award of costs is at the discretion of the Court and that under Section 27 of the *Civil Procedure Act*, costs generally follow the event.
33. The upshot of my finding is that this appeal is devoid of merit and the same is hereby dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 17<sup>TH</sup> DAY OF DECEMBER, 2024.**

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**HON.E.C CHERONO**

**ELC JUDGE**

In the presence of;

1. Mr. Oira for the Appellant
2. Mr. Alovi for the Respondent
3. Bett C/A

