



**Mulanga v Kisunza (Environment and Land Appeal 7 of 2021)  
[2023] KEELC 15899 (KLR) (28 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15899 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT AND LAND APPEAL 7 OF 2021  
LG KIMANI, J  
FEBRUARY 28, 2023**

**BETWEEN**

**JOSEPH KISUNZA MULANGA ..... APPELLANT**

**AND**

**KITIVA KISUNZA ..... RESPONDENT**

*(Being an Appeal from the ruling of the Chief Magistrate, Hon. S. Mbungi in Kitui Civil Case No.141 of 1999 delivered on 7th July 2020)*

**JUDGMENT**

1. The Appellant brings this appeal from ruling of the Chief Magistrate, Hon. S. Mbungi in Kitui Civil Case No.141 of 1999 delivered on 7<sup>th</sup> July 2020 on the following grounds:
  1. That the Learned trial Magistrate erred and misdirected himself both in law and facts by failing to appreciate that the respondent had come back into the decreed parcel of land and as such, S. 38 (a) of the Civil Procedure Act was applicable in enforcing that existing decree and other subsequent orders.
  2. That the Learned trial Magistrate erred and misdirected himself both in law and facts by failing to appreciate and note that there were orders in force to evict the respondents issued way back in 2.9.2004 for delivery of the parcel of land in question.
  3. That the Learned trial Magistrate erred and misdirected himself both in law and facts by failing to appreciate the principle of the law that litigation should come to an end and the best way to do so in this case was to issue orders to remove the respondent from the suit land.The Appellant prays that the appeal be allowed in the following terms:
  - a. That the ruling of the lower court be quashed and set aside.



- b. That the Respondent to pay costs of this appeal, and the costs in the lower court.
2. The original suit at the Chief Magistrate's Court was instituted vide a Plaint dated 4<sup>th</sup> April 1999 where the Appellant herein was the Plaintiff and the Respondent herein was the 9<sup>th</sup> Defendant. The Plaintiff claimed ownership of the suit land Matinyani/Kalindile/210 and accused the Defendant of entering into the suit land, cutting down trees, destroying grass and building a house thereon. The Plaintiff estimated the cost of damage done at Ksh.30, 000. He prayed for a permanent injunction, and special damages of Ksh.30, 000 as well as costs of the suit.
3. Judgment in the trial court was delivered on 29<sup>th</sup> July, 2003 where the court held as follows;
  - a. A permanent injunction, restraining the defendants jointly and severally from further trespassing upon the plaintiffs land
  - b. Special damages: This head was never proved it was just pleaded.
  - c. On general damages I will award nominal damages Ks. 15,000/= to the plaintiff for trespass
  - d. Costs of the suit and interest at its rate.
4. Arising out of the judgment a decree was drawn and issued initially on issued on 13<sup>th</sup> September 2004 but upon review by the court the same was corrected and issued on 5<sup>th</sup> August 2019.
5. The subject matter of this appeal is the Notice of Motion dated 2<sup>nd</sup> January, 2019 and amended on 12<sup>th</sup> September, 2019 which seeks the following orders;
  1. That this Honourable court be pleased to issue orders and/or warrants to remove the respondent and his family members from land parcel Matinyani/Kalindilo/210 to give vacant possession of the land as per the decree of the court dated 29<sup>th</sup> July 2003 and issued on 5<sup>th</sup> August 2019
  2. That this court be please to issue eviction orders against the Respondent and members of his family bond by the decree of the court herein.
  3. That the respondent be condemned to pay cost of this application.
6. The grounds in support of the application were that after the decree, the execution process took place and the respondent and his family stayed away from the suit land until 6<sup>th</sup> November 2018 when the respondent invaded the land, ploughed the same and planted some crops and at the time of filing the application he was constructing some temporary structures thereon contrary to the decree of the court.
7. That the applicant had reported the matter severally to the police and instructed his lawyers to issue several letters to the police for assistance to no avail. The plaintiff claimed that it was necessary for the court to issue eviction orders and warrants to forcefully remove the respondent and members of his family from the suit land. The plaintiff noted that the respondent had been obeying court orders since 2004 upto November 2018 when the actions giving rise to the application occurred.
8. The plaintiff claimed that the respondent and his family had chased him away from the land and denied him access. He claimed that he had relocated the 9<sup>th</sup> respondent and his mother to another land in Kamutei where they had been living until sometime in November 2018 when he returned and invaded the land in question.
9. The Defendant/Respondent in the trial court filed a replying affidavit stating that the decree was for an order of injunction and not an order of eviction. The Defendant claimed that the applicant wrongfully evicted him from the land through Ms Max Auctioneers in 2014. The defendant/respondent claimed



that suit land, though registered in the name of the Plaintiff, who is his father; the same was inherited from his grandmother Musoli Mulanga (deceased). He claimed that he has substantial interests in the land arising out of customary trust. He stated that he had already filed a suit against the applicant for declaration of a customary trust in Cms Land case No 1 of 2019 between himself and the applicant.

10. The Honourable Chief Magistrate S. Mbungi delivered the ruling dated 23<sup>rd</sup> of June 2020 and delivered on the 7<sup>th</sup> of July 2020 where the court considered the decree of the court and found that;
  1. The decree is neither for an eviction order or a mandatory injunction or delivery of immovable property.
  2. That the amended Notice of Motion dated 12<sup>th</sup> September 2019 as presented before the court has no merit and is dismissed.
  3. That each party to bear own costs.

### **The Appellants' Submissions\_**

11. The Appellants filed written submissions and set out the background of the case leading to the application dated 12<sup>th</sup> September 2019 and the ruling of the court dated 23<sup>rd</sup> June 2020 which are the subject of this appeal. He stated that this matter was decided to finality and since the defendants did not appeal there is a presumption that all the parties were satisfied by the judgment. The Appellant states that judgment was delivered, and thereafter there were execution processes and proceedings to enforce the decree in particular the warrant to bailiff to give vacant possession of land to the plaintiff under order XXI rule 30 of the *Civil Procedure Rules*. It appears that the parties reverted to their rightful positions and the defendants moved away from the suit land.
12. On Ground 1 of appeal The Appellant's Counsel pointed out that the trial court found that the plaintiff has absolute use and abuse of the land in issue against the whole world. He is responsible for what to do with his land and the Defendant has no right of entry. He submitted that the permanent injunction was against each and every one of the defendants since there was already a final judgment and decree in rem and in personam, the Appellant moved the court under the provisions of section 38(1) of the *Civil Procedure Act* and order 22 rule 29(1) and 30 of the *Civil Procedure Rules*.
13. The appellant's Counsel submitted that the substratum of the suit before the trial court was that of trespass and that his client was entitled to have the suit property delivered up to him. According to the counsel for the Appellant, since the court had issued subsequent execution orders against the defendants to give vacant possession of the suit land, then all that the Appellant as the Decree-holder had to do was to apply for fresh warrants seeking vacant possession.
14. On Ground two, Appellant's Counsel submitted that it was an apparent error or misdirection on the part of the trial magistrate to have failed to notice that the fresh application was the apt process to enforce the decree and existing orders. Further, that since the decree was not set aside, then the Appellant was entitled to protection of the law against the defendant(respondent) herein and that it was an apparent error or misdirection on the part of the trial magistrate to refuse to grant the fresh orders sought.
15. Submitting on Ground three, counsel for the appellant relied on the principle of finality where the verdict remains final unless another judgment is made or it is set aside and submitted that it is also seen in the doctrine of res judicata under section 7 of the *Civil Procedure Act* cap 21. Counsel for the Appellant submitted that the Appellant is not required to, or have to file a fresh suit to seek for specific orders of eviction. Further the Appellant submitted that there was enough notice to show cause why the court would not issue the fresh orders or warrants to give vacant possession and that the issue of



limitation could not suffice since there was a fresh cause of action that arose after the Respondent re-entered the suit land in 2018 when he had moved from the suit land since 2004.

### **The Respondent's Submissions**

16. The Respondent's Counsel submitted that the decree was for a permanent injunction restraining the Defendants jointly and severally from further trespassing upon the Plaintiff's land. According to counsel, the Decree of the Court was not for eviction of the Respondent, but for an injunction and that the remedy for breach of an injunction is an action for disobedience of court orders but not for eviction.
17. Further, the Respondent submits that the land in question is not stated in the decree and consequently, the decree is defective and also that it is actually time barred since the decree sought to be executed is dated 29<sup>th</sup> July 2003 and the Application to execute is dated 12/9/2019 and has passed the 12-year limit stipulated by section 4(4) of the *Limitation of Actions Act* Cap 22 Laws of Kenya. The Respondent relied on the case of *Moses Kipkurui Bor v John Chirchir* (2019) eKLR and *M'Kiara Mrunkanga & another v Gilbert Kabeere M'Mbijiwe* (2007) eKLR.
18. On ground one, the Respondent submitted that the decree was very defective incapable of being legally enforced since the judgment did not order for eviction. Counsel cited the provisions of order 21 rule (7)(1) that the decree shall agree with the judgment and shall specify the relief granted or other determination of the suit. The Respondent noted that the court reviewed the defective decree and set it aside on 12<sup>th</sup> January, 2019 and that no valid execution ever took place.
19. Submitting on ground two, the Respondent's Counsel stated that there were no valid orders enforced for delivery of vacant possession of Land to the Appellant since the decree was inconsistent with the judgment in the case.
20. The Respondent submitted on ground three that the decree for injunction was never sought to be executed and the trial court committed no error in the circumstances of the case and prayed that the appeal be dismissed with costs to the Respondent.

### **Analysis and Determination**

21. I have considered the appeal herein and the submissions filed by Counsel for both parties and the legal authorities cited. This is a first appeal and pursuant to many authorities, this court must evaluate the ruling of the trial court and make its own findings giving reasons thereof for upholding or making a different finding from the trial court. The duty of a first appellate court was captured by the Court of Appeal in *John Teleyio Ole Sawoyo v David Omwenga Maobe* [2013] eKLR thus:

“This being a first appeal we have the duty to reconsider both matters of fact and of law. On facts, we are duty bound to analyse the evidence afresh, re-evaluate it and arrive at our own independent conclusion but must bear in mind that the trial court had the advantage of hearing the witnesses testify and seeing their demeanour and should make allowance for the same.”



22. Still on the duty of the first appellate Court, Hancox JA (as he then was), stated in *Ephantus Mwangi & another v Duncan Mwangi Wambugu* [1982-88] 1KAR 278 at page 292, as follows:

“A Court of Appeal will not normally interfere with a finding of fact by the trial court unless it is based on no evidence or on a misapprehension of the evidence or the Judge is shown demonstrably to have acted on wrong principles in reaching the finding he did.”

23. The Appellant set out three grounds of appeal in their Memorandum of Appeal which I believe can be summarized as whether the Learned Chief Magistrate erred and misdirected himself on the law and the facts when he dismissed the Appellant’s Application dated 12<sup>th</sup> January 2019 and amended on 12<sup>th</sup> September, 2019.

24. The judgment of the trial court was delivered on 29<sup>th</sup> July, 2003 and an initial decree issued on 13<sup>th</sup> September, 2004 but upon review by the court the same was corrected and issued on 5<sup>th</sup> August, 2019 stating as follows;

1. There be a permanent injunction, restraining the defendants jointly and severally from further trespassing upon the plaintiff’s land.
2. There be an award of a nominal general damage of Ks. 15,000/= to the plaintiff for trespass.
3. The plaintiff is hereby awarded costs of the suit and interest at its rate.

25. The initial decree issued on 13<sup>th</sup> September, 2004 read as follows:

“That the Respondent, his family, agents, servants and employees move to the land at Kamutei and give vacant possession to the applicant, land parcel no. Matinyani/ Kalindilo/210.”

26. From the evidence adduced, the initial decree was executed through warrants issued by the court addressed to bailiff Max Auctioneers authorizing them to evict the defendants and give possession of land to the plaintiff. The O.C.S Kitui police station was directed to enforce the eviction. It is stated that as a result the defendants before the trial court moved to the land at Kamutei and vacant possession of land parcel No. Matinyani/Kalindilo/210 was given to the appellant.

27. Having moved out of the land in 2004, the Respondent herein and his family re-entered the suit land sometime in November 2018, ploughed the land, planted crops and constructed some temporary structures. It is stated that he also chased away the Appellant who now has no access to the said land.

28. A permanent injunction fully determines the rights of the parties before the court and perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected. This was stated by the court the case of *Kenya Power & Lighting Co. Limited v Sheriff Molana Habib* [2018] eKLR where it was 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...”

29. The Black’s law dictionary definition of a permanent injunction is;

“A prohibitive writ issued by a court of equity, at the suit of a party complainant, directed to a party defendant in the action, or to a party made a defendant for that purpose, forbidding the latter to do some act, or to permit his servants or agents to do some act, which he is threatening or attempting to commit, or restraining him in the continuance thereof, such act being unjust and inequitable, injurious to the plaintiff, and not such as can be adequately redressed by an action fit law”

30. The respondent was thus permanently prohibited from trespassing on the plaintiffs land by the judgement of the court made on 29<sup>th</sup> July 2003. Notwithstanding the fact that the decree initially issued did not agree with the judgement and the said decree was eventually corrected I am of the view that the said correction did not affect the contents of the judgment and its effect on the rights of the parties. Trespass has been defined by the 10<sup>th</sup> Edition of Black’s Law Dictionary as;

“an unlawful act committed against the person or property of another; especially wrongful entry on another’s real property.”

31. The Court in *John Kiragu Kimani v Rural Electrification Authority* [2018] eKLR also in defining trespass relied on Clark & Lindsell on Torts, 18<sup>th</sup> Edition on page 923 which defines trespass as;

‘any unjustifiable intrusion by one person upon the land in possession of another. The onus is on the Plaintiff to prove that the Defendant invaded his land without any justifiable reason.’

32. Section 3 (1) of the *Trespass Act*, defines trespass as follows;

“Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.”

33. The Respondent was by the judgement of the court restrained from further trespass on the Appellants land and in my view his re-entry on the said land was an act in contravention of a direct and specific order of the court and the appellant was entitled to take action to remove him and gain possession of the land. Order 22(6) of the *Civil Procedure Rules* on execution of decree provides that:

“Where the holder of a decree desires to execute it, he shall apply to the court which passed the decree, or, if the decree has been sent under the provisions hereinbefore contained to another court, then to such court or to the proper officer thereof; and applications under this rule shall be in accordance with Form No. 14 of Appendix A.”

34. The action the Appellant took in further execution of the decree was to file an application by way on Notice of Motion under section 38 (1) of the *Civil Procedure Act* cap 22 Laws of Kenya and order 22 rule 29 (1) and 30 of the *Civil Procedure Rules*.



35. Section 38 (1) of the [Civil Procedure Act](#) provides for powers of court to enforce execution of decrees and orders and states that;

Subject to such conditions and limitations as may be prescribed, the court may, on the application of the decree-holder, order execution of the decree—

(a) by delivery of any property specifically decreed;

36. Order 22 rule 29 (1) of the [Civil Procedure Rules](#) provides for execution of decree for immovable property and states that;

(1). Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

37. Order 22 rule 30 provides for execution of a decree for delivery of immovable property when in occupancy of tenant and the same provides that;

“Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property and notifying the occupant in such manner as may be suitable the substance of the decree in regard to the property.”

38. I agree with the trial court that the above provisions relate to an application for delivery of immovable property decreed by the court. This was not the case in the present suit since the decree did not order delivery of the suit land but was a permanent injunction restraining the defendants from trespassing on the land and payment of Kshs 15,000/= and costs of the suit as more particularly stated in the decree.

39. Further a consideration of the prayers set out in the amended notice of motion shows that the Appellant sought an order of removal of the defendant and his family members from the suit land and giving the plaintiff vacant possession of the same. On this, I agree with the trial court that the orders sought did not constitute execution of the decree as issued and drawn.

40. The Respondent objected to execution of the decree contending that the decree is time barred since judgment was delivered in 2003 and it is now more than 12 years after. The Respondent relies on the provisions of section 4(4) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya which provides: -

“(4)an action may not be brought upon a judgment after the end of twelve years from the date on which the judgment was delivered, or (where the Judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods) the date of the default in making the payment or delivery in question, in respect of a judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”



41. However, the order issued by the court was a permanent injunction which acts perpetually and in my view is incapable of expiring. The court in the case of *Bandari Investments & Co. Ltd v Martin Chiponda & 139 others* [2022] eKLR noted that:

“Permanent Injunction fully determines the right of the Parties before the Court and is normally meant to perpetually restrain the commission of an act by the Plaintiff in order for the rights of the Plaintiff to be protected.”

42. Further, when it comes to trespass, each act of trespass constitutes a new cause of action each time it occurs. The court in the case of *Ali Lekolela Montet v Rigogo Chonjo Farmers Co. Ltd* [2020] eKLR observed that:

“As long as the trespass continues, time begins to run afresh every new day. The Court of Appeal reiterated as much in *Isaack Ben Mulwa v Jonathan Mutunga Mweke* [2016] eKLR when it stated:

“... It is a well-settled principle that continuous injuries to land caused by the maintenance of tortious acts create separate causes of action barred only by the running of the statute of limitation against each successive acts. As explained by the learned authors Winfield and Jolowicz in *Winfield And Jolowicz On Tort*, 11th Edition, Sweet and Maxwell, London, 1979 at page 342:-

“Trespass, whether by way of personal entry or by placing things on the plaintiff’s land may be continuing and give rise to actions de die in diem so long as it lasts. Nor does a transfer of the land by the injured party prevent the transferee from suing the defendant for continuing trespass.”

43. From the foregoing it is clear that the Respondents objection to the execution of the decree as being time barred is unsustainable. However, I do find that the application before the trial court dated 2<sup>nd</sup> January 2019 and amended on 12<sup>th</sup> September 2019 was misconceived and lacked merit and the trial court was right in dismissing it. In the circumstances the appeal herein is also found not to have merit. I have found that the acts of the Respondent herein being acts of re-entry and remaining on the suit land are in contravention of the direct and specific orders of the trial court contained in the judgement delivered on 29<sup>th</sup> July 2003. Notwithstanding that the appeal herein is dismissed, the Appellant was entitled to take action to obtain compliance with the judgement of the court. For that reason, I direct that each party bear his own cost of the appeal herein.

### **Final Orders of the Court**

1. The appeal is hereby dismissed.
2. Each party to bear his own costs of the appeal.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**HON. LADY JUSTICE L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

**Judgement read in open court and virtually in the presence of-**

Musyoki: Court Assistant



N/A for the Appellant

Kasimu holding brief for Kalili for the Respondent.

