



Sugut v Yatich & another; Jepkorir (Interested Party) (Environment and Land Appeal E2 of 2022) [2023] KEELC 18610 (KLR) (5 July 2023) (Judgment)

Neutral citation: [2023] KEELC 18610 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND APPEAL E2 OF 2022**

LA OMOLLO, J

JULY 5, 2023

BETWEEN

SUSAN KIMELI SUGUT APPELLANT

AND

DAVID YATICH 1ST RESPONDENT

AHMED KIPROTICH KIRUI 2ND RESPONDENT

AND

EVALINE JEPKORIR INTERESTED PARTY

(Being an appeal against the Judgement of the Honorable magistrate Hon. R. Yator (PM) delivered on 3rd February 2022 in Molo CMCC ELC 18 of 2020)

JUDGMENT

Introduction.

1. By the Memorandum of Appeal dated 21st February 2022, the Appellant appeals against the judgement of Hon. R. Yator delivered on 3rd February 2022 in Molo CMC ELC No. 18 of 2020.
2. The Grounds of Appeal are as follows;
 - a. That the Learned Magistrate erred in law and in fact in making a finding that the interested party had obtained letters of administration in Eldoret High Court.
 - b. That the Learned Magistrate erred in law and in fact in failing to appreciate the difference between limited grant of letters of Administration Ad Litem and issuance of confirmation of grant to party in relation to a contested ownership;



confirmation of grant to date since 2010, has not been issued by the concerned Court.

- c. That the Learned Magistrate erred in fact and in law in failing to judiciously exercise her discretion in a dispassionate manner and uphold the principles of fairness in light of the fact that the government had caveated the section and had not taken any steps to remove the caveat.
- d. That the Learned Magistrate erred in law and in fact in failing to correctly relate the facts/law on issuance of limited grant of letters of administration Ad Litem to the interested party from 1st July 2010.

Factual Background.

3. The suit before the Subordinate Court was instituted by the Appellant vide a Plaint dated 24th March 2020 where she averred that she was the owner of land parcel No. Nakuru/Ngongongeri/258.
4. The Appellant also averred that the Respondents trespassed onto the suit property without any color of right. In her plaint she sought the following prayers;
 - a. Permanent injunction restraining the Defendants by themselves, servants, agents and or their employees from accessing, taking possession, entering, remaining, transferring, subdividing or any other way interfering with the suit land No. Nakuru/Ngongongeri/258.
 - b. An order confirming ownership of the suit land is the Plaintiff's to the exclusion of the Defendants.
 - c. Costs of the suit.
5. The Respondents filed their Statement of Defence and Counterclaim dated on 15th May 2020 wherein they denied the Appellant's claim and stated that it was the Appellant who had trespassed on land parcel No's Nakuru Ngongongeri/663 and 686.
6. They sought the following prayers in their counterclaim;
 - a. A declaration that the plaintiff has trespassed in land parcel numbers Nakuru/Ngongongeri/663 and Nakuru/Ngongongeri/686.
 - b. Special damages and mesne profits.
 - c. Costs of this counterclaim.
 - d. Interest.
7. The suit was heard and the Learned Trial Magistrate delivered judgement on 3rd February 2022 in the following terms;
 - a. The Plaintiff's case is dismissed with costs.
 - b. A declaration that the plaintiff has trespassed on parcel No. Nakuru/Ngongongeri/663 and Nakuru/Ngongongeri/686.
 - c. The plaintiff to pay costs of the counterclaim.



8. The Appeal was admitted to hearing and directions issued on 23rd January 2023. The directions were that the appeal would be disposed of by way of written submissions.
9. On 21st February 2023, parties confirmed having filed their submissions and the appeal was reserved for judgement.

Submissions.

10. The Appellant filed her submissions dated on 2nd February 2023 while the Respondents filed their submissions on 14th February 2023.
11. The Appellant's submissions are for the most part difficult to to comprehend but what I deduce from the said submissions is that the Learned Trial Magistrate failed to consider that the suit parcels are part of the Mau Forest Complex which is under a government caveat and the parcels cannot be alienated unless Mau Forest has been degazetted.
12. The Appellant relies on Section 34 of the *Forest Conservation and Management Act* 2016 and the case of *Mapelu & 13 Others v Cabinet Secretary, Ministry of Lands & Physical Planning & 164 Others; Nyayo Tea Zones Development Corporation & 2 Others (Interested Parties)* (Environment and Land Petition 12 & 13 of 2018) (Consolidated) [2022] KEELC 13468(KLR) in support of her arguments.
13. The Respondents submit that the Interested Party had obtained letters of Administration Ad Litem to sue on behalf of the estate of the deceased and despite the caveat being placed on the suit parcels, the issue before the court was on ownership.
14. The Respondents also submit that the trial court ordered the District Surveyor to visit the suit property and file his report which report was filed on 3rd July 2020.
15. The Respondents further submit that the District Surveyor in his report indicated that the portion of land the Appellant was claiming was land parcel No's Nakuru/Ngongongeri/663 and 686 and not land parcel No. Nakuru/Ngongongeri/258.
16. The Respondents submit that the District Surveyor confirmed that the Appellant had fenced the wrong parcels of land and planted maize.
17. The Respondents further submit that when the District Land Registrar gave his evidence, he confirmed that land parcel No. Nakuru/Ngongongeri/258 is registered in the name of Jackson Tanui and not the Appellant herein.
18. The Respondents also submit that the Appellant does not have any claim over land parcel No's Nakuru/Ngongongeri/663, 686 and 258.
19. The Respondents further submit that land parcel No's Nakuru/Ngongongeri/663 and 686 are registered in the name of the deceased whose personal representative had given them authority to carry out farming activities.
20. The Respondents rely on the judicial decision in *Ali Wanje Ziro vs Abdulbasit Abeid Said & Another* [2022] eKLR and submit that the Appellant's Appeal lacks merit and should be dismissed with costs.

Analysis and Determination.

21. Before delving into the issues for determination, this court notes that the Appellant's Memorandum of Appeal does not contain a paragraph expressly setting out his prayers.



22. Article 159 (2)(d) of the Constitution of Kenya provides that in exercising judicial authority, the courts should be guided by certain principles which includes the principle that justice shall be administered without undue regard to procedural technicalities.
23. As stated in the preceding paragraphs, the Appellant’s submissions are difficult to comprehend but upon perusing the plaint filed in the subordinate court, it is evident that he sought orders of permanent injunction against the Respondents restraining them from interfering with land Parcel No. Nakuru/ Ngongongeri/258. The Appellant also prayed that the court do issue an order confirming her as owner of the suit property.
24. It is therefore logical to deduce that the Appellant is seeking that the Learned Trial Magistrate’s judgement be set aside and a permanent injunction be issued restraining the Respondents from interfering with land Parcel No. Nakuru/ Ngongongeri/258 and an order be issued confirming the Appellant as the owner of the suit property.
25. In determining this appeal, I am further guided by Section 1A, 1B and 3A of the Civil Procedure Act.
26. Section 1A of the Civil Procedure Act provides as follows;

“ 1A. Objective of Act

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.”

27. Section 1B of the Civil Procedure Act provides as follows;

“ 1B. Duty of Court

- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) The just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.”



28. Section 3A of the *Civil Procedure Act* provides as follows;

“3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

29. Bearing in mind these legal provisions, I shall proceed to make a determination on the appeal.

30. After considering the Grounds of Appeal, it is my view that the following issues arise for determination;

- a. Whether the learned Trial Magistrate erred in finding that the Interested Party had obtained Letters of Administration.
- b. Whether the learned Trial Magistrate erred in fact and in law by failing to hold that the government had caveated the Mau Forest Complex where the suit parcels are located.
- c. Who should bear costs of this Appeal.

31. The role of the Appellate court was stated as follows by the Court of Appeal in the case of *Gitobu Imanyara & 2 Others vs Attorney General* [2016] eKLR;

“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 allowances in this respect”.

A. Whether the learned Trial Magistrate erred in finding that the Interested Party had obtained Letters of Administration.

32. The Appellant argues that the Learned Trial Magistrate erred in finding that the Interested Party had obtained Letters of Administration.

33. The Appellant also argues that the Learned Trial Magistrate failed to appreciate the difference between Limited Grant of Letters of Administration Ad Litem and issuance of a confirmed Grant of Letters of Administration.

34. The Respondents in their submissions argue that the Interested Party obtained Letters of Administration Ad Litem to sue on behalf of the estate of the deceased. They further argue that though a caveat was in place in respect of the area in which the suit parcel is situated, the issue before the trial court was on determination of ownership.

35. The Learned Trial Magistrate in her judgement delivered on 3rd February 2022 identified the following issues for determination;

- a. Whether the Plaintiff is the legal owner of the suit land.
- b. Whether the Plaintiff is entitled to the orders of injunction against the Defendant.
- c. Whether the Plaintiff has trespassed on or Parcels Nakuru/Ngongongeri/686.
- d. Whether the Defendant is entitled to special damages and mesne profits.



36. A perusal of the pleadings and the evidence given during the trial before the lower court reveal that the issue of whether or not the Interested Party in this appeal had obtained Letters of Administration in Eldoret High Court did not arise.

37. The Court of Appeal in the case of *Republic v Tribunal of Inquiry to Investigate the Conduct of Tom Mbaluto & others Ex-Parte Tom Mbaluto* [2018] eKLR held as follows;

“It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe*, CA No. 39 of 2015 and *Openda v. Abn* [1983] KLR 165). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See *North Staffordshire Railway Co. v. Edge* [1920] AC 254).”

38. I am of the view that since the question whether or not the Interested Party obtained Letters of Administration was not raised during the hearing before the trial court, the Appellant is precluded from raising the same before this court.

39. Consequently, I decline to make a determination on this ground.

B. Whether the Learned Trial Magistrate erred in fact and in law by failing to hold that the government had caveated Mau Forest Complex where the suit parcels are located.

40. The Appellant argues that the Learned Trial Magistrate erred in fact and in law in failing to hold that the government had caveated the Mau Forest Complex where the suit parcels are located.

41. On this point, the Respondents submit that the issue that arose for determination before the trial court was on the ownership of the suit properties. The Respondent does not dispute the fact of existence of a caveat on the suit properties.

42. Dismas Kwalya, the Senior Land Surveyor who testified as PW2 stated, in evidence, that the suit properties are located in Eastern Mau where the government had placed a caveat that there should be no dealings on the said land. This fact was well within the knowledge of this witness and the court.

43. Liyayi Collins, the Land Registrar Nakuru while giving his evidence before the trial court stated that there is a government caveat placed over the entire Mau Forest Complex in an effort to reclaim the forest land and revert it back to the government. Again, this witness confirms the fact of existence of a caveat.

44. On a perusal of the pleadings, evidence and the judgement it is evident that it was not disputed that the government had placed a caveat on Mau Forest Complex where the suit parcels are situated. The question before the Trial court was whether or not the occupation of the suit parcels by the Appellant was rightful and not whether or not there was a caveat placed on the Mau Forest Complex.



45. Part of the judgement of the trial court is at page 21 of the record of appeal and in answer to the question of ownership of the suit land Learned Magistrate states as follows;

“On whether the Plaintiff is the legal owner of the suit property, she did produce title deed in her names for parcel 258. The real issue seemed to be whether the land parcel the Plaintiff has been claiming to hers on the ground was actually 258.

Through a court order the surveyor visited the land in presence of all the parties and stated that- the parcel No. 258 the Plaintiff had claimed to be hers and as per the registry index map was actually parcel No. 686 and 663. That parcel No 258 was around 2 kms away from parcel No 686 and 663 and as such the land the Plaintiff showed them was not 258. The Report was produced as PEXB4.

This therefore clearly shows that the land the

Plaintiff has been claiming to be No 258 is not actually No258 and as such the Plaintiff has in fact trespassed into (sic) parcel No 686 and 663.’

46. As noted in my analysis under issue (A), the Appellant is precluded from raising new issues on appeal, which issues were not raised before the lower court. This ground of appeal also fails.

C. Who should bear costs of this Appeal?

47. Section 27 (1) of the [Civil Procedure Act](#) stipulates as follows;

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid: and the fact that that court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers.

Provided that the costs of any action, cause or other matter shall follow the event unless the court or judge shall for good reasons otherwise order.”

Disposition.

48. It is my considered view that the Learned Trial Magistrate correctly applied the facts to the law and did not commit any error in arriving at her determination. Nothing, therefore, warrants interference her finding.

49. In the result, I find that the Appeal lacks merit and is hereby dismissed with costs to the Respondents.

50. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF JULY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

Mr. Kipsang for the Appellant



Mr Machafu for the Respondents.

Court Assistant; Ms. Monica Wanjohi.

