



**Kangai v Nyomba & another (Environment and Land Appeal
E013 of 2024) [2025] KEELC 3005 (KLR) (25 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 3005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E013 OF 2024**

**BM EBOSO, J
MARCH 25, 2025**

BETWEEN

CATHERINE KANGAI APPELLANT

AND

JUDITH KAINDA NYOMBA 1ST RESPONDENT

LYDIA KANINI KWENGA 2ND RESPONDENT

(Being an Appeal arising from the Judgment of Hon Mbayaki Wafula, Senior Principal Magistrate, delivered on 18/10/2023 in Marimanti SPMC E&L Case No E014 of 2022)

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered by Hon Mbayaki Wafula (SPM) on 18/10/2023 in Marimanti SPMC E&L Case No E014 of 2022. The two key issues that fell for determination in the said case were: (i) Whether the appellant was entitled to a portion measuring 0.75 acres out of land parcel numbers Tharaka/Chiakariga “A”/4002 and 4003 and; (ii) Whether the appellant was a trespasser on land parcel numbers Tharaka/Chiakariga “A”/4002 and 4003. Invariably, these are the two key issues that arise for determination in this first appeal. Before I analyze and dispose the issues, I will outline a brief background to the appeal and summarize the parties’ respective submissions on the appeal.

Background

2. The suit giving rise to this appeal was instituted by the two respondents through a plaint dated 2/8/2022. They sought: (i) an order of permanent injunction restraining the appellant and her agents/servants against entering, remaining on, continuing in occupation of or dealing with land parcel numbers Tharaka/Chiakariga “A” 4002 and 4003 [hereinafter referred to as “the suit lands” or “the suit



properties”]: (ii) a mandatory injunction decreeing the appellants and her agents/servants to forthwith remove and demolish all the dwelling structures erected on the suit lands; (iii) an order decreeing the Officer Commanding Chiakariga Police Station to assist in enforcing the above orders; (iv) an order decreeing the appellant to pay the respondents mesne profits and damages; and (v) an order awarding the respondents costs of the suit.

3. The case of the respondents was that they were the registered proprietors of the suit lands, having acquired the parcels from their late mother, Ciangombe Kwenga Munyori, during her lifetime. They contended that the respondent had trespassed upon the suit lands and had illegally erected temporary structures on the lands.
4. The appellant responded to the suit through a defense and counterclaim dated 11/8/2022. Her case was that, together with her late husband, Joseph Murage Kwenga, she acquired a portion measuring 0.75 acres out of the suit lands from their mother/mother-in-law, the late Ciangombe Kwenga Munyori. She contended that they established their matrimonial home on the 0.75 acre portion and they had lived on it for a period “in excess of 10 years.”
5. By way of counterclaim, the appellant prayed for: (i) a declaration that she was the rightful owner of a portion measuring 0.75 acres out of the suit lands; (ii) an order directing the Land Registrar to excise and transfer to her a portion measuring 0.75 acres out of the suit lands; (iii) a permanent injunction restraining the respondents and their agents/servants/assigns against interfering with or dealing with the 0.75 acre portion; and (iv) an order awarding her costs of the primary suit and the counterclaim.
6. Upon concluding trial and receiving submissions, the trial court rendered the impugned Judgment in which it found that the respondents had proved their primary claim against the appellant on a balance of probabilities. The trial court further found that the appellant had failed to prove her counterclaim against the respondents.

Appeal

7. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following six (6) verbatim grounds:
 1. The learned trial magistrate erred in law and fact in holding that the appellant had not proved fraud in the manner in which the respondents acquired L.R No. Tharaka/Chiakariga “A”/4002 and 4003, whereas there was sufficient evidence to prove that there was indeed fraud.
 2. The learned trial magistrate erred in finding that the appellant was not married to the brother of the respondent (deceased), when there was overwhelming evidence which was not controverted that she was a widow to Joseph Murage Kwenga, who was a brother to the respondents.
 3. The learned trial magistrate erred in failing to hold that the appellant had lived on the suit land for over 12 years and therefore, the respondent’s cause of action had become statute barred and could not be enforced in a court of law.
 4. The learned trial magistrate erred in law and fact in dismissing the appellant’s counterclaim when there was sufficient evidence to support the same.
 5. The learned trial magistrate erred in failing to sufficiently analyse and review the evidence because had he done so, he would have arrived at a different evidence.
 6. The entire judgment of the learned trial magistrate is against the weight of evidence.



8. The appellant urged this court to grant her: (i) an order setting aside the Judgment of the trial court and dismissing the respondents' suit with costs; and (ii) an order allowing the appellants' counterclaim with costs.

Appellant's Submissions

9. The appeal was canvassed through written submissions dated 14/1/2024, filed by M/s Murango Mwenda & Co Advocates. Counsel for the appellant contended that the trial court erred in holding that the appellant failed to prove fraud. Counsel argued that it was not in dispute that the suit lands were previously registered in the name of the respondents' mother, the late Ciangombe Kwenga Munyori (the deceased), adding that the respondents failed to demonstrate how ownership changed from the deceased to the respondents. Counsel submitted that the exhibited official search showed that "the respondents got registered as proprietors in July of 2022 after the death of their mother." Counsel argued that the respondents failed to demonstrate the root of their titles, adding that failure to follow the law in transferring the land was an act of fraud.
10. On the contention that the trial court erred in finding that the appellant was not married to the respondent's brother, the late Joseph Murage Kwenga, counsel for the appellant submitted that four of the witnesses who testified in the matter were siblings of the respondents, adding that the four witnesses confirmed that the appellant was married to the respondents' late brother through customary rites.
11. On the contention that the respondents' claim was statute-barred, counsel submitted that there was evidence that the appellant got married to the respondents' brother in the year 2000 and that she had lived on the suit land for more than 22 years. Counsel argued that the appellant had been in open use of the 0.75 acre portion since 2000 without anyone attempting to evict her.
12. On the contention that the trial court failed to sufficiently analyse and review the evidence on record, counsel submitted that the 6 witnesses who testified in favour of the appellant confirmed that the appellant was married to the respondent's brother and the couple had lived on the land till 2014 when Joseph died.

Respondents' Submissions

13. The respondents opposed the appeal through written submissions dated 23/1/2025, filed by M/s Kijaru Lydiah & Company Advocates. On the appellants' contention that the trial court erred in holding that the appellant had not proved fraud, counsel submitted that the respondents tendered registered titles and official searches showing that they were the registered proprietors of the suit land, adding that it was the duty of the appellant to prove fraud in the registration of the respondents as proprietors of the suit lands.
14. On the contention that the trial court erred in finding that the appellant had not proved that she was married to the respondent's deceased brother, counsel submitted that the appellant was not a widow to the respondents' deceased brother, adding that evidence was tendered to the effect that whereas the two had a relationship long time ago, the relationship broke down prior to the demise of the respondents' deceased brother. Counsel argued that the trial court did not find credit in the appellant's claim of widowship because she had contended that the appellant's brother died in 2014 yet he died in 2002.
15. On the contention that the trial court erred in failing to hold that the respondents' claim was statute-barred by dint of the fact that the appellant had lived on the suit lands for over 12 years, counsel submitted that there was evidence that the appellant had been on the suit land for only 18 months. Counsel added that the appellant had introduced a new issue – the issue of adverse possession, in the



appeal, adding that this was irregular. Counsel further submitted that the appellant did not in any event establish the elements of adverse possession. Counsel urged the Court to reject the appeal.

Analysis and Determination

16. I have read and considered the entire original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. As observed in the introductory paragraph of this Judgment, the two key issues that fall for determination in this first appeal are: (i) Whether the appellant is entitled to a portion measuring 0.75 acres out of land parcel numbers Tharaka/Chiakariga "A"/4002 and 4003; and (ii) Whether the appellant is a trespasser on the said parcels. The two issues are intertwined. I will, in the circumstances, analyse and dispose them simultaneously. Before I dispose them, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
17. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The principle was summarized by the Court of Appeal in the case of Susan Munyi Vs. Keshar Shiani [2013] eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all the evidence and arrive at our own independent conclusions.”
18. The above principle was similarly outlined in Abok James Odera t/a A.J Odera & Associates Vs. John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
19. Is the appellant entitled to a portion measuring 0.75 acres out of parcel numbers Tharaka/Chikariga "A"/4002 and 4003? Is the appellant a trespasser on the said parcels? The respondents presented a primary claim to the trial court. They went to the trial court waving titles relating to the two parcels. Parcel number Tharaka/Chiakariga "A"/4002 was expressed as having been registered in the name of Judith Kainda Nyomba (the 1st respondent) on 22/7/2022. Parcel number Tharaka/Chiakariga "A"/4003 was expressed as having been registered in the name of Lydia Kanini Kwenga (the 2nd respondent) on 22/7/2022. The two respondents contended that the appellant was a trespasser on the two parcels.
20. On her part, the appellant denied the respondents' claim and contended that, together with her deceased husband, Joseph Murage Kwenga, they acquired a portion measuring 0.75 acres out of the two suit properties. By way of counterclaim, she, among other reliefs, sought a declaration that she was the rightful owner of the 0.75 acre portion.
21. Under Sections 107, 108 and 109 of the *Evidence Act*, he who alleges bears the burden of proof. The respondent had the burden of proving ownership of the two parcels. On her part, the appellant bore the burden of proving that she had acquired ownership of the 0.75 acre portion out of the two parcels.
22. A perusal of the evidence on record shows that the two respondents presented their respective titles and official searches proving that, indeed, they were the registered proprietors of the two parcels. Under Section 26 of the *Land Registration Act*, the two titles were to be taken by the court as prima facie



evidence that the respondents were the legitimate proprietors of the suit lands. Indeed, Section 26 of the [Land Registration Act](#) Provides as follows:

“Certificate of title to be held as conclusive evidence of proprietorship: -

1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
23. As a first appellate court, I have perused the appellants’ pleadings and evidence. The appellant did not challenge the registration of the respondents through her pleadings. She did not seek a cancellation of the registration of the respondents as proprietors of the suit lands. All she did was to ask for excision of a portion measuring 0.75 acres out of the suit lands. Did the appellant prove acquisition of ownership of the 0.75 acre portion that she wanted excised?
24. Section 7 of the [Land Act](#) contains the following framework on acquisition of interest in land:
- “7. Title to land may be acquired through: -
- a. allocation;
 - b. land adjudication process;
 - c. compulsory acquisition;
 - d. prescription;
 - e. settlement programs;
 - f. transmissions;
 - g. transfers;
 - h. long term leases exceeding twenty-one years created out of private land; or
 - i. any other manner prescribed in an Act of Parliament.”
25. It was incumbent upon the appellant to plead and prove acquisition of ownership of the 0.75 acre portion through one of the above means or through any other means recognised by the law. She did not plead any of the above or any other lawful means through which title to land is acquired. A perusal of her adopted written statement and her oral evidence does not disclose any attempt to prove acquisition



of ownership through any known lawful means. A key aspect of her oral evidence is at page 53 of the record of appeal and reads as follows:

“2014 is when my husband died not in 2002. I did not burry him on the land my mother-in-law showed us because at that time it had not been shown to us. We were shown the land when our mother-in-law was about to die. I stay on our mother’s land not yours.”

26. It is clear from the above verbatim evidence that at the time of testifying, the appellant asserted that the 0.75 acres which she claimed to own belonged to her mother-in-law (Ciangombe Kwenga Munyori). She did not prove that she had acquired ownership of the 0.75 acre portion through any means prescribed or recognized under the law.
27. In this appeal, counsel for the appellant faulted the trial court for failing to grant the appellant the 0.75 acre portion under the doctrine of adverse possession. Counsel contended that the appellant proved adverse possession. A perusal of the pleadings and the evidence on record does not support the appellant’s argument. First, the appellant did not plead a claim of acquisition of title through adverse possession. Secondly, she did not lead evidence proving adverse possession. The claim/argument of adverse possession was introduced through written submissions in this appeal.
28. Counsel for the appellant similarly faulted the trial court for failing to find that the appellant had proved fraud in the acquisition of the respondents’ titles. First, the appellant did not plead and particularize fraud. Secondly, she did not tender evidence proving fraud. The law on a civil claim of fraud is well settled. In *Vijay Morjaria v Nansingh Madhusingh Darbar & another* [2000] eKLR (Civil Appeal No. 106 of 2000) the Court of Appeal outlined the law as follows:

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
29. Suffice it to state that, without the appellant pleading, particularizing, and proving fraud, the trial court had no basis upon which to impeach the respondents’ titles. Put differently, the trial court could not impeach the respondents’ titles suo motto.
30. Through her submissions before this court, the appellant contended that the respondents’ claim was statute-barred because she (the appellant) had lived on the suit land for a period exceeding 12 years. This is an argument that was introduced in this dispute through counsel’s submissions on this appeal. The defence of limitation was never pleaded in the pleadings that were before the trial court. If the appellant had a defence under the *Limitation of Actions Act*, she was entitled to plead it and tender necessary evidence to support it. She neither pleaded limitation nor led evidence proving limitation. Her argument cannot, in the circumstances, be accepted at this point.
31. The respondents having proved that they were the registered owners of the suit lands, and the appellant having failed to prove her ownership of the 0.75 acre portion that she claimed to own, it follows that she was a trespasser on the suit lands. This court therefore has no basis to fault the trial court for decreeing her eviction from the suit lands.
32. For the above reasons, on an independent evaluation, this first appellate court finds that the appellant did not prove her entitlement to the 0.75 acre portion of the suit lands. The court further finds that the respondents proved that the appellant was a trespasser on the suit lands. Consequently, this appeal is devoid of merit. The appeal is dismissed for lack of merit.



33. In tandem with the general principle in Section 27 of the *Civil Procedure Act*, the appellant shall bear costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 25TH DAY OF MARCH, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Ms. Gumato h/b for Mr. Murango Mwenda for the Appellant

Ms. Kijaru for the Respondents

Court Assistant – Moses

