



**Ndirangu v Macharia (Environment & Land Case 4 of 2022)  
[2023] KEELC 16487 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16487 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 4 OF 2022**

**JO OLOLA, J  
MARCH 23, 2023**

**BETWEEN**

**SAMUEL MAINA NDIRANGU ..... APPELLANT**

**AND**

**JOHN GIKARA MACHARIA ..... RESPONDENT**

**JUDGMENT**

1. By a Plaint dated 25<sup>th</sup> February 2019, John Gikara Macharia (the Respondent herein) had sought Judgment against the Appellant herein (as the 1<sup>st</sup> Defendant) together with one Peter Ndirangu Kimani (the 2<sup>nd</sup> Defendant) for orders as follows:
  - (a) A permanent injunction restraining the Defendants and/or their agents from interfering with LR No Mahiga/Rokera/1202;
  - (b) An eviction order to be issued against the Defendant(s);
  - (c) Costs of the suit and interest; and
  - (d) Any other relief the Honourable Court may deem fit to grant.
2. Those prayers arose from the Respondent's contention that he was the registered proprietor of the said LR No Mahiga/Rokera/1202 having acquired the same pursuant to Othaya Senior Resident Magistrate Succession Cause No 471 of 2014; In the Matter of the Estate of Muchiriga Macharia. According to the Respondent, the suit property resulted from the sub-division of LR No Mahiga/Rokera/10 which was previously in the name of the late Muchiriga Macharia aforesaid.
3. It was the Respondent's case that before the said sub-division, his now deceased brother Daniel Wanjohi Wachira had leased a portion of LR No Mahiga/Rokera/10 to the Defendants who had



subsequently refused to release the same to the Respondent despite the deceased having left the said portion to the Respondent.

4. But in their joint Statement of Defence dated and filed on 13<sup>th</sup> March 2019, Samuel Maina Ndirangu (the Appellant) and the 2<sup>nd</sup> Defendant in the case denied the Respondent's claim. It was the Appellant's case that the late Daniel Wanjohi had sold to him the said portion of land before granting him occupation thereof. On his part, the 2<sup>nd</sup> Defendant pleaded that he was not in occupation of the land but was only looking after the same on behalf of the Appellant.
5. It was further the Appellant's case that the suit filed in the SRM's Court at Othaya was sub judice and an abuse of the Court process as there was in existence Nyeri MCL & E case No 213 of 2018 which was pending between him and the Respondent concerning the same subject matter.
6. Having had the Parties and in a Judgment delivered on 4<sup>th</sup> December, 2020 the Honourable MN Munyendo, Senior Resident Magistrate was satisfied that the Plaintiff has made out his case and was entitled to the orders sought. Accordingly, the Learned Trial Magistrate granted orders as follows:
  - (a) A permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant and/or his agents from interfering with LR No Mahiga/Rokera/1202;
  - (b) It is hereby ordered that the 1<sup>st</sup> Defendant be evicted from LR No Mahiga/Rokera/1202 to be effected within six (6) months from the date of this Judgment;
  - (c) The Plaintiff shall grant the 1<sup>st</sup> Defendant access to the property to remove any crops and or structure built therein; and
  - (d) The Plaintiff shall have costs and interests of the suit at Court rates from the date of this Judgment.
7. Aggrieved by the said Judgment, the Appellant moved to this Court vide his Memorandum of Appeal dated 25<sup>th</sup> January, 2022 seeking to have the orders set aside on the grounds that:
  1. The Learned Magistrate erred in law and fact by issuing an eviction order against the Appellant despite acknowledging that they were entitled to the land through the doctrine of adverse possession;
  2. The Learned Magistrate erred in fact by (misunderstanding) the evidence produced which led to a wrong finding in her determination. In particular, the Learned Magistrate erred by:
    - (a) Assuming that L.R Mahiga/Rokera/1202 was the same parcel of land as Mahiga/Rokera/10; and
    - (b) Assuming that L.R Mahiga/Rokera/10 was registered in the name of the Respondent;
  3. The Learned Magistrate erred in fact and law by failing to consider the issue of adverse possession and by dismissing the same as an afterthought, whereas the same was raised in the pleadings during the trial; and
  4. The Learned Magistrate erred in law by finding that the Respondent has satisfied the legal threshold for the grant of a permanent injunction, whereas



no evidence had been produced to show that the Respondent was the owner of Mahiga/Rokera/10.

8. This being the first Appellate Court, its duty is to revisit the evidence on record, re-evaluate the same and reach its own conclusion bearing in mind that the Court did not have the benefit of witnessing the testimony of the witnesses first hand.
9. The Appellant's first ground of Appeal is the contention that the Learned Trial Magistrate erred in law and in fact by issuing an eviction order against the Appellant despite acknowledging that they were entitled to the suit property through the doctrine of adverse possession.
10. In this respect, it is the Appellant's submission that the Court ought to have considered all the issues raised before it and that failure to do so would amount to a wrong judgment. The Appellant asserts that the issue of adverse possession was not only raised in the Amended Defence but was also pleaded before Court during trial by the two witnesses who stated that the Appellant had been on the land for a period of over 20 years.
11. I have taken time to peruse the Appellant's undated Amended Defence filed in the Trial Court on 24<sup>th</sup> July 2019. I was however unable to see any paragraph or sentence wherein a claim for adverse possession to the suit property was made by the Appellant. The submission that the issue of adverse possession was raised by the Appellant in his pleadings is therefore incorrect and misguided.
12. In support of the contention that a claim for adverse possession can be made in the form of a defence, the Appellant has cited the case of Gulam Mariam Noordin -vs- Julius Charo Karisa (2015) eKLR. I have looked at that authority as placed before me by the Appellant. While it is true the Court of Appeal did not fault the procedure by which the claim was made, the reason therein was because a claim for adverse possession had been specifically pleaded in the Defence.
13. In the instant case, the Appellant pleaded that he had been gifted the land in contention by the Respondent's brother and that he was in occupation of the land as a matter of right. That in my view is not the same thing as a claim of adverse possession.
14. As the Trial Court rightfully found, the issue of adverse possession was only raised in the Appellant's submissions. Until those submissions were filed, there was no claim by the Appellant on that matter. As the Trial Court again rightly found, a party is bound by his pleadings and cannot be allowed to raise different or fresh cases without due amendment of his pleadings properly made. That is a good rule for the sake of certainty and finality. It ensures that each Party knows the case he has to meet and cannot be taken by surprise at the trial.
15. On the Second Ground, the Appellant asserts that the Learned Magistrate misunderstood the evidence placed before her and arrived at a finding that was wrong in fact. On this ground, the Appellant submitted that no evidence was placed before the Court to demonstrate that LR No Mahiga/Rokera/1202 emanated from LR No Mahiga/Rokera/10. It was in this regard the Appellant's case that they had produced a Search Certificate indicating that LR No Mahiga/Rokera/10 was registered under one Gichungu Gachara while LR No Mahiga/Rokera/1202 was registered in the name of the Respondent.
16. From the material placed before me, it was apparent that the said Gichungu Gachara was the Respondent's father and that as at the time the Respondent's brother purported to sell the land to the Appellant, the said Gichungu Gachara was deceased and no succession proceedings had been



undertaken as regards his estate. Having considered that issue, the Learned Trial Magistrate delivered herself at Paragraph 14 of her Judgment thus:

“ 14. As the Plaintiff correctly pointed out, the law of succession prohibits intermeddling with the estate of a deceased person prior to confirmation of grant. I also stand well guided by the case of In re-estate of M’Ajogi M’Ikiugu (supra) as cited by the Plaintiff in his submissions. Thus the agreement is void as it offends Section 82(b)(ii) of the Law of Succession. I find and hold that the Defendant did not acquire an interest in the suit property in view of the illegal transaction entered into.”

17. I was again unable to fault this finding. Without a grant of representation, the Respondent’s brother Daniel Wanjohi Macharia did not have any powers to deal with his father’s property. Any such attempted sale of the immovable property of the estate before confirmation of the grant was null and void for all purposes and intents.
18. On the contention that the threshold for the grant of a permanent injunction had not been attained, it was apparent to me that having acquired no interest in the land, the Appellant could not be allowed to remain on the suit land. As at the time the Respondent’s brother had purported to sell the land to the Appellant, the shares of the persons beneficially entitled to the land was yet to be established and his interests remained amorphous and entangled within the estate. The Administrator or executor of the estate is the one who is entitled to deal with such property.
19. In the circumstances herein, the Appellant had no right whatsoever over the suit land and the Learned Trial Magistrate cannot be faulted for preserving the suit property by restraining the Appellant from any interference therewith.
20. It follows that I did not find any basis for this Appeal. The same is dismissed with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 23<sup>RD</sup> DAY OF MARCH, 2023.**

**J. O. OLOLA**

**JUDGE**

In the presence of :

Mr. Nderitu for the Appellant

Mr. Magua for the Respondent

Court assistant - Kendi

