



**Kagwiria & another v Mburugu (Environment and Land Appeal
E056 of 2021) [2023] KEELC 18302 (KLR) (21 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E056 OF 2021**

**CK YANO, J
JUNE 21, 2023**

BETWEEN

EVANGELINE KAGWIRIA 1ST APPELLANT

ALPHANO M. NTOGAI 2ND APPELLANT

AND

IMELDA KARENDI MBURUGU RESPONDENT

*(Being an appeal from the judgment and orders of the Honourable S.N
ABUYA (C.M) delivered on 7th April 2021 in Meru ELC NO. 181 OF 2018)*

JUDGMENT

A. Introduction

1. The appellant Evangeline Kagwiria filed this appeal against the whole of judgment and decree of the Chief Magistrate (Hon SN Abuya) delivered on April 7, 2021 and set out the following grounds of appeal;
 - i. The learned Trial Magistrate erred in law in failing to consider that James Mutai (deceased) had no estate as at the time of death since the adjudication process had not concluded.
 - ii. The learned magistrate erred in law in failing to appreciate that the respondent claim was time barred.
 - iii. The learned magistrate erred in law and fact in not considering that the respondent claim being a quasi-judicial procedure, any final decision by minister can only be challenged through judicial review proceedings by an order of certiorari as provided under Order 53 of the [Civil Procedure Rules](#).



- iv. The learned trial magistrate erred in law and fact in arriving at the decision that the appellant failed to disclose to the relevant tribunals dealing with objection that James Mutai (deceased) was dead when case No 122 of 95 indeed the same was properly captured in the proceedings of the land appeal on page 2 as 24th November, 1974.
 - v. The learned trial magistrate erred in law and fact in failing to appreciate that the appellant was a lay person and lacks locus standi to advise the minister.
 - vi. The learned trial magistrate fell into grave error of law and fact by failing to appreciate that the respondent's suit was statutorily time barred.
 - vii. The learned trial magistrate erred in law and fact by misreading and misinterpreting the evidence of the P.W 1 and P.w 2 and therefore finding in favour of the respondent.
 - viii. The learned magistrate erred in both law and fact by making a determination to the effect that the appellant illegally and unlawfully excised a portion of land from the respondent when there was absolutely no iota of evidence tendered to support the same.
 - ix. The judgment of the learned trial magistrate was not in consonance with the law and caused a massive miscarriage of justice.
2. The appellants prayed that the appeal herein be allowed with costs by setting aside the judgment of the lower court and in its place dismiss the respondent's suit in lower court with costs.

Background of the Appeal.

3. The gist of the case in a nutshell is that the respondent brought the suit vide the plaint dated February 10, 2015 as the legal representative of the estate of James Mutai who died domiciled in Meru County. The respondent pleaded that during the life time of the deceased, he was allocated by the Government of Kenya all the parcel of land known as L.R No Kiirua/nkando/581 measuring 25 acres or thereabout. That the deceased left the said land which was then within adjudication section as part of his estate and upon his death the appellants unlawfully and fraudulently cause the suit land to be subdivided into two parts with the 1st appellant getting registered as the owner of L.R No Kiirua/Nkando 1975 and the 2nd appellant L.R No Kiirua/Nkando/1974. The respondent stated that the two parcels of land now registered in the names of the appellants are sub-divisions of L.R No Kiirua/Nkando/581, now registered in the name of the deceased.
4. The respondent further stated that the two appellants intermeddled with the estate of the deceased as they were not the administrators of the deceased and acted fraudulently.
5. The respondent enumerated particulars of fraud as dealing with the land of the deceased without letters of administration, filing objections to the land against a dead person when the appellants knew the owner was dead, representing to the Land Adjudication & Settlement Officer that the owner was alive when both knew that he was dead, failing to disclose to the Land Adjudication Settlement Officer that the owner of the land was deceased, obtaining awards favorable to them from the Land Adjudication & Settlement Officer in an unfair and dishonest manner and dealing with the estate of a dead person without authority from the court.
6. The respondent averred that as a result of the appellants' fraudulent acts, the estate of James Mutai has been deprived of two parcels of land and has suffered loss.
7. The respondent prayed for a declaration that the L.R No Kiirua/Nkando/1974 and 1975 form part of the estate of James Mutai, cancellation of the registration of L.r No Kiirua/Nkando/1974 and 1975



- in the names of the 1st and 2nd appellants respectively and have it revert to the name of James Mutai as part of his estate and costs of the suit.
8. The appellants filed separate statements of defence denying the respondent's suit. In her defence dated October 15, 2018 the 1st Appellant admitted that the deceased was allocated land which he refused and the same was later given to the appellants by the then minister of land, Jackson Angaine. It was the 1st appellant's contention that the interest of the deceased was determined way back in the year 1996 in the minister's award which also directed that his said interest be registered in his mother, Eunice Igoji Kibanga.
 9. In his statement of defence dated September 20, 2016, the 2nd appellant also admitted that the deceased was allocated land parcel No Kiirua/Kiirua Nkando/581 by the Government of Kenya, but abandoned the same. That in 1972, the 2nd appellant's mother, one Marishara Mwari was allocated the suit land and shown her boundaries.
 10. The 2nd appellant averred that in 1984, he found the adjudication records still read the deceased's name as owner of the land and filed an objection No 31/84 which was deferred until the "objection period was opened. That despite several summons to the said James Mwiti to respond to the objection proceedings, he failed to attend and subsequently, the same Adjudication and Settlement Officer heard the appellants' objection in the absence of the said James Mutai after the area chief confirmed that he could not be traced, and on June 5, 1992 gave his award by allocating the 1st appellant 18 acres while the 2nd appellant was allocated 2 acres.
 11. It was the 2nd appellant's case that being aggrieved by the Land Adjudication officer's award, the 2nd appellant lodged an appeal with the minister being appeal No 11 of 1995 and on April 4, 1996 the appellants together with one Eunice Igoji Kibanga (James Mutia's mother) were summoned at the Meru District Commissioner's office for hearing of the appeal. That subsequent to the hearing, the minister in his award dated May 15, 1995 altered the land adjudication officer decision and awarded James Mutai 12 acres, the 1st appellant 8 acres and the 2nd appellant 5 acres respectively and further directed that since the said James Mutai died at a tender age his land be registered in the name of his mother Eunice Igoji Kibanga. The 2nd appellant therefore contended that the interest of the deceased were determined way back in 1995 after the minister's award was issued.
 12. After hearing evidence from both the appellants and the respondent, the subordinate court allowed the respondent's suit in the following terms:
 - a. A declaration that the L.R No Kiirua/Nkando/1975 form part of the estate of James Mutai.
 - b. The Land Registrar Meru be and is hereby ordered to cancel registration of L.R No Kiirua/Nkando/1974 and 1975 in the names of the 1st and 2nd defendant and in their place the deceased herein (James Mutai) be registered as the proprietor of the same.
 - c. The defendants to pay costs of the suit.
 13. It is the above decision that triggered this appeal.
 14. The appeal was canvassed by way of written submissions. The firm of Kiogora Mugambi & Co. advocates filed submissions dated January 20, 2023 on behalf of the appellant while M/s Murango Mwenda & Co. Advocates filed the respondent's submissions dated January 25, 2023.



Appellant's Submissions

15. Counsel for the appellant gave a brief background of the case and pointed out that the learned trial magistrate in his judgment framed two issues for determination namely, whether or not the sub division of the original parcel No Kiirua/Nkando/581 was fraudulently and illegally done and whether the respondent was entitled to the prayers sought in the plaint.
16. Counsel for the appellant submitted that the learned magistrate erred in failing to address the issue of jurisdiction which was raised by the appellant and the issue whether the said James Mutai (deceased) had any estate at the time of his death since the adjudication process had not been concluded. It was pointed out that the dispute concerning the suit was heard and determined through objection No 31/84 in 1995 and appeal to the minister No 122/1995 therefore the land dispute resolution mechanism provided under the *Land Adjudication Act* culminating with the decision by the minister had been followed.
17. The appellant's counsel submitted that the learned magistrate was wrong in failing to appreciate that the matter was res-judicata having been heard and determined by competent quasi – judicial organ, which are the adjudication bodies, and that there is no law that allows a subordinate court to overturn a decision of the minister after the dispute has gone through the legally recognized dispute resolution process. Further, that the determination of the ownership and interest in land in an adjudication area is given to the adjudication officer under Section 10 and an appeal to the minister under Section 29 which decision is final.
18. The appellant's counsel relied on the case of *Tobias Achola Osindi & 13 others v Cyprian Otieno & 6 others* [2013] Eklr where it was held that it is not the duty of this court to ascertain rights and interest in land in an Adjudication Section. That that jurisdiction is vested with the Land Adjudication Officer (with an appeal to the minister). It was further submitted that if the respondent wished to challenge the legality of the process that was used in arriving at the final decision, she could have come under judicial review. It was submitted that the appeal is merited and the same should be allowed.

The Respondent's Submissions

19. The respondent's counsel submitted that the appeal is incompetent for failure to comply with the provisions of Order 42 (1) and (2) of the *Civil Procedure Rules*. That the appellant did not attach to the memorandum of appeal a certified copy of the decree of the lower court and neither did the appellant take advantage of Order 42 Rules (2) to file a certified copy or the decree subsequent to the filing of the memorandum of appeal. It is submitted that it is trite law that failure to file a certified copy of the decree is fatal to the appeal and urged the court to hold and proceed to dismiss the appeal on that account without having any regard to the merits thereof.
20. The respondent pointed out that the appellant pleaded 9 grounds of appeal but through the submissions filed in court on January 23, 2023 confined herself to only two grounds, that of Jurisdiction of the lower court and whether or not the appellant had any estate capable of being protected as at the time of his death. The respondent submitted that by confining their submissions on the twin issues, the appellant is taken to have abandoned the other grounds of appeal and urged the court not to delve into their merits therefore. The respondent submitted that none of the grounds set out therein has merit and that the whole appeal should be dismissed with costs.
21. On ground 1, the respondent submitted that the appellant's submissions that James Mutai (deceased) on whose behalf the proceedings were commenced had no estate because land adjudication had not been completed as at the time of his death is erroneous both in law and fact. The respondent further



- submitted that there is undisputed evidence on record that the suit land No Kiirua/Nkando/581 was allocated to James Mutai (deceased) by the Government of Kenya and referred to the exhibits tendered. It is the respondent's submissions that there is no doubt that the rights of ownership to the deceased had accrued at the time of his death and that it is for that reason that he was being sued by the appellants.
22. With regard to grounds 2 and 6, the respondent submitted that the appellant is prohibited from raising the issue of limitation because it had not been pleaded in the defence and cited Order 2 Rule 4 of the *Civil Procedure Rules* and relied on the case of *Stephen Onyango Achola & another v Edward Hongo Sule & Another* [2014] EKLK and *Joseph Ondira v South Nyanza Sugar Co. Ltd* [2018] eKLR.
 23. Regarding ground 3, 4 and 5 of the appeal, the respondent submitted that in these proceedings, she was not seeking to review the proceedings, and the award of the adjudication officer, but that her claim was based on fraud in the entire process leading to the registration of the appellants as proprietors. That the titles are capable of being challenged on grounds of fraud or misrepresentation as provided under Section 26 of the *Land Registration Act*, adding that Section 80 of the said *Act* empowers the court to order rectification of land registers while section 101 of the *Environment and Land Court Act* gives the court powers to hear all disputes relating to environment and land. Counsel for the respondent relied on the case of *Amos Tirip Mutai & another v Festus K. Kiprono & 2 others* [2018] eKLR and submitted that nothing has been shown to indicate that the value of the subject matter was beyond the trial court's pecuniary jurisdiction.
 24. It is the respondent's submission that there is irrefutable evidence on record that show that James Mutai died in 1974, long before the appellants filed objections and therefore the trial court was correct in its finding that there was fraud as the appellants knew that the proceedings was against a person who was long dead.
 25. The respondent further submitted that the trial court subjected the evidence of all witnesses to great scrutiny and argued that grounds 7, 8 and 9 of the appeal have no merit. The respondent submitted that the appellants did not go the extra mile required of them when the title they hold were challenged. Counsel for the respondent relied on the case of *George Mbithi Kiebia & another v Isaya Therumi M'Lintari & another* [2014] eKLR and submitted that there was no evidence to rebut the respondent's evidence of fraud, that the proceedings were conducted when they knew that the registered owner of the land was dead, that the appellant did not have any valid document of allotment and set up the objections with the sole intention of getting the land while knowing the owner was dead and when there was no legal representation of his estate at the time. The respondent urged the court to find no merit in the appeal and dismiss it with costs.

Analysis And Determination

26. I have considered the record of appeal, the grounds of appeal, the submissions made and the authorities relied on. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. The issues that I find for determination are whether fraud was proved against the appellants as pleaded by the respondent and whether the decision of the learned magistrate was against the weight of the evidence and the law.
27. In this case, there is undisputed evidence that land parcel No Kiirua/Nkando/581 was allocated to James Mutai (deceased) by the government of Kenya. The material on record indicates that the deceased died sometime in the year 1974. On the other hand, the appellants claim that they acquired the land and subdivided it through objection No 31/84 and appeal to the minister No 122/1995.



28. To institute and prosecute (and also to defend) an action in respect of a deceased person, a litigant is clothed with locus upon obtaining a limited grant or a full grant of letters of administration. In the case of *Orieno v Ougo & another* (1986 – 1989) EALR 468, the Court of Appeal rendered itself thus:

“... an administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception...”

To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not has a case worth listening to ...”

29. In the case of *Alfred Njau & 5 others v City council of Nairobi* [1983] eKLR, the Court of Appeal defined locus standi as follows-;

“The term locus standi means a right to appear in court, and conversely as stated in Jowitt’s dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such proceedings.”

30. In the same breath, a deceased person cannot be sued. It is trite law that once a proprietor of land has died, his estate can only be administered by his/her administrators who must obtain letters of administration from the court. In this case, there was no iota of evidence presented to show that any of the deceased’s beneficiaries or anyone else applied for grant of representation and thereafter participated in the objection proceedings before the Land Adjudication Officer and the appeal to the minister. All the dealings touching on the deceased’s original parcel No Kiirua/Nkando/581 leading to the allocation to the appellant’s and the subdivision were indeed illegal and fraudulent since the deceased died in 1974. It goes without saying that the appellants’ objections and the subsequent appeal were against a deceased person and those proceedings were null and void ab initio. In my view the appellants could not sustain any claim against the deceased who was the original allottee of the land unless through the legal representative of his estate. Therefore the objection and the appeal were bad in law, misconceived and a nullity for they were against a deceased person instead of suing the estate of the deceased through his executors or administrators. Considering that the deceased died in the year 1974, the objections that were filed in the year 1974 and the subsequent appeal had no chances of success as they were a nullity from inception. Having confirmed that James Mutai was deceased in 1984 a fact known to the appellants, this court finds that the objection and appeal that the appellants relied on to lay a claim on the land were a non-starter for having been instituted against a deceased person. Only persons holding letters of administration have the capacity to represent the estate of a deceased person. Consequently, I find that the trial court rightly concluded that fraud had been proved and arrived at a right decision. It is clear that while deceased (James Mutai) died in 1974, the appellants with the knowledge of that fact went ahead and claimed the deceased’s land by filing objections before the Land Adjudication Officer in 1984 and an appeal to the minister in 1995. Not only were the objections and appeal a nullity, but was also fraudulent. I therefore agree with the trial court that the allocation and registration of the suit land in favour of the appellants were unprocedural, fraudulent and illegal.

31. In this case, I am satisfied that the findings of the learned trial magistrate were right and she reached just conclusions in arriving at her decision. In my view, the decision of the trial court was correct and I uphold the same.

32. In the result, I find no merit in the appeal and the same is hereby dismissed with costs to the respondent.

33. Orders accordingly.



DATED, SIGNED AND DELIVERED AT MERU THIS 21ST DAY OF JUNE 2023

IN THE PRESENCE OF

Nyaga holding brief for Kiogora Mugambi for appellants

Ms Gatwiri Mwiti holding brief for Murango Mwenda for respondent

C.K YANO

JUDGE

