



**Kimani (Suing as the administrator of the Estate of Samuel Kimani Gichuki - Deceased) v Karanja & another (Sued as the administrator of the Estate of Robinson Mbui Gichuki - Deceased) (Environment and Land Appeal E021 of 2022) [2023] KEELC 20124 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20124 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT AND LAND APPEAL E021 OF 2022**

**LN GACHERU, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**LEAH WAMUGU KIMANI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF SAMUEL KIMANI GICHUKI - DECEASED ..... APPELLANT**

**AND**

**GRACE NYAMBURA KARANJA ..... 1<sup>ST</sup> RESPONDENT**

**OWEN KAMAU MBUI ..... 2<sup>ND</sup> RESPONDENT**

**SUED AS THE ADMINISTRATOR OF THE ESTATE OF ROBINSON MBUI GICHUKI - DECEASED**

*(Being an Appeal arising from the Judgement delivered by Hon. S N Mwangi on 26th October 2022 in Murang'a CMELC No. E001 OF 2022)*

**JUDGMENT**

1. The Appellant herein Leah Wamugu Kimani (Suing as the Administrator of the Estate of Samuel Kimani Gichuki, had filed a suit at Murang'a CM's Court being Murang'a CMELC NO E001/2022, which was heard and determined by Hon. S. Mwangi (SRM) on 26<sup>th</sup> October, 2022. The Appellant had sought for various orders against the Respondents herein vide the Complaint dated 3<sup>rd</sup> January 2022. Among the prayers sought were;
  - a. A declaration that the estate of Robinson Mbui Gichuki hold Loc.18/Gachocho/2915, in trust for the estate of Samuel Kimani Gichuki.
  - b. An order compelling the Defendants to transfer Loc.18/Gachocho/2915, to the Plaintiff as the Administrator of the estate of Samuel Kimani Gichuki and



- c. An Order of injunction restraining the Defendants from disposing, selling, charging and or dealing with Loc. 18/Gachochi/2915, in any manner whatsoever without the Plaintiff's Consent and/or authority. The Defendants thereon being the Respondents herein did not enter appearance nor file any Defence.
2. The suit proceeded for formal proof wherein the Plaintiff Leah Wamugu Kimani, the Appellant herein gave evidence for herself by adopting her witness statement as her evidence in Chief, and produced the list of documents as P. EXHIBITS 1 – 9.
3. The second witness though sworn in and did not give evidence as the Court noted that the witness statement was filed without the leave of Court and thus the witness was stood down.
4. After consideration of the pleadings and the evidence adduced in Court on 26<sup>th</sup> October 2022, Judgement was entered for the Plaintiff (Appellant herein) to the effect that;
  - a. A declaration be and is hereby made that the estate of Robinson Mbui Gichuki hold the parcel of land Loc.18/Gachochi/2915, in trust for the estate of Samuel Kimani Gichuki.
  - b. An Order be and is hereby issued compelling the Defendants to transfer half of Loc.18/Gachochi/2015, to the Plaintiff as the administrator of the estate of Samuel Kimani Gichuki, for transferring the entire parcel of land to the Plaintiff means the Defendants and the estate of the late Robinson Mbui Gichuki will remain destitute.

Whereas the Appellant had prayed for the transfer of whole parcel of land.

4. Being aggrieved, by the said Judgement, the Appellant preferred an Appeal vide the Memorandum of Appeal dated 17<sup>th</sup> November 2022, and raised four grounds.
5. Thus, the Appellant urged the Court to allow the Appeal and set aside the Judgment of the trial Court of giving her half of the suit land and be substituted with award of the entire suit land to the Appellant as the administrator of the estate of Samuel Kimani Gichuki.
6. The facts founding the filing of this Appeal are that;

The Plaintiff(Appellant) is the Administrator of the estate of the late Samuel Kimani Gichuki, and the Defendants were the administrator of the estate of Robinson Mbui Gichuki. It was averred that the late Samuel Kimani Gichuki, and the late Robinson Mbui Gichuki were the sons of Gichuki Mbui and Grace Nyambura Gichuki. That Robinson Mbui Gichuki was the eldest Son and being the eldest son, he was registered as a trustee of the family of Gichuki Mbui as the proprietor of land parcel No. Loc.18/Gachochi/243, which was measuring approximate 3.38 Ha. It was further averred that in 1989, the late Robinson Mbui Gichuki, summoned his three other brothers being Henry Muturi Gichuki and Billy Josephat Karigu Gichuki, and informed them of his decision to share Loc.18/Gachochi/243, among the four sons of the late Gichuki Mbui. That the late Samuel Kimani Gichuki, was not present because he had died in 1987.

7. That it was agreed that the three brothers would share the land as follows;Henry Muturi Gichuki – 1.34 hectares for title No. Loc.18/Gachochi/2914.Billy Josephat Karigu Gichuki – 1.21 hectares for Loc.18/Gachochi/2916.Samuel Kimani Gichuki 0.81 hectares title Loc.18/Gachochi/2915.
8. It was further alleged that the portion for Samuel Kimani Gichuki was to remain in the name of Robinson Mbui Gichuki, as a trustee and upon sub-division it became Loc.18/Gachochi/2915, which is held by the estate of Robinson Mbui Gichuki, but to hold it in trust for the estate of the late Samuel



Kimani Gichuki. That was the reasons why the Plaintiff(Appellant) sought for a declaration that the estate of the late Robinson Mbui Gichuki, held the suit in trust for the estate of the late Samuel Kimani Gichuki and an order to compel the Defendants to transfer the suit land to the Plaintiff who is the administrator of the estate of the late Samuel Kimani Gichuki.

9. As stated above, the Defendants(Respondents)did not enter appearance nor file Defence and matter proceeded exparte. The trial Court rendered its Judgement on 26<sup>th</sup> October 2022, and a Decree was issued on 30<sup>th</sup> June 2023. Though the trial Court found that the estate of Robinson Mbui Gichuki, was holding land Parcel No. Loc.18/Gachochi/2915, in trust for the estate of the late Samuel Kimani Gichuki, the trial Court further ordered that only half of the said parcel of land should be transferred to the estate of the late Samuel Kimani Gichuki. The trial Court further held that transferring the entire parcel of land to the Plaintiff(Appellant) means that the Defendants(Respondents) and the estate of the late Robinson Mbui Gichuki, would remain destitutes. That is the bone of contention.
10. The Appellant has faulted the Judgment of the trial Court on the basis that the trial magistrate erred in law and fact, when she considered extraneous matters, that were not before the Court for consideration. That when the trial Court found that the suit property was held in trust for the estate of the late Samuel Kimani Gichuki, then it ought to have awarded the entire parcel of land to the appellant as the administrator of the said estate. However, the trial Court erred in not awarding the entire parcel of land, but only awarded half of it and further held that transferring the entire parcel of land to the Appellant meant that the Respondents and the estate of the late Robinson Mbui Gichuki would remain destitutes. That such evidence was not before the Court to support such finding.

The Appeal was argued by way of written submissions filed by the Appellant on 15<sup>th</sup> June 2023.

11. The Applicant submitted that though the trial Court properly found that the estate of Robinson Mbui Gichuki, holds the suit land Loc. 18/Gachochi/2915, in trust for the estate of the late Samuel Kimani Gichuki, the said trial Court failed to award the entire parcel of land to the Appellant, but only awarded half of it. It was further submitted that the reasoning by the trial Court that transferring the entire property to the Appellant would make the Respondents destitutes was not supported by any evidence, and cannot be sustained. Further that the trial Court contradicted its own findings by having found that the suit land was held in trust for the estate of the deceased, then the trial Court erred when it proceeded to order transfer of only (½) of the property to the Appellant. Further, that the Appellant having adopted her witness statement, and the same having not been challenged, there was no basis to hold that the Respondents would be left destitutes if the entire property was transferred to the Appellant. Further that the Respondents do not reside on the suit land, and the late Robinson Mbui Gichuki, was not working on the suit land before his death, but his other brothers who are not parties to this suit. There was no justification in reducing the share due to the estate of the late Samuel Kimani Gichuki (0.81 hectares) by half and then leave the other portions intact. That when the Court ordered the suit land to be shared into two, it relied on extraneous matter, that were not before the Court for consideration. Further, that there was no evidence before the trial Court that the Respondents resided on the said land, or that they depended on it for sustenance. That the trial Court should have ordered the Respondents to transfer the entire suit land to the Appellant.
12. The Appellant urged the Court to hold that the trial Court erred when it held that the Appellant was only entitled to ½ of the property. The Appellant also urged the Court to set aside the Judgement of the trial Court as far as it directed transfer of half of the suit land and substitute it with an order for transfer of the entire parcel of land to the Appellant.



13. The above being the pleadings, the evidence and the findings of the trial Court, this Court has considered the same together with the Memorandum of Appeal and the written submissions and finds as follows; -

A perusal of the Memo of Appeal informs this Court that the Appellant is only aggrieved by part of the Judgement that directed the Respondents to transfer ½(half) of the parcel of land to the Appellant, instead of the entire parcel of land. The Appellant has submitted that she supports the remainder of the Judgement and Decree thereon.

14. This being a first Appeal, the role of this Court is well laid out in Section 78 of the Civil Procedure Act, which is to re-evaluate, re-consider, re-assess and re-analyses the evidence afresh and makes a determination, while giving reasons for such determination. Therefore, the first appeal is by way of retrial and this Court as a first appellate Court will re-evaluate, re-analyse and re-reconsider, the evidence as contained in the Record of Appeal and then draw its own conclusion.

15. However, the Court will take into account that it did not see the witnesses and will give due allowance for that and deference to the determination of the trial Court.

16. In the case of *Gitobu Imanyara & 2 Others vs Attorney General (2016) eKLR*, the Court of Appeal held as follows; -

“An Appeal to this Court from the 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 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”.

17. The Court will also take into account that the discretionary power of the trial Court, just like this Court is donated by *the Constitution* as well as the statute, and therefore, this Court cannot unnecessarily interfere with the said discretion. See the case of *Mbogo & Another vs Shah (1968) EA Pg 15*, where the Court held;

“An Appellate Court will not interfere with the exercise of the trial Court’s discretion, unless it is satisfied that the Court in exercising discretion misdirected itself in some matters and as a result, arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong on the exercise of judicial discretion and that as a result, there has been Misjustice”

18. The Appellate herein must sufficiently guide this Court within the above parameters in order for this Court to interfere with the discretion of the trial Court.

19. Having laid the above basis, and having perused the Memo of Appeal, the Record of Appeal and the Appellant’s written submissions, the Court finds the issue for determination are;

- i. Whether the trial Court considered extraneous matter and thus erred in law and fact?
- ii. Whether the appeal is merited?
- iii. Who should bear costs of this Appeal?

20. As the Court stated earlier, the Appellant’s suit at the trial Court was not defended. Therefore, all the Appellant’s allegations remained uncontroverted. However, it did not mean that uncontroverted



evidence was sufficient prove of the case. The exparte evidence is also subject to scrutiny and has to meet the required standard of prove and in this case, it was on the balance of probability. See the case of Gichinga Kibutha VS Caroline Nduku [2018] eKLR, where the Court held as follows;

“The hearing referred to above is the one commonly known as “Formal proof”. The Civil Procedure Rules do not define “Formal Proof”. Black’s Law Dictionary defines “Formal” as including “rules established by an institution according to certain processes”. This particular hearing is for the claimant to prove his claim. It is not automatic that in instances where the evidence is not controverted, the claimant’s claim shall have his way in Court. He must discharge the burden of proof. He must prove his case, however much the opponent has not made a presence in the contest.”

21. The trial Magistrate did analyse and evaluate the evidence adduced by the Plaintiff(Appellant) and correctly arrived at a finding that the Plaintiff (Appellant herein) had proved existence of trust. However, the trial Court awarded the Appellant half of Loc.18/Gachochi/2915, though the Appellant had sought for the whole suit property.

#### **Whether the trial Court considered extraneous matter and thus erred in law and fact?**

22. Extraneous means; - that which is irrelevant or unrelated to the subject matter or of external origin – (from Concise Oxford English Dictionary). It is trite principle in law that parties are bound by their pleadings and any evidence led by any of the parties which does not support the averments in the Pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issues and must be disregarded. See IEBC & Another vs Stephen Mutinda Mule & 3 Others (2014)eKLR.

23. The general rule is that Courts should determine a case on the issues that flow from the pleadings, and therefore a Court may only pronounce Judgement on the issues arising from the pleadings and on such issues as the parties have framed for the Courts determination. See the case of Galaxy Paints Co. Ltd vs Falcon Guards Ltd. (2000) E.A 385, where the Court held;

“the issues for determination in a suit flowed from the pleadings and that a trial Court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. (See also IEBC & Another V. Stephen Mutinda Mule & Others, CA No. 219 of 2013).”

24. Further the Supreme Court of Nigeria in the case of Adetoun Oladeji(NIG) vs Nigerian Breweries PLC SC 91/2002 held as follows;

“It is trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings or put in another way, which is at variance with the averments of the pleadings goes to no issues and must be disregarded”

25. In the Plaint dated 3<sup>rd</sup> January 2022, the Plaintiff therein (Appellant herein) had sought for declaration that the estate of Robinson Mbui Gichuki holds Loc. 18/Gachochi/2915, in trust for the estate of Samuel Kimani Gichuki. She further sought for an order compelling the Defendants (Respondents herein) to transfer the whole suit property to the estate of Samuel Kimani Gichuki.

26. In its determination, the trial Court held that the Plaintiff(Appellant) had proved her case on the required standard that the estate of Robinson Mbui Gichuki was holding land Loc.2/Gachochi/243 in trust for his brothers.



27. Further in order No. (b) the trial Court ordered the Defendants(Respondents) to transfer half of Loc.18/Gachochi/2915, to the Plaintiff, who is the administrator of the estate of Samuel Kimani Gichuki as transferring the entire land to the Plaintiff would mean the estate of late Robinson Mbui Gichuki would remain destitutes.
28. The Appellant is challenging the 2<sup>nd</sup> order of the Court to the extent that the Appellant get half share as awarding her the full share would mean that the estate of Robinson Mbui Gichuki would remain destitutes.
29. The Respondents did not defend the suit before the trial Court. They did not claim that if the suit land is awarded to the Appellant, they would remain destitutes. This Court concurs with the Appellant's submissions that there was no basis of holding that the Respondents would be left destitutes, if the entire property was transferred to the Appellant.
30. The Appellant alleged that the Respondents have never resided on the suit property and they do not utilize the said property. That evidence was also not controverted and there was no justification of holding that the Respondents would be left destitutes. Indeed, the trial Court considered extraneous matter and denied the Appellant her full claim without any reasons to do so. Reliance is made in the case of IEBC vs Stephen Mutinda Mule, which cited the decision of Malawi Supreme Court of Appeal in Malawi Railways Ltd. Vs Nyasulu (1998) Mwsc 3, where the Court quoted with approval from an Article by Sir Jack Jacob entitled; "The present importance of pleadings" Published in (1960) Current Legal Problem at P.174, where the author stated;
 

“ .....for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made.. .... the Court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the Court to enter upon an inquiry into the case before Court other than to adjudicate upon on the specific matters in dispute, which the parties themselves have raised by the pleadings. Indeed, the Court would be acting contrary to its own character and nature, if it were to pronounce any claim or defence not made by the parties. To do so, would be to enter upon the realm of specification. Moreover, in such event the parties might themselves or at any rate one of them might feel aggrieved for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.....”
31. The Respondents herein never at all raised the issue of being left as destitutes in the event the trial Court was to allow the whole claim as pleaded by the Plaintiff(Appellant)
32. For the above reasons, the Court finds and holds that the trial Court erred both in law and fact when it considered extraneous matters.

**Whether the appeal is merited.**

33. This Court having found that in awarding the Appellant half share of Loc. 18/Gachochi/2915, the trial Court erred, then this Court finds that the appeal herein is merited. The Court finds and holds that having found that there was no justification in denying the Appellant her full claim in prayer No. b, this Court proceeds to upset the said finding and holding and substitute it with award of prayer(b) of the Plaint dated 3<sup>rd</sup> January 2022, in full. Consequently, order No. (b) of the Judgement delivered by the trial Court on 26<sup>th</sup> October 2022, is upset and substituted with the following award 5. (b)An order be and is hereby issued compelling the Defendants to transfer the entire Loc.18/Gachochi/2915, to the Plaintiff as the Administrator of the estate of Samuel Kimani Gichuki.



**Who should pay costs of this Appeal.**

34. It is evident that the proceedings before the trial Court and this appeal were not defended. Though costs do follow the event and is awarded to the successful litigant, the suit herein was not defended and there will be no orders as to costs.
35. The upshot of the foregoing is that the Appellant's Appeal herein succeed to the extent that the Order of the trial Court to award half of the suit property to the Appellant is set aside, and the same is substituted with an order of transfer of the entire parcel of land to the Appellant as prayed in prayer No. (b) of the Plaint dated 3<sup>rd</sup> January 2022, with no orders as to costs.

It is so ordered.

**DATED,SIGNED AND DELIVERED VIRTUALLY AT MURANGA THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2023.**

**L. GACHERU**

**JUDGE**

Delivered online in the presence of: -

M/s Wangare for the Appellant

Respondents – Absent

Joel Njonjo - Court Assistant.

**L. GACHERU**

**JUDGE**

**28/9/2023**

