



REPUBLIC OF KENYA



**Githere & 2 others v Githere (Suing as Administrator of the Estate of James Githere Njuguna - Deceased) (Environment and Land Appeal 16B of 2023) [2023] KEELC 21270 (KLR) (23 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21270 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL 16B OF 2023**

**BM EBOSO, J  
OCTOBER 23, 2023**

**BETWEEN**

**JAMES MBURU GITHERE ..... 1<sup>ST</sup> APPELLANT  
CATHERINE KIBUI GITHERE (SUING AS ADMINISTRATORS OF THE  
ESTATE OF DAVID MBURU GITHERE -DECEASED) ..... 2<sup>ND</sup> APPELLANT  
THE LAND REGISTRAR KIAMBU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**AYUB NDUNGU GITHERE (SUING AS ADMINISTRATOR OF THE ESTATE  
OF JAMES GITHERE NJUGUNA - DECEASED) ..... RESPONDENT**

*(Being an Appeal against the Ruling of Hon. W. Rading, Senior Resident Magistrate, delivered on 25/11/2022 in Kiambu Chief Magistrate Court MCL & E Case No. E061 of 2021)*

**JUDGMENT**

**Introduction**

1. This appeal challenges the ruling rendered on 25/11/2022 by Hon W. Rading, Senior Resident Magistrate, in Kiambu Magistrate Court Environment & Land Case No. E61 of 2021. Ayub Ndungu Githere [the respondent in this appeal] was the plaintiff in the said suit. James Mburu Githere, Catherine Kibui Githere and the Land Registrar [the 1st, 2nd and 3rd respondents in this appeal] were the 1st, 2nd and 3rd defendants respectively.
2. At the time of lodging this appeal, the dispute in the trial court was still pending. The dispute revolved around the question of ownership of land parcel number Kiambaa/Kihara/1056 [hereinafter referred to as “the suit property”]. The respondent contended that his father, James Githere Njuguna (deceased) was the bonafide proprietor of the suit property, adding that pursuant to a further rectified



Certificate of Confirmation of Grant issued in Nairobi High Court Succession Cause No 978 of 1989 – In the Matter of the Estate of James Githere Njuguna, the land devolved to him together with James Githere Mburu, Joshua Kimani Githere and Madrine Mbairi Kamali. On their part, the appellants contended that the suit property originally belonged to David Mburu Githere (deceased). They further contended that the suit property subsequently devolved to the 2nd appellant by virtue of a Grant issued in Kiambu High Court Succession Cause No. 90 of 2019. In the Matter of the Estate of David Mburu Githere (deceased). The gravamen of the appellants is that the learned magistrate determined the preliminary objection dated 26/7/2022 instead of considering and determining the appellants' application dated 15/7/2022. One of the two issues to be determined in this appeal is whether the lower court fatally misdirected itself in its consideration and findings in the impugned ruling.

## Background

3. The primary claim was initiated by the respondent through a plaint dated 26/8/2021. During pendency of the suit, the 1st and 2nd appellants filed a notice of motion application dated 15/7/2022 seeking orders that: (i) the honourable court do strike out the suit with costs to the defendants; and (ii) the costs of the application be provided for. Subsequent to that, the 1st and 2nd appellants filed a notice of preliminary objection dated 26/7/2022, inviting the court to strike out the suit on the ground that the plaintiff's claim was anchored on a further rectified Grant dated 28/6/2021 which had been revoked by the High Court in Nairobi Succession Cause No. 978 of 1989 by Justice A.O. Muchelule on 19/6/2022, hence the court had no jurisdiction to deal with the matter as there no cause of action disclosed.
4. On 28/7/2022, the lower court gave directions on the hearing of the application dated 15/7/2022. The respondent filed a replying affidavit dated 31/8/2022, opposing the application. The 1st and 2nd appellants filed submissions dated 22/8/2022 and supplementary submissions dated 22/9/2022 in support of their application. The respondent filed submissions dated 16/9/2022. Parties thereafter attended court on numerous occasions and, upon confirming that parties had filed submissions, the court reserved 3/11/2022 as the date on which it was to render a ruling. The ruling was, however, not rendered on 3/11/2022; it was delivered on 25/11/2022 in the absence of the parties and a copy was sent to the parties via email. The trial court pronounced itself as follows:

“The evidence adduced in support or in opposition of the application can only be properly prosecuted at a hearing of main suit. It isn't a point of law that a preliminary objection can only be raised on.

The applicants in their further submissions asked this court to uphold ruling delivered by J. A Muchelule. My reading of the ruling doesn't support the prayer as it merely revokes confirmed rectified grant but doesn't settle the question of ownership of property Kiambu/Kihara/1056, which is subject of the suit dated 26/8/2021.

Therefore, in light of the foregoing, the preliminary objection is hereby disallowed and pleadings dated 26/8/2021 stand awaiting further directions on the matter.”

## Appeal

5. Aggrieved by the ruling of the trial court, the appellants brought this appeal, advancing the following ten (10) verbatim grounds:
  1. That the trial honourable magistrate erred in law and fact by delivering a ruling on a preliminary objection dated 26/7/2022, which preliminary objection parties had not been heard and direction was not given on its hearing.



2. That the trial honourable magistrate erred in law and fact by not delivering a ruling on the appellants' application dated 15/7/2022, on which application direction had been given that the same be canvassed by way of written submissions and a ruling date set on 3/11/2022.
  3. That the trial honourable magistrate erred in law and fact by delivering a ruling without notice to the parties.
  4. That the trial honourable magistrate erred in law and fact by not considering the appellants' submissions dated 22/8/2022 and supplementary submissions dated 16/9/2022 on appellants' application dated 15/7/2022.
  5. That the trial honourable magistrate erred in law and fact in making a finding that the trial court had jurisdiction to deal with Kiambu MCELC/E061/2021 the substratum of a revoked confirmation of grant of 29/6/2022 by High Court Succession Cause No. 979 of 1989 which is the same subject matter whereby the High Court has dealt with and a ruling delivered which is binding to the subordinate court.
  6. That the trial honourable magistrate erred in law and fact by making a finding that the issues before the High Court in Succession Cause No. 979 of 1989 are not a substratum of the Kiambu MCELC/E061/2021 when indeed it is admitted by the respondent that his claim is based on a further rectified grant of 28/6/2021 which was revoked by the High Court on 29/6/2022.
  7. That the trial honourable magistrate erred in law and in fact by failing to consider the law on striking out of Respondent's pleadings, thereby arriving at a wrong decision.
  8. That the trial honourable magistrate erred in law and fact by making a finding that the matters before the trial court are not similar to the High Court decision in High Court Succession Cause No. 979 OF 1989.
  9. That the trial honourable magistrate erred in law and fact by making a finding that the issue of ownership was not dealt with in succession cause No. 979 of 1989.
  10. That the trial honourable magistrate erred in law and fact by not considering the title of the 2nd Appellant through Kiambu Succession Cause No. 90 of 2019.
6. The appellants sought the following reliefs through their amended memorandum of appeal: (i) that the court allows the appeal by setting aside the decision of the honourable trial magistrate Hon. W. Rading delivered on 25/11/2022; (ii) that the honourable court strikes out MCELC No. E061 of 2021 in the Chief Magistrate Court at Kiambu; and (iii) that the respondent to pay the costs of the appeal and costs in the lower court.

### **Appellants' Submissions**

7. The appeal was canvassed through written submissions dated 2/5/2023 and supplementary submissions dated 20/6/2023 filed by M/s Julius Nyakiangana & Company Advocates. The appellants identified ten grounds of appeal but submitted on only five grounds.
8. On the 1st ground, counsel submitted that the ruling dated 25/11/2022 indicated that the trial court had considered and made a determination on a notice of motion dated 28/8/2021 and the preliminary objection dated 26/7/2022. Counsel added that the two applications were not before the lower court for determination. Counsel argued that the error amounted to a misdirection and that the misdirection resulted into a miscarriage of justice.



9. On the second ground, counsel submitted that it was clear from the ruling dated 25/11/2022 that the trial court rendered a ruling on a preliminary objection which had not been heard orally or by way of written submissions. Counsel argued that failure to set aside the impugned ruling would amount to a miscarriage of justice to the appellants whose application was heard but was not determined by the lower court.
10. On the third ground, counsel submitted that parties were not issued with notices for delivery of the ruling dated 25/11/2022 contrary to the provisions of Order 21 Rule 1 of the Civil Procedure Rules. Counsel relied on the decision in the case of *Mathew Kangora v Marete Kotha* [2016]eKLR in support of this submission.
11. On the fourth ground, counsel submitted that it was on record that the trial court considered a preliminary objection dated 26/7/2022 and an application dated 26/8/2021 which were not canvassed before it. Counsel further submitted that the trial court erred in law by failing to consider the appellants' submissions in respect of the notice of motion dated 15/7/2022.
12. On whether the trial court erred in finding that it had jurisdiction to deal with the suit before it, counsel for the appellants submitted that the subject matter of the suit before the lower court was a dispute over land parcel number Kiambaa/Kihara/1056. Counsel added that the said dispute had been heard and determined by the High Court in Succession Cause No. 978 of 1989 vide a ruling delivered on 29/6/2022. Counsel contended that while the matter at the High Court was ongoing, the respondent instituted the suit at the lower court and fraudulently misled the lower court into believing that he was the legitimate owner of land parcel number Kiambaa/ Kihara/1065. Counsel for the appellants argued that the trial court had no jurisdiction to hear and determine the matter before it since the same had already been heard and determined by a court of competent jurisdiction.
13. Counsel relied on the decision in the case of *Phoenix of E.A. Assurance Company Limited v S.M Thiga t/a Newspaper Service* [2019] eKLR. Counsel further contended that the pleadings filed by the respondent in the trial court were scandalous, frivolous, vexatious and an abuse of the court process. Counsel relied on Order 2, rule 15 of the *Civil Procedure Rules*, 2010 and the decision in the case of *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR. Counsel argued that the respondent's pleadings were liable for striking out given that the appellants had met the threshold envisaged in Order 2 rule 15 of the Civil Procedure Rules as outlined in *Madison Insurance Company Limited v Augustine Kamanda Gitau Case* (supra).
14. Lastly, counsel submitted that the respondent had neither filed an appeal on the ruling in Nairobi High Court Succession Cause No. 978 of 1989 nor had demonstrated any cause of action in the suit in the lower court. Counsel added that this court ought to strike out the respondent's suit and award costs to the appellants, given that the trial court lacked jurisdiction to determine the suit.

### **Respondent's Submissions**

15. The appeal was opposed through written submissions dated 23/5/2023, filed by M/s Kairu Kimani & Company Advocates. Counsel for the respondent identified the following as the four issues that fell for determination in the appeal: (i) Whether or not the appeal is valid; (ii) Whether or not the delivery of the ruling in the absence of the parties affected the outcome of the ruling; (iii) Whether or not the trial court made an error in its finding that it had jurisdiction to hear the matter; and (iv) Who should bear costs of the appeal.
16. On whether or not the appeal is valid, counsel submitted that the firm of M/s Julius Nyakiangana & Company Advocates instituted the appeal in the name of all the three appellants even though they



did not obtain instructions to institute the appeal on behalf of the 3rd appellant. Counsel for the respondent contended that the appeal had been instituted irregularly. Counsel urged the court to dismiss the appeal on that ground.

17. Counsel for the respondent conceded that indeed the trial court made errors in its impugned ruling but added that the errors were only in the wording of the impugned ruling. Counsel contended that the notice of motion application by the 1st and 2nd appellants dated 15/7/2023 and the preliminary objection dated 26/7/2023 sought similar orders. Counsel argued that the errors in the ruling were clerical, adding that removing the words “preliminary objection” and replacing them with the words “notice of motion application” would have led to a similar decision in the impugned ruling.
18. On whether delivery of the ruling in the absence of the parties affected the outcome of the said ruling, counsel submitted that delivery of the impugned ruling in the absence of the parties did not affect the outcome of the ruling given that the outcome would have been similar had both parties been present in court during delivery of the ruling. Counsel added that failure by the trial court to issue notices to the parties was an administrative omission which did not affect the merits of the ruling and the subject application. Counsel relied on the cases of *Nicholas Mutuku Mwasuna v Patricia Mueni Kilonzo* [2022]eKLR and *Mathew Kangora v Maretee Kotha* [2016].
19. On whether the trial court made an error in finding that it had jurisdiction to hear the matter, counsel submitted that the subject matter in the two suits were different. Counsel further submitted that the dispute in Nairobi High Court Succession Cause No. 979 of 1989 related to distribution of the Estate of James Githere Njuguna alias J Githere Njuguna while the dispute in the lower court related to land parcel number Kiambaa/Kihara/1065. Counsel contended that the appellants were challenging the evidence produced by the respondent in the trial court which was the Grant issued by the High Court in Succession Cause No. 979 of 1989, adding that the said Grant can only be challenged once the hearing of the main suit commences. Counsel added that evidence produced in support of a suit cannot be disqualified through an interlocutory application. Counsel relied on Order 18 Rule 2 of the Civil Procedure Rules in support of this submission.
20. Lastly, on who should bear costs of the appeal, counsel relied on the provisions of Section 27 (1) of the *Civil Procedure Act*. Counsel submitted that the respondent had demonstrated that the appeal was devoid of merit. Counsel urged the court to dismiss the appeal and to award costs to the respondent.

### **Analysis and Determination**

21. I have read and considered the entire original record of the subordinate court alongside the record filed in this appeal and the parties’ respective written submissions. I have also considered the relevant legal frameworks and jurisprudence. Two key issues fall for determination in this appeal. The first issue is whether the subordinate court fatally misdirected itself in its consideration and findings in the ruling dated 25/11/2022. The second issue is whether the appellants met the criteria for striking out a suit as sought in the notice of motion dated 15/7/2022. Before I dispose the two issues, I will outline the principle that guides this court when exercising appellate jurisdiction.
22. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar 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 of the evidence and arrive at our own independent conclusions.”

23. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v 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.”

24. The first issue for determination is whether the subordinate court fatally misdirected itself in its consideration and findings in the ruling dated 25/11/2022. The appellants faulted the subordinate court for considering and determining the preliminary objection dated 26/7/2022 instead of considering and determining the notice of motion dated 15/7/2022. In his submissions, the respondent conceded that, indeed, the subordinate court made errors in the impugned ruling but contended that the errors were in terms of the “wording of the ruling”, adding that the errors did not have any effect on the outcome of the ruling.
25. A reading of the proceedings of the trial court alongside the impugned ruling and the parties’ submissions reveals that on 28/7/2022, the subordinate court gave disposal directions on the appellants’ application dated 15/7/2022 (the error relating to the month is noted). The respondent requested for seven (7) days within which to respond to the application. The court directed parties to file and exchange written submissions. On 22/9/2022, parties’ advocates attended before the subordinate court and confirmed to the court that they had filed their written submissions as directed. Based on that, the court reserved a ruling date for the application that had been canvassed before it. The record of the subordinate court does not disclose prosecution of the preliminary objection dated 26/7/2022 or any other preliminary objection.
26. A reading of the impugned ruling reveals that the subordinate court, in a strange turn of events, considered and rendered a determination on the preliminary objection dated 26/7/2022 instead of considering and determining the notice of motion dated 15/7/2022. Clearly, this was a grave error on part of the subordinate court. The parties expected a consideration and a determination of the application dated 15/7/2022; they did not expect a consideration and determination of the preliminary objection dated 26/7/2022. There was therefore a grave miscarriage of justice to the above extent. The error is so grave that the impugned ruling cannot stand. The aggrieved parties will genuinely feel that they were denied justice if this court were to find that the impugned ruling properly disposed the application dated 15/7/2022. That’s my finding on the first issue.
27. The second issue in this appeal speaks to the merits of the application dated 15/7/2022. I have made a finding to the effect that the subordinate court erroneously considered and determined the preliminary objection dated 26/7/2022 instead of considering and determining the application dated 15/7/2022. In the circumstances, the view I take in this appeal is that the subordinate court should be given the opportunity to consider and determine the application dated 15/7/2022 so that any party who is aggrieved by the determination of the subordinate court is not deprived of the right of first appeal to this court. I will, in the circumstances, remit the application to the subordinate court for consideration and determination.
28. On costs of this appeal, it is clear from the original record that the appellants contributed to the confusion by filing an unnecessary preliminary objection dated 26/7/2022. Secondly, on 28/7/2022, the appellants’ counsel misled the court that their application was dated 15/6/2022 yet the correct



date of the application was 15/7/2022. Thirdly, in their written submissions before the subordinate court, the appellants did not clearly identify the subject of the submissions the way the respondent identified the subject in their submissions dated 5/9/2022. Lastly, the error leading to this appeal was substantially caused by the subordinate court. I will, in the circumstances, order that parties do bear their respective costs of this appeal.

### **Disposal Orders**

29. In the end, this appeal is allowed in the following terms:

- a. The ruling rendered by Hon W Rading, Senior Resident Magistrate, on 25/11/2022 in Kiambu Chief Magistrate Court E & L Case No E061 of 2021 is hereby set aside wholly.
- b. The notice of motion dated 15/7/2022 brought by the defendants in the said suit shall be heard a fresh and determined by an appropriate magistrate at the Kiambu Chief Magistrate Court Station other than Hon W Rading.
- c. Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 23RD DAY OF OCTOBER 2023**

**B M EBOSO**

.....

**JUDGE**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

In the presence of: -

Mr Julius Nyakiangana for the Appellant

Mr Rukwaro for the Respondent

Court Assistant: Osodo/Hinga

