



**Njoroge v Githinji & 2 others (Environment and Land Appeal
E002 of 2023) [2023] KEELC 20799 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20799 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E002 OF 2023
LN GACHERU, J
OCTOBER 19, 2023**

BETWEEN

KARANJA NJOROGE APPELLANT

AND

ESTHER WANJIRU GITHINJI 1ST RESPONDENT

COUNTY GOVERNMENT OF MURANG'A 2ND RESPONDENT

MEDICAL OFFICER OF HEALTH MURANG'A 3RD RESPONDENT

(Being an Appeal from the Ruling and Order of the Senior Principal Magistrate's Court at Kandara, the Hon. M. Sudi delivered on the 21st September 2022, in MISC ELC No. E023 of 2022) pursuant to leave issued on 19th January 2023 in Miscellaneous Application No. E026 of 2022.)

Courts cannot determine issues of land ownership on a miscellaneous application.

The trial court granted an exhumation order based on the 1st respondent's claim that the suit property belonged to her deceased husband, and the appellant had no rights to inter his son's remains on the land. The appellant, unaware of the exhumation proceedings, sought to review or set aside the order, asserting his ownership of the property. The trial court dismissed the application, leading to the instant appeal. The appellate court partially allowed the appeal, ruling that the trial court erred by determining land ownership via a miscellaneous application, which is not intended to settle substantive rights. The court set aside the declaration of land ownership and directed the appellant to pursue the issue through proper legal channels. The exhumation order remained valid.

Reported by John Ribia

Civil Practice and Procedure – applications – miscellaneous applications – nature of miscellaneous applications - what were the nature of disputes that could be determined via a miscellaneous application - whether a court could not determine the issue of land ownership on a miscellaneous application.



Civil Practice and Procedure – issues for determination – moot matters – ability of a court to entertain a moot matter - whether a court could entertain a matter that was moot where there was a continuing injury.

Land Law – certificate of title – legal effect as to ownership of land - whether a certificate of title was conclusive evidence of ownership and that the registration of a person conferred absolute and indefeasible rights to the registered proprietor - Land Registration Act (Cap 300) section 26.

Brief facts

The 1st respondent had moved the Court vide a miscellaneous application in Murang'a ELC Misc. No. E015 of 2022, seeking orders for exhumation of the remains of the appellant's son whose remains were interred. The trial court allowed the application and gave orders that the remains of the appellant's son be exhumed. It was the findings of the trial court that the suit land belonged to the 1st respondent's husband and the appellant had no rights over.

The appellant thereafter moved the trial court by an application that sought orders for review, varying and or/ setting aside the exhumation orders. It was his claim that he was not aware of the exhumation proceedings and maintained that he was the owner of the suit land. The court declined to grant the application on the strength that it had made pronouncement. That propagated the filing of the instant appeal.

The 1st respondent had sought orders that the remains of Dominic Karanja Njoroge that had been interred on the suit property be exhumed. The basis for the orders sought was that the suit property belonged to her deceased husband and the appellant had no right to inter the remains of his son on the suit property. The trial court held that the suit land belonged to the 1st respondent's husband and as such devolved to his family upon his death. It proceeded and allowed the exhumation orders.

Aggrieved the appellant filed the instant appeal.

Issues

- i. Whether a court could entertain a matter that was moot where there was a continuing injury.
- ii. Whether a certificate of title was conclusive evidence of ownership and that the registration of a person conferred absolute and indefeasible rights to the registered proprietor.
- iii. What was the nature of disputes that could be determined via a miscellaneous application?
- iv. Whether a court cannot determine the issue of land ownership on a miscellaneous application.

Held

1. The right of appeal was a Constitutional and a statutory right. The role of the first appellate court was to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the trial court were to stand or not and give reasons either way. The appellate court must do so with caution so as not to interfere with the discretionary powers of the trial court. The discretionary powers of the trial court was donated by the Constitution as well as Statute and as such, the appellate court cannot unnecessarily interfere with the said discretion. The appellant had a duty to demonstrate to the court how the trial court erred in the discharge of the discretionary right.
2. The power to grant exhumation orders was under section 146 of the Public Health Act. The trial court acted within the confines of the law in granting the exhumation orders and it could not be said to have acted beyond the powers allowable.
3. Court orders could not be issued in vain. Orders against a matter overtaken by events could not be tenable and allowing a court to make any order with full knowledge that the orders could not be executed will expose the court to ridicule.
4. The exhumation had already occurred. Giving orders of setting aside an event that had already occurred would be an exercise in futility. The appeal had been overtaken by events. However, that was only limited to the issue on exhumation of the body. Even if the court was to find that the issue of land ownership was moot, a court could entertain a matter that was moot where there was a continuing injury.



5. Even though the issue of exhumation had already occurred, the issue of land ownership was a matter that could be entertained by the court. The issue of land ownership was not moot within the meaning of it.
6. A certificate of title was conclusive evidence of ownership and that the registration of a person conferred absolute and indefeasible rights to the registered proprietor. It was also a statutory provision under section 26 of the Land Registration Act.
7. The authenticity of the 1st respondent's root of title was not put to challenge. The 1st respondent's husband and the appellant were engaged in a legal battle in Nairobi ELC Mis. No. 2071 of 2007. That was a Miscellaneous Application. The matter was at some point withdrawn for want of prosecution. A miscellaneous application was not meant to settle rights or obligations.
8. There was evidence that the land was registered in the name of the 1st respondent's husband. The appellant was previously the registered owner of the suit land. That supported the analogy that the appellant sold the land to the 1st respondent. The correctness of the foregoing would require the calling of evidence.
9. A court could not determine the issue of land ownership on a miscellaneous application. The nature of such application was not to confer a right or an obligation. It could be instituted in matters where there was no dispute as to the right for example in an advocate client bill of costs, it not in dispute that counsel had a right to his/ her legal fees. In cases of exhumation, it would be easy to bring an application for exhumation where the proprietary rights had been determined.
10. The trial court fell into error in making pronouncement on the ownership of land based on a miscellaneous application. That was an order that the instant court could not countenance for the sole reason that the appellant was condemned unheard. However, it would not be anticipated that the appellant would seek to challenge the 1st respondent's title in a miscellaneous application. Allowing the appeal would revert the parties to the proceedings in miscellaneous application. The court had the power to make such orders as to ensure that the end of justice was met.

Appeal partially allowed.

Orders

- i. *Order 1 of the orders of the trial court issued on September 21, 2022, being the order that declared Esther Wanjiru Githinji as the owner of the suit land was set aside.*
- ii. *The appellant was to move the court appropriately for the court to determine the issue of ownership*
- iii. *The impetus of order (ii) above did not seek to oust the judgment of any court that might have been properly moved to determine the issue of ownership.*
- iv. *The appellant was directed to move the court appropriately within 30 days from the date of the judgement failure, to which the appellant would be deemed to have waived the right over the suit land.*

Citations

Cases

Kenya

1. *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* Civil Appeal 161 of 1999; [2013] KECA 208 (KLR) - (Explained)
2. *Joseph Kibowen Chemjor v William C Kisera* (Miscellaneous Case 2 of 2013) [2013] KEELC 140 (KLR) - (Explained)
3. *Kibira v Independent Electoral & Boundaries Commission & 2 others* Petition 29 of 2018; [2019] KESC 62 (KLR) - (Explained)
4. *Leisure Lodges Limited v Japhet S Asige & another* Civil Suit 279 of 2004; [2018] KEHC 2848 (KLR) - (Explained)
5. *Mombasa Brick & Tiles & 5 others v Arvina Shah & 7 others* Civil Application 79 of 2018; [2018] eKLR - (Explained)



6. *National Assembly of Kenya & another v Institute for Social Accountability & 8 others* Civil Appeal 92 & 97 of 2015 (Consolidated); [2017] KECA 170 (KLR) - (Followed)
7. *Nguruman Limited v Shompole Group Ranch & Ol Kiramatian Group Ranch* Civil Application 90 of 2013; [2014] KECA 358 (KLR) - (Explained)
8. *Norah Ndunge Henry & Prisca Mwendu Ndunda v Abednego Mutisya & Mesback Mutua Ndunda* Miscellaneous Application E12 of 2021; [2022] KEELC 382 (KLR) - (Followed)
9. *Okoiti, Okiya Omtatah & another v Council of Governors; Attorney General & 2 others* Petition 124 of 2015; [2021] KEHC 6919 (KLR) - (Explained)
10. *Okoyana, Elizabeth v Henry Amwayi Ndeti* Civil Appeal 102 of 2001; [2005] KEHC 2047 (KLR) - (Explained)
11. *Omtata, Okiya & 2 others v Attorney General & 4 others* Constitutional Petition E004 of 2022; [2022] eKLR - (Followed)
12. *Sonko v County Assembly of Nairobi City & 11 others* Petition 11 (E008) of 2022; [2022] KESC 76 (KLR) - (Explained)
13. *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* Civil Appeal 36 of 1983; [1985] KECA 39 (KLR); [1985] EA 898 - (Explained)

South Africa

AB and Another v Pridwin Preparatory School and Others CCT 294/18 [2020] ZACC 12 - (Followed)

Statutes

Kenya

1. Constitution of Kenya In general - (Cited)
2. Land Registration Act (cap 300) section 26 - (Interpreted)
3. Public Health Act (cap 242) section 146 - (Interpreted)

Advocates

Kanyi Kiruchi & Co Advocates for the appellant

Njeri Karanja & Associates for the 1st respondent

Kimwere Josphat & Co for the 2nd and 3rd respondents

JUDGMENT

1. The 1st respondent had moved the court vide a Miscellaneous Application in Murang'a ELC Misc No E015 of 2022, seeking orders for exhumation of the remains of the appellant's son whose remains were interred on Fort Hall Lolc 16/ Mbugiti/15. By an order of this court July 27, 2022, the matter was transferred to Kandara Law Courts and allocated No Kandara PMC Misc ELC No E023 of 2022. In its ruling of September 16, 2022, the trial court allowed the application and gave orders that the remains of the appellant's son be exhumed. It was the findings of the trial court that the suit land belonged to the 1st respondent's husband and the appellant had no rights over.
2. The appellant thereafter moved the trial court by an application dated October 12, 2022, seeking orders for review, varying and or/ setting aside the exhumation orders. It was his claim that he was not aware of the exhumation proceedings and maintained that he was the owner of the suit land. The court declined to grant the application on the strength that it had made pronouncement. This propagated the filing of the instant Appeal.
3. The appellant's appeal is grounded on Nine Grounds set out in the Memorandum of Appeal dated January 20, 2023, and sought for Orders that;



- a. Set aside, vacate and/ or review the ruling and order made on September 21, 2022, and allow the appellant to prosecute his notice of motion dated October 12, 2022 on merits.
 - b. Appropriate orders be made for costs of this appeal and in respect of proceedings in the lower court.
 - c. Any such other or further relief as the honourable court may deem appropriate.
4. Interestingly, the 1st respondent filed a replying affidavit responding to appeal and detailing the history of the suit. The Appeal was admitted and parties directed to dispense with the same by way of written submissions.
 5. The appellant filed his submissions on June 13, 2023, through the Law Firm of Kanyi Kiruchi & Co Advocates and raised four issues for determination by this court.
 6. On the issue of whether the trial court erred in declaring itself to be *functus officio*, the appellant submitted that the trial court had the power to entertain an application for review. Reliance was placed on the case of *Leisure Lodge Ltd v Japhet Asige and Another* (2018) eKLR, where the court observed that an application for review can be entertained after judgment. Further reliance was placed on the case of *Mombasa Brick & Tiles & 5 Others v Arvina Shah & 7 Others* (2018) eKLR, where the court highlighted review as some of the application that can be entertained post judgment. It was his submissions that he had established the parameter for orders of review.
 7. On whether the court erred on issuing the orders on interim, the appellant submitted that the court issued mandatory orders on a Miscellaneous Application which orders could only be granted in a substantive suit. He relied on the case of *Norah Ndunge Henry & Another v Abednego Mutisya & Another* (2022) eKLR, where the court defined what amounts to a suit.
 8. On the issue of exhumation of the body, the appellant submitted that the respondents lied to the court. He highlights the various circumstance that shows that the 1st respondent lied to the court. He urged the court to condemn the 1st respondent to pay costs for the appeal.
 9. The 1st respondent filed her submissions on July 6, 2023, through the Law Firm of Njeri Karanja & Associates, Advocates and raised three issues for determination.
 10. On the issue of whether the appeal had been overtaken by events, the 1st respondent submitted that the instant application is moot within the meaning espoused by the court in the case of *Okinya Omtata & 2 others v Attorney General & 4 others* (2022) eKLR, and *National Assembly of Kenya & Another v Institute of Social Accountability & 6 Others* (2017) eKLR. She urged this court not to issue orders in vain.
 11. The 1st respondent further submitted that the appeal is not an arguable one since the appellant has not demonstrated that he is the owner of the suit land or that he has any interest thereon. She submitted that the issue of ownership of the suit land cannot be raised on appeal and if the appellant so desires, he ought to file a suit against the family of Charles Kimani. She urged this court to dismiss the appeal and proceed to award her costs.
 13. The 2nd and 3rd respondents filed their submissions on the July 25, 2023 through the Law Firm of Kimwere Josphat & Co and maintained that they are not concerned with the proceedings since their role was limited to overseeing the exhumation process. That they oversaw the process and their role has since been concluded. As such that there is no appeal that lies and it should thus be dismissed.



14. The parties herein moved the trial court through a Miscellaneous Application for exhumation orders. But taking cue from the facts founding the Appeal, there seem to lay claim for ownership of land which is Loc 16 Mbugiti/151. This court gathers that the appellant interred the remains of his son on the suit property where he claims to be the owner. The 1st respondent on the other hand claims ownership by dint of transmission;- that the suit land belonged to her deceased husband.
15. As stated hereinabove, the matter had been first filed in this court before it was transferred to Kandara Senior Principal Magistrate Court. The application for exhumation was placed before the trial court on August 1, 2022, where the court gave directions that the application be heard on 24th August, 2022. Importantly, the appellant herein was not in attendance. The appellant did not participate in the hearing of the application for exhumation and the trial court in its ruling noted that the appellant herein had not filed any response to the application. It would appear that the appellant was jolted to action by the exhumation exercise if any. It is then that he filed an application for review on the strength that the 1st respondent had not disclosed certain information to the court.
16. This court has perused a copy of a Green Card that is attached to the Record of Appeal. It appears that Karanja Njoroge was first issued with the land on September 18, 1961, and a title deed issued. Subsequently, the land was registered in the name of Kimani Mwangi on March 12, 1975, as per entry No. 3 and who was issued with a Land Certificate as per entry No 4. It appears in entry No 7 that the land was closed for sub-division, generating three distinct parcels. It was the disposition of the 1st respondent herein that her husband had bought the suit property from Karanja Njoroge, whom this court notes was the first registered owner as per the Green Card and who is also the appellant herein.
17. The appellant claims to be the owner of the suit land which his son has been previously buried. He alleges not to have been served with the pleadings and as such he was not able to participate. This court has perused a copy of an affidavit of Service and it notes the contents therein, and there is nothing that shows that service was effected on the appellant.
18. The appellant had moved the trial court seeking it to review, vary or set aside its orders. The trial court declining to allow the application ordered that the appellant moves the ELC Court for review orders since it had already pronounced itself. The effects of the ruling of the trial court of September 21, 2022, were that the 1st respondent was declared the owner of the suit property and the appellant's claim thereof if any, were extinguished. The court also gave orders for exhumation of the body and it appears from the record that the orders were executed.
19. This court has now been moved on appeal and must therefore pronounce itself thus;-

The Right of Appeal is a Constitutional and a statutory right as was observed by the court in the case of *Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal* [2015] eKLR. The role of this court on appeal is well laid out in section 78 of the [Civil Procedure Act](#) which is to re-evaluate, re-assess and re-analyze the evidence as contained in the Record of Appeal. This was emphasized by the court in *Selle v Associated Motor Boat Co.* [1968] EA 123, which espouses the role of a first appellate court as to: ‘..... re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.’ This provision was buttressed by the court of Appeal in the case of *Peter M Kariuki v Attorney General* [2014] eKLR, where it was held that:

“We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and reevaluate it to draw our own



independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence.

20. Further, the court in the case of *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR, the rightly held: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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.”

21. In the exercise of this role on appeal, this court must do so with caution as not to interfere with the discretionary powers of the trial court. The discretionary powers of the trial court just like that of this court is donated by the *Constitution* as well as Statute and as such, this court cannot unnecessarily interfere with the said discretion.

22. The circumstances that this court can interfere with such discretion was well laid out by the Supreme Court in the case of *Apungu Arthur Kibira v Independent Electoral & Boundaries Commission & 3 others* [2019] eKLR, whether the court held:

“We reiterate that in an appeal from a decision based on an exercise of discretionary powers, an appellant has to show that the decision was based on a whim, was prejudicial or was capricious.”

23. Madan, JA (as he then was) captured the principle more succinctly in the case of *United India Insurance Co Ltd v East African Underwriters (Kenya) Ltd* (1985) EA 898, where he held as follows:

“the Court of Appeal will not interfere with the discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to various factors in the case. the Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

24. The Supreme Court in the case of *Sonko v County Assembly of Nairobi City & 11 others* (Petition 11 (E008) of 2022), also had this to say:

“A first appellate court should accord deference to the trial court’s conclusions of fact and only interfere with those conclusions if it appeared to it, either that the trial court had failed to take into account any relevant facts or circumstances or based the conclusions on no evidence at all, or misapprehended the evidence, or acted on wrong principles in reaching the conclusions.”

25. This court has been sufficiently guided on how to discharge its role and the circumstances it should consider in interfering with the trial court’s discretionary powers. The appellant has a duty to demonstrate to this court how the trial court erred in the discharge of the discretionary right.



26. Having perused the courts record, read through the memorandum of appeal and having considered the written rival submissions by parties and guided by the authorities, the issue for determination is whether the appeal is merited.
27. In determining whether this appeal is merited or not, this court must first determine whether the orders ought herein if granted have been overtaken by events as alluded to by the respondents. The appellant wants this court to set aside the order allowing exhumation of the body, as well as the order declaring the 1st respondent is the owner of the suit land.
28. On exhumation, this court is reminded that power to grant such orders is well laid out under the [Public Health Act](#). Section 146 provides:

Section 146 of the [Public Health Act](#) states as follows: -

- (1) Subject to the provisions of section 147, it shall not be lawful to exhume anybody or the remains of anybody which may have been interred in any authorized cemetery or in any other cemetery, burial ground or other place without a permit granted in manner hereinafter provided.
- (2) Such permit shall be granted only to the legal personal representative or next of kin of the person buried, or to his or their duly authorized agent.
- (3) Such permit may be granted by the Minister in respect of anybody or the remains of anybody interred in any cemetery or burial ground or any other place.
- (4) The permitting authority may prescribe such precautions as he may deem fit as the condition of the grant of such permit, and any person who exhumes anybody or the remains of anybody contrary to this Act, or who neglects to observe the precautions prescribed as the condition of the permit, shall be guilty of an offence and liable to a fine not exceeding one thousand five hundred shillings:

Provided that nothing herein contained shall be deemed to affect the right of a magistrate to order the exhumation of a body or the remains of anybody for the purpose of holding an inquiry into the cause of death of any person.

29. The trial court acted within the confines of the law as elaborated above in granting the exhumation orders and it cannot be said to have acted beyond the powers allowable.
30. Notably, the 1st respondent had sought orders that the remains of Dominic Karanja Njoroge that had been interred on the suit property be exhumed. The basis for the orders sought was that the suit property belonged to her deceased husband and the appellant had no right to inter the remains of his son on the suit property. The trial court held that the suit land belonged to the 1st respondent's husband and as such devolved to his family upon his death. It proceeded and allowed the exhumation orders.
31. The 1st respondent submits that the appeal is moot for the reason that the order were acted on. The 2nd and 3rd respondents submitted that they supervised the exhumation. The appellant wants this court to set aside the orders of September 21, 2022, which included the order of exhumation. There is no evidence that the said order was stayed.



32. It is trite law that court orders cannot be issued in vain. Orders against a matter overtaken by events cannot be tenable and allowing a court to make any order with full knowledge that the orders cannot be executed will expose the court to ridicule.
33. This court has no reason to doubt the submissions that exhumation has already occurred. Giving orders of setting aside an event that has already occurred will be an exercise in futility. This court agrees with the respondents that the appeal has been overtaken by events. However, this is only limited to the issue on exhumation of the body.
34. Even if this court was to find that the issue of land ownership is moot, it is important to remember, a court can entertain a matter that is moot where there is a continuing injury. This court finds some guidance in the South African case of *AB and Another v Pridwin Preparatory School and Others* (CCT 294/18) [2020] ZACC 12 as quoted by the court in the case of *Okiya Omtatah Okoiti & another v Council of Governors; Attorney General & 2 others* where the court held
- “But that is not the end of the matter because “mootness is not an absolute bar to deciding an issue . . . the question is whether the interests of justice require that it be decided.” In class actions or public interest litigation, the decisions pertaining to the rights contained in the Bill of Rights can have a far-reaching practical effect on many others.
35. In Langeberg Municipality, this court formulated the test for adjudicating a moot matter in these terms:
- “This court has a discretion to decide issues on appeal even if they no longer present existing or live controversies. That discretion must be exercised according to what the interests of justice require. A prerequisite for the exercise of the discretion is that any order, which this court may make, will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument advanced.”
36. Even though the issue of exhumation has already occurred, the issue of land ownership is a matter that can be entertained by this court. Contrary to the submissions by the 1st respondent the issue of land ownership is not moot within the meaning of it as espoused in the case of *Okiyah Omtata, supra* as relied on by the 1st respondent.
37. The trial court had made an order that the suit land belonged to the 1st respondent. The appellant on the other hand claims ownership over the suit property. He contends that there existed a legal battle between himself and the 1st respondent's husband over the suit property.
38. While it is true that a certificate of title is conclusive evidence of ownership and that the registration of a person confers absolute and indefeasible rights to the registered proprietor, it is also a statutory provision under section 26 of the *Land Registration Act* that this right can be taken away. It provides
- “The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer ... 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 ... 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.”

39. To ascertain whether the title can be challenged on the basis of the foregoing will require the calling of evidence.
40. The trial court had expressed itself on the ownership of the suit property and in allowing the exhumation orders found that the 1st respondent having demonstrated ownership and being there no opposition, the orders ought to have been granted. The trial court further observed that there was no place for a seller to resort back to and reclaim land registered in the buyer’s name so as to assert ownership rights.
41. Respectfully, the authenticity of the 1st respondent’s root of title was not put to challenge. It is apparent to this court that the 1st respondent’s husband and the appellant were engaged in a legal battle in Nairobi ELC Mis No 2071 of 2007. This was a Miscellaneous Application and deducing from the proceedings attached to the Record of Appeal, the matter was at some point withdrawn for want of prosecution. A Miscellaneous Application is not meant to settle rights or obligations.
42. It is not in dispute that there is evidence that the land was registered in the name of the 1st respondent’s husband. It is also not in dispute that the appellant was previously the registered owner of the suit land. This seems to support the analogy that the appellant sold the land to the 1st respondent. As to the correctness of the foregoing, that will require the calling of evidence.
43. A court cannot determine the issue of land ownership on a Miscellaneous Application. As stated earlier, the nature of such application is not to confer a right or an obligation. It can be instituted in matters where there is no dispute as to the right for example in an advocate client bill of costs, it not in dispute that counsel has a right to his/ her legal fees. In cases of exhumation, it will be easy to bring an application for exhumation where the proprietary rights have been determined.
44. This court agrees with the findings of the court in the case of *Elizabeth Okoyana v Henry Amwayi Ndete* [2005] eKLR, where the appellate court observed that the trial court ought not have granted exhumation orders on interim before hearing parties’ viva voice. This was notwithstanding the glaring evidence of ownership which needed to be interrogated. To determine the rights over land, a court must be properly moved. In Misc Case No 2 of 2013, *Joseph Kibwo Chemjor v William C Kiseru*, (2013)eKLR, the court held that:-
- “The *Land Registration Act* does not prescribe any rules on how proceedings under the statute need to be commenced. The default statute therefore remains the *Civil Procedure Act* which prescribes the manner in which suits must be instituted. Order 3 rule 1 prescribes the way in which suits should be instituted.....” Every suit shall be instituted by presenting a plaint to the court or in such manner as may be prescribed”.
45. As such, the trial court fell into error in making pronouncement on the ownership of land based on a Miscellaneous Application. This is an order that this court cannot countenance for the sole reason that the appellant was condemned unheard.
46. However, it would not be anticipated that the appellant will seek to challenge the 1st respondent’s title in a Miscellaneous Application. Allowing the appeal will revert the parties to the proceedings in Miscellaneous Application. This court has the power to make such orders as to ensure that the end of



justice is met. This was observed in the case of *Nguruman Limited v Shompole Group Ranch & Another* [2014][eKLR, where the court observed;

“It is now trite that the inherent power of the court exists in the court’s Jurisdiction as a safety valve to enable the court to make such orders as may be necessary for the ends of Justice or to prevent the abuse of the power of the court.”

47. With this in mind it is the finding of this court that the appeal partially succeeds in terms of ground three of the Memorandum of Appeal. This is to the extent that the trial court erred in issuing substantive orders in a Miscellaneous Application. As such, and in the interest of justice, this court makes the following orders
- i. Order 1 of the orders of the trial court issued on September 21, 2022, being the order that declared Esther Wanjiru Githinji as the owner of the suit land be and is hereby set aside.
 - ii. The appellant to move the court appropriately for the court to determine the issue of ownership
 - iii. It should be noted that the impetus of order (b) above does not seek to oust the judgment of any court that might have been properly moved to determine the issue of ownership.
 - iv. The appellant be and is hereby directed to move court appropriately within 30 days from the date of this judgement failure, to which the appellant will be deemed to have waived the right over the suit land.
48. On matters of costs, it is trite law that costs shall follow the vents and a successful party is entitled to costs. The appeal was partially successful. Therefore, this court directs each party to bear their own costs.
49. In a nutshell, the instant appeal succeeds partially and the court directs as above.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 19TH DAY OF OCTOBER, 2023.

L. GACHERU

JUDGE

Delivered virtually in the presence of; -

appellant – Absent

2nd respondent - Absent

3rd respondent

Court Assistant - Joel Njonjo

L. GACHERU

JUDGE

19/10/2023

