



REPUBLIC OF KENYA



**Githinji v Maigua (Environment and Land Appeal 2 of 2023)  
[2023] KEELC 22125 (KLR) (7 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22125 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
ENVIRONMENT AND LAND APPEAL 2 OF 2023  
YM ANGIMA, J  
DECEMBER 7, 2023**

**BETWEEN**

**STEPHEN KIHARA GITHINJI ..... APPELLANT**

**AND**

**JEREMIAH KAGONYE MAIGUA ..... RESPONDENT**

*(An appeal against the judgment and decree of Hon. M. K. Mutegi  
(SRM) dated 04.07.2017 in Engineer PMCC No. 26 of 2017)*

**JUDGMENT**

**A. Introduction**

1. According to the memorandum of appeal dated May 3, 2019 this is an appeal against the judgment of Hon. M.K. Mutegi (SRM) dated July 4, 2017 in Engineer PMCC No. 26 of 2017. By the said judgment, the trial court allowed the respondent's suit against the appellant with costs. In particular, the trial court directed the appellant to file a succession cause for the estate of his late father Eliud Githinji Kamiti in order to transfer a quarter an acre of the suit property to the respondent. As an alternative, the appellant was ordered to pay the respondent the sum of Kes 250,000/= as the market value of the land together with the developments thereon.

**B. Background**

2. The record shows that *vide* a plaint dated November 11, 2016 the respondent sued the appellant seeking the following reliefs against him:
  - a. An order that the defendant do file a succession cause of his late father Eliud Githinji Kamiti (deceased) in order to transfer quarter (1/4) an acre of land to be excised from parcel of land known as Nyandarua/Mikaro/253.



- b. In the alternative, the defendant do refund to the plaintiff Kes 250,000/= being the current market value of the said piece of land and the developments thereon.
  - c. Any other and/or better relief this honourable court may deem fit and just to grant.
  - d. Costs of this suit plus interest hereof.
3. The respondent pleaded that *vide* a sale agreement dated May 8, 2009 he bought from the appellant a portion of a quarter an acre of land to be excised from Title No. Nyandarua/Mikaro/253 which was in the name of the appellant's late father. The respondent pleaded that he paid the full purchase price of Kes 35,000/= together with an additional Kes 4,800/= for the mature trees which were on the land. It was further pleaded that it was agreed between the parties that the appellant shall file a succession cause for the estate of his late father to facilitate the transfer of the portion sold.
4. The respondent pleaded that in breach of the said agreement, the appellant had frustrated the sale agreement by failing to file the succession cause in order to transfer the portion of a quarter an acre the subject matter of the sale agreement. It was the respondent's case that despite issuance of a demand and notice of intention to sue the appellant had failed to make good his claim hence the suit.
5. The record shows that the appellant neither entered appearance nor filed a defence to the suit in consequence whereof interlocutory judgment was entered against him. Thereafter, the suit proceeded for formal proof on May 23, 2017 and an *ex parte* judgment was delivered against the appellant on June 20, 2017 allowing the respondent's claim in terms of prayers (a) and (b) of the plaint together with costs of the suit. The appellant was consequently given the option of either undertaking succession proceedings and transferring a quarter (1/4) an acre to the respondent or, compensating him for the market value of the land in the sum of Kes 250,000/=.
6. The record further shows that *vide* a notice of motion dated October 30, 2017 the appellant sought the setting aside of both the interlocutory judgment and *ex parte* judgment purportedly passed on September 20, 2017 and for leave to defend the suit. The appellant contended that he was never served with summons to enter appearance and that, in any event, he had a good defence on the merits.
7. The said application was heard before Hon. E.K. Nyutu (PM) who delivered a ruling on April 17, 2018 dismissing the same with costs. The court found and held that the appellant was duly served with summons as per the process server's affidavit of service on record and that the appellant had not demonstrated any triable issues in his proposed defence. The court noted that the appellant had admitted the existence of the sale transaction as well as receipt of the purchase price. The court further held that since the appellant had allowed the respondent to take possession and even develop the land he could not turn back and plead lack of capacity to sell after keeping the purchase price for over 9 years.

### **C. Grounds of Appeal**

8. It is evident from the material on record that the Appellant was aggrieved by both the *ex parte* judgment and decree of the Hon. M. K. Mutegi (SRM) dated June 20, 2017 (erroneously referred to as July 4, 2017) as well as the dismissal order of Hon. E.K. Nyutu (PM) dated April 17, 2018. It would appear that the appellant simply decided to combine two appeals into one by filing a memorandum of appeal dated May 30, 2019 attacking both the *ex-parte* judgment of June 20, 2017 and the ruling of April 17, 2018.



9. Vide his memorandum of appeal dated May 3, 2019 the appellant raised the following 12 grounds of appeal:
- a. That the learned trial magistrate erred in law and in fact by enforcing a contract purportedly entered into between the appellant herein and the respondent herein whereas no valid contract existed as between the appellant and the respondent or at all.
  - b. That the learned trial magistrate erred in law and in fact by failing to observe that the appellant herein had no capacity to contract in the land subject matter of the suit and that the purported contract between the appellant herein and the Respondent herein was null and void *ab initio*.
  - c. That the learned trial magistrate erred in law and in fact by failing to appreciate that any contract relating to land situate at any land control area requires the mandatory consent from the relevant Land Control Board and that lack of the same renders the said contract null and void *ab initio*.
  - d. That the learned trial magistrate erred in law and in fact by finding that a regular judgment had been entered against the Appellant herein which was a misdirection and a non-direction on her part.
  - e. That the learned trial magistrate erred in law and in fact by failing to find that she had unfettered discretion to set aside both the interlocutory and ex-parte judgment on such terms as would have been just between the parties.
  - f. That the learned trial magistrate erred in law and in fact by finding that the proposed defence did not raise any triable issues.
  - g. That the learned trial magistrate erred in law and in fact by failing to find that the only remedy available to the respondent herein was the refund of the consideration paid to the appellant herein and not the purported current market value of Kes 250,000.
  - h. That the learned trial magistrate erred in law and in fact by finding that the Appellant should file a succession cause in respect of his deceased father Eliud Githinji Kamiti (deceased) in order to transfer a quarter (1/4) an acre of land to be excised from Land Parcel Number Nyandarua/Mikaro/253 – which land belonged to the said deceased in favour of the Respondent herein.
  - i. That the trial magistrate erred in law and in fact by granting the alternative prayer that the appellant do refund unto the Respondent a sum of Kes 250,000/= purportedly being current market value of the suit premises.
  - j. That he learned trial magistrate erred in law and in fact by finding that the appellant herein had come to court with unclean hands.
  - k. That the learned trial magistrate erred in law and in fact by alleging that the respondent herein had been misled and/or defrauded by the appellant herein.
  - l. That the learned trial magistrate erred in law and in fact by purporting to create a contract between the appellant and the respondent herein which was a misdirection and/or a non-direction on her part.



#### D. Directions on Submissions

10. When the appeal was listed for directions, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their written submissions. The record shows that the Respondent's submissions were filed on July 10, 2023 whereas the appellant's submissions were not on record by the time of preparation of the judgment.

#### E. Issues for Determination

11. The court is of the opinion that the following are the key issues which arise for determination herein:
  - a. Whether the instant appeal was filed out of time.
  - b. Whether there is merit in the Appellant's appeal.
  - c. Who shall bear costs of the appeal

#### F. Analysis and Determination

##### a. Whether the instant appeal was filed out of time

12. The court has also noted from the appellant's record of appeal that the first page declares that it relates to an appeal against the ruling and order of Hon. E.K. Nyutu dated April 17, 2018 dismissing the appellant's setting aside application dated October 30, 2017.
13. The court finds it strange that the appellant chose to file the memorandum of appeal dated May 3, 2019 challenging the *ex parte* judgment dated June 20, 2017 nearly 2 years after delivery of judgment without seeking an extension of time to lodge an appeal out of time. There is no indication on record to demonstrate that such leave was sought and obtained. The appellant did not exhibit a copy of any such order in the record of appeal. Ordinarily, the heading of the memorandum of appeal should indicate that it was filed pursuant to leave granted by a specified court and on a specified date.
14. Section 79G of the *Civil Procedure Act* (cap.21) provides the timelines for lodging appeals from decisions of subordinate courts as follows:

“Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the Appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”
15. Even if the court were to treat the memorandum of appeal dated May 3, 2019 as an appeal against the ruling and order of hon. E. K. Nyutu dated April 17, 2018 the appeal would still be faced by similar challenges on the limitation period. The appellant has not explained on what basis he filed the memorandum of appeal dated May 3, 2019 more than one year after the date of the impugned ruling in contravention of the provisions of section 79G of the *Civil Procedure Act* (cap.21). There is no indication on record that the appellant ever sought and obtained leave to appeal out of time and there is no citation on the face of the memorandum of appeal on when such leave was obtained. The court is thus of the view that the instant appeal is incompetent for having been filed outside the prescribed period without leave of court.



**b. Whether there is merit in the appellant's appeal**

16. The court has already taken the view that the appeal is incompetent and improperly before the court for having been filed out of time. In the premises, it is not necessary to consider and determine the merits of an appeal which the court considers to be incompetent.

**G. Conclusion and Disposal Orders**

17. The upshot of the foregoing is that the court finds and holds that the instant appeal is incompetent for having been filed out of time without leave of court. As a consequence, the appeal is hereby struck out with costs to the respondent.

It is so decided.

**JUDGMENT DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 7TH DAY OF DECEMBER, 2023.**

**In the presence of:**

N/A for the Appellant

Respondent – present in person

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C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

