



Ngoru & another (Suing as Personal Representatives of the Estate of Samuel Ngoru Kamau - Deceased) v Kamau (Environment and Land Appeal E027 of 2023) [2025] KEELC 3438 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E027 OF 2023**

**MN GICHERU, J
APRIL 29, 2025**

BETWEEN

WILIAM KAMAU NGORU 1ST APPELLANT

AMOS MUNGAI KAMAU 2ND APPELLANT

**SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF SAMUEL
NGORU KAMAU - DECEASED**

AND

WAMBUI MWANGI KAMAU RESPONDENT

(Appeal is against the judgment and decree in Murang'a CM ELC Case No. E07B of 2021)

JUDGMENT

1. This appeal is against the judgment and decree in Murang'a CM ELC Case No. E07B of 2021. In the Judgment dated 29/11/2023, the learned trial magistrate ordered the cancellation of the Appellant's title to L.R. No. Loc.7/Iganjo/247 and ordered that the same reverts to the name of Mwangi Kamau, the husband of the Respondent.
2. Dissatisfied with the judgment of the lower court, the Appellants, through counsel on record, filed a memorandum of appeal dated 11-12-2023 seeking the setting aside of the judgment dated 29-11-2023. Six grounds were given for seeking the setting aside the judgment. They are as follows.

The learned trial magistrate erred in law/fact by-

- i. granting an order in favour of the Respondent after dismissing the Respondent's case,
- ii. constructing Section 80(1) of the Land Registration Act to give the court powers to rectify the register suo moto,



- iii. finding that the suit land was fraudulently, illegally and/or unprocedurally transferred without any prejudice being adduced by the Respondent,
 - iv. disregarding the evidence of the Appellant and arriving at the conclusion that the Appellant had not proved his counterclaim,
 - v. failing to consider that the Respondent's claim for the suit land was time barred under the Limitation of Action Act and
 - vi. considering extraneous evidence that was not part of the record pertaining to civil case No. 15 of 1971 public auction etcetra.
3. The facts of the case, according to the Plaintiff now Respondent are as follows. One, she is the wife of Mwangi Kamau who was the registered owner of the suit land Loc.17/Iganjo/247 comprising of 4.05 hectares. Two, she used to reside at a different parcel of land at Ndorome and to cultivate the suit land with her mother in law Nduta Kamau. Three, in the year 1982, they relocated to Gititu in Kakuzi location where they eventually settled on L.R. No Kakuzi/kirimiri/Block VI/60 where she stays to date. Four, when her husband died on 25-5-1995, he was buried on the suit land. Five, in the year 1998 the Respondent filed succession cause No. 31/1998 at Thika Magistrate's Court where she was issued with a grant in respect of the estate of her late husband. Six, since she was being assisted by a Good Samaritan and she did not know how to read, she found out later that the suit land had been left out of the succession proceedings. Seven, the Respondent used to send her daughter , Mary Nyambura, to check on the suit land. She would find it vacant and uninterfered with. However, in the year 2020, she found a notice on the land that trespassers would be prosecuted. That is when they found out that the Appellant had presented a false land control board application to Makuyu Land control board pretending that the Respondent's late husband had obtained a consent for the transfer of the entire suit land and obtained a title deed on 5/9/1994. Finally, the Respondent retains the original title deed to the suit land which was given to her by her husband for safe keeping and he cannot be the one who sold the land. It is for the above stated reasons that the Respondent sought for the cancellation of the Defendant's title and for the suit land to revert to the name of her late husband.
4. The facts of the case, according to the defence are as follows. Samuel Ngoru Kamau bought the suit land from his own father Williams Kamau. In the year 1994, his father applied for the consent of the land control board and obtained. He paid the entire purchase price to his father by 1995. He has been on the land since then. He has been growing hay, planted Eucalyptus and other trees. Nobody has ever been to the land claiming it until this suit was filed. The reason for erecting the sign board on the land was because some brokers were trespassing on the land and claiming that it was on sale when this was not the case.
5. At the trial on 25-10-23, the Plaintiff did not turn up even though she had been served. The Appellant and the land registrar testified as the only witnesses.
6. Before hearing the Appellant an the land registrar, the learned trial magistrate first dismissed the Respondent's case on 25-10-23.
7. Counsel for the parties filed written submissions dated 10-6-2024 and 19-11-2024 respectively. The Appellant's counsel identified the following issues for determination.
- i. Whether the Respondent's suit was time barred?
 - ii. Whether there is an error apparent on the face of the record in relation to section 80(1) of the [Land Registration Act](#).



- iii. Whether fraud was proved in the absence of evidence from the Respondent.
- iv. Whether the trial magistrate considered extraneous evidence that was not on record.

The Respondent's counsel's written submissions though filed after the Appellant's submissions, did not respond to the Appellant's issues. The least that the Respondent's counsel should have done was to reply to the Appellant's counsel's submissions or at least respond to the six grounds of appeal. He did neither.

- 8. I have carefully considered the appeal in its entirety including the record, the memorandum, the grounds and the submissions by learned counsel for the parties. I will primarily decide on each of the six grounds but also consider the four issues identified by the Appellant's counsel.

“This being a first appeal, this court must reconsider the evidence of the trial Court, evaluate it itself and draw its own conclusions though it should always bear in mind that it neither saw nor heard the witnesses and should make due allowance in this respect.”

See *Selle vs. Associated Motor Boat Co. Ltd and another* (1968) E A 123.

- 9. On the first ground, I find that having dismissed the Respondent's suit on 25-10-23, the only thing that was left for the lower court to do was to determine the Appellant's counterclaim. The trial magistrate could not allow any of the prayers in the plaint dated 24-11-2021 because she had already dismissed the Respondent's suit against the Appellant.

Order 12 rule 3(1) of the Civil Procedure Rules is very emphatic on what happens when the Plaintiff fails to attend court on the day the case is fixed for hearing. It provides as follows.

“If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the Defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court.”

Subrule (3) continues as follows.

“If the Defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.”

The judgment dated 29-11-2023 should only have been on the Appellant's counterclaim and the worst that the court would have done was to dismiss the counterclaim. The fact that the court went beyond dismissing the counterclaim means that the learned trial magistrate erred.

- 10. Looking at the second ground of appeal which happens to be the second issue raised by the Appellant's counsel, in the written submission I find that the trial magistrate had jurisdiction to order for the rectification of the register if the case had been proved by the Respondent to the required standard. We know, however, from the finding on the first issue that there was no evidence on record at all.
- 11. Regarding the third ground of appeal, I find that the learned trial magistrate erred. Where fraud is alleged, it must be proved to a standard higher than that in ordinary civil cases. In the case of *Ndolo vs. Ndolo* Civil Appeal No. 128 of 1995, the court of Appeal had this to say in part.

“We start by saying that it was the Respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance



of probabilities, but the burden of proof on the Respondent was certainly not one beyond reasonable doubt as in Criminal cases...”

In this case, fraud was alleged but never proved at all. Firstly, there is on record evidence on how the husband of the Respondent came to lose the suit land. He was a judgment debtor in RM’s Court at Fort Hall in case No. 15 of 1971. The decretal sum was Kshs. 1,870.40. The judgment creditor was Samuel Wahwai Ngugi and the suit land was sold to Misheck Mwangi. The green card which was produced as an exhibit by the land registrar shows the concatenation of transfers that resulted in the appellant being registered as the owner of the suit land. Mishek Mwangi was the owner before S. John Williams Kamau who then transferred it to the Appellant. It would be fraud if there was no explanation as to how the Respondent’s husband came to lose the land. Secondly, the Respondent does not impress as a truthful person. How could she stay form the land all those years from 1982 to the year 2020, a period of 38 years? Where is the husband’s grave on the suit land? Why was this land not included in Thika Succession Cause No. 31 of 1998? Why did the Respondent avoid coming to court on 25-10-2023 and earlier? Her case raises more questions than answers, yet she is the one with a heavy burden of proof of fraud against the appellant. One would be forgiven for thinking that she abandoned her case when she found the mountain she had to climb in proving her case.

12. In regard to the fourth ground, I find that the learned trial magistrate ran into error. The judgment dated 29-11-2023 makes no mention on what is wrong with the testimonies of the Appellant and the land registrar and why they is to be disregarded in favour of the specific findings that the court made. The issue of sale of the suit land in the year 1971 through a court process should have been addressed in the judgement of the learned trial magistrate.
13. Finally on whether the Respondent’s suit is time barred, I find that it is not. According to the evidence of the Respondent it was not until the year 2020 that she found that the suit land was occupied by the Appellant. Under section 26(a) of the *Limitation of Actions Act*, where there is an allegation of fraud on the part of the defendant or his agent, time does not begin to run until the alleged fraud has been discovered. In this case time against the Respondent started running in 2020.

Section 26(a) of Cap 22.

“Where, in the case of an action for which a period of Limitation is prescribed, either –

- a. the action is based upon the fraud of the Defendant, or his agent, or any person through who he claims or his agent or ...
the period of limitation does not begin to run until the Plaintiff has discovered the fraud or mistake...”

The Respondent was on time in bringing the action.

14. In conclusion and for the reasons already given,
I find merit in the appeal and I order as follows.
 1. The judgment of the learned trial magistrate dated 29-11-2023 is hereby set aside together with all the consequential orders.
 2. Judgment be and is hereby entered for the Appellant as prayers (a), (b) and (c) of the counterclaim dated 8-2-2022.
 3. Costs of this appeal and those of the lower court case to the Appellant.

It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 29TH DAY OF APRIL ,
2025.**

M.N. GICHERU

JUDGE.

Delivered online in the presence of; -

Court Assistant – Mwangi Njonjo

Appellant's Counsel – Mr. Mbugua

Respondent's Counsel – Mr Marai

