



REPUBLIC OF KENYA



**Gatimu & another v Ngari & 3 others (Environment and Land Appeal 93 of 2014) [2022] KEELC 4922 (KLR) (19 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 4922 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 93 OF 2014**

**L WAITHAKA, J**

**MAY 19, 2022**

**(FORMERLY NYERI HCCA NO. 124 OF 2011)**

**BETWEEN**

**SAMUEL MURIUKI GATIMU ..... 1<sup>ST</sup> APPELLANT**

**ISABELLA NJURI KOIGI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MUGO NGARI ..... 1<sup>ST</sup> RESPONDENT**

**MBOGO NGARI ..... 2<sup>ND</sup> RESPONDENT**

**JAMLECK MURIITHI ..... 3<sup>RD</sup> RESPONDENT**

**COUNTY GOVERNMENT OF KERUGOYA/KUTUS ..... 4<sup>TH</sup> RESPONDENT**

*(Being an appeal of the Judgment of Mr. K. K. Cheruiyot, (RM) in Nyeri Civil Case No. 374 of 2008)*

**JUDGMENT**

**Background**

1. By a plaint dated June 8, 1992 and amended on July 19, 2010 the appellants herein instituted a suit in the lower court to wit, Nyeri CMCC No. 374 of 2008 seeking judgment against the respondents herein for:-
  - a. A declaration that plot No.190 Kutus (the suit property) legally belongs to them;
  - b. An order directing the 4<sup>th</sup> respondent to transfer the plot to them;In alternative to prayers (a) and (b) above,



- c. An order directing the 1<sup>st</sup> respondent to refund to them the whole of the purchase price he received from them plus 19% as per the sale agreement executed between them;
  - d. An order directing the 1<sup>st</sup> respondent to compensate them for all expenses they incurred in respect of the plot;
  - e. Costs of the suit;
  - f. Any other relief which the honourable court may deem fit to grant.
2. In support of their case, the appellants led evidence to the effect that they entered into an agreement with the 1<sup>st</sup> respondent for transfer to them of the suit property; that the 1<sup>st</sup> respondent executed transfer documents in their favour but the 4<sup>th</sup> respondent failed to effect the transfer.
  3. Explaining that the 4<sup>th</sup> respondent did not give them the reasons for failing to effect the transfer in their favour, the appellants urged the court to find that they had made up a case for a declaration that the suit property belonged to them and an order for transfer of the suit property to them.
  4. On its part, the 4<sup>th</sup> respondent acknowledged that it had received transfer documents in favour of the appellants but explained that it could not transfer the suit property to the appellants because there was an unresolved ownership dispute in respect of the suit property.
  5. During hearing of the case, it emerged that the 1<sup>st</sup> respondent passed on before the suit was heard and determined and that he was not substituted as by law required.
  6. Upon considering the case urged before him, the Trial Magistrate stated:-
 

“... I have considered the evidence. The issue is whether the declaration and order directing the 4<sup>th</sup> defendant to transfer Plot 190 Kutus to the plaintiffs can issue. The 4<sup>th</sup> defendant in my finding did not defer to transfer the plot since there was a dispute. I have seen the third defendant’s letter dated 13.12.1991, DEXBT 4, where he claims interest. It is said that the 2<sup>nd</sup> defendant and 3<sup>rd</sup> defendants had been in occupation since 1972. From the exhibit produced, DEXBT 2 and 3, it is apparent the plot had been sold way back to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant before the sale to the plaintiffs. My conclusion is that the failure to transfer was not occasioned by the 4<sup>th</sup> defendant. The suit was therefore wrongly brought against the 4<sup>th</sup> defendant. The claim between the plaintiffs and the defendants cannot be solved by these proceedings since the first defendant is deceased. The 1<sup>st</sup> defendant is still the registered owner of the plot. There can be no declaration orders against the interest of the first defendant or his estate without substitution. The second and third defendants are not registered as the owners. Their claim is that they bought the plot. The court cannot order them to stop asserting the same if it is true. In the end, I find and hold that the orders sought cannot be granted. ...In the circumstances, I dismiss the plaintiff’s case against the 3<sup>rd</sup> defendant with costs. ...”.
  7. Aggrieved by the above determination, the plaintiffs appealed to this court on the grounds that the learned Trial Magistrate erred by:-
    - i. Determining that the 4<sup>th</sup> respondent did not defer the transfer of the suit property to them and holding that the 4<sup>th</sup> respondent was wrongly sued;



- ii. Determining that there was a dispute between the plaintiffs and the 2<sup>nd</sup> and the third respondents when the 2<sup>nd</sup> and the 3<sup>rd</sup> respondent did not present any evidence before him proving the same;
  - iii. Determining that the 2<sup>nd</sup> and 3<sup>rd</sup> respondent have been in occupation of the suit property since 1972 and had bought it when no evidence had been tendered before him capable of proving that fact;
  - iv. Failing to analyze and consider the evidence they presented hence arriving at a wrong decision;
  - v. Failing to find that they had established that they were bona fide purchasers of the suit property hence the same should be transferred to them.
8. For the foregoing reasons, the appellants pray that the appeal be allowed with costs to them.
9. The appeal was disposed by way of written submissions.

**Analysis and Determination.**

10. From the grounds of appeal and the submissions in respect thereof, the sole issue for the court's determination is whether the Trial Magistrate erred by failing to find in favour of the appellants.
11. With regard to that question, in exercise of the duty vested in this court as a first appellate court, I have evaluated afresh the evidence adduced before the Trial Magistrate with a view of arriving at my own independent conclusion but bearing in mind that I neither saw nor heard the witnesses testify.
12. Having so done, my view of the appeal herein is that it turns on the following undisputed or uncontroverted facts:-
- i. That the 1<sup>st</sup> respondent, passed on before the suit was heard and determined, without being substituted as by law required;
  - ii. That the 1<sup>st</sup> respondent was and still is the registered owner of the suit property;
  - iii. That the 1<sup>st</sup> respondent had not admitted the appellants' claim;
  - iv. That there was a dispute between the appellants and the 1<sup>st</sup> to 3<sup>rd</sup> respondents over the ownership of the suit property.
13. The fact that the 1<sup>st</sup> respondent was still the registered proprietor of the suit property and that he had not admitted the appellants' claim against him brings into fore the issue as to whether the orders sought by the appellants and which orders were incompatible with the case urged by the 1<sup>st</sup> respondent could be lawfully issued in the absence of the 1<sup>st</sup> respondent or his legal representative.
14. Having considered the special circumstances of this case, highlighted herein above, I agree with the Trial Magistrate's determination that the orders sought by the appellants could not lawfully be issued against the 1<sup>st</sup> respondent because firstly, the 1<sup>st</sup> respondent was a necessary party to the appellants' case; secondly, the appellants' case against the 1<sup>st</sup> respondent by operation of law ceased to exist one year after the 1<sup>st</sup> respondent passed on without being substituted as by law required. Thirdly, granting the orders in the absence of the 1<sup>st</sup> respondent when he had not admitted the appellants' case would have amounted to denying the 1<sup>st</sup> respondent or his estate an opportunity to be heard on the case urged against him.
15. For the foregoing reasons, I find the appeal to be unmaintainable and dismiss it with costs to the respondents.



**DATED AND SIGNED AT ITEN THIS 9<sup>TH</sup> DAY OF MAY, 2022.**

**L. N. WAITHAKA**

**JUDGE**

**READ, SIGNED AND DELIVERED AT NYERI THIS 19<sup>TH</sup> DAY OF MAY, 2022.**

**J. O OLOLA**

**JUDGE**

