



**Ngurukie v Attorney General & 5 others (Environment & Land Case 83 of 2015) [2022] KEELC 12721 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12721 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 83 OF 2015  
JO OLOLA, J  
SEPTEMBER 28, 2022  
(FORMERLY NYERI HCCC NO. 206 OF 1995)**

**BETWEEN**

**MATEO GITHUA NGURUKEIE SUBSTITUTED BY SAMUEL GITHUA  
NGURUKIE ..... PETITIONER**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT  
STANDARD CHARTERED BANK LIMITED ..... 2<sup>ND</sup> RESPONDENT  
LAND REGISTRAR NYERI ..... 3<sup>RD</sup> RESPONDENT  
C.I.D. NYERI ..... 4<sup>TH</sup> RESPONDENT  
SOLOMON MWANIKI WAMBOO ..... 5<sup>TH</sup> RESPONDENT  
JOYCE WANJIRU MWAURA ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. Following directions given herein on November 2, 2017, parties were required to dispose of the petition herein dated March 5, 2014 by way of written submissions. Upon taking over the conduct of these proceedings on March 14, 2022, this court was informed that the parties had filed submissions and on that basis, a judgment date was fixed for July 28, 2022.
2. When the court retired to prepare the said judgment however, it did become apparent that there was need to rethink the manner of disposal of this matter which has since been in our court system for some twenty seven (27) years. While it was not clear from the record how the matter was transferred to this court, this suit was initially filed at the High Court at Nyeri and given Reference Number Nyeri HCCC 206 of 1995.



3. From a perusal of the record, it was apparent that prior to the filing of this suit, the original plaintiff herein Mateyo Githua Ngurukie had initially in 1987 filed an originating summons in Nyeri HCCC No 122 of 1987 against the original defendants Solomon Mwaniki Wambo and Joyce Wanjiru Mwaura accusing them of acquiring the suit land by way of fraud.
4. Following an objection raised by the defendants and in a ruling delivered on February 2, 1995 in the said Nyeri HCCC No 122 of 1987, the Honbournable Lady Justice Ang'awa then seized of the matter agreed with the defendants that the suit ought to have been filed by way of an ordinary plaint. Noting however that the preliminary objection was raised some 6 years after the originating summons was filed, the Learned Judge dismissed the same but directed in the interest of justice that the claimant be allowed to bring his claim by way of a plaint which was to be filed within 14 days of the ruling.
5. Some 10 months later by a plaint dated December 5, 1995, the original plaintiff instituted this suit seeking inter alia a declaration that Land Parcel No Othaya/Kihingiru/424 (the suit property) was registered in the names of the two defendants illegally, fraudulently and unlawfully. The plaintiff also sought the rectification of the register to have the defendants names deleted therefrom and to have his own name inserted as the lawful proprietor of the land.
6. The basis of those prayers was the plaintiff's contention that he was initially the registered proprietor of the land and that in the year 1958, he had charged the same to the Standard Bank to secure a loan of kshs 1,500/-. It was further the plaintiff's case that in the years 1976, the 1<sup>st</sup> defendant and the husband of the 2<sup>nd</sup> defendant had colluded with the Bank to have the property discharged after which it was registered in the name of the 1<sup>st</sup> defendant who eventually passed the titles to the 2<sup>nd</sup> defendant's husband who had since died.
7. Upon being served with the suit papers, the defendants filed a joint Statement of Defence dated January 29, 1996 where they contended inter alia that the suit was res judicata. By an application dated February 5, 1996, the plaintiff sought to have that defence struck out and to grant judgment as sought in the plaint.
8. In a short ruling rendered on January 24, 1997, the Honourable Justice J L A Osiemo dismissed the application and directed as follows:

“This being a dispute involving land I order that the same be referred to the Land Disputes Tribunal Nyeri District for arbitration.”
9. Accordingly, this matter was transferred to the Nyeri District Land Disputes Tribunal which in a decision rendered on May 27, 1998 “awarded” the land to the plaintiff. The defendant however appealed the decision to the Nyeri Provincial Land Disputes Appeals Tribunal which in a decision rendered on September 27, 2001 proceeded not only to overturn the District Tribunal's decision and award the land to the 2<sup>nd</sup> defendant but also ordered the eviction of the plaintiff who had since taken possession of a portion of the land therefrom. Those proceedings were adopted as an order of the court in Nyeri Chief Magistrate's Land Ward Case No 73 of 2001.
10. Dissatisfied by the decision, the plaintiff filed herein a notice of motion application dated October 12, 2001 wherein he sought to set aside the award of the Provincial Land Disputes Appeals Tribunal. He also sought an order that the matter proceeds in court on a point of law. The application was heard by the Honourable Justice J K Sergon who by a ruling delivered on November 19, 2010 determined that the application was misplaced and improperly before the court as the High Court could only hear an appeal filed under Section 8 (9) of the *Land Disputes Tribunal Act* No 18 of 1990.



11. By yet another application dated March 5, 2013, the plaintiff sought orders to set aside the ruling of November 19, 2010 on account that he had developed health complications and was unable to timeously prosecute the earlier application a ruling whereon was delivered ten (10) years down the line. The new application was placed before the Honourable Justice A Ombwayo who on 15<sup>th</sup> July, 2013 dismissed the same stating thus:

“The plaintiff filed the notice of motion dated October 12, 2001 challenging the decision of the Appeals Committee. The whole process in this matter is tainted by procedural irregularities and nullities which can only be salvaged by reviewing the order of Justice Osiemo to allow the court make an informed decision on the basis of the plaint and defence and the evidence to be adduced by the parties as a Judge’s decision when it is made out of the subject matter jurisdiction is forever a nullity in the eyes of the law by operation of the law. However the plaintiff/applicant has not moved the court properly for the procedural impropriety and nullities to be addressed. Reviewing the decision of Justice Serгон will not salvage the procedural muddles in this matter. In any event the decision of Justice Sergon was a point of law with which I agree. The application is hereby dismissed with costs.”

12. Some eight (8) months after the ruling and in a rather unusual turn of events, the plaintiff now substituted by his son Samuel Githua Ngurukie instituted within these same proceedings what was termed a petition dated March 5, 2014 seeking various orders against the 1<sup>st</sup> and 2<sup>nd</sup> defendants who were no relegated as the 5<sup>th</sup> and 6<sup>th</sup> respondent as well as the honourable attorney general (as the 1<sup>st</sup> respondent), the Standard Chartered Bank (as the 2<sup>nd</sup> respondent), the land registrar nyeri (as the 3<sup>rd</sup> respondent) and the CID Nyeri (as the 4<sup>th</sup> respondent).
13. In the so-called petition filed within this suit, the plaintiff now prays for the following:
- (a) A declaration that the registration of title as Mateo S. M. Wambooo was fraudulent and that he could not have passed a better title, to a 2<sup>nd</sup> Purchaser. Applicable is the rule of market overt in sale of goods (sic);
  - (b) A declaration that the acquisition of registration of title document was fraudulent;
  - (c) A declaration that the tribunal did not have the authority to hear and determine a fraud matter;
  - (d) A declaration that since the Tribunal did not have authority then the order of eviction is a nullity and stand ruling (sic);
  - (e) A declaration that the petitioner is entitled to the suit land and that the encumbrances on the title document should remain in force and that the registration should revert to the 1<sup>st</sup> registered owner, the petitioner herein until documentation is shown to the contrary;
  - (f) A declaration that the 6<sup>th</sup> respondent do pay mesne profits from the date of eviction until restoration to the suit property;
  - (g) A declaration that the eviction of the petitioner from the suit land is a violation of his fundamental rights and freedom particularly article 25(a) on freedom from inhuman or degrading treatment or punishment and thus entitled to damages;
  - (h) A declaration that the 6<sup>th</sup> respondent is liable to pay costs of this petition; and
  - (i) Any other relief that this court deems fit to grant.



14. The basis of the new prayers is the plaintiff's contention that the suit property was improperly discharged by the 2<sup>nd</sup> respondent bank before being fraudulently registered in the name of the 5<sup>th</sup> respondent who ultimately transferred the same to the name of the 6<sup>th</sup> respondent's husband who is now deceased. The plaintiff asserts at paragraph 23 of the new "petition" that he has now brought a constitutional petition to try and undo all that has been done such as referring the matter to the Land Dispute Tribunal which had no jurisdiction to hear the same and his subsequent eviction from the suit land. It is his case that he should now be given his day in court and be heard for a proper judgment to be delivered.
15. In response to the said "petition" the 2<sup>nd</sup> defendant (now the 6<sup>th</sup> respondent) filed a notice of preliminary objection on March 20, 2014 objecting to the hearing of the petition on the grounds:
  1. That all the issues raised have been decided in the court cases and no appeals have been preferred: HCCC No 17 of 1968; HCCC 122 of 1987, HCCC 206 of 1995, Award Case No 17 of 2001; HC Misc 137 of 2011, HC Misc 157 of 2012 and the ruling in this file of July 15, 2015;
  2. The petition is wrongly filed in this case and neither is it supported by an affidavit; and
  3. That the sale was pursuant to a court order at a public auction and the court did transfer the land legally. See advertisement letters and a court order attached (sic).
16. The said preliminary objection was placed before the Honourable Justice Ombwayo who in a ruling delivered herein on February 27, 2015 determined that it had no basis as the matter was only determined by the Land Disputes Tribunal which tribunal had no jurisdiction to determine the question herein.
17. In my considered view, once the court determined that the tribunal had no jurisdiction to deal with the matter, the parties can only go back and be heard on the basis of the pleadings filed by the plaintiff against the two defendants on December 5, 1995. The suit as filed herein was never a petition and the plaintiff cannot be allowed under any circumstances to sneak in a new claim in the same suit in the guise of the petition some 19 years after he filed the suit herein. Where the plaintiff intended to enjoin more defendants to his claim, he could only do so by amending his plaint as filed in the year 1995 otherwise if he intended to file a constitutional petition, he must do so outside of these proceedings with the proper leave of the court.
18. From a perusal for the record herein, it was also apparent from the affidavit of service filed by the plaintiff herein on April 17, 2019 that when his process server went to serve the 1<sup>st</sup> defendant on April 17, 2019, he was informed that he 1<sup>st</sup> defendant has since passed away and the "petition" was then served upon one David Maitho Wambo who is said to be his son. As it were, that defendant was not substituted and the claim against him has not been withdrawn by the plaintiff.
19. Given the unique and rather unfortunate circumstances of this case, I hereby invoke the inherent jurisdiction of this court to do justice unto all parties, set aside the directions adopted herein on November 2, 2017 and give the following new directions:
  - (a) The plaintiff is hereby granted leave to amend and serve his plaint dated December 5, 1995 if need be within 14 days from today.
  - (b) The defendants shall have 7 days after service to file and serve an amended defence if need be;
  - (c) The plaintiff shall within 30 days from today file and serve any documents and/or witness statements they wish to rely on at the trial upon the defendants.



- (d) The defendants shall within 14 days of such service file and serve their documents and/or witness statements upon which they intend to rely upon the plaintiffs; and
- (e) This matter shall be mentioned in court on December 1, 2022 for purposes of confirming compliance and to fix a date for the hearing of the suit.

**ruling DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

In the presence of:

Ms Miriti holding brief for Mahan for the 6<sup>th</sup> defendant

No appearance for the plaintiff

Court assistant - Kendi

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**J. O. OLOLA**

**JUDGE**

