



REPUBLIC OF KENYA



**Ganira v Ganira & 3 others (Environment and Land Appeal 16 of 2021)  
[2022] KEELC 14737 (KLR) (10 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14737 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT VIHIGA  
ENVIRONMENT AND LAND APPEAL 16 OF 2021**

**E ASATI, J**

**NOVEMBER 10, 2022**

**BETWEEN**

**FEMINES MUSIMBI GANIRA ..... APPELLANT**

**AND**

**ALICE LOVOGA GANIRA ..... 1<sup>ST</sup> RESPONDENT**

**GABRIEL JUMA OKUMU ..... 2<sup>ND</sup> RESPONDENT**

**SENA PHLYS IMUNGU ..... 3<sup>RD</sup> RESPONDENT**

**LAND REGISTRAR VIHIGA COUNTY ..... 4<sup>TH</sup> RESPONDENT**

*(being an appeal from the Ruling of the Hon. S. O. Ongeru SPM  
dated 27th April 2022 in VIHIGA SPMC E&L CASE No 58 of 2020)*

**JUDGMENT**

1. The appeal herein arises from the ruling dated April 27, 2021 of the trial court in Vihiga SPMC E&L Case No 58 of 2020. In the suit instituted vide the plaint dated September 26, 2020, one Femines Musimbi Ganira was named as the plaintiff suing the four (4) respondents herein. The suit challenged transfer of land Parcel known as South Maragoli/Buyonga/1286 (the suit land herein) from Femines Musimbi Ganira to the 1<sup>st</sup> respondent and subsequently to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. It sought for orders for cancellation of certain entries in the register and title to the suit land, that the registration thereof reverts to Femines Musimbi Ganira and for costs of the suit.
2. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed a joint statement of defence dated October 26, 2020. They denied the plaintiff's claim and stated that the suit was not filed by the named plaintiff but by one Julius Masiva Obuga without the named plaintiff's consent. That the named plaintiff is physically blind and that there is no way she could have prepared and signed the pleadings. That the transfer of the suit land



in favour of the 1<sup>st</sup> defendant (1<sup>st</sup> respondent) was by consent of the named plaintiff and that Julius Masiva Obuga filed the suit just to frustrate the respondents.

3. Femines Musimbi Ganira, the named plaintiff had an application filed on her behalf by the firm of Risper Arunga & Co Advocates *vide* the notice of motion dated November 5, 2020. She sought for an order that the suit be struck out with costs to the defendants. The grounds of her application were that she was not the one who filed the suit, that she did not sign the pleadings, that the alleged power of attorney donated by her to Julius Masiva Obuga was a forgery, that she was blind and hence unable to sign any documents and that she transferred the suit land willingly to the 1<sup>st</sup> defendant and has no claim against the defendants.
4. Before the application dated November 5, 2020 could be heard, Julius Masiva Obuga filed another application dated January 22, 2021 in the name of the named plaintiff. He sought orders that a temporary injunction issues restraining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from carrying out construction activities, disposing off, transferring, wasting or any other manner carrying out developments on the suit land pending the hearing and determination of the suit.
5. Both applications were heard simultaneously by the Senior Principal Magistrate who delivered his ruling dated April 27, 2021. He dismissed the application for injunction filed by Julius Masiva Obuga and allowed the application by the named plaintiff and struck out the suit with costs.
6. Aggrieved by the ruling on April 27, 2021, Julius Masiva Obuga preferred the appeal herein *vide* the undated memorandum of appeal filed in court on July 8, 2021 in the name of Femines Musimbi Ganira as the appellant. He raised four (4) grounds of appeal and sought orders that the appeal be allowed, the trial court's orders dated April 27, 2020 be set aside and an order be made that the suit proceeds to hearing.
7. Directions were taken on the appeal by consent of the parties that the appeal be argued by way of written submissions to be filed and exchanged between the parties. Consequently, Femines Musimbi Ganira filed her written submissions dated October 11, 2022 through the firm of Risper Arunga & Co Advocates acting for her. Counsel submitted in support of the trial court's decision to strike out the suit. Counsel relied on the Court of Appeal decision in the case of *Kivanga Estate Limited v National Bank of Kenya Limited [2017] eKLR* where it was held in part that:-

“Striking out of pleadings, though draconian, the court will in its discretion resort to it. Where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles and is satisfied upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists as an appellate court, this court will not interfere with the exercise of the former's discretionary power to strike out the pleading.

That there is a greater duty for the court than to ensure that it maintains the integrity of the system of administration of justice and ensure that justice is not only done but seen to be done by, amongst other measures, stopping litigation brought for ulterior and extraneous considerations. The courts, litigants and counsel are enjoined by both the *Constitution* and the law to assist the court to further the overriding objective for the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative resource; the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the parties. We believe the learned



Judge had this in mind when he warned counsel for the appellant of the risk of an order of costs being made personally against him if he continued to bring more actions on the same.”

Counsel urged the court to dismiss the appeal.

8. Julius Masiva Obuga filed his written submissions dated October 7, 2022 in person. He described himself in the submissions as the appellant. He submitted that the appellant was disadvantaged by the trial magistrate’s failure to allow the witnesses to present their evidence(statement). That the trial court deliberately failed to observe that the Power of Attorney had been donated in the year 2015. That the trial court deliberately ignored to admit letters written to the tenants of the plaintiff and a letter written to the 3<sup>rd</sup> defendant which show that the power of attorney in court file was approved by the donor. That the defendants did not produce evidence of revocation of the power of Attorney and that the trial court erred in law and fact in denying the appellant a chance to defend the property of the plaintiff. He prayed that the appeal be allowed.
9. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed joint submissions dated September 28, 2022 through the firm of Wekesa S Wekesa & Co Advocates acting for them. Counsel submitted that it was clear from the proceedings in the trial court that Julius Masiva Obuga had no authority to act for Femines Musimbi Ganira in filing the suit. Counsel relied on the provisions of order 9 rule 2(a) and the case of *Ajayi v Legos (1967) ALR 213*.
10. This being a first appeal, the court reminds itself of its duty as a court handling a first appeal. That duty is to reconsider and analyse the evidence tendered before the trial court make its own independent conclusion and thereby determine whether the trial court’s decision/conclusion was in accordance with the evidence and applicable law.

In *Gitobu Imanyara & 2 others v Attorney General [2016] eKLR* the court held that:

“ this being a first appeal, it is trite law that this court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this court from a trial by the High Court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

Having the above principles in mind, I proceed to determine the issues arising herein.

11. I have considered the record of appeal filed and the submissions made. The issues that arise for consideration and determination by this court are: -
  - a. Whether or not the appeal is properly before the court
  - b. Whether or not the appeal has merit.
12. On whether or not the appeal is properly before the court, I have noted that the ruling appealed from was made on April 27, 2021. I have also noted that the undated memorandum of appeal was filed in court on July 8, 2022. Section 79G of the *Civil Procedure Act* cap 21 Laws of Kenya provides that: -

“ Every appeal from a subordinate 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.”



13. From the date of the ruling to the date of filing of the appeal, a period of more than two months had elapsed. This was clearly out of time. No order for extension of the time for filing of the appeal has been shown to the court in accordance with the provisions of the proviso to section 79G of the [Civil Procedure Act](#). No certificate of delay in preparation of the proceedings and order appealed from has been shown to the court. The record of appeal shows that the proceedings were ready and certified by the trial court as at May 5, 2022 which was well within the time of filing of the appeal.
  14. Order 42 rule 1(1) provides that every appeal to the High court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. The memorandum of appeal was undated. The [Civil Procedure Act](#) and rules are applicable to ELC matters pursuant to the provisions of section 19(2) of the [Environment and Land Court Act](#) and the practice directions.
  15. Further from the submissions filed it is clear that the appeal was filed by Julius Masiva Obuga who purports to be acting on behalf of the named appellant one Femines Musimbi Ganira on the strength of a Power of Attorney. Femines Musimbi Ganira already denounced the actions of the said Julius Masiva Obuga on oath. The ruling being challenged in this appeal was in respect of an application by the said Femines Musimbi Ganira seeking that the suit be struck out because she never filed it or asked anybody to file the suit on her behalf. The trial court agreed with her and struck out the suit. What interest or locus standi would the said Julius Masiva Obuga have to pursue the matter further? What grievance would he have against the ruling? I find none demonstrated. Though Julius Masiva Obuga describes himself as the appellant, I find that being a non-party in the proceedings he had no locus standi to file the appeal.
  16. Having keenly read the entire ruling appealed against alongside the memorandum of appeal and the appellant's (Julius Masiva Obuga's) submissions, I find that the trial court was properly guided on the principles applicable when considering applications to strike out pleadings/suits. I find no reason to interfere with the trial court's exercise of its discretionary power in striking out the suit.
  17. This appeal is a classical case of abuse of the court process as described in the case of [Muchunga Investment Limited v Safari Unlimited \(Africa\) Ltd & 2 others \[2009\] eKLR](#) where the Court of Appeal stated that

“the term abuse of the court process has the same meaning as abuse of judicial process. The employment of judicial process is an abuse when a party uses the judicial process to the irritation and annoyance of his opponents and the efficient and effective administration of justice. It is a term generally applied to a proceeding which is wanting in bona fides and is frivolous and vexatious or oppressive.”
  18. Abuse of judicial process is not only a hinderance to the effective administration of justice but also defeats the overriding objective of the court as provided for in the section 3 of the [Environment and Land Court Act](#) and sections 1A and 1B of the [Civil Procedure Act](#).
  19. I find that the appeal was filed out of time, without the permission of the alleged donor of the power of attorney and by a non-party in the proceedings. In the circumstances the appeal fails and is dismissed. Costs of the appeal payable by Julius Masiva Obuga are awarded to Femines Musimbi Ganira and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
- Orders accordingly.

**JUDGEMENT, DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 10<sup>TH</sup> DAY OF NOVEMBER 2022.**



**E ASATI**

**JUDGE**

**In the presence of:-**

Neville - Court Assistant

Appellant (Julius Masiva Obuga) present in person

Wekesa Advocate holding brief for Resper Arunga for Femines Musimbi Ganira

Wekesa Advocate for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.

**E ASATI**

**JUDGE**

