



**Kimani v Kimani & another (Environment and Land Appeal
E043 of 2022) [2025] KEELC 1134 (KLR) (4 March 2025) (Judgment)**

Neutral citation: [2025] KEELC 1134 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E043 OF 2022**

BM EBOSO, J

MARCH 4, 2025

BETWEEN

JAMES KAMAU KIMANI APPELLANT

AND

NDUNGU KIMANI 1ST RESPONDENT

SOLOMON KIMANI MWANGI 2ND RESPONDENT

(Being an appeal against the Judgment of Hon. H. Ng'anga's Principal Magistrate, delivered on 20/4/2022 in Gatundu Senior Principal Magistrate Court MCL & E Case No. 14 of 2019)

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered by Hon. H. Ng'anga (Principal Magistrate) on 20/4/2022 in Gatundu SPMC E & L Case No. E14 of 2019. Ndungu Kimani, the 1st respondent in this appeal, was one of the two plaintiffs in the primary claim. The other plaintiff was Solomon Kimani Mwangi, described as a son to the late Mwangi Kimani. On the face of the pleadings and the evidence on record, there was nothing to suggest that he sued as the duly appointed personal representative of the late Mwangi Kimani.
2. The appellant in this appeal, James Kamau Kimani, was the 1st defendant in the primary claim. The Attorney General was named in the amended plaint as the 2nd defendant. Besides his defence, James Kamau Kimani had a counterclaim in which he contended that the suit land was held by Ndungu Kimani under customary trust and that he was entitled to a portion of the suit land under the customary trust.
3. The four key issues which emerged from the pleadings and the evidence that were before the trial court were: (i) Whether land parcel number Kiganjo/Gatei /1315, which was subsequently subdivided into



Kiganjo/Gatei/2315 [registered in the name of Ndungu Kimani] and Kiganjo/ Gatei/2316 [registered in the name of the late Mwangi Kimani] was trust property held by Ndungu Kimani under customary trust for the benefit of the family of the late Kimani Nginya; (ii) Whether James Kamau Kimani was entitled to a portion of the said land under the customary trust; (iii) Whether the reliefs sought in the primary suit were available; and (iv) Whether the reliefs sought in the counterclaim were available. These are the four key issues that fall for determination in this first appeal. I will outline a brief background to the appeal before I dispose the appeal.

Background

4. The 1st respondent initiated the suit in the trial court through a plaint dated 17/6/2019. He sought the following reliefs in the original plaint: (i) an order decreeing removal of the caution lodged by the appellant against land Parcel number Kiganjo/Gatei/2315; (ii) an order prohibiting the appellant against entering onto, interfering with and/or otherwise causing annoyance to the 1st respondent or his family in their quiet enjoyment of the suit land; (iii) an order prohibiting the appellant against lodging a caution against or interfering with the register relating to Kiganjo/Gatei/2315; and (iv) costs of the suit and interest.
5. After testifying, the 1st respondent sought and obtained leave to amend the plaint. The leave was granted on the basis of a draft amended plaint that had only one plaintiff, Ngungu Kimani [the 1st respondent]. Through the subsequent amended plaint, the 1st respondent introduced Solomon Kimani Mwangi as the 2nd plaintiff and sought the following reliefs in relation to himself: (i) a declaration that he [the 1st respondent] was the legal owner of land parcel number Kiganjo/Gatei/2315; (ii) a declaration that land parcel number Kiganjo/Gatei/2315 was not family/ancestral land; (iii) an order directing the Land Registrar to remove the caution placed on land parcel number Kiganjo/Gatei/2315 by the appellant; (iv) a permanent injunction prohibiting the appellant against trespassing on land parcel number Kiganjo/Gatei/2315; and (v) an order awarding him [the 1st respondent] costs of the suit. No relief was sought on part of the added plaintiff.
6. The 1st respondent's case was that in 1970, he and his brother, Mwangi Kimani (deceased), with the assistance of their father, Kimani Nginya (deceased), purchased land parcel number Kiganjo/Gatei/1315, measuring approximately 1 acre. With the consent of his late brother, Mwangi Kimani, land parcel number Kiganjo/Gatei/1315 was registered in his name. It was the 1st respondent's case that at the time of his late father's death in 1997, land parcel number Kiganjo/Gatei/1315 had been registered in his name. He contended that, subsequently, Mwangi Kimani (deceased) asked him to subdivide land parcel number Kiganjo/Gatei/1315 so that the two of them could get their respective shares. As a result, land parcel number Kiganjo/Gatei/1315 was subdivided into two parcels, namely, land parcel number Kiganjo/Gatei/2315 - registered in the name of the 1st respondent and land parcel number Kiganjo/Gatei/1216 - registered in the name of Mwangi Kimani (deceased). The 1st respondent contended that it was after the subdivision that the appellant placed cautions on the two subdivisions, claiming that they were family land. He contended that him and the late Mwangi Kimani were the absolute owners of the suit land. He contested the existence of a customary trust over the suit land.
7. The appellant entered appearance and subsequently filed a defence and counterclaim dated 21/8/2019. The appellant denied the contention that the 1st respondent was an absolute owner of the suit land. His case was that land parcel number Kiganjo/Gatei/1315 belonged to their deceased father, Kimani Nginya, who purchased it from one Robert Kimonye in the 1970s. He added that the 1st respondent was registered as proprietor of land parcel number Kiganjo/Gatei/1315 to hold it in trust for the entire family in accordance with Kikuyu customs. The appellant faulted the 1st respondent for



disregarding the customary trust and fraudulently causing land parcel number Kiganjo/Gatei/1315 to be subdivided and registered in his and Mwangi Kimani's (deceased) names.

8. In his counterclaim, the appellant sought the following reliefs: (i) an inhibitory order prohibiting the appellant against interfering with and/or dealing with land parcel numbers Kiganjo/Gatei/2315 and Kiganjo/Gatei/2316; (ii) a declaration that land parcel numbers Kiganjo/Gatei/2315 and Kiganjo/Gatei/2316 which emanated from the subdivision of Kiganjo/Gatei/1315 belong to the 1st respondent and their late father, Kimani Nginya; (iii) a declaration that the sub-division of land parcel Kiganjo/Gatei/1315 was illegal and fraudulent; (iv) an order compelling the Land Registrar-Gatundu to cancel the title deeds relating to Kiganjo/Gatei/2315 and Kiganjo/Gatei/2316 and decree that the same be registered in the 1st respondent's name to hold it in trust for his siblings; and (v) costs of this suit.
9. Upon conducting trial and receiving submissions, the trial court, through a Judgment rendered on 20/4/2022, found that land parcel number Kiganjo/Gatei/1315 was not ancestral land, adding that the land had been acquired through purchase by the respondents. The trial court further held that the appellant had not succeeded in his counterclaim.

Appeal

10. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following eight (8) verbatim grounds:
 1. That the learned magistrate erred in law and in fact by upholding the respondents' case and finding the appellant's counterclaim unmeritorious and dismissing the same.
 2. The learned magistrate erred in finding that indeed suit property was owned by Robert Kimonye from whom it was acquired through purchase by the appellant and respondent's father.
 3. The learned magistrate erred in law and in fact by finding for the respondents when there was clear indication that their father had purchased suit property and that the respondents adduced no proof of payment.
 4. The learned magistrate erred in law and in fact in finding that the suit land did not belong to the appellant's father by the fact that the appellant did not pursue rights in suit land if indeed it was his late father's.
 5. That the learned magistrate erred in law by failing to have due regard and to take into account the various issues raised in the pleadings, witness statements and evidence produced by the appellant.
 6. The learned magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant.
 7. The learned magistrate failed to appreciate the submissions of the Learned Counsel for the appellant by finding in favour of the respondents herein.
 8. That in all the circumstances of the case, the learned magistrate failed to do justice before him based on the pleadings and the findings of the learned magistrate are insupportable in law or on the basis of the evidence adduced.



11. The appellant urged this court to: (i) allow the appeal; (ii) set aside the Judgment of the lower court that was in favour of the 1st respondent; and (iii) award the appellant costs of this appeal and costs of the suit in the lower court.

Submissions

12. The appeal was canvassed through written summons dated 26/7/2024, filed by M/s Kiarie, Joshua & Company Advocates. The 1st respondent opposed the appeal through written submissions dated 27/3/2024, filed by Nafula Nyongesa & Co Advocates. The 2nd respondent did not file submissions in the appeal. The Court has considered the parties' respective submissions. For reasons that are set out in the brief analysis below, I will not summarize the submissions.

Analysis and Determination

13. The court has considered the original record of the trial court; the record filed in this appeal; and the parties' respective submissions. The court has also considered the relevant legal frameworks and jurisprudence. As observed in the introductory part of this Judgment, the four key issues that arose for determination in the trial court are the same key issues that fall for determination in this appeal. The issues are: (i) Whether land parcel number Kiganjo/Gatei/1315, which was subsequently subdivided into Kiganjo/Gatei/2315 [registered in the name of Ndungu Kimani] and Kiganjo Gatei/2316 [registered in the name of the late Mwangi Kimani] was trust property held by Ndungu Kimani under customary trust for the benefit of the family of the late Kimani Nginya; (ii) Whether James Kamau Kimani was entitled to a portion of the said land under the customary trust; (iii) Whether the reliefs sought in the primary suit were available; and (iv) Whether the reliefs sought in the counterclaim were available.
14. This court is invited to exercise jurisdiction in this appeal as a first appellate court. The task of a first appellate court was summarized by the Court of Appeal in the case of Susan Munyi v Keshar Shiani (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
15. The principle was similarly outlined in Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
16. Would the above issues which fell for determination in the trial court and now fall for determination in this appeal be effectually adjudicated upon and settled in the absence of the estate of the late Mwangi Kimani? The land register relating to the suit land was opened on 5/4/1983. On the same day, the land was registered in the name of Ndungu Kimani. A land certificate was issued to Ndungu Kimani on 6/4/1983. The exhibited land register shows that in December 2009, the land register was closed following subdivision of the land into: (i) Kiganjo/Gatei/2315 - which was registered in the name of



- Ndungu Kimani; and (ii) Kiganjo/Gatei/2316 - which was registered in the name of the late Mwangi Kimani.
17. Among the reliefs sought in the counterclaim were orders nullifying the subdivision and cancelling the two subdivision titles. The appellant also sought an order decreeing that upon the closed land register being restored, parcel number Kiganjo/Gatei/1315 was to be held as trust property for the benefit of the 1st respondent's siblings. Those are the same orders that are sought in this appeal.
 18. Were this court, as a first appellate court, to evaluate the evidence on record and come to the conclusion that the appellant proved his case to the required standard, the court would be expected to grant the above reliefs. Grant of the reliefs would mean that the title held by the estate of the late Mwangi Kimani would stand nullified without the said estate being joined as a party to the cause in which the nullification decree is issued or enforced. Put differently, the title held by the estate of Mwangi Kimani would stand annulled without the estate being accorded the opportunity to be heard. Kenya's Civil Procedure Rules do not permit that. Indeed, *the Constitution* of Kenya does not permit nullification of title to land without giving the registered proprietor the right to be heard.
 19. On this Court's evaluation of the pleadings and the evidence on record, it is clear that the estate of the late Mwangi Kimani was a necessary party to both the primary claim and the counterclaim. For reasons that only the appellant and the 1st respondent know, they both omitted the said estate from the primary suit and the counterclaim. Yet the orders sought in the suit affect the title of the late Mwangi Kimani
 20. This court takes the view that, for the effectual adjudication and settlement of the issues that fall for determination in the dispute, the estate of the late Mwangi Kimani is a necessary party to the primary suit and to the counterclaim. The estate is entitled to be heard in the dispute because were the appellate court to find that a customary trust exists, the finding of the court would culminate in a nullification of the title that is in Mwangi Kimani's name.
 21. Order 1 rule 10 (2) of the Civil Procedure Rules contemplates a scenario such as this and vests in the court powers to join a necessary party to a suit suo motto to facilitate complete and effectual settlement of all the questions that arise for settlement in the dispute.
 22. Having made the above finding, the court will not make merit pronouncements on the identified issues. Merit pronouncements on the identified issues are likely to prejudice the parties when they go for fresh trial in the lower court after joinder of the omitted party.
 23. For the above reasons, this appeal will be allowed on the ground that the estate of the late Mwangi Kimani, the holder of one of the impugned titles, was irregularly omitted from the proceedings in the lower court. Parties are directed to join the estate of the late Mwangi Kimani to both the primary suit and the counterclaim. Fresh trial will be conducted before a different magistrate.
 24. Given that the parties in this appeal failed to join the estate of the said Mwangi Kimani to the proceedings in the lower court, they will bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF MARCH 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Ms Musyoka for the Appellant

Ms Gwembere for the Respondent



Mr Tupet – Court Assistant

