



REPUBLIC OF KENYA



**Ngugi v Kungu & 2 others (Environment and Land Appeal
E004 of 2023) [2025] KEELC 4224 (KLR) (5 June 2025) (Judgment)**

Neutral citation: [2025] KEELC 4224 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

JM KAMAU, J

JUNE 5, 2025

BETWEEN

JANE WANJIRU NGUGI PLAINTIFF

AND

SAMUEL NJOROGE KUNGU 1ST DEFENDANT

SETTLEMENT FUND TRUSTEES 2ND DEFENDANT

LUCY WACHUKA NJAU 3RD DEFENDANT

(Appeal from the Ruling of Honourable Stephen O. Mogute, Senior Principal Magistrate in Nyahururu CM ELC No 250 of 2018 delivered on the 7/11/2023)

JUDGMENT

1. This is an appeal from the Ruling of Honourable Stephen O. Mogute, Senior Principal Magistrate in Nyahururu CM ELC No 250 of 2018 delivered on the 7/11/2023. In the amended Plaintiff in the subordinate Court dated 15/3/2029, the Appellant said she instituted the suit in her capacity as the Legal Representative of the Estate of the late Isaac Ngugi alias Isack Ngugi Njuguna in Nyahururu Succession cause No 25 of 2017. She claimed to be the owner of the parcel of land known as Nyahururu/Kirima/612 and avers that on or around 4/10/1983 the late Isack Ngugi Njuguna bought from Zaddock Otieno Aguer Plot No. 371 the latter having been the then registered owner of the same for Kshs 18,000/=-.
2. The Deceased settled on the land before he was moved to Plot No 612 (which was initially Plot No. 717) by the Settlement Fund Trustees when it was discovered that a third party was actually occupying plot No 371.
3. It was then discovered that the allottee of plot No 603 (initially Plot No 718) was in occupation of plot No 612 (initially 717). The Settlement Fund Trustees swapped parcels No 612 with 603 on



the R.I.M which he occupied from 1984 to 2003 when one Grace Wanjiru Rucu started claiming it, who also died on 3/8/2004 giving the late Isaac Ngugi quiet enjoyment of the parcel of land plot No 603 until 2017 when the 1st and 3rd Defendants encroached onto the parcel of land and deposited construction materials thereon and the 2nd Respondent has refused to intervene to protect the Appellant's land, having given him Title documents which they registered in favour of the 3rd Respondent on 30/8/2017 who later charged the property to Kenya Commercial Bank for a sum of Kshs 2,000,000/= on 1/11/2017.

4. The particulars of fraud and illegality attributed to the Respondent were :-
 - a. Misrepresentation of the 2nd Respondent as the bonafide legal owner of the suit land.
 - b. Failure to acquire the appropriate land control Board Consent.
 - c. Failure to pay stamp duty.
 - d. Illegal trespass on the suit land.
 - e. Acquiring Title documents over the Applicant's parcel of land.
 - f. Failure to surrender or transfer the title documents in favour of the Appellant.
3. The Appellant therefore prayed for:
 - a. A declaration that the plaintiff is the legal and bonafide owner of parcel No Nyandarua/kirima/612 (Old No. 717)
 - b. An order of permanent injunction restraining the Defendants from entering, disposing off and/or dealing in any manner with parcel No. Nyandarua/Kirima/612 (Old Nno 717).
4. In their statement of Defence and counterclaim by the 1st and 3rd Respondents, the Respondents denied all the substantive averments in the Plaint and claimed that L.R No. Nyahururu/Kirima/612 is owned by the 3rd Respondent having legally acquired it from the 2nd Respondent and that when the suit land was shown to the 3rd Respondent by the 2nd Respondent, the same was unoccupied and underdeveloped, that the 1st Respondent entered the suit land with the 3rd Respondent's permission and as the former's agent.
5. The 3rd Respondent admitted having charged the suit land with the Kenya Commercial Bank Ltd since she has Title Documents to the land.
6. In the counter-claim, the 3rd Respondent avers that she is the registered owner of L.R No. Nyahurur/Kirima/612 onto which the Appellant has encroached during the pending of this suit and the 3rd Respondent seeks vacant possession of the same. She claims mesne profits of Kshs 5,000/= per Acre per annum with effect from 1/1/2018, besides a permanent injunction restraining the Appellant and anybody claiming under her from entering, remaining, using, cultivating, leasing, dealing or in any other manner interfering with L.R No. Nyahururu/Kirima/612, costs and interest and any further or better relief that the Court would deem fit to grant,
7. In the Reply to the Defence and Defence to counter-claim, the Appellant repeats the contents of her Plaint and avers that if the 3rd Respondent is the registered owner of Nyahuru/Kirima/612, she is so registered illegally and fraudulently.
8. On 27/7/2021 counsel for 1st and 3rd Respondents appeared in court in the absence of the Appellant and her counsel Munene Chege who had been served with a Hearing Notice through the email address minenechege@yahoo.com on 3/6/2021.



9. The case proceeded. The Respondents gave evidence and on 26/5/2021 the Honourable S.N.Mwangi, SRM having heard the Respondents case delivered the following Judgement:-
 - a. The Plaintiff's suit be and is hereby dismissed and the costs of the suit be awarded to the 1st and 2nd Defendants.
 - b. The Plaintiff to surrender vacant possession immediately failure to which she is to be evicted from all that parcel of land known as L.R No. Nyahururu/Kirima/612 at her own costs.
 - c. The Plaintiff is condemned to pay Kshs 50,000/= as mesne profits to the 3rd Defendant.
 - d. The 1st and 3rd Defendants are also awarded costs and interests herein.
10. As expected the Appellant, under a certificate of urgency, moved the Court in a Motion dated 13/10/2022 supported by the Affidavit of the Appellant sworn on 13/10/2022 requesting the Court to review, set aside and vary the Judgement delivered on 26/8/2021 and vacate the proceedings therein and that the Appellant's case be re-opened and she be granted leave to tender her oral evidence. She gave the grounds for her Application as the fact that the case proceeded during the difficult times of Covid-19, that she was not allowed to proceed with the hearing online as was the custom then and that there was cessation of movement within borders due to the strict Covid-19 Rules.
11. The ex parte Hearing of the case was due to an error on the face of the record since there was no service upon her and that it could cause great prejudice to the Appellant if she was not given an opportunity to prosecute her case. Of course, the Appellant blamed her Advocate and pleaded the old adage that it would be wrong for a party to be condemned unheard due to mistakes attributed to her Advocate.
12. In his Affidavit in reply to the above Application sworn on 4/9/2023, the 1st Respondent deponed that the 2nd Respondent is his wife and that he had granted him permission to swear the Replying Affidavit. He said that the trial Magistrate on 7/4/2021 allowed the case to be heard virtually because of the Covid-19 restrictions. On the 25/5/2021 neither the Appellant nor her counsel appeared in Court and the case was adjourned to the 28/7/2021 and a Hearing Notice was served through the email address of Munene Chege & Co Advocates and which was attached to the Affidavit in Reply. Having been satisfied of the service, the Trial Magistrate allowed the 2nd Respondents to testify from his Advocates Office in Nyahururu, having travelled from Nairobi.
13. He said that what prompted the Appellant to move the Court is the warrant of eviction issued on 2/2/2022 and the eviction carried out on 20/4/2023 and the impending Application for contempt of Court dated 8/5/2023. They prayed that the Application be dismissed with costs since in the Respondent's own words, it had been overtaken by events.
14. After submissions were filed, the Honourable Trial Magistrate gave his Ruling on the 7/11/2023 dismissing the Application with costs to the Respondents. He based his Ruling on the fact that the Court was to consider the reasons for failure to prosecute the suit and the Court must exercise its discretion judicially. He confirmed that the Respondents demonstrated that the Appellant was served with a Hearing Notice. He said that the Application was made more than 12 months from the date of delivery of Judgement which is inordinate. The Court noted that this was not a proper case for the exercising of discretion in favour of the Appellant. The Application was dismissed for want of merit.
15. The Appellant appealed against this Ruling on the following grounds: -
 - i. The learned trial Magistrate erred in law and in fact by dismissing the Appellant's application dated 13th October, 2022.



- ii. The learned Magistrate erred in law and fact by failing to hold that the Appellant was not properly served with a Hearing Notice to warrant the dismissal of the Plaintiff's case in the subordinate Court on 25th May, 2021 this is due to the fact that the day's proceedings was conducted in open Court at a time when the country was locked down on account of corona virus.
 - iii. The learned Trial Magistrate erred in law and in fact in failing to reinstate and subsequent reopen the Appellant's case thereby condemning the Appellant unheard.
 - iv. The learned Trial Magistrate erred in law and in fact in failing to hold that the 2nd and 3rd Defendant did not participate in the proceedings that took place on 25th May, 2021 before the subordinate Court thereby arriving at an erroneous and irregular Judgment.
 - v. The learned Trial Magistrate erred in law and in fact in disregarding the Appellant submissions in support of the application dated 13th October, 2022.
 - vi. The learned Magistrate went on a frolic of his own disregarding the pleadings, evidence and submissions and as a result arrived at an erroneous conclusion.
16. She therefore urged the Court to: _
- a. Allow the instant Appeal.
 - b. Set aside, vary or/and vacate the Ruling delivered by the Trial Court on 7/11/2023 in Nyahururu CM ELC No. 250 of 2018.
 - c. The Respondents be ordered to pay the costs of this Appeal throw away costs.
17. I have gone through the written submissions of both parties as well as the Application and Replying Affidavit. This is a case that proceeded to hearing and the Appellant never participated. She then moved the Court that had heard the case ex-parte after about a year urging the said Court to set aside the ex parte proceedings and Judgment and then hear the case de novo. There is no doubt that before the case proceeded to hearing, the trial Magistrate did satisfy herself that the Appellant's Advocate had already been served with a Hearing Notice. The Appellant's Advocate did not deny that he was indeed served with the Hearing Notice. His explanation for not participating in the Hearing was that he wrongly diarized this case. This is inexcusable and, in any case,, there were 2 times that the Appellant and her Advocate did not turn up for the hearing of the case i.e. on 25/5/2021 and later on the 26/7/2021. It cannot be that in both cases the Appellant's Advocate misdiarized this case.
18. It is quite clear that the Appellant's Advocate is fully to blame. He was informed of the Hearing date through his email address. The hearing date was properly indicated in the Hearing Notice and I do not understand how he wrote the hearing date in the diary unlike a situation where the hearing date is given by the Court where one can be excused for not having got the date right. Again, the Advocate cannot be excused for taking another one year to realize that the case had been heard and determined. Probably because of the prevalent Covid-19 he and/or his personnel may have avoided visiting the Court Registry, but one year is inordinate.
19. Coming to the Appellant herself, there is no way she could have known the hearing date. Legally her Advocate was her agent. There is no way she could have been served directly. The service must have been to her Advocate. She was also not expected to know that the case was heard and determined unless she got this from her Advocate who has not told the Court that he ever communicated this information to his client.



20. It is usual for parties to visit their Advocates whom they don't hear from to find out the progress of their cases but as said above, this was an unfortunate period where man became man's biggest enemy. I believe no Advocate wanted to welcome clients to his office. There are also many Advocates who closed the doors of their offices for obvious reasons. But the Appellants should have phoned the Advocate and vice versa for communication on the progress of the case. We are not told whether this happened and if not, why. However, this were difficult times and the Appellant can be excused for not having known anything about her case.
21. For this and only this reason, the Court will exercise its discretion in favour of the Appellant and set aside the entire proceedings and Judgment in the lower Court. The Court will also allow the case to proceed de novo before any other Magistrate save the one who heard the case and the one who heard and determined the Application dated 13/10/2022. However, the Appellant will pay the Respondents the sum of Kshs 20,000/= within the next 30 days as throw away costs.
22. These are the orders of this Court.

RULING SIGNED AND DELIVERED AT NYANDARUA THIS 5TH DAY OF JUNE 2025.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Samson.

Mr. Gakenia..... for the Plaintiff

Ms Ndegwa..... for the Defendants

