



**Muigai v Njeru (Environment and Land Appeal E008 of 2024)
[2025] KEELC 4045 (KLR) (22 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 4045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E008 OF 2024**

BM EBOSO, J

MAY 22, 2025

BETWEEN

JAPHET NJERU MUIGAI APPELLANT

AND

LUCYLINE CIAMBUBA NJERU RESPONDENT

*(Being an Appeal arising from the Judgment of the Senior Principal
Magistrate Court (Hon D A Ocharo, SPM), delivered on 22/5/2024
in Chuka Chief Magistrate Court E&L Case No 65 of 2019)*

JUDGMENT

Introduction

1. This appeal challenges the Judgment of the Senior Principal Magistrate Court (Hon D A Ocharo SPM) rendered on 22/5/2024 in Chuka Chief Magistrate Court E&L Case No 65 of 2019. The appellant in this appeal was the plaintiff in the suit. The respondent was the defendant and the counterclaimant in the suit. Some of the key questions that fell for determination in the suit were: (i) Whether registration of the appellant as proprietor of land parcel number Karingani/Ndagani/3427 (“the suit land”) was procured fraudulently by the appellant; (ii) Whether the said registration should be annulled; and (iii) Whether the respondent was a trespasser on the suit land. These are some of the key issues that this first appellate court is required to determine. Before I dispose the issues that fall for determination in the appeal, I will outline a brief background to the appeal.

Background

2. In 1994, land parcel number Karingani/Ndagani/3427 was parceled as a subdivision out of Karingani/Ndagani/195. On 11/7/1994, the land was registered in the name of the late Murathi Nkoroi (hereinafter referred to as “the deceased”). The deceased was issued with a title deed on 12/7/1994. On



- 5/10/2001, the land was transferred and registered in the name of the appellant. The appellant was issued with a title deed on the same day. On 1/3/2006, one Tirus Kinyua Njeru registered a caution against the title, claiming a beneficiary interest in the land. On 4/12/2007, an inhibition procured by the deceased (the late Murathi Nkoroi) in Chuka SPMC Civil Case No 19 of 2007 was registered against the title. On 6/2/2019, the estate of the late Murathi Nkoroi registered an inhibition against the title, issued in Chuka CMC E&L Case No 265 of 2018.
3. It does emerge from the record of appeal and from the original record of the trial court that on 8/11/2007, the late Murathi Nkoroi instituted Chuka PMC Civil Case No 19 of 2007 against the appellant, challenging the registration of the appellant as proprietor of the suit land. The deceased alleged that the appellant had fraudulently and through misrepresentation procured transfer of and registration of the suit land into his name (into the appellant's name). He contended that the appellant misrepresented to him that he was signing documents as a guarantor for a loan that the appellant was to take but the appellant used the documents to register the suit land into his name. The late Murathi Nkoroi urged the court to cancel the registration of the appellant as proprietor of the suit land and restore him (the late Murathi Nkoroi) as the registered proprietor of the land. Upon the death of Murathi Nkoroi in August 2008, the suit was not pursued by his estate and it abated.
 4. On 18/6/2015, the respondent (Lucyline Ciambura Njeru) obtained a limited grant of letters of administration from the Meru High Court. On 8/11/2018, she instituted Chuka CMC E&L Case No 265 of 2018 on behalf of the estate of the late Murathi Nkoroi against one Japhet Bundi Muigai. (The appellant contends that he is not the said defendant and adds that the respondent used an ex-parte interlocutory order obtained in the said suit to evict him from the suit land). Through the suit, the estate sought one substantive relief – an order directing cancellation of the registration of Japhet Bundi Muigai as proprietor of the suit land and replacing the said name with the name of the respondent.
 5. The record relating to Chuka CMC E&L Case No 265 of 2018 shows that a defence dated 7/12/2018 was filed in the suit. The record also shows that at the ex-parte interlocutory stage, the lower court issued an ex-parte interim injunction against Japhet Bundi Muigai. However, at the stage of extracting the order, the middle name of the said defendant was altered to read “Njeru” instead of “Bundi”. The record does not bear any amended pleadings or any order allowing the change.
 6. Although the file relating to Chuka CMC E&L Case No 265 of 2018 was on 1/7/2020 called for by the trial court and was availed and placed in the file folder relating to Chuka CMC E&L Case No 65 of 2019, the records in the two files do not bear any consolidation order or any joint trial relating to the two suits. Indeed, the impugned Judgment does not bear a single mention of Chuka CMC E&L Case No 265 of 2018. The said case remains pending, although the file folder is still retained in the file folder relating to Chuka CMC E&L Case No 65 of 2019.
 7. It does also emerge from the original record of the trial court that on 1/11/2019, the appellant filed Chuka CMC E&L Case No 65 of 2019 against the respondent in her personal capacity. The appellant sought an order restraining the respondent against interfering with his (the appellant's) occupation, utilization and cultivation of the suit land or “transacting” on the suit land. He also sought compensation for property destroyed “in the occupation of the suit parcel of land by” the respondent. He contended that he was the registered proprietor of the suit land and that the respondent had “invaded” the suit land “with crude weapons and chased” him away.
 8. The respondent filed a personal defence and a personal counterclaim dated 25/5/2021 against Japhet Njeru Mugai (not Muigai). She averred that the defendant named in the counterclaim cunningly, deceptively and fraudulently” caused the late Murathi Nkoroi to sign transfer documents vesting the suit land in his name. She itemized various particulars of fraud. Through the counterclaim, she prayed



for an order decreeing the Land Registrar to cancel the registration of the suit land in the name of Japhet Bundi Muigai (not Japhet Njeru Muigai) and to register the land in her name.

9. There is no evidence of any formal or oral application that was made with regard to consolidation of the two suits that relate to the same suit land. The trial court conducted trial after which it rendered the impugned Judgment in relation to Case No 65 of 2019 with no mention of Case No 265 of 2018. During trial, the appellant testified as PW1. His evidence was that the deceased gifted him the suit land and transferred the suit land to him.
10. Daniel Kinyua Mbaari testified as PW2. He stated that he was a casual worker from Karigini. He knew the appellant. His evidence was that he was “informed” that the deceased “had decided to transfer” the suit land to the appellant.
11. The respondent testified as DW1 and closed her case. Her evidence was that she was a widow to the deceased, adding that they got married in 1970 and their union was blessed with 4 children. She stated that prior to the demise of the deceased, “they” sued the appellant to challenge the registration of the appellant as proprietor of the suit land.
12. Upon conclusion of trial and upon receipt of submissions, the trial court rendered the impugned Judgment in which it found that the appellant “must have and indeed did obtain registration of the suit property in his favour by deception and fraud.” The trial court stated thus:

“He must have caused the proprietor to execute the transfer documents believing that what he was executing was something different. I am of the firm view that the transfer of LR NO KARINGANI/NDAGANI/3427 by the late Murathi Nkoroi to the plaintiff was procured through fraud.”

13. Ultimately, the trial court dismissed the appellant’s primary suit and allowed the respondent’s counterclaim in the following verbatim terms:
 - “ ii. The counterclaim is allowed in the following terms:
 - a. An order be and is hereby issued directing the Registrar to cancel the title registered in the name of the plaintiff herein and reconstitute the property known as LR No Karingani/Ndagani/3427 to the estate of the deceased Murathi Nkoroi
 - iii. Costs of the counterclaim are hereby awarded to the defendant.”

Appeal

14. Aggrieved by the judgment and decree of the trial court, the appellant brought this appeal advancing the following seven (7) grounds:
 1. That the learned magistrate erred in law and in fact in dismissing the appellant’s suit without considering the evidence before him.
 2. That the learned magistrate erred in law and in fact by making a finding in favour of the respondent for fraud without the minimum threshold of fraud being pleaded or proven.
 3. That the learned magistrate erred in law and in fact by failing to appreciate the law of absolute title ownership and rights conferred to proprietor on registration of title thus arriving at wrong decision.



4. That the learned magistrate erred in law and in fact by relying on an abated suit that was never tried as the basis of his finding in Chuka Magistrate's Court ELC No. 65 of 2019 thereby arriving at the wrong decision.
 5. That the learned magistrate erred in law and in fact by allowing the respondent's counter claim in Chuka Magistrate's Court ELC No. 65 of 2019 while the respondent didn't tender any credible evidence to support the counterclaim.
 6. That the leaned magistrate erred in law and in fact by failing to look at the evidence of the appellant herein which failure led to arriving at a wrong decision.
 7. That the learned magistrate was misled by the respondent on the facts of the land which reliance therefore led to arriving at a wrong decision.
15. The appellant urged the court to allow the appeal, set aside the Judgment of the trial court; and order a retrial or make new findings. He also prayed for costs of the appeal.

Appellant's Submissions

16. The appellant filed written submissions dated 24/2/2025 in person. The appellant submitted that he acquired ownership of the suit land rightfully, adding that the deceased was his paternal uncle. The appellant further submitted that the deceased invited him and his family to live with him in 1990. He added that the deceased's leg was "sick" and he had no one to take care of him.
17. The appellant argued that he had been living on the suit land without interruption until 2018 when he was evicted by the respondent using an ex-parte order. The appellant further contended that the deceased gifted him the suit land, adding that all legal processes to effect the transfer were done. He contended that he had all the documentary evidence to support his title, adding that his evidence was corroborated by his witness.
18. On whether the respondent was married to the deceased, the appellant submitted that the deceased never married, adding that the deceased lived alone on the suit land. The appellant argued that the respondent admitted in court that she had never lived on the suit land. He added that the respondent had no evidence to demonstrate that she was indeed married to the deceased.
19. On whether the deceased had children, the appellant submitted that nobody had ever claimed to be his child. The appellant argued that the respondent failed to produce any evidence by way of birth certificates to demonstrate that indeed the deceased was the father of her four children. On whether the respondent's counterclaim had merit, the appellant submitted that the evidence tendered before the trial court indicated that the respondent's counterclaim had no merit.

Respondent's Submissions

20. The respondent opposed the appeal through written submissions dated 24/1/2025, filed by Basilio Gitonga, Muriithi & Associates. Counsel submitted that there were missing principal documents that ought to have been part of the record of appeal. Counsel argued that failure by the appellant to adhere to the requirements of Order 42 rule (13) (4) was incurable and fatal to the appeal and urged the court to strike out the entire appeal with costs.
21. Counsel submitted on grounds 1, 6 and 7 contemporaneously, observing that the appellant had faulted the trial magistrate for failing to consider the evidence adduced at the hearing and for being misled by the respondent. Counsel argued that a perusal of the judgment demonstrated that the trial court carefully considered the evidence of the parties prior to arriving at the impugned judgement.



22. On the contention that the respondent did not prove fraud, counsel submitted that fraud was pleaded in the respondent's counterclaim and the same was not defended by the appellant. Counsel argued that during cross-examination of the appellant, it was demonstrated that the letter of consent by the Land Control Board did not bear the date of issue. Counsel contended further that the application for transfer of land did not bear the date when the appellant appeared before the Commissioner for Oaths and it bore a different national identity card number.
23. On the contention that the trial court relied on an abated suit, counsel argued that the trial court was right to conclude that the suit abated because the respondent's husband was deceased and he was the one who had sued the appellant. Counsel urged the court to dismiss the appeal.

Analysis and Determination

24. The court has read and 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 law. Taking into account the grounds of appeal and the parties' submissions, the key issues that fall for determination in this appeal are: (i) Whether this appeal should be struck out for non-compliance with Order 42 rule 13 (4) of the Civil Procedure Rules; (ii) Whether the appellant filed a defence to the counterclaim in Chuka CMC E&L Case No 65 of 2019; (iii) Whether Chuka CMC E&L Case No 65 of 2019 and Chuka CMC E&L Case No 265 of 2018 involved the same parties; (iv) Whether the two suits were heard together and were disposed through the impugned Judgment; (v) Whether registration of the appellant as proprietor of land parcel number Karingani/Ndagani/3427 ("the suit land") was procured fraudulently by the appellant; (vi) Whether the said registration should be annulled; (vii) Whether the respondent was a trespasser on the suit land; and (viii) Whether the respondent prayed for the order which the trial court granted. I will be brief in my analysis and disposal of the issues.
25. Should this appeal be struck out for non-compliance with the provisions of Order 42 rule 13 (4) of the Civil Procedure Rules? The said framework provides as follows:
 - "(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—
 - a. the memorandum of appeal;
 - b. the pleadings;
 - c. the notes of the trial magistrate made at the hearing;
 - d. the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
 - e. all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
 - f. the judgment, order or decree appealed from, and, where appropriate, the order (if any)
 - g. giving leave to appeal:
26. It is clear from the framework that, issues relating to compliance or non-compliance with the provisions of Order 42 rule 13(4) are supposed to be canvassed before the appeal is admitted. In the event of



deliberate non-compliance by a party, the court, suo motto or on the motion of a party to the appeal, is entitled to reject the appeal and to dismiss it summarily or strike it out.

27. The present appeal came up for directions before Yano J on 28/10/2024. Mr. Mbugua was present for the respondent. The appellant was present in person. On that day, Mr. Mbugua did not object to the admission of the appeal. He instead invited the court to direct that the appeal be canvassed through written submissions. He submitted thus:

“The matter is for directions. We pray that the appeal be canvassed by way of written submissions.”

28. On his part, the appellant submitted as follows:

“We can canvass the appeal by way of written submissions.”

29. Given that non-compliance with Order 42 rule 13 (4) had not been raised as an issue, the Court (Yano J) admitted the appeal in the following verbatim terms:

- “1) The appeal to be canvassed by way of written submissions.
- 2) The appellant will have 30 days from today’s date and the respondent to have 30 days from the date of service by the appellant.
- 3) Mention on 27/1/2025 to confirm filing of submissions and to fix a judgment date.”

30. From the above submissions and directions, it is clear that the respondent did not object to the admission of the appeal on the ground of non-compliance when she had the opportunity to do. She conceded to the admission of the appeal. Her objection at this point is belated.

31. Secondly, this court exercises appellate jurisdiction on the basis of both the original record of the trial court and the extracted record of the lower court which consists of typed and photocopied record of the lower court. This court, unlike the Court of Appeal and the Supreme Court, is always seized of the original record of the lower court. Indeed, I am seized of the entire original record of the lower court in this appeal. For the above reasons, I find that the respondent’s objection is belated and unmerited.

32. Did the appellant file a defence to the respondent’s counterclaim in Chuka CMC E&L Case No 65 of 2019? The defendant named in the counterclaim was Japhet Njeru Mugai (with a single “i”). The plaintiff’s name is Japhet Njeru Muigai (with two “i”). I have looked at both the original record of the trial court and the record dated 18/10/2024 which the appellant filed in this appeal. I have not seen any defence by the defendant named in the counterclaim. It is therefore logical to conclude that none was filed. The court must nonetheless add that even in the absence of a defence to the counterclaim, the respondent was required to discharge her burden of proof. (See Section 107 and 109 of the [*Evidence Act.*](#))

33. Did Chuka CM E&L Case No 65 of 2019 and Chuka CMC E&L Case No 265 of 2018 involve the same parties? For convenience, I will refer to the two suits simply as “Case No 265 of 2018” and “Case No 65 of 2019” respectively. The plaintiff in Case No 265 of 2018 was Lucyline Ciambura Njeru – Suing as the Legal Representative of the Estate of Murathi Nkoroi. The defendant in the said case was Japheth Bundi Muigai of P.O. Box 23 – 60400 Chuka. The original file relating to the said case was placed in the file folder relating to Case No 65 of 2019 on 1/7/2020. The court has perused both



- records. There is no evidence of any amended plaint that was filed changing the name of the defendant. There is no record of any order allowing or adopting any change relating to the name of the defendant.
34. There are a number of disturbing aspects of the record relating to Case No 265 of 2018. The two reliefs which the estate of the late Murathi Nkoroi sought were: (i) an order cancelling the registration of Japheth Bundi Muigai (not Japhet Njeru Muigai) to replace him with Lucyline Ciambura Njeru; and (ii) costs of the suit. There was no prayer for an injunctive relief. However, upon filing the suit, the estate of the deceased, through the respondent, sought an ex-parte interim interlocutory injunction in the matter, restraining Japhet Bundi Muigai (not Japhet Njeru Muigai) against interfering with the estate's occupation, access, utilization and cultivation of the suit land. On 12/11/2018, the lower court granted an ex-parte interim order in the above terms. At the stage of extracting the formal order, the name of the defendant in the court order was changed to read "Japhet Njeru Muigai" instead of "Japhet Bundi Muigai." A new file folder bearing the name Japheth Njeru Muigai was introduced on top of the original file folder which bore the name Japhet Bundi Muigai. Consequently, whereas the lower court issued an ex-parte interim order against Japhet Bundi Muigai, the extracted order bears the name Japhet Njeru Muigai. The appellant has contended in this appeal that this is an illegal ex-parte court order which was used to evict him. I will refrain myself from saying more.
35. Case No 65 of 2019 on the other hand was filed by Japhet Njeru Muigai on 1/11/2019 through a plaint dated 31/10/2019. The defendant sued was Lucyline Ciambura Njeru, sued in a personal capacity. The reliefs sought in the plaint were: (i) an order restraining Lucyline Ciambura Njeru against interfering with Japheth Njeru Muigai's peaceful occupation, utilization and cultivation of the suit land or transacting on the suit land; (ii) compensation for "all the property destroyed in the occupation" of the suit land by the named defendant; and (iii) costs of the suit.
36. In the counterclaim in Case No 65 of 2019, the plaintiff was Lucyline Ciambura Njeru, suing in her personal capacity. The defendant in the counterclaim was Japhet Njeru Mugai (not Muigai). The reliefs sought in the counterclaim were: (i) an order decreeing the Land Registrar to cancel the registration of Japhet Bundi Muigai (sic) as proprietor of the suit land and to register Lucyline Ciambura Njeru as proprietor of the land; and (ii) costs of the suit.
37. It is clear from the foregoing that the parties in the two suits were not the same. First, the Estate of Murathi Nkoroi which was the plaintiff in Case No 265 of 2018 was not a party in Case No 65 of 2019. Secondly, Japhet Bundi Muigai who was the defendant in Case No 265 of 2018 was not a party in Case No 65 of 2019. For strange reasons, the cancellation order sought in the respondent's counterclaim in Case No 65 of 2019 was against Japhet Bundi Muigai as opposed to the defendant in the counterclaim who was Japhet Njeru Mugai (not Muigai) and as opposed to the plaintiff in the primary suit who was Japhet Njeru Muigai.
38. One of the disturbing aspects of the impugned judgment is that whereas the estate of the deceased was not a party to the suit and whereas no relief had been sought in its favour, the trial court decreed registration of the suit land in the name of the deceased. The respondent never sought that relief.
39. Were the two suits heard together and disposed in the impugned judgment? I observed in the background part of this judgment that the trial court called for the file relating to Case No 265 of 2018. No consolidation order was sought and none was made. No order was made relating to joint trial relating to the two suits. There is no single mention of Case No 265 of 2018 in the impugned judgment in the context of it being the subject of the said judgment. The folder relating to Case No 265 of 2018 was placed in the file folder relating to Case No 65 of 2019 and that was the end. It is therefore my finding that the two suits were neither consolidated nor heard together.



40. Given the above serious anomalies, the court is convinced that the impugned judgment cannot stand. There is need for fresh pre-trial and fresh trial by the lower court. For this reason, I will not make pronouncements on issue numbers (v), (vi) and (vii) because this may prejudice the parties when they go for fresh trial.
41. On costs, a number of the errors giving rise to the fate of this appeal were committed by the trial court. For this reason, parties will bear their respective costs of the appeal.
42. In the end, this appeal is allowed in the following terms:
 - a. The Judgment and the decree in Chuka CMC E&L Case No 65 of 2019 is set aside wholly.
 - b. The said suit shall go for fresh pre-trial and fresh trial before a different magistrate.
 - c. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT CHUKA THIS 22ND DAY OF MAY, 2025.

B M EBOSO [MR]

JUDGE

In the Presence of:

Appellant – Japhet Njeru Muigai present in person.

Mr. Murithi, Advocate for the Respondent.

Court Assistant – Mr. Mwangi

