



REPUBLIC OF KENYA



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**Kinuthia & 8 others v Pentinga & 2 others (Environment and Land Appeal  
E033 of 2022) [2023] KEELC 15852 (KLR) (6 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 15852 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E033 OF 2022  
BM EBOSO, J  
FEBRUARY 6, 2023**

**BETWEEN**

**CHARLES NJENGA KINUTHIA ..... 1<sup>ST</sup> APPELLANT  
JAMES WAMITI GICHUKI ..... 2<sup>ND</sup> APPELLANT  
PAUL MITHUI GICHUKI ..... 3<sup>RD</sup> APPELLANT  
FERDINARD MASHILI KIMIRI ..... 4<sup>TH</sup> APPELLANT  
JANETH JANTAA NDOTO WALONGO ..... 5<sup>TH</sup> APPELLANT  
FRIDAH KARIMI KABURU ..... 6<sup>TH</sup> APPELLANT  
PAUL KWARE KAHUHU ..... 7<sup>TH</sup> APPELLANT  
WILLIAM KIPTOO CHESEREK ..... 8<sup>TH</sup> APPELLANT  
CALEB KIPROTICH RONO ..... 9<sup>TH</sup> APPELLANT**

**AND**

**CHRISTINE NJERI KIRAITHE PENTINGA ..... 1<sup>ST</sup> RESPONDENT  
RUIRU LAND REGISTRAR ..... 2<sup>ND</sup> RESPONDENT  
ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

*(Being an Appeal against the Judgment of Hon C. K Kisiangani (SRM) delivered in the Senior  
Principal Magistrate Court at Ruiru on 6/4/2022 in Ruiru SPMC Civil Case No 95 of 2020)*



## JUDGMENT

### Background

1. This appeal challenges the Judgment rendered on April 6, 2022 by Hon C K Kisiangani (SRM) in Ruiru SPMC Environment & Land Case No 95 of 2020. Christine Njeri Kiraithe Pentinga [the 1<sup>st</sup> respondent in this appeal] was the plaintiff in the said case. The appellants were the 1<sup>st</sup> to 9<sup>th</sup> defendants in the case. The Land Registrar – Ruiru and the Attorney General [the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in this appeal] were the 10<sup>th</sup> and 11<sup>th</sup> defendants respectively.
2. The dispute in the suit revolved around the question of ownership of land parcel number Ruiru/Kiu Block 2 (Githunguri) 2347 [hereinafter referred to as parcel number 2347] and the twelve subdivisions that were surveyed out of the said land. The twelve subdivisions were surveyed as parcel numbers Ruiru/Kiu Block 2 (Githunguri) 21913 to 21924 [hereinafter referred to as “the subdivision parcels”]. There was common ground that land parcel number 2347 was part of a larger parcel of land that was owned and subdivided by Githunguri Constituency Ranching Company [hereinafter referred to as “the company”] and allotted to its shareholders. There was also common ground that the late Ng’ang’a Kahungura was the previous beneficial owner of parcel number 2347. Before I delve into the key issues that fall for determination in the appeal, I will briefly outline a brief background to the appeal.
3. Vide a plaint dated August 18, 2020, the 1st respondent initiated the above suit in the trial court. Her case was that through a sale agreement between John Maina Mburu on one part and her and her husband, Jelle Pentinga, on the other part, dated July 20, 2009, they purchased parcel number 2347 which at the time was denoted by Ballot No 2399. They paid the agreed purchase price and the vendor [John Maina Mburu] gave her vacant possession of the land. In 2018, she visited the company and obtained a clearance certificate together with transfer forms, with a view to processing title in her name. Upon presenting the documents at the Land Registry, she was advised that her application would not be processed because there was an already opened and closed parcel register relating to parcel number 2347 and subdivision registers and titles relating to the twelve subdivisions that had been parceled out of parcel number 2347. Efforts to procure cancellation of the titles through the Office of the Land Registrar, on the ground that they had been obtained fraudulently, were fruitless.
4. Consequently, she instituted the suit in the trial court, contending that the said titles were fraudulent. She sought, among other reliefs, an order cancelling the registration of the 1st appellant as proprietor of parcel number 2347. She also sought an order of permanent injunction against the nine appellants.
5. The nine appellants’ responded to the suit through a defence and counterclaim dated October 13, 2020. They denied fraud and contended that the 1st respondent, together with other persons not parties to the suit, had fraudulently procured purported documents of ownership relating to the suit property. They specifically contended that the 1st respondent together with other persons had altered internal records at the company to reflect John Kinuthia Ng’ang’a, John Maina Mburu and the plaintiff as the successive beneficial owners of parcel number 2347.
6. Through the counterclaim, they sought a declaration that the 1st appellant was the bonafide registered proprietor of parcel number 2347 and that the 2nd to the 9th appellants were the legitimate proprietors of their respective subdivision parcels. Further, they sought an order nullifying the ownership documents that were issued to John Maina Mburu and to the 1st respondent by the company. Lastly, they sought an order lifting the restrictions registered against the subdivision parcel registers.



7. Upon conclusion of trial, and upon taking submissions, the trial magistrate rendered the impugned Judgment in which she made a finding to the effect that the title obtained by the 1st appellant in relation to parcel number 2347 was not procured through the laid down procedure, and that the 1st respondent had proved that she was the rightful owner of the suit property. The trial court dismissed the appellants' counterclaim and granted the 1st respondent a permanent injunction. Further, the trial court issued an order cancelling the sub division titles and directed that parcel number 2347 be registered in the name of the 1st respondent.

## **Appeal**

8. Aggrieved by the findings and disposal orders of the trial court, the appellants brought this appeal, advancing the following eleven (11) verbatim grounds of appeal:
  1. The trial magistrate erred in law and in fact in disregarding the evidence and submissions tendered by the appellants.
  2. The trial magistrate erred in law and in fact in finding that the 1st respondent is the registered owner of land parcels Ruiru/Kiu/Block 2(Githunguri) 21913 – 21924.
  3. The trial magistrate erred in law and fact in failing to consider that parties are bound by their pleadings.
  4. The trial magistrate erred in law and fact in finding that the 1<sup>st</sup> appellant did not produce a share certificate while the same was produced before court.
  5. The trial judge (sic) erred in law and in fact in failing to consider that the appellants surrendered the transfer documents and land board consent to the 2<sup>nd</sup> respondent therefore they are not in possession of the same.
  6. The trial Judge [sic] erred in law and fact in failing to note that the 1st respondent's evidence contradicted her pleadings.
  7. The trial Judge (sic) erred in law and fact in holding that the appellant acquired the suit property fraudulently and illegally while no evidence was tendered by the 1st respondent.
  8. The trial magistrate erred in law and in fact by failing to isolate and determine the issues that emanated from the pleadings.
  9. The trial magistrate erred in law and in fact in making findings in favour of the 1st respondent against the weight of the evidence.
  10. The trial magistrate erred in law and in fact in relying on extraneous matters and wrong precedent thus arrived at a wrong conclusion.
  11. The trial magistrate erred in law and in fact in disregarding the appellants' evidence and considering irrelevant matters thus arriving at the wrong conclusion.
9. The appellants prayed for the following reliefs in this appeal:
  - i. The appeal be allowed.
  - ii. The Judgment delivered on April 6, 2022 be set aside.
  - iii. The counterclaim be allowed as prayed.
  - iv. Costs of this appeal be borne by the respondents.



## Submissions

10. The appeal was canvassed through written submissions dated August 3, 2022, filed by M/s Mumbi Muritu Advocates. Counsel for the appellants identified the following as the three issues that fall for determination in the appeal: (i) Whether the trial magistrate erred in relying on extraneous and irrelevant matters and in holding that the appellants acquired the suit lands fraudulently and illegally; (ii) Whether the trial magistrate failed to consider that the respondents were bound by their pleadings; and (iii) Who is to bear the costs. Counsel for the appellants submitted that there was no evidence tendered to demonstrate that the share certificate issued to the 1<sup>st</sup> appellant was procured fraudulently. Counsel contended that the trial magistrate ignored the evidence of DW2 which confirmed that the 1st appellant's share certificate was signed by Francis Kaivinya and Stephen Mwangi who were the authorized officials of the company at the time. Counsel faulted the trial court for ignoring the 1st appellant's evidence which indicated that he acquired his share from the late Nganga Kahungura unlike John Maina Mburu who was not able to demonstrate how he acquired his share certificate. Counsel further faulted the trial court for ignoring the evidence of the Land Registrar which had confirmed that there was due process before the Land Registry issued a title to the 1st appellant. Counsel argued that there was no evidence to support the trial court's finding that the 1st appellant committed fraud in the acquisition of his title.
11. On whether the trial magistrate failed to consider that the respondents were bound by their pleadings, counsel observed that whereas the 1<sup>st</sup> respondent had pleaded and testified that John Maina Mburu purchased the suit property from Nganga Kahungura, in his testimony, John Maina Mburu testified that he purchased the suit property from John Kinuthia Ng'ang'a. Counsel argued that due to the contradictions, it was clear that the 1<sup>st</sup> respondent failed to demonstrate how John Maina Mburu acquired the suit property.
12. The 1<sup>st</sup> respondent opposed the appeal through written submissions dated November 14, 2022, filed by M/s Kanyi Kiruchi & Co Advocates. Counsel for the 1<sup>st</sup> respondent identified the following as the issues that fall for determination in the appeal: (i) Who is the bona fide owner of Ruiru/Kiu Block 2 (Githunguri) 2347; (ii) Whether the 1<sup>st</sup> appellant's title was acquired fraudulently; (iii) Whether this appeal is merited; and (iv) What order should be made in relation to costs.
13. On who is the bonafide owner of parcel number 2347, counsel for the 1<sup>st</sup> respondent submitted that the records held by the company were the true and correct reflection of the rightful ownership of the suit property. Counsel contended that the 1<sup>st</sup> respondent tendered evidence demonstrating an unbroken chain on how she acquired ownership of the suit property while the 1<sup>st</sup> appellant failed to demonstrate how he acquired the suit property.
14. On whether the 1<sup>st</sup> appellant's title was acquired fraudulently, counsel argued that the 1st appellant failed to attend before the Land Registrar to explain how he acquired his title. Counsel contended that the 1<sup>st</sup> appellant's failure to explain how he acquired his title was proof that he had no explanation to tender.
15. Counsel submitted that the appeal herein is unmerited and should be dismissed. On costs, counsel urged the court to award the 1<sup>st</sup> respondent costs of the appeal.
16. The 2nd and 3rd respondents filed written submissions dated October 12, 2022 through Mr Benson Njagi, Senior State Counsel. Counsel identified the following as the six issues that fall for determination in the appeal: (i) Whether the trial court erred in finding that the 1st respondent was the registered owner (sic) of the suit property; (ii) Whether the trial magistrate erred in finding that the appellant



- (sic) had not produced documents in court to demonstrate how he acquired his title; (iii) Whether the trial court erred in finding that the appellant acquired his title fraudulently; (iv) Whether the trial court relied on extraneous matters and wrong precedents in arriving at its decisions; (v) Whether the trial magistrate disregarded the appellant's evidence and (iv) Whether the trial magistrate erred in finding in favour of the 1st respondent and arriving at her decision.
17. On the first identified issue, counsel submitted that the trial magistrate did not err because the company's current directors had disputed the authenticity of the 1<sup>st</sup> appellant's title and the 1<sup>st</sup> appellant had failed to produce documents to demonstrate how he acquired his title. Counsel added that the 1<sup>st</sup> appellant did not prove the validity of the documents he tendered in evidence, hence the trial court did not err in finding that the 1<sup>st</sup> appellant had not produced documents in court.
  18. On whether the 1<sup>st</sup> appellant acquired his title fraudulently, counsel cited the Court of Appeal decision in [\*Munyu Maina v Hiram Gathiba Maina \[2013\] eKLR\*](#) and submitted that the 1<sup>st</sup> appellant failed to demonstrate to the court the root of his title. On the question as to whether the trial court relied on extraneous and wrong precedents, the learned state counsel submitted that the appellants did not specify the wrong precedents which the trial court relied on. On whether the trial court disregarded the appellants' evidence, counsel submitted that the trial court considered the evidence provided by all the parties in arriving at its decision. In conclusion counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents submitted that the trial court did not err in its decision because the 1<sup>st</sup> appellant failed to demonstrate how he acquired his title. Counsel urged the court to dismiss the appeal.

### **Analysis and Determination**

19. I have perused and considered the original record of, the trial court; the record relating to this appeal; and the parties respective submissions. I have also considered the relevant legal frameworks and jurisprudence on the issues that fall for determination in this appeal.
20. The appellants itemized eleven grounds of appeal in the memorandum of appeal dated April 12, 2022. However, at the hearing of the appeal, the appellants' counsel condensed the eleven grounds of appeal into the following three issues: (i) Whether the trial court erred in relying on extraneous and irrelevant matters and in holding that the appellants acquired the suit land fraudulently and illegally; (ii) Whether the trial magistrate failed to consider that the respondents were bound by their pleadings; (iii) Who is to bear costs? Because this is an appeal, I will restrict myself to the above issues on which counsel for the appellants submitted. Before I dispose the issues, I will briefly outline the principle which governs this court when exercising appellate jurisdiction.
21. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of [\*Susan Munyi v Kesbar 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.”
22. The above 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.”

23. The first issue is whether the trial magistrate erred in relying on extraneous and irrelevant matters and holding that the appellants acquired the suit land fraudulently and illegally. There was common ground that parcel number 2347 was denoted by Ballot No 2399 issued to the late Ng’ang’a Kahungura. The 1st appellant contended that the late Ng’ang’a Kahungura transferred to him his shares in Githunguri Constituency Ranching Company and by dint of the transfer, he became the proprietor of parcel number 2347. On her part, the 1st respondent pleaded at paragraph 6 of the plaint and also stated at paragraph 3 of her witness statement that John Maina Mburu sold to her the land in July 2009, adding that John Maina Mburu had purchased the land from Ng’ang’a Kahungura. During trial, John Maina Mburu testified as PW2. His evidence was that he purchased the land from John Kinuthia Ng’ang’a, a son to Ng’ang’a Kahungura. Apart from being the vendor who purportedly sold the suit property to the 1st respondent, John Maina Mburu was the director and Chairman of Githunguri Constituency Ranching Company from 2009. He was still the Chairman at the time of testifying.
24. The 1st respondent and John Maina Mburu contested the 1st appellant’s title and contended that Ng’ang’a Kahungura did not transfer his shares to the 1<sup>st</sup> appellant. Similarly, the 1<sup>st</sup> appellant contested John Maina Mburu’s acquisition of the land, contending that John Maina Mburu never acquired the land. John Maina Mburu was the person alleged to have sold the land to the 1st respondent. He was a person who had an interest in the outcome of the case.
25. In my view, given the above circumstances, a complete and effectual adjudication of the questions relating to the allegations and counter allegations of fraud in the acquisition of the suit property from the late Ng’ang’a Kahungura could not be achieved in the absence of the estate of the late Ng’ang’a Kahungura. The estate of the late Ng’ang’a Kahungura was the one to tell the court the person to whom Ng’ang’a Kahungurua [or his estate] transferred his shares in relation to parcel number 2347. In my view, this is one matter where the trial court should have invoked its jurisdiction under Order 1 rule 10(2) of the *Civil Procedure Rules* and ordered joinder of the estate of Ng’ang’a Kahungura as a party to the suit. I am, for this reason, in agreement with the appellants that the trial magistrate erred in holding that the titles held by the appellants were acquired fraudulently. A finding to that effect would have made sense if the parties challenging the appellants’ titles demonstrated that, indeed, Ng’ang’a Kahungura transferred his shares relating to parcel number 2347 to John Maina Mburu or to John Kinuthia Ng’ang’a. There was no evidence relating to the transfer of shares by Ng’ang’a Kahungura to either John Maina Mburu or John Kinuthia Ng’ang’a. Consequently, my finding on the first issue is that the trial court erred in annulling the appellants’ titles without evidence from the estate of Ng’ang’a Kahungura on the question of transfer of Ng’ang’a Kahungura’s shares.
26. The second issue is whether the trial court erred in failing to consider that the respondents were bound by their pleadings. I have observed in one of the preceding paragraphs of this Judgment that at paragraph 6 of her plaint, the 1st respondent pleaded that John Maina Mburu purchased the suit land from Ng’ang’a Kahungura. She repeated the same assertion in paragraph 3 of her written witness statement which she adopted during trial. Indeed, her counsel made a similar assertion in paragraph 1 of the written submissions presented to this court. The 1st respondent’s pleadings and evidence were at variance with the evidence of PW2 (John Maina Mburu) who testified that he purchased and acquired the suit property from John Kinuthia Ng’ang’a. At the very least, the trial court should have rendered itself on the import of the above inconsistencies before pronouncing itself on the legitimacy of the appellants’ titles and the validity of the 1st respondent’s documents.



27. For the above reasons, I find merit in this appeal. Because the most significant error occasioning the appeal was made by the trial court, and taking into account the fact that the court is inclined to remit the case back to the Senior Principal Magistrate Court for fresh trial, parties will bear their respective costs of this appeal.

### **Disposal Orders**

28. In the end, this appeal succeeds and is disposed through the following orders:

- a. The Judgment rendered on April 6, 2022 in Ruiru SPMC E & L Case No 95 of 2020 together with the trial court's proceedings leading to the said Judgment are hereby set aside.
- b. The claimants in the primary suit and in the counterclaim shall cause the estate of the late Ng'ang'a Kahungura to be joined as defendants in both the primary suit and in the counterclaim
- c. In the event that there is no existing personal representative and his relatives are unwilling to petition for a grant, parties will be at liberty to initiate appropriate proceedings under the *Law of Succession Act*.
- d. Fresh trial in Ruiru SPMC E & L Case No 95 of 2020 shall be conducted by a different magistrate.
- e. Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF FEBRUARY 2023**

**B M EBOSO**

**JUDGE**

Ms Muritu for the Appellants

Ms Muchemi for the 1st Respondent

Mr Njagi for the 2nd and 3rd Respondents

Court Assistant: Hinga

