



**Githinji v Mugo & another (Environment & Land Case
634 of 2014) [2023] KEELC 17208 (KLR) (8 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 634 OF 2014**

JO OLOLA, J

MAY 8, 2023

BETWEEN

MATHEW KARIUKI GITHINJI PLAINTIFF

AND

SCHOLASTICA WAIRIMU MUGO 1ST DEFENDANT

NAOMI WANJIKU NDIRITU 2ND DEFENDANT

JUDGMENT

1. This suit was initially filed at the High Court at Nyeri on 26th June, 2008 as Nyeri HCCC No. 65 of 2008. It was transferred to this Court and given its current reference on 2nd December, 2014.
2. By his Complaint dated and filed herein on 26th June, 2008, Mathew Kariuki Githinji (the Plaintiff) prays for Judgment against the two Defendants for:
 - (a) An order for cancellation of the title issued to the late Mathew Ndiritu Rubia;
 - (b) An order for rectification of the title Register to reflect the names of the Plaintiff as the registered proprietor of land parcel No. Othaya/Itemeini/1203;
 - (c) An order that the Defendants do give vacant possession of land parcel No. Othaya/Itemeini/1203 to the Plaintiff;
 - (d) An order that the Defendants do pay the Plaintiff mesne profits for the period the deceased and his estate have been in occupation of the suit land; and
 - (e) Costs of this suit.
3. Those prayers arise from the Plaintiff's contention that both Scholastica Wairimu Mugo and Naomi Wanjiku Ndiritu (the Defendants) are the Administrators of the Estate of the late Mathew Ndiritu



Rubia who is currently shown as the registered proprietor of land parcel No. Othaya/Itemeini/1203 (the suit property).

4. It is the Plaintiff's case that in September 2003, he approached the late Mathew Ndiritu Rubia for a soft loan of Kshs.29,000/- which loan was granted on condition that the Plaintiff was to give the deceased the title deed for the suit property as a pledge. The Plaintiff was to clear the loan once he completed his studies at Kenyatta University at the end of the year 2005.
5. The Plaintiff avers that in October, 2005 in Nairobi, the deceased unlawfully entered and occupied the suit property without any colour of right. On enquiries the deceased became hostile and barred the Plaintiff from entering the suit property. As a result, the Plaintiff filed Nyeri CMCC No. 805 of 2005 against the deceased but he passed away on 13th May, 2006 before the conclusion of the case. The said case had since abated and hence this new claim.
6. But in their Joint Statement of Defence dated 31st March, 2009 and filed herein on 6th April 2009, Scholastica Wairimu Mugo and Naomi Wanjiku Ndiritu (the Defendants) deny all the averments contained in the plaint and invite the Plaintiff to strict proof.
7. In particular, the Defendants aver that the suit property was duly transferred to the deceased pursuant to a Land Sale Agreement in relation thereto. It is further the Defendant's case that the sale transaction was given consent by the Land Control Board and the Plaintiff thereafter executed a transfer on behalf of the deceased pursuant to which the land was transferred.

The Plaintiff's Case

8. The Plaintiff called two witnesses who testified in support of his case in the trial that commenced before the Honourable Justice L. N. Waithaka on 10th May, 2016.
9. PW1 – Mathew Kariuki Githinji is the Plaintiff and a Lecturer at Tetu University. He told the Court the late Mathew Ndiritu was his friend and that he knew him in the year 2001. PW1 told the Court that the late Mathew Ndiritu operated a Shylock business and that in the year 2003, he borrowed a sum of Kshs.29,000/- from the late Ndiritu.
10. PW1 testified that the late Ndiritu asked him to put up a security for the loan. As a result they entered into a Sale Agreement dated 13th May, 2002 wherein PW1 gave Ndiritu his original title deed for land parcel No. Othaya/Itemeini/1203. PW1 was to refund that money after completing his studies in 2005.
11. PW1 told the Court that in July 2005, he refunded the money and that Mathew Ndiritu was not in the office on the date he paid the money. Ndiritu's secretary received the money and gave him back the original Sale Agreement. He was not however given back his title deed.
12. PW1 testified that on 7th October, 2005 he returned home at around 8.00 p.m to find his door barricaded. The following morning, a young man by the name Maina informed PW1 that Mathew Ndiritu intended to sell the land to himself. PW1 reported the matter to the Police Station but was advised to report the matter to the Area Chief. Subsequently PW1 filed Nyeri CMCC No. 805 of 2005 against Ndiritu.
13. PW1 told the Court that in response, Mathew Ndiritu produced documents showing that the suit property belonged to himself. Mathew however died before the case was prosecuted and the suit abated. The two Defendants were thereafter named as the administrators of his Estate.



14. PW1 told the Court he did not execute any documents transferring the property to the deceased. He further told the Court he never went to the Land Control Board and did not apply for their consent to transfer the land. PW1 further told the Court he had not executed the Sale Agreement dated 13th May, 2005 and that all the documents used to effect the transfer had been found by the CID to be forgeries.
15. On cross examination PW1 told the Court he knew the deceased to be a Shylock and that they agreed that he would refund the same amount of Kshs.29,000/- that he had borrowed upon completion of his degree course. When he refunded the money, he was only given back the original Sale Agreement. He was not given any document acknowledging receipt of the money paid. They also retained the original title deed.
16. PW2 – Paul Wagiita Theuri is an Advocate of the High Court of Kenya practicing under the name Wagiita Theuri & Company Advocates. He told the Court the Sale Agreement dated 13th May, 2002 did not emanate from his office. He further told the Court he had attested the transfer document after it was taken to his office. He was summoned over those documents to the Police station where he was shown one Mathew Githinji. He told the Police that was not the person who had taken the transfer documents to his office.

The Defence Case

17. The Defendants did not call any witness at the trial herein. Instead on 18th May 2022, the Defendants instituted an application dated 17th May, 2022 seeking to have the suit struck out on the basis that the same was an abuse of the Court process and filed in contravention of the law.
18. It was the Defendants' case that the initial suit filed by the Plaintiff having abated, the Plaintiff was not at liberty to file a fresh suit on the same cause of action.
19. By directions given herein on 18th May 2022, the said application was deemed as part of the Defendant's pleadings and the Plaintiff was required to respond to the same by way of an affidavit. As a result the Plaintiff filed a Replying Affidavit herein sworn on 2nd June, 2022.
20. In is response to the application the Plaintiff contends that the former suit he had filed was a nullity in law as the claim could only be validly filed in the High Court and not in the Magistrate's Court where it had been filed. It is accordingly the Plaintiff's case that the said suit being a nullity, there was no suit that had abated.
21. I have carefully perused and considered the pleadings herein, the testimony of the Plaintiff as well as the evidence adduced herein. I have similarly perused and considered the written submissions and authorities placed before me by the Learned Advocates representing the Parties herein.
22. By this suit, the Plaintiff urges the court to order for the cancellation of the title issued to the late Mathew Ndiritu Rubia and for an order reflecting his name as the registered proprietor of L.R No. Othaya/Itemeini/1203. In addition, the Plaintiff prays that this Court directs the Defendants to grant him vacant possession of the suit property and that they pay mesne profits for the period they have been in occupation of the suit property.
23. It is the Plaintiff's case that in September 2003, he approached the late Mathew Ndiritu Rubia who he states was a Shylock for a loan of Kshs.29,000/-. The Plaintiff told the Court that the deceased granted him the loan on the condition that the Plaintiff would deposit the title deed for the suit property with the deceased as security. It was the Plaintiff's case that he was to clear the loan once he completed his studies at Kenyatta University at the end of the year 2005.



24. The Plaintiff pleaded that sometime in October, 2005 while he was away with his wife in Nairobi, the deceased unlawfully entered and occupied the suit property without any colour of right and refused to vacate the land. It was the Plaintiff's case that as a result of the said invasion, he filed Nyeri CMCC No. 805 of 2005 against the said Mathew Ndiritu Rubia but he passed away on 13th May, 2006 before the conclusion of the case. Subsequently, the Plaintiff filed this suit against the two Defendants who are the administrators of the estate of the late Mathew Ndiritu Rubia.
25. In their joint Statement of Defence, the two Defendants deny the Plaintiff's allegations and assert that the deceased bought the subject parcel of land pursuant to a Sale Agreement executed between the Plaintiff and the deceased. The Defendants further aver that the suit otherwise discloses no cause of action, is incompetent and an abuse of the Court process.
26. In addition to their Statement of Defence, the Defendants by their Notice of Motion dated 17th May, 2022 sought to have the Plaintiff's suit struck out on the basis that it was an abuse of the Court process as the Plaintiff had initially filed a suit against the deceased which suit had abated before the Plaintiff filed this present suit against themselves. Considering that the application had come many years after the suit was filed and some six (6) years after the Plaintiff testified, this Court directed that the same be considered as part of the Defendant's pleadings.
27. Given that by the time the application was made the Plaintiff had testified as aforesaid, the Plaintiff was given time to file a response on oath to the application. In his Affidavit in Reply sworn on 2nd June, 2022, the Plaintiff avers in the relevant portion as follows:
- “ 3. That the initial suit CMCC No. 805 of 2005 was for a claim stipulated under (the now repealed) section 159 of the Registered Land Act relating to land;
 4. That I am informed by my Advocates on record which I verily believe to be true that the claim could only be filed in the High Court and not in the Magistrates' Court as it were;
 5. That as a result, the said suit was all along a nullity for lack of jurisdiction and therefore the suit was as good as not filed;
 6. That in the circumstances, there was no suit to abate for purposes of this application;
 7. That the current application is therefore baseless and an exercise in futility since there was no suit that abated following the death of the defendant; and
 8. That the current suit was filed against the Applicants in their capacity as the administrators of the deceased.”
28. As it were, the question as to whether or not there was a previous suit filed by the Plaintiff was not an idle one. Under order 4 rule 1 (f) of the Civil Procedure Rules, it is a requirement in law that every Plaintiff shall contain an averment that there is no other suit pending, and that there have been no previous proceedings, in any Court between the Plaintiff and the Defendant over the same subject matter and that the cause of action relates to the Plaintiff named in the Plaintiff. In his bid to comply with that provision, the Plaintiff avers as follows at Paragraph 15 of the Plaintiff:
- “ 15. The Plaintiff avers that there is no other claim or suit between the parties herein arising from the same cause of action pending in this Court or any other Court



save that the Plaintiff had filed Civil Case No. Nyeri CMCC No. 805 of 2005 against the deceased which has now abated.”

29. Again, the Plaintiff makes reference to that previous suit in his recorded Statement filed herein on 17th April, 2013 wherein he asserts at Paragraphs 3, 4 and 7 thereof as follows:

“In October 2005, Mathew Nderitu Rubia forcefully moved in and settled in my shamba and occupied it. When I asked him what was going on, he became hostile and denied me access to the land or my family members.

This made me to file Civil Suit number Nyeri CMCC No. 805 of 2005. The deceased filed a defence stating that he was the rightful owner of the parcel of land.

However, the Nyeri CMCC No. 805 of 2005 had already abated hence filing of the instant suit.”

30. From those averments including his testimony herein at the trial, it was evident that this suit was filed against the two administrators because the suit earlier on filed against the late Mathew Ndiritu Rubia had abated. While the Plaintiff now contends that the Magistrates’ Court had no jurisdiction to try the said suit, it was clear to me that that was nothing but an afterthought. At any rate, there was absolutely nothing placed before the Court to demonstrate that the Court before which the previous suit was filed had no jurisdiction to entertain the same.
31. As it were, Parties are bound by their pleadings and therefore the contents of the Plaintiff’s pleadings bind the Plaintiff and he cannot be allowed to raise a different fresh case at the trial without due amendment to his pleadings properly made. By purporting at this stage that there was no suit capable of being revived and hence the filing of this suit against the legal representatives of the Defendant in the previous suit, the Plaintiff was trying to run away from his own averments and to disown his own pleadings and Witness Statements. That is clearly an attempt to mislead this Court and it cannot be allowed to pass. The Plaintiff is clearly guilty of equivocation. In one breath he states that the suit abated. In the other he states there was no suit that abated.
32. In the matter herein, it was not disputed that Mathew Ndiritu Rubia passed away on 13th May 2006. The suit against him abated on 13th May, 2007. As provided under order 24 rule 7(1) where the suit abates and the same is not revived, no fresh suit can be brought on the same cause of action. That being the case it was evident that this suit was filed in abuse of the Court process.
33. That notwithstanding, the Plaintiff’s case was rather unconvincing. While it was his case that the late Mathew Ndiritu Rubia was a shylock, and that the deceased had lent him Kshs.29,000/- in the year 2003, it was difficult to see how a shylock would lend him the money to be refunded minus interest after two years.
34. In support of that contention, he produced before the Court an Agreement which he told the Court was drawn by himself dated 3rd September 2003. While he stated that he needed the money for fees for his University education, in his recorded statement, the said “Agreement” which was not executed by anyone else but himself states as follows:

Agreement

I, Mathew Kariuki Githinji of P.O. Box 606, Othaya do borrow Kshs.29,000/- (Twenty Nine Thousands) from Mathew Ndiritu Rubia being school fees for my Daughter – Tumu Tumu and my son – Lenana school under the following Terms:

- (i) The money shall be paid back with no interest, when I complete my studies at Kenyatta University – After 2005;



- (ii) This interest waiver is the Commission for promoting his business to my friends;
- (iii) That I shall get back my Land Title Deed in good order (Othaya/Itemeini/1203).

Signed:

- 35. Asked about the so-called “Agreement” in cross-examination, the Plaintiff conceded that there was no signature by Mathew on that document. That being the case, I was not persuaded that the document prepared by the Plaintiff dated 3rd September, 2003 was an “agreement” as it was purported to be and that it is the means through which the deceased came to be in possession of the suit property.
- 36. Again while in his pleadings the Plaintiff avers that he was in Nairobi with his wife when he got news that the deceased had invaded his land, the story was different when he testified in Court. At the trial, the Plaintiff told the Court that he returned home at 8 p.m sometime in October, 2005 to find his door and windows barricaded. It was his case that he spent the night elsewhere and that when he came back in the morning, he found a young man by the name Maina hovering around his compound. When he asked what was going on, the said Maina told him that the deceased intended to sell the suit property to him that morning. It was then that the Plaintiff reported the matter to the Police.
- 37. From a copy of the Title Deed produced by the Plaintiff, it was apparent that the deceased was registered as the proprietor of the suit property on 8th October, 2004. While the Plaintiff accused the deceased of fraudulently causing himself to be so registered as the proprietor of the land, no evidence of any such fraud and/or how it was perpetrated was placed before the Court.
- 38. It follows that I was not persuaded either that there was merit in the Plaintiff’s case.
- 39. The suit is accordingly dismissed with costs to the Defendants.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 8TH DAY OF MAY, 2023.

In the presence of

No appearance for the Plaintiffs

No appearance for the Defendants

Court assistant - Kendi

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J. O. Olola

JUDGE

