



Mbugua & another v Macharia & 2 others (Environment and Land Appeal E058 of 2021) [2023] KEELC 18085 (KLR) (7 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18085 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E058 OF 2021**

BM EBOSO, J

JUNE 7, 2023

BETWEEN

MAGDALENE WANJIRU MBUGUA 1ST APPELLANT

JOHNSON NDUNGU MBUGUA 2ND APPELLANT

AND

PETER KIMANI MACHARIA 1ST RESPONDENT

SULEIMAN KIMANI MWANGI 2ND RESPONDENT

WILLY MURIU MWAURA 3RD RESPONDENT

(Being an Appeal against the Judgment of Hon E. Riany, Senior Resident Magistrate, delivered on 25/3/2021 in Thika CMC MCL & E Case No. 65 of 2019)

JUDGMENT

Background

1. This appeal challenges the Judgment rendered by Hon. E. Riany, SRM, on 25/3/2021 in Thika CMC MCL & E Case No 65 of 2019. The three respondents in this appeal were the plaintiffs in the trial court. The two appellants were the defendants. The key issue that fell for determination in the trial court was the question as to whether the appellants were trespassers on land parcel number Ndaragu/Gakoe/328 [hereinafter referred to as “the suit property”], measuring approximately 14.7 acres. I will outline a brief contextual background to the appeal before I dispose the key issue that falls for determination in the appeal.
2. Vide a plaint dated 22/3/2019, the respondents sued the appellants in Thika CMC MCL & E Case No 65 of 2019. Their case was that they were the joint registered proprietors of the suit property, having obtained ownership by virtue of being beneficiaries of the estate of the late Mwangi Kimani Muhoro and pursuant to a certificate of confirmation of grant dated 19/1/2011. They averred that in the year



2017, the appellants trespassed onto the suit property by cultivating the suit property and leasing the suit property to third parties. The respondents prayed for: (i) an order of eviction against the appellants; and (ii) damages, costs and interest.

3. Acting in person at the time, the appellants filed separate statements of defence in which they, by and large, raised a similar defence. Their case was that they were not trespassers on the suit property. They averred that the suit property initially belonged to the respondents' father, the late Mwangi Kimani. They added that their father, the late Mbugua Gakau, purchased the suit property from the respondents' father [Mwangi Kimani] in 1964 and upon purchase, the respondents' father gave to the their father vacant possession of the suit property. It was the case of the appellants that the reason why the family of the late Mbugua Gakau had been in occupation of the suit property since 1964 was because the suit property was owned by the late Mbugua Gakau.
4. The appellants added that following Mwangi Kimani's [the respondents' father's] failure to transfer the suit property to their the late Mbugua Gakau, he filed a case in the High Court and the dispute in the case was subsequently referred to and heard by a panel of elders under the Chairmanship of the District Officer for Gatundu. The panel found that the respondents' father had sold the suit property to the late Mbugua Gakau and awarded the suit property to the late Mbugua Gakau. They added that the award was subsequently adopted as a Judgment of the High Court in Nairobi High Court Civil Case No 1523 of 1977.
5. The appellants further averred that, while the respondents were aware of the fact that the suit property belonged to the estate of the late Mbugua Gakau, they listed the suit property as one of the free assets of the late Mwangi Kimani and invited the High Court to distribute it as part of the late Mwangi Kimani's free estate in Nairobi High Court Succession Cause No 1725 of 2009. They termed the respondents' actions as fraud.
6. Trial proceeded before Hon Riany who subsequently rendered the impugned Judgment. A key aspect of the impugned Judgment is that the trial court declined to pronounce itself on the question of ownership of the suit property in determining whether the appellants were trespassers on it. The trial court took the view that the respondents having obtained a certificate of confirmation of grant in Nairobi High Court Succession Cause No 1725 of 2009, and a title having been issued to them through transmission, she could not re-open and consider or pronounce herself on the issue of ownership of the suit property.
7. The trial court proceeded to grant the respondents "their prayers as sought". Among the orders granted to the respondent was an eviction order. The trial court did not, however, assess damages.

Appeal

8. Aggrieved by the Judgment of the trial court, the appellants brought this appeal, advancing the following sixteen grounds of appeal:
 1. The honourable magistrate erred in fact and law thus misdirected herself in reaching the conclusion that she could issue eviction orders without taking into account the issue of ownership of the land property title number: Ndarugu Gakoe 328 (hereinafter the suit land).
 2. The honourable magistrate erred in fact and law in not finding that the ownership of the suit land was the subject matter and issue adjudicated before the High Court Case, Johana Mbugua Gakau v Mwangi Kimani (Civil Case No 1523 of 1977).



3. The honourable magistrate erred in fact and law in disregarding the arbitration award and orders made on arbitration in favour of Johana Mbugua Gakau, father of the appellants in relation to the suit property.
4. The honourable magistrate erred in fact and law by disregarding that there had been a High Court Case over the subject matter which directly affected the decree of the trial court and thus, the trial court assumed jurisdiction in appeal of decision of a superior court.
5. The honourable magistrate erred in fact and thereby misdirected herself when she took the position that the appellants had not told the court of any efforts made since 19th January, 2011 touching on the impugned Grant of Succession dated in Succession Cause No 1725 of 2009 was issued and whereas the appellants were unequivocally clear that they became aware of the said succession proceedings upon being served with the pleadings for MCL & E 65 of 2019. [sic]
6. The honourable magistrate erred in fact and thereby misdirected herself when she took the position that the appellants had not told the court of any efforts made touching on the impugned Grant of Succession dated in Succession Cause No 1725 of 2009 was issued and whereas a copy of an application for revocation of the said grant sent to the High Court on 15th November, 2020 was shared with the court. [sic]
7. The honourable magistrate erred in fact and law in failing to say or generally stand over the proceedings before the court pending the outcome of the application for revocation of the Grant or succession dated 19th January, 2011 in Succession Cause No 1725 of 2009 (the estate of Mwangi Kimani) in question.
8. The honourable magistrate erred in fact and law in failing to direct the proper forum to have sought reprieve touching on the issues litigated upon before the trial court was in the High court case Johana Mbugua Gakau v Mwangi Kimani (Civil Case No 1523 of 1977).
9. The honourable magistrate erred in fact and law by ignoring the submissions made by the appellants advocates albeit the same had been filed in court.
10. The honourable magistrate erred in fact and law and thereby misdirected herself on the statements given by the appellants in re-examination and attempted to make a case for the respondents.
11. The honourable magistrate erred in fact and law and thereby directed herself by failing to find that Mbugua Gakau being the rightful owner of the suit property by virtue of the High Court case and having been in exclusive possession since 1964, the appellants could not be lawfully evicted.
12. The honourable magistrate erred in fact and law by decreeing the eviction of the appellants from the suit property in which they are beneficial owners.
13. The honourable magistrate erred in fact and law by disregarding the allegations of fraud surrounding the obtaining of the title document over the suit property by the respondents.



14. The honourable magistrate erred in fact and law by disregarding the respondent's material disclosures on the existence of the High Court case Johana Mbugua Gakau v Mwangi Kimani (Civil Case No 1523 of 1977) and in acquisition of the said Grant of Succession and outcomes.
 15. The honourable magistrate erred in fact and law in having a misapprehension of the facts, issues and evidence before her.
 16. The entire judgment of the honourable magistrate was biased against the appellants and was a total miscarriage of justice.
9. The appellants urged this court to set aside the Judgment of the trial court and substitute it with an order dismissing the respondents' suit. Further, the appellants prayed for costs of this appeal.

Appellants' Submissions

10. The appeal was canvassed through written submissions dated 2/9/2022, filed by M/s Magdaline M & Co Advocates. Counsel for the appellants condensed the 16 grounds of appeal into the following three grounds: (i) that the learned magistrate erred in law and fact in not finding that the ownership of the suit property was the subject matter and issue adjudicated before the High Court Case, Johana Mbugua Gakau v Mwangi Kimani (Civil Case No 1523 of 1977); (ii) that the honourable magistrate erred in fact and law by ignoring the submissions made by the appellants; and (iii) that the honourable magistrate erred in fact and thereby misdirected herself when she took the position that the appellants had not told the court any efforts made touching on the impugned grant of succession.
11. Counsel submitted that evidential materials were placed before the trial court showing that the issue of ownership of the suit property was the subject of litigation in Nairobi High Court Civil Case No 1523 of 1977 involving the appellants' late father, the late J. Mbugua Gakau, and the respondents' late father, the late Mwangi Kimani, and that the High Court referred the dispute to the panel of elders which made an award to the effect that the suit property had been sold to the late Mbugua Gakau by the late Mwangi Kimani hence it belonged to the late Mbugua Gakau [the appellant's father]. Counsel added that there was oral evidence before the trial court to the effect that the award of the elders' panel had been adopted by the High Court as a Judgment of the High Court. Counsel faulted the trial court for ignoring this aspect of the appellants' defence and evidence. Counsel contended that regardless of whether or not the father to the appellants won the High Court case, the trial court erred by failing to pronounce itself on the import of Nairobi High Court Civil Case No 1523 of 1977.
12. Counsel submitted that regardless of whether or not Nairobi HCCC No 1523 of 1977 had been concluded, the trial court was not the right forum for exercising the jurisdiction which the respondent had invited it to exercise. Counsel contended that the proper court that should have been invited to adjudicate the dispute was a superior trial court.
13. Counsel for the appellants added that the issue relating to ownership of the suit property had been adjudicated in Nairobi HCCC No 1523 of 1977, hence the same was res judicata. Counsel for the appellants faulted the trial court for taking the view that it could issue an eviction order without taking into account the issue of ownership of the suit property. It was the position of counsel that to determine whether or not to issue an eviction order required a pronouncement on the question of ownership of the suit property.
14. On the contention that the trial court ignored the submissions made by the appellants, counsel for the appellants submitted that the appellants had submitted that they had lived on the suit property from 1964 and they were entitled to the suit property under the doctrine of adverse possession/prescription.



Counsel made reference to PW1's testimony in which he stated that he did not know the exact time when the appellants entered the suit property, and submitted that the appellants' evidence to the effect that they entered the suit property in 1964 was to be taken as uncontroverted.

15. On the contention that the trial court misdirected itself by taking the position that the appellants had not demonstrated to the court any efforts made towards challenging the succession orders, counsel drew the attention of the court to the proceedings of the trial court on 11/11/2020 and on 18/11/2020. Counsel argued that the said proceedings were clear that the appellants fully brought to the attention of the trial court the fact that they had filed an application in the succession cause challenging the inclusion of the suit property among the free assets of the late Mwangi Kimani. Counsel urged the court to allow the appeal.

Respondents' Submissions

16. The respondents filed written submissions dated 13/2/2023 through M/s Mugo & Associates Advocates. Counsel for the respondents identified the following as the two issues that fell for determination in this appeal: (i) Whether the trial magistrate correctly directed her mind in issuing eviction orders; and (ii) Whether the appellant proved adverse possession.
17. Counsel submitted that the respondents demonstrated to the trial court that they were the registered proprietors of the suit property, having acquired the suit property legally and procedurally through transmission. Counsel contended that if the appellants had any genuine interest in the suit property, they should have timeously challenged the succession orders in the High Court. Counsel argued that the question of ownership of the suit property had been conclusively determined by the succession court. Counsel added that by dint of the provisions of Section 26 of the *Land Registration Act*, the trial court properly came to the finding that the respondents were entitled to eviction orders. Counsel for the respondents added that the appellants failed to adduce evidence in support of their defence.
18. Counsel argued that the appellants failed to tender evidence demonstrating that: (i) they are children of Mbugua Gakau; (ii) Johana Mbugua Gakau is the same person as Mbugua Gakau; (iii) Mwangi Kimani is the same person as Mwangi Kimani Muhoro; (iv) the appellants had been in occupation of the suit property from 1964; (v) the respondents transferred the suit property in total disregard of the Judgment of the High Court; and (vi) Case No 1523 of 1977 was concluded in favour of their alleged father.
19. Counsel for the respondents argued that the proceedings and award of the elders arbitration panel which the appellants tendered as evidence could not be relied upon because DW1 who testified on behalf of the appellants was not privy to them and was unable to shed more light on how the appellants acquired them; the proceedings were incomplete and not sequential; it was not clear when the proceedings took place; the proceedings were undated and not signed by all panel members; the proceedings were uncertified.
20. On the contention that the respondents' case was res judicata, counsel for the respondents contended that the purported proceedings relating to Nairobi HCCC 1523 of 1977 were questionable and could not be verified because DW1 was unable to shed more light on them. Counsel added that in the absence of relevant pleadings, the trial court could not ascertain whether or not the issues in the said case were the same as the issues that fell for determination in the trial court. Counsel added that in the absence of a copy of the judgment or decree in HCCC no 1523 of 1977, the trial court had no basis for downing its tools. It was the position of counsel for the respondents that no evidence was placed before the trial court demonstrating that the issue of ownership of the suit property had been determined by a court of competent jurisdiction.



21. On the contention that the trial court erroneously took the position that the appellants had failed to demonstrate to the trial court any effort made towards revocation of the grant, counsel contended that the appellants were aware of the succession cause and they had done nothing to revoke the grant.

Analysis and Determination

22. I have read the original record of the trial court together with the record filed in this appeal. I have also read and considered the parties' rival submissions; the applicable legal frameworks; and the relevant jurisprudence on the key issue that falls for determination in this appeal. The single issue that falls for determination in this appeal is whether the trial court erred in issuing an eviction order against the appellants without pronouncing itself on the import of Nairobi HCCC No 1523 of 1977 and without determining the question of legitimate ownership of the suit property. Before I dispose the above issue, I will outline the principle that guides this court when exercising appellate jurisdiction.
23. 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.”
24. 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.”
25. The case of the appellants was that they were children of the late Mbugua Gakau, also known as J Mbugua Gakau, and also known as Johana Mbugua Gakau. They contended that their late father purchased the suit property from the late father of the respondents, the late Mwangi Kimani, in 1964. They further contended and led evidence to the effect that their late father and themselves had been in occupation of the suit property since 1964. They tendered evidence to the effect that when the respondents father, the late Mwangi Kimani, failed to transfer the suit property to their father (the late Mbugua Gakau), their father initiated Nairobi HCCC No 1523 of 1977, seeking to compel the late Mwangi Kimani to transfer the suit property to him.
26. A perusal of the record of the trial court reveals that evidence was placed before the trial court showing that the High Court referred the dispute to a panel of elders chaired by the District Officer of Gatundu and the panel of elders heard the parties and rendered an award in favour of the appellants' father, the late Mbugua Gakau. There was evidence that the award was forwarded to the Deputy Registrar of the High Court for adoption. A copy of the adoption order was, however, not exhibited. The appellants' case was that the issue of ownership of the suit property had been adjudicated and determined by the High Court in the context of the above proceedings. There is, however, nothing in the impugned Judgment which suggests that the trial court gave any consideration to this aspect of the appellants' defence and evidence. This, in my view, was a grave error that amounted to a miscarriage of justice. The trial court was, in my view, obligated to consider and determine the question as to whether the



issue of ownership of the suit property had been adjudicated and determined in Nairobi HCCC No 1523 of 1977.

27. The foundation of an action for trespass to land is ownership of the land. The appellants contended that they had been on the land from 1964 when their late father purchased the land from the respondents' father. They contended that they were on the land by dint of being children of the late Mbugua Gakau who was the legitimate owner of the land. To determine whether or not they were trespassers on the land, the trial court was obligated to pronounce itself on the circumstances under which the appellants entered the land. The trial court was also obligated to pronounce itself on whether the respondents' father sold and gave the suit property to the appellants' father in 1964. Thirdly, the trial court was required to pronounce itself on the question as to whether the issue of ownership of the suit property had been adjudicated and settled by the High Court in Nairobi HCCC No 1523 of 1977. The trial court said nothing about the above issues but proceeded to adjudge the appellants as trespassers and issued an eviction order against them.
28. This was not the only error which the trial court made. While declining to pronounce itself on the issue of ownership, the trial court took the view that because the respondents held a certificate of confirmation of grant issued by a succession court, the said certificate was conclusive proof of ownership. That was an error. Under the *Constitution* of Kenya 2010, and under the *Environment and Land Court Act* and the *Magistrate Courts Act*, disputes relating to ownership of title to land are vested in the Environment and Land Court and in the Magistrate Courts that are presided over by Magistrates who have been duly appointed to exercise jurisdiction over environment and land disputes.
29. A succession court under the *Law of Succession Act* is only concerned with the distribution of the uncontested or undisputed land of the deceased. Where a land title held in the name of the deceased is contested by a third party, the succession court is not the forum for adjudication of the ownership dispute between the third party and the estate of the deceased. The proper fora for adjudication of the dispute are the courts legislated to determine issues relating to ownership of land. Indeed, both this Court and the High Court have umpteen times stated that whenever a dispute relating to ownership arises in relation to land title that is held in the name of a deceased person and is the subject matter of a succession cause relating to a the deceased, the contested title should be preserved and the third party claimant should be allowed the opportunity to ventilate his claim in the appropriate court. It is expected that the third party claimant would move the succession court for an appropriate preservative order pending determination of the ownership dispute by the appropriate land court. It is also expected that should the third party claimant be successful in the relevant land court, he would promptly move the succession court to exclude the adjudged title from the list of assets of the deceased.
30. For the above reasons, my finding on the single issue in this appeal is that the trial court erred in issuing eviction orders against the appellants without considering or pronouncing itself on the import of the proceedings in Nairobi HCCC No 1523 of 1977 and without determining the question of legitimate ownership of the suit property.
31. Given that the appellants' defence was neither considered nor determined, this appeal will succeed. The matter will be remitted back to the Chief Magistrate Court for disposal in accordance with the law.
32. Taking into account the fact that the suit property measures approximately 14.7 acres and is located in Gakoe, Gatundu, the Chief Magistrate Court will be at liberty to satisfy itself on the question of its jurisdiction to adjudicate the dispute. This court will refrain itself from making any definitive pronouncement on the question of jurisdiction for two reasons: because there is no evidence on record relating to the value of the suit property at the time the suit was filed in the trial court; and



a pronouncement on any aspect of the question of jurisdiction may prejudice the parties when they appear before the trial court.

33. On costs, it is clear that the error leading to this appeal was made by the trial court. In the circumstances, parties will bear their respective costs of this appeal.
34. In the end, this appeal is allowed in the following terms:
 - a. The Judgment rendered on 25/3/2021 in Thika CMC MCL & E Case No E65 of 2019 is hereby set aside wholly.
 - b. The suit shall be disposed afresh in accordance with the law.
 - c. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the Presence of: -

Ms Kimani holding brief for Ms Mwangi for the Appellants

Mr Mugo for the Respondents

Court Assistant: Hinga

