



**Gituku v Mithika & 2 others (Environment and Land Appeal
E118 of 2021) [2023] KEELC 18810 (KLR) (4 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 18810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E118 OF 2021**

BM EBOSO, J

JULY 4, 2023

BETWEEN

SERAH NJOKI GITUKU APPELLANT

AND

MOLLY KINANU MITHIKA 1ST RESPONDENT

LAND REGISTRAR - RUIRU 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

*(Being an Appeal arising from the Ruling of Hon J. A Agonda, Principal Magistrate,
delivered on 30/11/2021 in Ruiru SPMC E & L Misc Application No E005 of 2021)*

JUDGMENT

Background

1. This appeal challenges the ruling rendered by Hon J. A Agonda, Principal Magistrate, on 30/11/2021 in Ruiru SPMC E & L Miscellaneous Application No E005 of 2021. The miscellaneous application was filed by Stephen Kariuki Gituku and Serah Njoki Gituku. It is not clear why the duo elected to initiate the suit through a notice of motion filed as a miscellaneous application as opposed to filing a substantive suit by way of a plaint.
2. The original notice of motion was dated 10/6/2021. All that was sought in the motion were the following two verbatim orders:
 - a) That this honourable court be pleased to order the respondent to remove a restriction vide entry Ref 830/02, 831/02, 832/03 and 834/02 dated 14th February lodged on land parcels number Ruiru/Ruiru East Block 2/2132,



2/2133, 2/2134 and 2/2135 pending the hearing and determination of this application. [The underlining is by the court].

- b) Costs to be in the cause.
3. The miscellaneous application was canvassed through written submissions. On 6/9/2021, Hon J. A Agonda disposed the application through the following verbatim orders:
- a) A temporary injunction is hereby issued restraining the respondents either by themselves, their servants and/or their agents from alienating, transferring, accessing, entering and/or interfering with applicants' quiet possession of the suit property being title No. Ruiru/Ruiru East Block 2/2132, 2/2133, 2/2134 and 2/2135 or in any other manner endangering the applicants' occupation of the suit properties for 90 days pending hearing and determination of this suit.
 - b) The OCS Ruiru Police Station to provide the applicants security during enforcement of the orders herein.
 - c) Costs of this application shall be in the cause.
4. The formal order out of the ruling of 6/9/2021 was extracted and issued on 14/9/2021. Ten days later, the applicants in the original notice of motion filed another notice of motion dated 22/9/2021 within the same miscellaneous application, seeking an "order of rectification" of the order that was made on 6/9/2021 and issued on 14/9/2021. The application dated 22/9/2022 also sought leave to amend the already disposed notice of motion dated 10/6/2021 to reflect different land parcel numbers. The application dated 22/9/2021 was allowed on 5/10/2021 as prayed.
5. The two applicants in the already disposed notice of motion subsequently filed an amended notice of motion dated 12/10/2021 seeking the following verbatim orders:
- a) That this honourable court be pleased to order the respondent to remove a restriction vide entry Ref 830/02, 831/02, 832/03 and 834/02 dated 14th February lodged on land parcels number Ruiru/Ruiru East Block 2/21032, 2/21033, 2/21034 and 2/21035 pending the hearing and determination of this application.
 - b) Costs to be in the cause.
6. What followed was a notice of motion dated 13/10/2021 by Molly Kananu Mithika [the 1st respondent in this appeal] seeking: (i) an order vacating the orders that were made on 6/9/2021, issued on 14/9/2021, and amended on 5/10/2021; (ii) an order affirming the orders issued on 30/8/2021 by Hon V Kachuodho Senior Resident Magistrate in Thika Chief Magistrate Court Children Case No 218 of 2017; and (iii) an order affirming the orders issued by Hon O. Wanyaga, Senior Resident Magistrate, on 18/5/2021 in Thika Chief Magistrate Court Children Case No 218 of 2017.
7. Upon hearing the parties on the application dated 13/10/2021, Hon J. A Agonda rendered a ruling dated 30/11/2021 in which she found in favour of Molly Kinanu Mithika. She rendered herself thus:
- "In the foregoing premises, the upshot of this court's ruling is that the applicant's notice of motion application dated 13th October 2021 is merited and I proceed to make the following orders:



- 1) This court vacates its orders issued on 14th September, 2021 as amended on 5th October 2021 regarding temporary injunction to issue in favour of the respondents regarding suit land Ruiru/Ruiru East Block 2/21032, 2/21033, 2/21034 and 2/21035 for 90 days pending hearing and determination of main suit and OCS Ruiru to assist in the enforcement of the orders herein.
 - 2) The court affirms the orders issued on 30th August 2021 by Hon V. Kachuodho in Thika Children’s Case No 218 of 2017 that the execution on LR Ruiru/Ruiru East Block 2/21032 should proceed forthwith plus the costs of the proceedings.
 - 3) The court affirms the orders issued by Hon. O. Wanyaga on May 18, 2021 that the order of attachment of only one property of two properties identified as Ruiru/Ruiru East Block 2/21032 or 2/21033, unless the outstanding amount as at 18th May, 2021 and costs to NTSC assessed at 10,000 are paid within seven days of the date of ruling.
 - 4) The plaintiff’s suit is dismissed with costs for duplicity.
8. The above ruling rendered by Hon J. A Agonda is the subject of this appeal.
9. For clarity, the appellant, Serah Njoki Gituku, is one of the joint administrators of the estate of the late Leah Wanjiru Gituku. Her co-administrator is Stephen Kariuki Gituku who is the estranged husband of Molly Kananu Mithika. It is clear from the notice of motion which initiated Ruiru SPMC E & L Miscellaneous Application No E005 of 2021 that the duo jointly sued as the “personal representatives to the Estate of Leah Wanjiru Gituku (sic)” For reasons that only the duo know, Serah decided to bring this appeal as a sole appellant, yet the capacity in which they sued in Ruiru SPMC E & L Miscellaneous Application No E005 of 2021 was that of joint personal representatives. The court will render itself on this anomaly later in this judgment.

Appeal

10. The appellant itemized the following twelve verbatim grounds of appeal:
- 1) That the honourable learned magistrate erred in law and in fact by issuing orders on September 6, 2021 that were not prayed for by the appellant in the Notice of Motion dated June 10, 2021.
 - 2) That the honourable learned magistrate erred in law and in fact by determining that the appellant concealed material facts when orders were issued on September 6, 2021 material facts that were not known by the appellant at the time.
 - 3) That the honourable magistrate erred in law and in fact by making a determination on matters that were not placed before the court by the appellant.
 - 4) That the honourable learned magistrate erred in law and in fact by dismissing the appellant’s suit with costs for duplicity, while the cause of action and parties were separate and distinctively different.
 - 5) That the honourable learned magistrate erred in law and fact on November 30, 2021 by affirming the orders issued on August 30, 2021 by Hon. V.



Kachuodho and orders dated May 18, 2021, by Hon O. M Wanyaga, on matters that were not in the honourable court's jurisdiction.

- 6) That the honourable learned magistrate erred in law and fact on November 30, 2021 by affirming the orders issued on August 30, 2021 by Hon V. Kachuodho and orders dated May 18, 2021, by Hon O. M Wanyaga, as though the honourable court was sitting on appeal.
- 7) That the honourable learned magistrate erred in law and fact by making a determination that the appellant was a judgment debtor (JD) in Thika Children's Case number 218 of 2017, while the appellant was an objector with a good cause.
- 8) That the honourable learned magistrate erred in law and fact by making a determination that the appellant was in contempt of court orders issued on August 30, 2021 while facts indicate she was not the judgment debtor, but an objector.
- 9) That the learned trial magistrate misdirected herself in upholding without proof that the appellant was subject to the maintenance orders issued on May 18, 2021 in Thika Children's Case Number 218 of 2017.
- 10) That the honourable learned magistrate erred in law and fact by arriving to her decision to dismiss the appellant's application dated June 10, 2021 without making any determination on the validity or otherwise of the land cautions placed by the 1st respondent to Land Reference Ruiru/Ruiru East Block 2/21032, Ruiru/Ruiru East Block 2/21033, Ruiru/Ruiru East Block 2/21034 and Ruiru/Ruiru East Block 2/21035
- 11) That the honourable learned magistrate erred in law and fact by arriving at her ruling and issuing orders on the November 30, 2021 without reference to the appellant's pleadings or submissions which were on record.
- 12) That the honourable learned magistrate erred in law and fact by wrongly determining that personal representatives in the estate were acting in their private capacity, and that the appellant was also a judgment debtor in Thika Children's Case Number 218 of 2017.

Appellant's Submissions

11. The appeal was canvassed through written submissions dated 29/11/2022, filed by M/s C. A Wandera & Co Advocates. Counsel itemized the following as the two issues that fell for determination out of the twelve grounds that were itemized in the memorandum of appeal: (i) Whether there was material non-disclosure by the appellant before the learned honourable magistrate; and (ii) Whether the honourable court erred in upholding the appellant's rights and privileges as proprietor of land parcel numbers Ruiru/Ruiru East Block 2/21032; Ruiru/Ruiru East Block 2/21034; and Ruiru/Ruiru East Block 2/21035;
12. On whether there was material non-disclosure by the appellant before the learned honourable magistrate, counsel submitted that the appellant was not a party in Thika Children Case No. 218 of 2017 at the time she made her application dated 10/6/2021. Counsel further submitted that the appellant was not a judgment debtor in any suit before or after making her application on 10/6/2021 nor was there any dispute relating to her rights as a registered proprietor of the suit properties.



13. Counsel argued that the dispute between the 1st respondent and her husband had nothing to do with the estate of Leah Wanjiru Gituku (deceased), adding that the Children Case was between the 1st respondent and her husband in his personal capacity as father of their children. Counsel relied on section 120 of the Evidence Act and section 24 of the Land Registration Act.
14. On whether the honourable court erred in not upholding the appellant's rights and privileges as proprietor of land parcel numbers Ruiru/Ruiru East Block 2/21032; Ruiru/Ruiru East Block 2/21033; Ruiru/Ruiru East Block 2/21034; and Ruiru/Ruiru East Block 2/21035; counsel submitted that a restriction should not remain in place indefinitely. Counsel argued that a restriction should only hold a property in abeyance as the underlying issue leading to the restriction is being resolved and that in the instant case, the cautions were not placed to hold the estate's property in abeyance, as there was no underlying issue that was being resolved. Counsel relied on section 76 of the Land Registration Act and the decision in the case of David Macharia Kinyuru v District Land Registrar, Naivasha & another (2017)eKLR.
15. Counsel further submitted that what was before the trial court for determination was purely a matter of law and considerations of facts, disclosures or other suits between strangers were irrelevant. Counsel urged the court to allow the appeal as prayed.

1st Respondent's Submissions

16. The 1st respondent filed written submissions dated 20/3/2023 through M/s Njihia & Associates. Counsel for the 1st respondent identified the following as the three issues that fell for determination in the appeal: (i) Is the appellant or Stephen Kariuki Gituku the rightful and legal owner of land parcel numbers Ruiru/ Ruiru East Block 2/21032; 2/21033; 2/21034; and 2/21035; (ii) Should the ruling of Hon J. A Agonda delivered on the November 30, 2021 be sustained; and (iii) Who should bear the costs of this appeal.
17. On the question of the rightful and legal owner of the suit properties, counsel submitted that Stephen Kariuki Gituku was the sole legal and rightful owner of the properties. Counsel added that once the Certificate of Confirmation of Grant in Nairobi High Court Succession Cause No. 2342 of 2010, In the matter of Estate of Leah Wanjiru Gituku (deceased) was issued on 3/10/2014, distribution of the estate of the deceased was finalized and the suit properties vested in the name of Stephen Kariuki Gituku.
18. Counsel contended that the Certificate of Confirmation of Grant was clear on the mode of distribution and on the property each beneficiary was to get and that the orders in the said Certificate ought to have been adhered to and subdivisions out of land parcel no. Ruiru/Ruiru East Block 2/5200 should have been registered solely in the name of Stephen Kariuki Gituku.
19. Counsel argued that upon distribution of the estate, subdivision parcel numbers Ruiru/Ruiru East Block 2/21032, 2/21033, 2/21034, 2/21035, 2/21036, 2/21037, 2/21038, 2/21039, 2/21040, 2/21041, 2/21042, 2/21043 and 2/21044 became the properties of Stephen Kariuki Gituku as evidenced in the Certificate of Confirmation of grant and their title deeds ought to read bear his sole name. Counsel contended that it was only through illegal, fraudulent, dubious and unprocedural means that the appellant's name appeared in the title deeds relating to the suit properties.
20. Counsel buttressed her argument by referring to section 83 (g) of the Law of Succession Act, sections 28 (1) (a & b) and 61 of the Land Registration Act and the decisions in the cases of In Re Estate of Kiberenge Mukwa (deceased) [2021] eKLR, and Nakuru Matrimonial Cause No. 24 of 2016.



21. On the issue of whether the ruling of Hon. J.A Agonda delivered on 30/11/2021 should be sustained, counsel submitted that having established that the suit properties solely belonged to Stephen Kariuki Gituku, the order of J. A Agonda ought to be upheld.
22. Counsel argued that the appeal should be dismissed with punitive costs since the appellant merely filed the appeal to further frustrate the 1st Respondent's claim to the suit properties while being aware she had no vested interest therein.

Analysis and Determination

23. I have read and considered the entire record of the subordinate court; the record filed in this appeal; and the parties' respective submissions in this appeal. I have also considered the relevant legal framework and jurisprudence. The key question to be determined in this appeal is whether a proper basis has been disclosed in the grounds of appeal and in this appeal generally to warrant the setting aside of the impugned orders of the subordinate court. Before I dispose the issue, I will outline the principle that guides this court when exercising jurisdiction as an appellate court. I will also make a comment on the appellant's decision to mount this appeal as a single appellant
24. 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 Keshar 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.”
25. 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.”
26. The appellant together with Stephen Kariuki Gituku lodged the miscellaneous application in the subordinate court as joint personal representatives of the late Leah Wanjiru Gituku. They jointly procured orders that had not been prayed for. The first ground of appeal is that in its ruling of 6/9/2021, the subordinate court issued orders that were not prayed for in the notice of motion dated 10/6/2021. When those orders were subsequently set aside, the appellant alone decided to lodge this appeal. Order 31 rule 2 of the *Civil Procedure Rules* required the appellant to bring this appeal jointly with her co-administrator of the estate of Leah Wanjiru Gituku. The only instance when joint administrators are excused from initiating a cause jointly is when one of them is outside the country.
27. The court has not been told why Stephen Kariuki Gituku was left out of this appeal. The issue of non-joinder was, however, not raised by the respondents and was not canvassed in this appeal. Solely for that reason, the court will not rest this appeal on the question of non-joinder of Stephen Kariuki Gituku.
28. Is there a proper basis disclosed to warrant the setting aside of the impugned orders? The appellant faulted the subordinate court on various grounds. Exercising jurisdiction as a first appellate court that is vested with both appellate and supervising jurisdiction over the subordinate court, and having read



the original record of the subordinate court, I come to the conclusion that the subordinate court had no suit before it on which to issue the successive sets of orders that it issued. Why do I say so?

29. The notice of motion dated 10/6/2021 which was the instrument through which the miscellaneous application was initiated and which was the platform on which the subordinate court issued the first set of orders sought the following verbatim prayers:
- a) That this honourable court be pleased to order the respondent to remove a restriction vide entry Ref 830/02, 831/02, 832/03 and 834/02 dated 14th February lodged on land parcels number Ruiru/Ruiru East Block 2/2132, 2/2133, 2/2134 and 2/2135 pending the hearing and determination of this application. [The underlining is by this court].
 - b) Costs to be in the cause.
30. From the above wording of the notice of motion, it is clear that there was no substantive prayer in the miscellaneous application. The miscellaneous application was therefore incompetent and incapable of attracting any form of relief. In the absence of substantive prayers in the motion, the subordinate court had no basis for entertaining the miscellaneous application.
31. What did the trial court do in the circumstances? In disposing the miscellaneous application which only sought the above relief, the subordinate court *suo motto* granted the following injunctive reliefs through its ruling rendered on 6/9/2021:
- a) A temporary injunction is hereby issued restraining the respondents either by themselves, their servants and/or their agents from alienating, transferring, accessing, entering and/or interfering with applicants' quiet possession of the suit property being title No. Ruiru/Ruiru East Block 2/2132, 2/2133, 2/2134 and 2/2135 or in any other manner endangering the applicants' occupation of the suit properties for 90 days pending hearing and determination of this suit.
 - b) The OCS Ruiru Police Station to provide the applicants security during enforcement of the orders herein.
 - c) Costs of this application shall be in the cause.
32. The injunctive orders which the subordinate court issued were never sought in the notice of motion dated 10/6/2021. Indeed, the appellant raised this as the first ground of appeal.
33. Secondly, it does emerge from the record of the subordinate court that it was not alive to the fact that upon disposal of the notice of motion dated 10/6/2021 through the ruling dated 6/9/2021, there was no suit pending before it. Oblivious of this, the subordinate court proceeded to give the case a mention date, yet it had disposed the miscellaneous application through its ruling dated 6/9/2021.
34. The subsequent ruling of 30/11/2021 which triggered this appeal was a culmination of the notice of motion dated 13/10/2021 which had been triggered by the irregular orders that had been granted by the subordinate court on 6/9/2021 and subsequently amended. The said orders were issued on the platform of a miscellaneous application that was totally incompetent. In my view the orders giving rise to the application which culminated in the impugned ruling were clearly irregular for two reasons: (i) there was no competent suit before the subordinate court; and (ii) the order had not been prayed for in the notice of motion dated 10/6/2021.



35. It does also emerge from the ruling dated 30/11/2021 that the subordinate court continued to commit more errors. It disposed the issue of non-disclosure as if the orders giving rise to the review application dated 13/10/2021 had been procured ex-parte. Whereas I have no doubt that the orders dated 6/9/2021 stood to be discharged for being irregular, I do not think non-disclosure was the proper reason for discharging them. I say so because Molly Kinanu Mithika participated in the proceedings leading to the ruling of 6/9/2021 and had the opportunity to place before the court all the evidence that she subsequently presented through the notice of motion dated 13/10/2021.
36. Further, the trial court failed to appreciate that the platform on which to enforce the orders that were issued in Thika CMC Children Case No 218 of 2011 was the suit where those orders were issued. Ruiru SPMC E & L Miscellaneous Application No E005 of 2021 was not available as a platform for enforcing those orders. Molly Kinanu Mithika did not have a counterclaim in Ruiru SPMC E & L Miscellaneous Application No E005 of 2021. There was no suit on which the orders granted to Ms Mithika were anchored.
37. In light of the foregoing, the proper disposal order to issue in this appeal is an order vacating all the irregular orders issued in the subordinate court and striking out the incompetent suit. This is informed by the fact that the suit in the subordinate court is incompetent. Secondly, the appellant together with her co-administrator had and still have the opportunity to ventilate their grievances on the platform of a substantive suit initiated by way of a plaint. They chose to initiate a miscellaneous application through a notice of motion that did not have a substantive prayer. Their decision led to the irregular orders that have been outlined in this Judgment. Indeed, the emerging practice where litigants initiate hotly contested claims through miscellaneous applications by way of notices of motion is one that should be discouraged.
38. For the above reasons, this appeal will be disposed in tandem with prayer 4 of the memorandum of appeal in which the appellant prayed for “any other alternative relief that this court may deem fit to grant”. The appropriate disposal order is to strike out the incompetent miscellaneous application and discharge all the orders that were issued in the said incompetent miscellaneous application. Because it is the subordinate court that failed to flag out the fatal anomaly and proceeded to successively issue irregular orders, parties will bear their respective costs of this appeal and costs of the miscellaneous application in the subordinate court.
39. In the end, this appeal is allowed and disposed in the following terms:
- a) All the orders issued in Ruiru SPMC E & L Miscellaneous Application No E005 of 2021 are discharged and the said miscellaneous application is struck out for being incompetent in that the notice of motion initiating it did not have a substantive prayer and that the orders issued on 6/9/2021 were not prayed for.
 - b) Parties shall, similarly, bear their respective costs in the said miscellaneous application.
 - c) Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF JULY 2023

B M EBOSO

JUDGE

In the Presence of: -

Ms Wanjiru Njihia for the 1st Respondents



Court Assistant: Hinga/Osodo

