



**Ngung'u & another v Gathii (Environment and Land Appeal  
11 of 2022) [2023] KEELC 20574 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20574 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA  
ENVIRONMENT AND LAND APPEAL 11 OF 2022  
JM MUTUNGI, J  
OCTOBER 12, 2023**

**BETWEEN**

**JOSEPH NYAGA NGUNG'U ..... 1<sup>ST</sup> APPELLANT**

**MUGO NGUNG'U ..... 2<sup>ND</sup> APPELLANT**

**AND**

**FRANCIS NGUNGI GATHII ..... RESPONDENT**

*(Arising from an Appeal against the Judgment of the Hon. Chief Magistrate  
A. K. Ithuku in Kerugoya CMCC No. 76 of 2016 delivered on 5th May 2022)*

**JUDGMENT**

1. The Appellants who were the Defendants in the suit before the Subordinate Court have brought the present appeal against the Judgment delivered by the Hon. A. K. Ithuku, Chief Magistrate in Kerugoya CMCC No 76 of 2016 on 5<sup>th</sup> May 2022.
2. Before the Subordinate Court the Respondent who was the Plaintiff claimed ownership of Land Parcel Number Baragwe/Guama/ 798 which he had caused to be subdivided to create land parcel Number Baragwe/Guama/ 3632,3633 and 3634. It was the Respondent's case that the Appellants had illegally, unlawfully and without his consent trespassed on to his said parcels of land where they erected some semi permanent structures and were cultivating thereon. The Respondent sought orders for forcible eviction of the Appellants from the parcels of land; a permanent injunction jointly and severally against the Appellants and costs of the suit.
3. The Appellants filed a joint statement of defence in person dated 20<sup>th</sup> April 2016, which was a general denial of the Respondent's averments contained in the Plaint. The Appellants appointed M/ s A.P. Kariithi & Co. Advocates to represent them who filed an Amended Statement of defence and Counterclaim dated 5<sup>th</sup> July 2016. The Respondent objected to the filing of the Amended Defence



and Counterclaim without leave since the initial defence was still on record. The Appellants filed an application dated 2/8/2016 seeking leave to file an Amended Defence and Counterclaim and the application was allowed by consent on 30/5/2017 following a consent made by the parties in writing. The Appellants were granted leave to file and serve fresh statement of defence and Counterclaim within 14 days. The Appellants as per the record never complied with the directions given by the Court on 30/5/2017 and hence the Appellants had no defence and Counterclaim on record when the suit was heard before the Subordinate Court.

4. The Respondent testified before the Lower Court as the sole witness in support of the Respondent's case. He relied on his witness statement and the documents filed together with the Plaintiff. He explained that he had purchased the land from one Anastacia Ileri and that the land was transferred to him in 1979 when he got a title. He stated the land was three (3) Acres and that he later subdivided the land into three (3) portions being Baragwe/Guama/ 632, 3633 and 3634. . He stated the Appellants entered into his land and had put up semi permanent structures thereon. He sought to have the Appellants evicted.
5. The Learned Trial Magistrate following the testimony of the Respondent and closure of the Respondent's case ruled the Appellants had not filed their defence and Counterclaim which they had pursuant to the consent dated 18<sup>th</sup> April, 2017 adopted by the Court on 30/5/2017 not filed their defence and Counterclaim and hence the suit was undefended.
6. On the evidence of the Respondent, the Learned Trial Magistrate held the Respondent was the absolute registered owner of land parcel Baragwe/Guama/ 798 which he had subdivided into three (3) portions Baragwe/Guama/[particulars withheld], [particulars withheld] and [particulars withheld]. The Respondent exhibited copies of title deeds and copies of abstracts of title (Green cards) which showed he was indeed the registered proprietor. The Learned Trial Magistrate held that as the registered absolute owner the Respondent was entitled to quiet and vacant possession of his land. The Learned Trial Magistrate accordingly entered Judgment in favour of the Respondent and ordered the Appellants to be evicted.
7. The Appellants aggrieved by the Judgment have preferred the present Appeal and have set out the following grounds of Appeal as per the Memorandum of Appeal dated 13<sup>th</sup> May 2022.
  - 1) The Learned Chief Magistrate erred both in law and facts when he refused to consider 1<sup>st</sup> and 2<sup>nd</sup> Applicant statements of defence dated 20<sup>th</sup> April, 2016 which they had filed in person before engaging the Firm of M/s Kariithi and Company Advocates despite him disregarding the statement of defence dated 5<sup>th</sup> July 2016.
  - 2) The Learned Chief Magistrate erred both in law and facts when he refused to consider the evidence adduced in Court.
  - 3) The Learned Chief Magistrate erred both in law and facts when he failed/refused to consider that the Plaintiffs/Respondents case was res-judicata in the first instance.
  - 4) That the Appellants craver leave to add to omit, subtract or amend any of the grounds listed herein.
8. The Appellants prayed that the Appeal be allowed and the Judgment of the Learned Chief Magistrate be set aside. It is evident from the grounds of Appeal that the Appellants are in effect challenging the conduct of the trial, in the sense that they aver they were denied the opportunity of presenting evidence in support of their defence. It is noteworthy that the Appellants before the Lower Court entered appearance in person on 7<sup>th</sup> April 2016 and filed a joint defence on 20<sup>th</sup> April 2016. The



Appellants appointed the Law Firm of A. P. Kariithi & Co. Advocates to act for them and the Law Firm filed a Notice of Appointment of Advocate dated 5<sup>th</sup> July 2016 on the 11<sup>th</sup> July 2016. The Law Firm simultaneously with filing the Notice of Appointment of Advocate filed an Amended Statement of Defence and Counterclaim. The Respondent objected to the filing of the Amended defence and Counterclaim without leave and when there was the joint defence of the Appellants on record. That objection undoubtedly prompted the Appellants Advocate to file the application dated 2/8/2016 which was allowed by consent and the Appellants granted leave to file and serve fresh statement of defence and Counterclaim within 14 days of filing of the consent.

9. The parties canvassed the Appeal by way of written submissions. The Appellant on 9<sup>th</sup> May 2023 filed what he described as “Plaintiff written submissions”. However, a perusal of the document shows the document to be what would otherwise have been evidence at the trial and not submissions. The purported submissions annexed a copy of decree in Nairobi HC Misc No 16 of 1977 (Ndungu Munyi v Njeru Ndungu) and a decree and order in Nyeri SRMCC No 107 of 1981 (Francis Ngungi Gathii v Ndungu Munyi & 2 others) which would constitute evidence that was not adduced before the Lower Court. There was no leave sought by the Appellant to adduce additional evidence during the Appeal and the Court cannot consider such material at the hearing of an Appeal.
10. This Court sitting as the Appellate Court of first instance is obligated and indeed under a duty to reconsider and re evaluate the evidence placed before the Subordinate Court to determine whether the decision arrived at by the Trial Court was justified. See the Case of *Selle & another v Associated Motor Boad Co. Ltd & others* (1968) E.A 123.
11. The instant Appeal in my view turns on whether the Learned Trial Magistrate acted in accordance with the Law when he declined to allow the Appellants to lead evidence on the basis that the Appellants had no defence on record. The Learned Trial Magistrate on 12<sup>th</sup> October 2021 after the Counsel for the Respondent had objected to the Appellants being allowed to give evidence as they had failed to file a defence as per the consent order made by the Court on 5/6/2017 gave directions as follows:-

“I have duly noted the orders given on 5/6/2017 where a consent was recorded expunging a defence. The Defendant was to file and serve a defence and Counterclaim in 14 days. That has not happened todate. This means that the claim is not defended. The Plaintiff closed their case. The matter should then go for submissions. The Defendant participated by cross examination having entered appearance.”
12. The directions were given in the presence of Counsel for the parties. The Appellants did not challenge the directions on Appeal. The record reveals that the Appellants through their Advocates then on record on 2/8/2016 made an application where they sought leave to withdraw the defence filed by the Defendants in person and to be granted leave to file a fresh statement of defence and Counterclaim. That was the application that was allowed by consent and the Defendant granted leave to file and serve fresh statement of defence and Counterclaim within 14 days from the date of filing the consent. The effect of the consent order was that the defence on record stood expunged and that a fresh defence and Counterclaim was to be filed within 14 days. The Appellants did not file the defence and Counterclaim as per the terms of the consent with the result that after the expiry of 14 days from the date of recording the consent, the Appellants had no defence on record. On the basis of the record the Learned Trial Magistrate cannot be faulted for not allowing the Appellants to lead evidence at the trial. They had no defence on record.
13. The Appellants raised a ground in the Memorandum of Appeal that the suit before the Chief Magistrate’s Court was res judicata. The burden to establish the suit was res judicata rested with the



Appellants. The issue of res judicata was as observed by the Trial Magistrate obliquely raised. The Magistrate stated thus:-

“Oblique reference were made to suits pending or finalised before the High Court Nairobi.

This Court was not shown any evidence to support the claims---”

14. Before this Court the Appellant who appeared in person once more made reference to Miscellaneous Civil Suit No 16 of 1977(Nairobi) and attached a decree and further referred to Nyeri RM CC No 107 of 1981 and attached a decree and an order in the case given in 1989 and 1992 respectively. While in the Nairobi case, both the Appellant and Respondent do not appear to have been parties, the Appellant was equally not a party in the Nyeri Suit; on the basis of the material availed it is not possible to determine whether the doctrine of res judicata was applicable and the trial Magistrate was justified to hold that there was no material or evidence upon which he could find the suit before him was res judicata.
15. On the whole and upon a re evaluation of the matter, I find no basis upon which I can interfere with the Learned Trial Magistrate’s Judgment. On the evidence adduced before him, the Judgment he entered against the Appellant was justifiable.
16. The Appeal lacks any merit and the same is ordered dismissed with costs to the Respondent.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**J. M. MUTUNGI**

**ELC JUDGE**

