



**Njenga & 3 others v Kagia & another (Environment and Land Appeal
23 of 2022) [2023] KEELC 20704 (KLR) (11 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 20704 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 23 OF 2022**

BM EBOSO, J

OCTOBER 11, 2023

BETWEEN

MARY WAMBUI NJENGA 1ST APPELLANT

JOHN CHEGE NJENGA 2ND APPELLANT

MONICA NJERI WANJIKU 3RD APPELLANT

FAITH WANJIKU NJOKI 4TH APPELLANT

AND

JOSEPH NJUGUNA KAGIA 1ST RESPONDENT

VIRGINIA NJOKI NJUGUNA 2ND RESPONDENT

*(Being an Appeal against the Ruling of Hon J. A Agonda, Principal Magistrate, delivered on
28/2/2022 in Ruiru Senior Principal Magistrate Court Miscellaneous E & L Case No. E7 of 2021)*

JUDGMENT

Background

1. This appeal challenges the ruling of Hon. J. A Agonda, Principal Magistrate, rendered on 28/2/2022 in Ruiru SPMC Misc E & L Case No E7 of 2021. The miscellaneous application was filed by Joseph Njuguna Kagia and Virginia Njoki Njuguna [the 1st and 2nd respondents in this appeal]. The only respondent in the miscellaneous application was Mary Wambui Njenga [the 1st appellant in this appeal]. The key prayer sought in the miscellaneous application was an order authorizing the eviction of the 1st appellant from land parcel number Ruiru /Kiu Block2/T.336.
2. The Principal Magistrate [Hon Agonda] considered the application in chambers and directed that the application be served; an affidavit of service be filed electronically; and a mention be scheduled for



22/7/2021. One Amos Chege Kanoga subsequently swore and filed an affidavit of service in which he deposed that he had served the 1st appellant with the application alongside a mention notice.

3. The 1st appellant was not in court when the miscellaneous application came up for mention on 22/7/2021. The Principal Magistrate directed the two respondents in this appeal to file written submissions within 7 days and the miscellaneous application was scheduled for mention on 9/8/2021 to fix a date for ruling. Ruling was subsequently rendered on 16/9/2021 in open court in the absence of all the parties. The Principal Magistrate allowed the application dated 2/7/2021 in the following verbatim terms:

“I order the respondent to be evicted from the land parcel Ruiru Kiu Block 2/T.336. The applicant is at liberty to instruct auctioneers to evict the respondent. I further order the OCS, Ruiru, to provide security during the eviction exercise. The applicants shall also have the costs of this application. Orders accordingly.”

4. The four appellants subsequently filed a notice motion dated 3/1/2022 within the miscellaneous application, seeking, among other reliefs, an order joining John Chege Njenga, Monica Njeri Wanjiku and Faith Wanjiru Njoki as interested parties in the miscellaneous application; an injunction restraining the respondents against subdividing, selling, transferring, leasing, charging, alienating or dealing with land title number Ruiru Kiu block 2/T.336 (also known as Ruiru/Ruiru East Block 2/T.336 pending the determination of the application; an order reinstating them into the portion of Ruiru Kiu Block 2/T.336 which they had occupied prior to their eviction; an order setting aside the eviction order; an order requiring the respondents to rebuild their houses.

5. The Principal Magistrate considered the above application and disposed it through a ruling rendered on 28/2/2022 in which she found the notice of motion dated 3/1/2022 unmerited and struck it out “with orders as to costs”. The learned magistrate rendered herself thus:

“I am alive to the provisions of Article 159(2)(d) of *the Constitution* which provides that justice shall be administered without undue regard to technicalities. My view is that the commencement of suit in a manner in which the instituting documents cannot be held to be “pleadings” goes beyond a mere technicality. The purpose of having rules of procedure is to have proceedings controlled in a logical sequence so that justice can be done to all parties. It is incumbent upon parties and counsels to follow the procedures laid out. This of course does not imply that a court has no discretion to permit some sort of deviation especially where the deviation is minimal and no prejudice is caused to the other party.

If I am to allow the current “pleadings” to stand, I do not see how this matter will be determined without prejudice being caused to the respondent. Even if no prejudice will be caused to the respondent I would rather strike out this application at this stage, which will only invite minimal costs, rather than to allow the proceedings to stand, and thereafter be at a loss on how to thereafter proceed with the matter. The former action will benefit all parties and is certainly the lesser of the two evils.

For the reasons stated hereinabove, my view is that there is no suit before court capable of being determined on merits. I have little option having come to the conclusion that the notice of motion application dated 3rd January, 2022 is not merited. The same is hereby struck out with orders as to costs. Orders accordingly.”



Appeal

6. Aggrieved by the ruling of the Principal Magistrate, the appellants brought this appeal, advancing the following verbatim grounds:
 1. That the learned Magistrate erred in law and in fact by totally ignoring the 2nd, 3rd and 4th Appellants application to be joined as interested parties in the miscellaneous application and making no finding on their prayer for joinder.
 2. That the learned magistrate erred in law and in fact in failing to find that the Appellants were neither served with the eviction notices nor the eviction application and therefore their eviction from the suit property was tainted with illegality.
 3. That the learned magistrate erred in law and in fact by blaming the appellants instead of the respondent for commencing their action by way of a miscellaneous application instead of a plaint.
 4. That the learned magistrate erred in law and in fact by failing to find that the respondent's miscellaneous application was res judicata.
 5. That the learned magistrate erred in law and fact in purporting to have considered the affidavits filed by the applicant while no reference was made to the 2nd, 3rd and 4th appellants' supporting affidavit.
 6. That the learned magistrate erred in law and fact in mixing succession law issues of intermeddling with estates of deceased persons and land law issues of ownership and arrived at the wrong determination.
 7. That the learned magistrate erred by finding that she could not set aside or review the ex parte orders issued by her court in the absence of the appellants.
 8. That the learned magistrate erred in law and fact by failing to find that the respondents' amended application was filed out of time, had fundamental flaws and was incurably defective.
7. The appellant sought the following verbatim reliefs:
 - a. The ruling delivered on 28th February 2022 and all consequential orders arising therefrom be set aside.
 - b. A declaration that the eviction of the appellants from the suit property was illegal, null and void.
 - c. An order reinstating the appellants back to the portion of land they occupied prior to their eviction.
 - d. The appellants be allowed costs of this appeal and costs in the Magistrates court.

Appellant's Submissions

8. The appeal was canvassed through written submissions dated 31/3/2023, filed by M/s Njeru Gitonga & Co Advocates. Counsel for the appellants identified the following as the four thematic issues that arose from the eight grounds of appeal: (i) the magistrate court's failure to make a finding on crucial prayers in the application; (ii) the effect of commencing acting by way of a miscellaneous application; (iii) the question of res judicata in relation to the respondent's miscellaneous application



dated 2/7/2021; and (iv) the effect of pronouncements on the issue of intermeddling in the estate of a deceased person.

9. On whether the honourable court failed to make a finding on crucial prayers in the application, counsel submitted that prayer No. 2 of the application dated 3/1/2022 sought an order for joinder of John Chege Njenga, Monica Njeri Wanjiku and Faith Wanjiru Njoki. Counsel contended that despite the prayer being the first relief in the application, the learned magistrate did not make any finding on that prayer. Counsel further submitted that the affidavit of service filed by the respondents made reference to service of the application upon Mary Wambui Njenga in Ruiru Town where she allegedly resided but did not make any reference to the 2nd to 4th appellants. Counsel argued that this was the clearest proof that the 2nd to 4th respondents were never served with the application for eviction orders. Counsel further submitted that the 1st appellant deposed in her affidavit that she never resided in Ruiru Town as alleged in the affidavit of service.
10. Secondly, counsel submitted that the appellants' application dated 3/1/2022 was supported by two independent supporting affidavits; one sworn by the 1st appellant and the other by the 2nd appellant but the ruling by the Magistrate Court seemed to suggest otherwise at page 96 where the Learned Magistrate stated as follows:

“I have considered the applicant’s application together with the affidavit and submissions made thereof.”

11. Counsel argued that the use of the word ‘affidavit’ in its singular form was a clear indication that the honourable magistrate disregarded the affidavit sworn by the 2nd appellant and arrived at the wrong conclusion. Counsel contended that the appellants were evicted from the place they had called home for 20 years without the opportunity of being heard in contravention of the rules of natural justice. Counsel relied on the decision in *JMK V MWM & Another* [2015] eKLR to buttress this argument.
12. On whether it was proper for the respondents to commence the suit by way of a miscellaneous application, counsel submitted that the appellants protested the procedure used by the respondents to commence the eviction proceedings. Counsel further submitted that the learned magistrate shifted the blame of commencing the suit by way of a miscellaneous application to the appellants in the impugned ruling when she stated as follows:

“Does the applicants suit herein fall under such suits which can be originated by way of a miscellaneous application as described above? I do not think so.”

13. Counsel further submitted that given that the suit had already been commenced (albeit by way of a miscellaneous application), the appellants could not have filed a fresh suit to seek a reversal of the orders. Counsel contended that the only practical way was to go back to the same court that had issued the exparte orders and apply to set aside the said orders.
14. On whether the respondents' miscellaneous application was res judicata, counsel relied on Section 7 of the *Civil Procedure Act*. Counsel submitted that in the supporting affidavit dated 3/1/2022, the 1st appellant annexed a copy of the application and the order issued on 13/5/2008 in Thika Chief Magistrate Court D.O Case Number 78 of 2006. Counsel further submitted that the 1st appellant and the 1st respondent were the parties in the said case and that the dispute revolved around the question of ownership of Ruiru/ Ruiru East /Kiu Block 2/T.336 which was the description of the suit property by the 1st respondent in the year 2006. Counsel contended that an eviction order had already been granted on 13/5/2008 in Thika Chief Magistrate Court D.O Case Number 78 of 2006, hence filing a fresh suit was a violation of Section 7 of the *Civil Procedure Act*.



15. On whether the honourable court misdirected itself when making its finding, counsel submitted that the Learned Magistrate went off target as soon as she started determining the dispute. Counsel quoted a paragraph in the impugned ruling which reads as follows:

“The essence of a temporary injunction is to forbid the inter-meddlers from interfering or disposing off the estate of the deceased because the purported administrators are apprehensive that such interference may obliterate their interest in the land in the land.”

16. Counsel submitted that the dispute before the trial court had nothing to do with the administration of the estate of a deceased person and that all the appellants and respondents were alive and that no party submitted on intermeddling or administration of the estate of a deceased person. Counsel further contended that the honourable court was not determining the dispute presented before it for adjudication by the parties but was rather determining a succession law dispute that the parties in the matter were not privy to.

Respondents’ Submissions

17. The respondents filed written submissions dated 4/5/2023 through M/s Wambugu Njogo Advocates LLP. Counsel for the respondents identified the issues in terms of the grounds itemized in the memorandum of appeal.
18. On the issue of the trial court’s failure to make a finding on the prayer for joinder and failure to make reference to the 2nd, 3rd and 4th appellants’ affidavits, counsel submitted that the Learned Magistrate considered all that she ought to have considered and made a proper determination. Counsel submitted that the appellants’ argument that one of their supporting affidavits was not considered because of the fact that the word affidavit appears in singular form is very simplistic. Counsel argued that the use of the word “affidavit” in singular form might as well have been as a result of a typographical error.
19. On ground number 2 relating to the allegation that the court failed to find that the appellants were not served with the application and eviction notices, counsel submitted that the eviction notice and the application dated 2/7/2021 were all served on the 1st appellant and affidavits of service were sworn and filed in all the instances. Counsel argued that the appellants never requested to challenge or impeach the affidavits of service on record. Counsel contended that the only known occupant of the respondents’ property was the 1st appellant and that the 2nd, 3rd and 4th appellants were not known to the respondents and that the three appellants were only included in the application to convolute the issues before the trial court after the 1st appellant realized the consequences of ignoring the eviction notice and court summons.
20. On the issue of whether it was proper to commence the suit by way of a miscellaneous application, counsel submitted that the respondents were not calling the court to determine any substantive issues as to ownership and/or registration of the suit property and therefore the respondents did not have to commence the suit by way of a substantive suit. Counsel further contended that it was the appellant who ought to have filed a substantive suit since they were introducing issues of registration and ownership of the suit property by bringing up a different title number not known to the respondents. Counsel further argued that the Environment and Land Court at Nakuru allowed a similar application in form of a miscellaneous application for eviction of illegal occupiers of private land. Counsel relied on the case of Margaret Karwirwa Mwangera V Francis Kofi [2019] eKLR to buttress this argument.
21. On whether the respondents’ application was res judicata, counsel relied on Section 7 of the *Civil Procedure Act*, 2010 and the Black’s Law Dictionary. Counsel submitted that the respondents had never applied nor sought any orders in relation to the property described as parcel number Ruiru/Ruiru East



Block 2 (Githunguri)T336. Counsel further submitted that there had never been any litigation nor judgment between the parties relating to land parcel number Ruiru/Ruiru East Block 2/T.336 other than the miscellaneous application to which this appeal relates. Counsel contended that the Learned Magistrate addressed herself to the issue of res judicata raised by the appellants and in her ruling found that there was no evidence of a former suit between the parties.

22. On the contention that the Learned Magistrate mixed matters of succession in the impugned ruling, counsel submitted that it was an isolated error emanating from the typing or printing of the ruling and it amounted to a mere clerical error that had no bearing on the ruling of the court. Counsel further argued that the appellants had not pointed out how the pronouncement on intermeddling influenced the final determination of the court.
23. On whether the Learned Magistrate erred in finding that she could not set aside or review the exparte orders, counsel submitted that the trial court dismissed the entire application upon determining that the issues raised therein could not be determined by way of a miscellaneous application and the same ought to have been raised by way of commencement of a suit in order to determine all the substantive issues raised by the appellants.
24. On the allegation that the trial court erroneously failed to find that the respondents' amended application was filed out of time, counsel submitted that ground number 8 of the memorandum of appeal was abandoned by the appellants.

Analysis and Determination

25. I have perused and considered the original record of the Senior Principal Magistrate Court alongside the record filed in this appeal. I have also read and considered the relevant legal frameworks and the prevailing jurisprudence on the key issues that fall for determination in this appeal. The appellants itemized eight (8) grounds of appeal. In their subsequent written submissions, they condensed the eight grounds of appeal into the following four thematic issues upon which they faulted the Principal Magistrate Court, namely; (i) failure to make a finding on curial prayers in the application; (ii) the question as to whether the reliefs sought in the notice of motion dated 2/7/2021 were available on the platform of a miscellaneous application; (iii) the question as to whether the miscellaneous application dated 2/7/2021 was res judicata; and (iv) the question as to whether the trial court's pronouncements on the issue of intermeddling with a deceased's estate was a fatal misdirection. Before I dispose the four issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
26. 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 analyse, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
27. 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.”

28. The appellants faulted the Principal Magistrate Court for its failure to make findings on crucial prayers. They singled out the Principal Magistrate Court’s failure to consider and make a finding on the plea for joinder of John Chege Njenga, Monica Njeri Wanjiku and Faith Wanjiku. Indeed, the trio had sought to be joined in the miscellaneous application as interested parties. A perusal of the impugned ruling reveals that the plea was neither considered nor determined. This was certainly a grave omission. The appellants moved the court contending that an eviction order had been executed against them without them being given the opportunity to be heard. The 1st appellant who was the only party that had been sued in the miscellaneous application was categorical that she had not been served with the miscellaneous application and the mention notice. She denied residing in Ruiru Town. In my view, the first key issue that fell for determination in the notice of motion dated 3/1/2022 was the question as to whether the 1st appellant had been properly served. The Principal Magistrate Court did not consider and determine this critical issue.
29. The question of service was critical because of the centrality of the right of a party to be heard before being condemned. Article 50 of *the Constitution* required that the 1st appellant be accorded the opportunity to be heard. Our superior courts have been categorical that where a decree or an order is procured without service upon the affected party, that decree or order ought to be vacated. [See the Court of Appeal pronouncement in the case of James Kanyita Nderitu & another v Marios Philota Ghikas & another [2016] eKLR.
30. Failure to make a finding on whether the 1st appellant had been properly served was therefore a grave omission on the part of the Principal Magistrate. For the above reasons, this court entirely agrees with the appellants that the Principal Magistrate Court gravely erred in failing to make findings on critical questions.
31. Was the miscellaneous application motion the proper platform on which to procure eviction orders? As a general rule, unless otherwise provided by law, ordinary civil suits in Kenya’s legal system are instituted by way of plaint. Indeed, Order 3 rule 1 of the Civil Procedure Rules provides as follows:

“Every suit shall be instituted by presenting a plaint to the court or in such other manner as may be prescribed.”
32. Similarly, Section 19 of the *Civil Procedure Act* provides that:

“Every suit shall be instituted in such manner as may be prescribed by the rules.”
33. The applicants in the miscellaneous application dated 2/7/2021 sought an eviction order against the 1st appellant. They elected to mount their claim on the platform of a notice of motion presented as a miscellaneous application. The notice of motion was expressed as presented under Order 51 rule 1 of the Civil Procedure Rules; Section 1A, 1B and 3A of the *Civil Procedure Act*, and Section 152(E) of the *Land Act*. The above legal frameworks do not provide for institution of a suit for eviction orders by way of a miscellaneous notice of motion. To the extent that Ruiru Senior Principal Magistrate Court Miscellaneous E & L Case No E7 of 2021 was a plea for eviction orders and was instituted as a miscellaneous application by way of notice of motion, the suit clearly offended the mandatory requirements of Order 3 rule of the Civil Procedure Rules. To this extent, there was no competent suit before the Senior Principal Magistrate Court. The Principal Magistrate ought to have downed her tools by striking out the incompetent miscellaneous application.



34. Our superior courts have been categorical that where a land owner seeks eviction orders, the proper instrument on which to seek and obtain the eviction orders is by way of a substantive suit initiated in accordance with the requirements of Order 3 rule 1 of the Civil Procedure Rules. In *Norah Ndunge Henry & another v Abednego Mutisya & another* [2022] eKLR the court emphasized the above position as follows:

“Eviction orders are serious orders. They must be anchored in a suit as per the provisions of the Civil Procedure Rules and the *Land Act*.”

35. The court further stated that:

“As a general rule a suit can only be instituted by way of a plaint, petition or an originating summons. A notice of motion is not legally recognized as an originating process. A Notice of Motion can only be within a properly instituted suit.”

36. In *Tatecoh Housing and Co-op Sacco Ltd V Qwetu Sacco Ltd* [2021]eKLR the Court rendered itself thus:

“Without much ado, I will agree with the position of the respondentthat the appellant cannot seek the orders sought in the miscellaneous application without going through the process of filing suit. It will be observed that among the orders sought are orders of eviction.one will ordinarily only obtain an order of eviction after a full hearing of the case. What the appellant needed to do was therefore to file a substantive suit for eviction through a plaint. It is upon the hearing of such suit and If successful, that an order of eviction would issue.”

37. The respondents contended that they did not require to file a substantive suit because the question of ownership had already been determined. I do not agree with that view. If the respondents already had a decree in their favour, the platform on which to execute the decree was the suit in which the decree was issued. Procurement of eviction orders on a miscellaneous application was irregular.

38. It is clear from the impugned ruling that the Principal Magistrate was aware of the requirement to institute a proper suit by way of plaint. She, however, mistook the appellant’s notice of motion dated 3/1/2022 as the instrument initiating the incompetent suit. The proper position is that the incompetent suit was initiated through the respondents’ notice of motion dated 2/7/2021. The respondents’ notice of motion dated 2/7/2021 is what should have been struck out for violating the requirements of Order 3 Rule 1 of the Civil Procedure Rules. The Principal Magistrate erroneously entertained and allowed the notice of motion dated 2/7/2021 and subsequently faulted and struck out the wrong motion.

39. For the above reasons, I agree with the appellants that the trial court committed a grave error by entertaining and granting the notice of motion dated 2/7/2021 and by subsequently faulting the wrong motion.

40. Did the Principal Magistrate err by considering the question of intermeddling in the estate of a deceased? The Principal Magistrate rendered herself as follows in the second paragraph under the subtitle “Issues and Determination”:

“Restraining orders are provided for in the *Civil Procedure Act* Cap 21 Laws of Kenya under Order 40(1) and Order 51 rule 1 of the Civil Procedure Rules, 2010. The essence of a temporary injunction is to forbid the intermeddlers from interfering or disposing off



the estate of deceased because the purported administrators are apprehensive that such interference may obliterate their interest in the land.”

41. It is difficult to comprehend what it was that the Principal Magistrate was considering in the above quoted verbatim pronouncement. The issue of intermeddling in the estate of a deceased person had not been canvassed before her and had not fallen for determination by the court in the application. This was clearly a misdirection that invites the intervention of this court.
42. The last issue relates to the question as to whether the miscellaneous application dated 2/7/2021 was res judicata. This court has made a finding to the effect that the notice of motion dated 2/7/2021 was fatally incompetent because it violated the requirements of Order 3 rule 1 of the Civil Procedure Rules. It stood to be struck out on that ground without venturing into the substantive question as to whether the plea for an order of eviction was res judicata.
43. Secondly, at this point, it is probable that the respondents or the appellants may wish to initiate proper suits to ventilate their claims or grievances. It is therefore inappropriate for this court to render itself on the issue of res judicata in the absence of a proper suit and proper evidence. The issue will be conclusively determined as and when a proper suit is initiated and parties are granted the opportunity to present appropriate evidence.
44. Before I dispose this appeal, it is important to make one key observation. The 2nd, 3rd and 4th appellants were not sued in the ill-fated miscellaneous application. They nonetheless moved the court seeking to be joined in the miscellaneous application on the ground that the eviction order had been illegally enforced against them. They went a step further to seek an injunction and compensation in the incompetent miscellaneous application.
45. Execution of a decree or an order against a person who is not a party to a suit would constitute a new cause of action by a new party. The new cause of action is one to be ventilated on the platform of a fresh suit. The 2nd, 3rd and 4th appellants were at liberty to institute fresh suits to ventilate their respective causes of action. The reinstatement orders which they sought through the memorandum of appeal should have been sought in the fresh suits. Seeking to join the incompetent miscellaneous application as the platform on which to ventilate their causes of action was not necessary. I will, for this reason, not grant them the reinstatement orders which they sought through the memorandum of appeal. They are at liberty to ventilate their causes of action through proper suits.
46. In the end, for the above reasons, this appeal is allowed in the following terms:
 - a. The ruling rendered on 28/2/2022 by the Principal Magistrate in Ruiru Senior Principal Magistrate Court E & L Miscellaneous Case No E7 of 2021 is hereby set aside and is substituted with an order wholly striking out Ruiru Senior Principal Magistrate Court E & L Miscellaneous Case No E7 of 2021 and vacating all the orders made in the said Miscellaneous Application (suit).
 - b. Given that the errors giving rise to this appeal were largely contributed to by the Principal Magistrate Court, parties will bear their respective costs of this appeal and costs of the suit in the lower court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 11TH DAY OF OCTOBER 2023.

B M EBOSO

JUDGE



In the presence of: -

Mr Njeru for the Appellants

Mr Wambugu Njogo

Court Assistant: Osodo/Hinga

