



**Bunja v Mwangi & 2 others (Environment and Land Appeal
39 of 2021) [2022] KEELC 3825 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 3825 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 39 OF 2021**

BM EBOSO, J

JULY 7, 2022

BETWEEN

PETER NJUGUNA BUNJA APPELLANT

AND

ANNIE NYAKANINI MWANGI 1ST RESPONDENT

NYAKINYUA INVESTMENTS LIMITED 2ND RESPONDENT

RUTH WAMBUI BUNJA 3RD RESPONDENT

*(Being an Appeal arising from the Judgement and Decree of Hon J. M NANGEA (CM)
delivered on 13/4/2021 in Thika Chief Magistrate Court Civil Case No 322 of 2013)*

JUDGMENT

1. This appeal challenges the Judgment rendered on April 13, 2021 by Hon JM Nangea, Chief Magistrate, in Thika Chief Magistrate Court Civil Case Number 322 of 2013. The 1st respondent in this appeal, Annie Nyakanini Mwangi, initiated the said suit against M/s Nyakinyua Investments Ltd through a plaint dated April 17, 2013. On April 24, 2015, an amended plaint dated April 23, 2015 was filed. Through the amended plaint, Ruth Wambui Bunja was joined as a 2nd defendant in the suit. The original record of the trial court shows that joinder of Ruth Wambui Bunja followed an application by the 1st respondent. Exhibited in support of the application for joinder was an official search issued by the Land Registrar on July 28, 2014, showing that Ruth Wambui Bunja was the registered proprietor of land parcel number Ruiru/Ruiru East Block 2/764 [the suit property] as at April 28, 2014.
2. The record of the trial court further shows that on July 9, 2015, Peter Njuguna Bunja, the appellant in this appeal, filed an application in the trial court seeking to be joined as an interested party in the suit. Exhibited in support of the application by the appellant was a copy of the title relating to the suit property, showing that on June 10, 2015 [about a month prior to the filing of the application for joinder], the suit property was transferred into the name of the appellant. The trial court granted the



appellant his plea for joinder as an interested party in the suit. There is no record of any defence filed in the trial court by the appellant.

3. The 1st respondent's case in the trial court was that she was the lawful owner of land parcel number Ruiru/Ruiru East Block 2/764 by dint of her shareholding in Nyakinyua Investment Company Ltd and by dint of the corresponding ballot relating to land parcel number Ruiru/Ruiru East Block 2/764, to wit, ballot number 462. It was her case that the shares and ballot relating to the suit property initially belonged to her late mother, Elizabeth Wanjiku Maguathi, who transferred it to her during her lifetime. She added that M/s Nyakinyua Investments Ltd effected the shares transfer during her mother's lifetime. She contended that M/s Nyakinyua Investments Ltd and Ruth Wambui Bunja had fraudulently caused the suit property to be registered in the name of Ruth Wambui Bunja. She sought a nullification of Ruth Wambui Bunja's registration as proprietor of the suit property, among other prayers. She faulted the 2nd respondent for failing to attend to her grievances.
4. The 2nd respondent [Nyakinyua Investments Ltd] filed a defence dated July 1, 2013 in which it averred that it was not aware of its alleged failure to sort out the 1st respondent's grievances. It added that if there was another party laying claim to the suit property, that other party was the one to be sued by the 1st respondent. The company further averred that if the 1st respondent had all the requisite documents issued by the company, then she was the rightful owner of the suit property.
5. Ruth Wambui Bunja did not enter appearance. The record of the trial court does not bear an affidavit of service relating to service of summons on Ruth Wambui Bunja, requiring her to enter appearance. The summons were collected from the court registry on April 24, 2015 by one Andrea of the firm of J Ngumo Mbogo & Co Advocates.
6. The record of the trial court shows that when the appellant filed a notice of motion dated July 9, 2015 on July 9, 2015, seeking to be joined as an interested party, he exhibited copy of a title showing that he was registered as proprietor of the suit property on June 10, 2015. He did not, however, exhibit a copy of the transfer and the certificate of confirmation of grant, if any. His plea for joinder as an interested party was granted on November 13, 2015. On the same day, November 13, 2015, he filed a notice of preliminary objection dated November 11, 2015 inviting the court to strike out the 1st respondent's suit on the ground that it did not disclose a reasonable cause of action and that it was frivolous, vexatious and an abuse of the court process. Ruling on the preliminary objection was rendered on July 28, 2017 and the suit was sustained.
7. Subsequently, the 1st respondent testified as PW1 on November 19, 2019. She adopted her witness statement dated April 17, 2013. She testified that her late mother, Elizabeth Wanjiku Maguathi, acquired the suit property from the 2nd respondent in 1976 after paying for her shares in the company. She added that her late mother transferred the shares and the land to her in September 1995. She produced various documents, among them, receipts relating to payments made to M/s Nyakinyua Investments Ltd by her late mother, share certificate issued to her by the company and ballot card relating to the suit property, issued by the company.
8. When the suit came up for defence hearing, the 2nd respondent's attempt to lead evidence by a witness who had not filed and served a witness statement was objected to by the 1st respondent. The objection was upheld by the court. The 2nd respondent proceeded to close their case without leading any evidence. The appellant's attempt to lead evidence during trial was, similarly, objected to by the 1st respondent. The objection was similarly upheld by the trial court on the ground that an interested party is only entitled to take notes, listen to the proceedings, and cross-examine witnesses called by substantive parties and thereafter make submissions. It was the holding of the trial court that the appellant who was an interested party had no right to lead evidence during trial.



9. After that, parties to the suit filed and exchanged written submissions. This culminated in the impugned Judgment in which the trial court found that the 1st respondent had proved her case and issued the following *verbatim* disposal orders:
 - a. The transfer and/or registration of the suit land in favour of the 2nd defendant is hereby declared null and void.
 - b. Although the material on record seems to show that the interested party also holds title to the suit land and is in occupation thereof, no eviction orders issue as the plaintiff didn't sue the interested party to enable him to be heard substantively.
 - c. The defendants will bear costs of the suit as incurred by the plaintiff.
10. I have deliberately outlined the above background in detail because it is necessary for the proper understanding of the context under which this court is invited to exercise jurisdiction as a first appellate court.

Appeal

11. Aggrieved by the judgement of the trial court, the appellant brought this appeal, advancing the grounds that the trial magistrate erred in:
 - a. allowing the 1st respondent's claim to annul the title which previously belonged to Ruth Wambui Bunja and was at that moment registered in the appellant's name.
 - b. declaring that the transfer and registration of the said title in the name of Ruth Wambui Bunja was null and void while aware that the declaration had the effect of annulling the transfer to and registration of the appellant as proprietor of the suit property;
 - c. holding that the appellant was a purchaser for value of the suit property yet the appellant had inherited the suit property from the late Ruth Wambui Bunja.
 - d. holding that Ruth Wambui Bunja who had died on April 24, 2011 had failed to enter appearance and defend the suit which had been instituted after her death;
 - e. failing to properly or at all consider the evidence and submissions by the appellant;
 - f. failing to consider that the suit property was no longer registered under the name of Ruth Wambui Bunja who was long deceased; and
 - g. issuing a declaration that the transfer of the suit property to Ruth Wambui Bunja was null and *void ab initio* and thereby effectively annulling the title of the appellant.

Submissions

12. The appeal was canvassed before this court through written submissions dated November 26, 2021, filed by the firm of Isolina Kinyua & Co Advocates. The appellant condensed the above seven grounds of appeal into three, that the trial court erred in:
 - i. declaring the transfer of the suit property in favour of Ruth Wambui Bunja null and void;
 - ii. proceeding with a case against Ruth Wambui Bunja who was deceased at the time; and
 - iii. holding that the appellant was a purchaser for value.



13. On the contention that the trial court erred in declaring the transfer of the suit property in favour of Ruth Wambui Bunja was null and void, counsel for the appellant submitted that annulment of the transfer that vested the suit property in the name of Ruth Wambui Bunja automatically annulled all subsequent registrations relating to the suit property. Counsel added that having acknowledged in its Judgment that the materials on court record showed that the appellant held a title to the suit property, the trial court erred in annulling the registration of Ruth Wambui Bunja because the effect of the annulment was to cancel the appellant's title. Counsel for the appellant submitted that the trial court having denied the appellant audience during trial, it should not have issued orders that were adverse to the appellant's interest in the suit property. Counsel argued that the trial court should have allowed the appellant to testify and lead evidence to shed light on ownership of the suit property because the appellant was the registered proprietor at the time of trial.
14. On the contention that the trial court erred in proceeding with the case against Ruth Wambui Bunja who was deceased at the time, counsel for the appellant submitted that he had presented to the trial court documents that showed that Ruth Wambui Bunja was deceased at the time the suit was filed. Counsel added that there was no evidence of service of summons on Ruth Wambui Bunja to enter appearance in the suit. Counsel submitted that in a case where an order annulling a title was sought, the court was obligated to verify that there was proper service of summons to enter appearance.
15. On the contention that the trial court erred in holding that the appellant was a purchaser for value, counsel submitted that no evidence was presented to the court to suggest that the appellant was a purchaser of the suit property. Counsel contended that in all the documents filed in the proceedings, the appellant had stated that his mother, Ruth Wambui Bunja, transferred the suit property to him. Counsel urged the court to allow the appeal.
16. The 1st respondent filed written submissions dated January 17, 2022 through the firm of J Ngumo Mbogo & Co Advocates. Counsel for the 1st respondent identified the following as the four issues that fell for determination in this appeal: (i) Who is the true and legal owner of the suit property; (ii) Whether Ruth Wambui Bunja's title to the suit property was acquired procedurally and legally?; (iii) Whether it was proper for Nyakinyua Investment Co Ltd to issue Ruth Wambui Bunja with a certificate of clearance which led to issuance of the title deed to Ruth Wambui Bunja "despite having paid all the necessary fees and complied with all requirements?; and (iv) Whether the transfer of the suit property to Ruth Wambui Bunja and subsequently to Peter Njuguna Bunja was valid.
17. On who the true and legal owner of the suit property was, counsel for the 1st respondent submitted that the 1st respondent had proved that the suit property was purchased by her late mother, Elizabeth Wanjiku Muguathi, from Nyakinyua Investment Company Ltd through acquisition of shares and through balloting. Counsel added that the 1st respondent had demonstrated that her late mother transferred the suit property to her during her lifetime, hence she was the true and legal owner of the suit property.
18. On whether Ruth Wambui Bunja's title to the suit property was acquired procedurally and legally, counsel for the 1st respondent submitted that the appellant did not lead evidence to demonstrate how Ruth Wambui Bunja obtained registration of the suit property in her name. Counsel contended that Ruth Wambui Bunja's title and the appellant's title were obtained illegally and unprocedurally. Counsel urged the court to dismiss the appeal.

Analysis and Determination

19. I have considered the entire record of the trial court. I have also considered the parties' respective submissions in the appeal. Similarly, I have considered the relevant legal frameworks and jurisprudence



on the key issues that fall for determination in this appeal. The appellant advanced seven grounds of appeal. However, in his subsequent written submissions, his counsel condensed the seven grounds of appeal into three. The court will consider the three grounds that were canvassed and make its brief analysis and pronouncements on them. Before the court does that, it is important for the court to remind itself of the principles upon which it is required to exercise jurisdiction.

20. This is a first appeal. The principles upon which a first appellate court exercises jurisdiction are 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.”

21. The above principle was similarly outlined in [Abok James Odera t/a AJOdera & 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. See the case of Kenya Ports Authority vs Kustron (Kenya) Limited 2000 2EA 212.”

22. The first ground canvassed by the appellant is that the trial court erred in law and fact by declaring that the transfer of the suit property in favour of Ruth Wambui Bunja was null and void. I have considered the above contention. The record of the trial court reveals that at the time the appellant applied to be joined in the suit as an interested party, the suit property was registered in his name. He exhibited copy of a title showing that he was registered as proprietor of the suit property on June 10, 2015, about one month prior to him filing the application for joinder. With this information placed before the trial court, it was obvious that any order annulling Ruth Wambui Bunja’s registration and title was going to automatically annul the appellant’s registration and title because the appellant succeeded Ruth Wambui Bunja in terms of registration of ownership of the suit property. Put differently, it followed that the appellant was going to be adversely affected by the relief of annulment which the 1st respondent had sought against the defendants in the suit. The title which the appellant had procured into his name was going to be automatically annulled by the annulment sought against Ruth Wambui Bunja.

23. In my view, given the fact that the trial court was expected to be aware of the above legal ramifications of the order sought in the suit, it should have invoked its powers under order 1 rule 10 of the [Civil Procedure Rules](#) to admit the appellant as a defendant instead of admitting him as an interested party. Admission of the appellant as a defendant would have accorded the appellant the opportunity to file pleadings in the suit. Secondly, given the fact that the relief sought by the 1st respondent was, by extension, going to annul the appellant’s title, the trial court should have, in addition to admitting the appellant as a defendant, accorded the appellant the right to lead evidence in defence of the title he had procured in June 2015. In my view, even if the trial court had not committed any other error, the judgment of the trial court would stand to be set aside on the ground that the principle of fair hearing as enshrined in article 50 of the [Constitution](#) was violated by the trial court in that the trial court denied the appellant the opportunity to lead evidence yet the title held by he appellant had been challenged and faced impeachment.



24. There is no gainsaying that in a suit where the dispute relates to ownership of land, an interested party asserting a rival claim of ownership of the same land ought to be admitted as a defendant so that the question of ownership is adjudicated and settled effectually and completely. The practice where such persons are admitted merely as interested parties is, in my view, wrong and should not be entertained by trial courts adjudicating land disputes.
25. Looking at the disposal orders which the trial court ultimately issued, it is clear that the trial court realized the error which it had committed in failing to admit the appellant as a substantive party and in denying the appellant the opportunity to lead evidence. After issuing a disposal order annulling Ruth Wambui Bunja's registration as proprietor of the suit property, the trial court issued the following subsequent disposal order:
- “Although the material on record seems to show that the interested party also holds title to the suit land and is in occupation thereof, no eviction orders issue as the plaintiff didn't sue the interested party to enable him to be heard.”
26. Clearly, at that point, the trial magistrate understood that the appellant was entitled to be heard. What he erroneously failed to appreciate is that the foundation of the appellant's registration was the registration of Ruth Wambui Bunja as proprietor of the suit property and once the registration of Ruth Wambui Bunja was annulled, all subsequent registrations stood annulled. Secondly, it is obvious from the above relief that the judgment of the trial court did not effectually and completely settle the dispute. For the above reasons, the first ground canvassed in this appeal succeeds.
27. The second ground canvassed in this appeal is that the trial court erred in proceeding with a case against Ruth Wambui Bunja. While I entirely agree with the appellant that proceeding with a suit against a deceased party is legally untenable. I must, however, point out that the record of the trial court shows that the appellant may have deliberately elected to withhold key details relating to the death of Ruth Wambui Bunja. The appellant contends that Ruth Wambui Bunja is his deceased mother and that she died on April 24, 2011. Full documentary evidence relating to her death was not placed before the trial magistrate by the appellant at the time he applied to be joined as an interested party. Secondly, the appellant did not explain how he got to be registered as proprietor of the suit property on June 10, 2015, Ruth Wambui Bunja having died on April 24, 2011. He did not exhibit a copy of the death certificate of Ruth Wambui Bunja whom he contends is his late mother. He similarly did not exhibit any certificate of confirmation of grant which enabled him to procure registration of the suit property in his name on June 10, 2015. He did not disclose to the court who the administrators of his late mother's estate were. In my view, by withholding the above relevant information, the appellant contributed to the above error on part of the court. The legal position, nonetheless, remains that no legally valid proceedings could be taken against a deceased defendant without joining her legal representatives to the suit.
28. Lastly, the appellant faulted the trial court for the statement made in paragraph 7 of the impugned judgment in the following words:
- “7 Peter Njuguna Bunja was admitted as an interested party claiming rights as a purchaser of the suit land.”
29. The above statement is not one of the findings or holdings which the trial court made. In my view, it is a mis-statement which does not go to the root of the findings or disposal orders in the impugned Judgement. I would not give the mis-statement much weight.



30. Having considered the record of the trial court, the parties' submissions and the relevant legal frameworks and jurisprudence, I have come to the conclusion that, for the above reasons, the judgment of the trial court cannot stand. My finding is that, this appeal has merit and should succeed.

Disposal Orders

31. In the end, this appeal is disposed as follows:

- a. The judgment in Thika CMC Civil Case Number 322 of 2013 is set aside in its entirety.
- b. The appellant shall be joined in the said suit as a third defendant.
- c. The appellant shall, within ten (10) days from today, file in the Chief Magistrate Court and serve copies of the death certificate and grant of letters of administration or probate relating to the estate of his late mother, Ruth Wambui Bunja, to enable the court to effect substitution relating to the 2nd defendant in the said suit.
- d. Pending further orders by the trial court, no dealings shall be registered in the land register relating to the suit property, Ruiru/Ruiru East Block 2/764.
- e. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 7TH DAY OF JULY 2022

B M EBOSO

JUDGE

In the Presence of: -

Ms Kinyua for the appellant

Ms Weyimi for the 1st respondents

Court Assistant: Ms Lucy Muthoni

