



**Karanja (Suing as Next of Kin of the Estate of Michael Karanja Kimunya) v Kuria
(Civil Appeal 146 of 2018) [2024] KEHC 10206 (KLR) (10 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 10206 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL 146 OF 2018
DO CHEPKWONY, J
JULY 10, 2024**

BETWEEN

**MARGARET NYAMBURA KARANJA (SUING AS NEXT OF KIN OF THE
ESTATE OF MICHAEL KARANJA KIMUNYA) APPLICANT**

AND

ROSEMARY NYAMBURA KURIA RESPONDENT

*(Being an appeal from the ruling and order of Hon. S. Atambo, Senior Principal
Magistrate in Civil Miscellaneous No.80 of 2018 at Kiambu on 8th September, 2018)*

JUDGMENT

Brief background.

1. This appeal arises from a suit filed in the Magistrate’s Court at Kiambu being Kiambu Senior Principal Magistrate’s Civil Miscellaneous No.80 of 2018 wherein the Respondent as a daughter to one Michael Karanja Kimuya sued the Appellant herein. The Respondent’s argument was that she purchased a parcel of land known as Ndumberi/Riabai/4170 from the said Michael Karanja Kimuya and she acquired a title deed from the same. According to the Respondent, the seller, Michael Karanja Kimuya died and his family then had intentions of burying him on the suit land, which prompted her to file the suit alongside an application in court seeking injunctive orders to prevent the said burial from taking place and for orders of vacant property.
2. The Application was opposed by the Appellant who argued that the sale was fraudulent for the reason that at the time of the alleged execution, the Respondent had brought to the deceased alcohol which he drunk and was convinced to sign a document which they purported was to be used to conduct a search of the suit land. She further stated that the deceased filed the suit in ELC No. 25 of 2018 against the Respondent seeking to have the whole sale and transfer of the land declared null and void and for an order that the land be transferred back to him (the deceased).



3. The trial court considered the application of the Respondent and delivered a ruling in her favour that the deceased should not be buried in the subject land as it was registered in the names of the Respondent. This Ruling culminated into the filing of the present Appeal.
4. In the Memorandum of Appeal dated 16th November, 2018 the Appellant raised the following Grounds:-
 - a. That the Learned Trial Magistrate erred in law and fact in granting a temporary injunction order whereas there was no suit before the trial Court.
 - b. That the Learned Trial Magistrate erred in law and fact by not applying principles and law on granting injunction orders.
 - c. That the Learned Trial Magistrate misinterpreted the law by making a finding that there being no suit before the court was technical whereas it was a substantive issue as per the provisions of the law.
 - d. That the Learned Trial Magistrate erred in law and fact by failing to hold that the application was sub judice as there exists a similar suit being ELC No.25 OF 2018 before the Chief Magistrate Court at Kiambu over the same subject matter.
 - e. That the Learned Trial Magistrate erred in law and fact by failing to exercise her discretion judicially.
 - f. That the Learned Trial Magistrate erred in law and fact in holding that the deceased should not be buried in Ndumberi/Riabai/4170 after holding that there was no evidence of death certificate or burial permit tendered before the court.
 - g. That the Learned Trial Magistrate erred in law and fact by disregarding the appellant's evidence and submissions.
 - h. That the Learned Trial Magistrate erred in law and fact by disregarding High Court authorities, findings and precedents on the same issues which are binding upon her.
 - i. That the Learned Trial Magistrate misdirected herself that the Appellant cannot hide behind the issue of having no capacity to be sued.
 - j. That the Learned Trial Magistrate erred in law and fact by considering extraneous matters not before the court.
 - k. That the Learned Trial Magistrate did not write the ruling as per the law.
5. The appeal was admitted for hearing on 21st November, 2019 and 12th September, 2022. The parties were directed to canvass the same by way of written submissions. The Appellant filed her submissions on 24th February, 2023 while the Respondent filed hers on 2nd March, 2023.

Appellants' Submissions.

6. In her submissions, the Appellant has stated that the trial magistrate exercised her discretion wrongly when applying the principles of granting an injunction in a suit. It is her contention that the court had no basis of granting the mandatory injunction under Order 40 Rule 1 of the Civil Procedure Rules at an interlocutory stage without addressing the question of special circumstances or compelling orders. The Appellant goes on to submit that by the trial court issuing these orders, it had dealt with and or determined the entire suit in a summary manner without a hearing. According to the Appellant,



the orders sought were substantive and mandatory in nature. She argues that under Order 40 of *Civil Procedures Rules*, there must be a suit before an injunction is issued.

7. The Appellant holds that the issues that were raised in the application involved a dispute in land known as Ndumberi/Riabai/4170 which is Environment and Land Court matter for which the court does not have jurisdiction to deal. She further argues that the trial court failed to find that the Respondent had no capacity to be sued in the matter the same having arisen against the father who was now deceased, therefore required an administrator to be appointed, who would then have the legal capacity to be sued.

The Respondent's Submissions

8. On the other hand, Respondent submits that the Appeal is only an attempt to deny her from enjoying the fruits of her Ruling and order which amounts to an abuse of court process and a ploy to waste judicial time. She holds that litigation must come to an end. It was her argument that the trial court did not err in holding that the deceased should not be buried on the suit property since the same was not registered in the names of his family member or someone who was willing to have the burial take place on their land.
9. The Respondent contends that the Appellant did not raise the issue that the prayer of injunction was not based on a suit and therefore is estopped from raising it at this point without leave of court. The Respondent also disputes the allegation by the Appellant that the Application was *subjudice* since there exists another suit being ELC No. 25 of 2018 but she submitted that the suit was brought by different parties, seeking different prayers and therefore it did not meet the criteria for subjudice.
10. The Respondent further submits that the Appellant has stated that she lacked capacity to be sued, to which the Respondent responds that going by the said statement, this Appeal cannot be argued as the Appellant still lacks capacity to file and prosecute the suit on behalf of the deceased without the letters of representation. According to the Respondent, it agrees with the court which held that the land was registered in the name of the Respondent who was not willing to have the burial take place there and had the court allowed it thus would have caused irreparable loss and damage to the Respondent. The Respondent has urged the court to dismiss the Appeal as the Ruling of the trial court cannot be faulted.

Determination

11. This being a first Appeal, the court is reminded of its duty as was stated in the case *Selle & Another – vs- Associated Motor Boat Co. Ltd. & Others* [1968] EA 123 in the following terms:-

“I accept counsel for the Respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hammed Saif – vs- Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270).”



12. In consideration of the grounds of appeal, I have read through the proceedings before the trial court and find that the main issue for determination summarised in the following words; whether the trial court erred in law and in fact in its Ruling to warrant the interference of this court.
13. The ruling of the trial court was that since the land in question was registered in the names of the Respondent and even though the Title Deed has been challenged, it would be wrong for the deceased to be buried on a land which is in someone else's name other than that of a family member or a party willing for the burial to take place on their land.
14. In considering the ruling issued by the trial court, it is clear that the issue that was before the trial court pertained the burial of the deceased, which was already addressed. This court finds that the trial court did not err in law or in principle in its decision that the deceased could not be buried on a land which was registered in the name of another person and or a party who was not willing to have the burial take place on the said land. The trial court made this finding on the basis of the title deed, which though it is being challenged, the same was still in the name of the Respondent.
15. From the prayers in the application, the Respondent sought for the Respondent to be restrained from burying the remains of the deceased on the suit property and vacant possession of the said suit property. The trial Magistrate only determined the first prayer but declined to address the second prayer of vacant possession on the ground that there was a pending suit being ELC No.25 of 2018 which is pending at Kiambu Law Courts with regard to the issue of ownership of land. And if this is the case, it is this court's position that an issue of land ownership should be addressed at the Environment and Land Court, which is the court clothed with the requisite jurisdiction to deal with issues of ownership and use of land, but not this court.
16. The upshot is that the Appeal herein lacks merit and the same is dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED AT KIAMBU VIA ELECTRONIC MAIL THIS 10TH DAY OF JULY , 2024.

D. O. CHEPKWONY

JUDGE

