



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC APPEAL NO. 22 OF 2019

**JOSHUA MWITI KARAI.....1ST
APPELLANT**

**CHRISTOPHER MURITHI KUBAI.....2ND
APPELLANT**

**PETER KIUNGA M'MWENDA.....3RD
APPELLANT**

**WILLIAM M'MBURA NABEA.....4TH
APPELLANT**

**HENRY NJEA MUNORU.....5TH
APPELLANT**

**JULIUS ITHANYA MUKETHA.....6TH
APPELLANT**

**BEATRICE KAUMO.....7TH
APPELLANT**

**STANLEY THIANE.....8TH
APPELLANT**

=VERSUS=

**KARANI MUCHEKE.....
RESPONDENT**

(An Appeal against the Judgment of the Senior Resident Magistrate Court at Maua [Hon. A. G. Munene, SRM] dated 31/12/2018 in Maua Chief Magistrate Court Civil Case No. 79 of 2011)

JUDGMENT

Introduction

1. This appeal challenges the judgment rendered by the **Senior Resident Magistrate Court at Maua [Hon A G Munene SRM]** on **31/12/2018** in **Maua CMC Civil Case No. 79 of 2011**. One of the key issues that arose for determination in the said suit was the question as to whether land parcel numbers **2696, 7583, 7580, 5477, 7332, 3299, 4471, 1775** and **857**, located **Amwathi/Maua Adjudication Section**, were fraudulently created out of land parcel number **1984, Amwathi/Maua Adjudication Section**, belonging to the late **M'Mucheke M'Aluma**. The respondent contended that the parcels were fraudulently created out of parcel number 1984 through fraudulent alteration of the adjudication register. The trial court made a finding in the affirmative and granted the respondent the reliefs that he sought. Invariably, the above issue is one of the key questions that fall for determination in this first appeal. Before I analyse and dispose all the issues that fall for determination, I will briefly outline the background to the appeal, and the parties' respective submissions on the appeal.

Background

2. Vide a plaint dated **6/5/2011**, the respondent filed **Maua SPMC Civil Case No. 79 of 2011** against some 9 defendants, among them the 8 appellants in this appeal. He sought the following reliefs against them: (i) an order declaring him as the rightful owner of land parcel numbers **2696, 7583, 7580, 5477, 7332, 3299, 4471, 1775** and **857**; (ii) an order restraining the 9 defendants against interfering with the said parcel in any way; and (iii) costs of the suit. An amended plaint dated 14/9/2011

was filed. Through the amended plaint, **Glory Karambu Kajuki [3rd defendant]** and **Peter Kaibiria Bathina [8th defendant]** were removed from the suit.

3. The respondent's case was that she was the duly appointed administrator of the estate of the late **M'Mucheke M'Aluma** who died on 8/2/1989. He was a son to the late M'Mucheke M'Aluma. At the time of his demise in 1989, the late M'Mucheke M'Aluma was the adjudicated and recorded owner of land parcel number 1984 located within **Amwathi/Maua Adjudication Section**. Vide a certificate of confirmation of grant issued to the respondent on 5/8/2009, parcel number 1984 devolved to him
4. The respondent averred that parcel number 1984 was gathered by his great grandparents and had devolved to his father and subsequently to him. He added that through corrupt and fraudulent activities of **Benson Gatobu** who was the Vice Chairman of **Amwathi/Maua Adjudication Section** and whom he had sued as the 1st defendant, the 9 impugned parcels were fraudulently created out of parcel number 1984. He itemized various particulars of fraud. He added that the fraudulent alteration of the adjudication register was done after the demise of the late M'Mucheke M'Aluma and were effected without any grant of letters of administration. He urged the trial court to grant him the reliefs sought, adding that he had obtained the consent of the Land Adjudication Officer, authorizing him to initiate the case.
5. Benson Gatobu, Peter Kiunga M'Mwenda [3rd appellant], Julius Ithanya Muketha [6th appellant] and Beatrice Kaumo [7th appellant] filed a joint statement of defence dated 17/6/2011 in

which they contested the respondent's claim. They averred that parcel number 1984 was at all material times gathered and lawfully owned by the late **M'Imanyara M'Imuru**. They contended that the said land was transferred to them upon subdivision vide **Objection No. 6123**. They added that Peter Kiunga M'Mwenda bought his subdivision in 1984 while Julius Ithanya Muketha and Beatrice Kaumo bought their respective parcels in 1990. They urged the court to reject and dismiss the respondent's claim.

6. As observed, through the amended plaint dated 14/9/2011 and admitted by the trial court on 28/3/2012 [through an order granting the application dated 14/9/2011], **Glory Karambu Kajuki** and **Peter Kaibiria Baithira** were removed from the suit.
7. **William M'Mbura Nabea** [4th appellant] and **Henry Njea Munoru** [5th appellant] were sued as the 4th and 5th defendants respectively. They filed a joint statement of defence dated 17/5/2011. They contested the respondent's claim. They averred that the 4th appellant was the lawful owner of parcel number 7332 which he bought from one **Samuel M'Barimba** while the 5th respondent was the lawful owner of parcel number 3299 which he similarly bought from **Samwel M'Barimba**. They contended that they had been in occupation of their respective parcels for over 20 years. They urged the court to reject and dismiss the respondent's claim.
8. Stanley Thiane [8th appellant] was sued as the 9th defendant. He filed a defence dated 20/6/2011. He contested the respondent's claim and averred that he was the lawful owner of

parcel number 857. He denied the allegation that parcel number 957 was created out of parcel number 1984 through a corrupt and fraudulent scheme, adding that the said parcel was sold to him by the respondent's father, the late **M'Mucheke M'Aluma** way back in 1972 and that he had since then used, developed and cultivated the parcel. He urged the court to reject and dismiss the claim against him.

- 9. Joshua Mwirigi Karai and Christopher Murithi Kubai** were joined to the suit as defendants on 6/6/2014. Both the original record of the trial court and the record of appeal do not bear their statements of defence.
- 10.** At the commencement of defence hearing, the appellants indicated to the trial court that due to "time factor", they were proposing that two defendants give evidence on behalf of the other defendants. The trial court did not make a formal order adopting the proposal as an order of the court. Subsequently, during defence hearing, the appellants changed their minds and decided that each defendant was going to testify. Their plea to testify was rejected by the trial court.
- 11.** Upon conclusion of trial and upon receiving submissions, the trial court rendered the impugned judgment in which it found that, at all material times, parcel number 1984 measured 5.52 acres and belonged to the late **M'Mucheke M'Aluma**. It further found that all the subdivisions that were created out of parcel number 1984 were illegal. The trial court granted the reliefs that were sought by the 1st respondent.

Appeal

12. Aggrieved by the judgment and decree of the trial court, the 8 appellants filed this appeal through a memorandum of appeal dated 25/1/2019. They advanced the following 12 verbatim grounds:

- 1) That the Learned Senior Resident Magistrate erred in law and fact in giving judgment for the respondent against the weight of facts and evidence.**
- 2) That the Learned Senior Resident Magistrate erred in law and in fact in shifting the burden of proof from the respondent to the appellants.**
- 3) That the Learned Senior Resident Magistrate erred in law and in fact in issuing a blanket judgment against all the defendants (in the sub-ordinate court) even without consideration that the 8th defendant (in the sub-ordinate court suit) died in the course of the hearing and he was not substituted.**
- 4) That the Learned Senior Resident Magistrate erred in law and in fact in relying on evidence that was neither adduced nor recorded.**
- 5) That the Learned Senior Resident Magistrate erred in law and in fact in failing to hold that the respondents suit was time-barred.**
- 6) That the Learned Senior Resident Magistrate erred in law and in fact in awarding judgment against the appellants whereas the Land Registrar and Attorney General were not enjoined as parties.**

- 7) That the Learned Senior Resident Magistrate erred in law and fact in adopting exhibits and evidence against the rules and principles of taking of evidence or set out under the Evidence Act (Cap 80 Laws of Kenya)**
- 8) That the Learned Senior Resident Magistrate erred in law and fact in using the shortcomings of the respondent's witness against the appellants.**
- 9) That the Learned Senior Resident Magistrate erred in law and in fact in awarding a judgment to the respondent whose net effect was to award to the respondent land much bigger than he pleaded for or claimed.**
- 10) That the Learned Senior Resident Magistrate, erred in law and in fact for the effect of his Judgment is to bastardize the operations and implementations of the provisions of Chapter 292 Laws of Kenya.**
- 11) That the Learned Senior Resident Magistrate erred in law and in fact in refusing to allow the appellants to all testify.**
- 12) That the Learned Senior Resident Magistrate erred in law and fact in failing to acknowledge that in a suit where fraud is raised in litigation touching on land that it is mandatory to enjoin the Government Officers and Attorney General**

13. They urged this court to set aside the judgment of the lower court. They also prayed for an order awarding them costs of this appeal and costs of the suit in the lower court.

Appellants' Submissions

- 14.** The appeal was canvassed through written submissions dated **14/2/2025**, filed by **M/s Mbogo & Muriuki Advocates**. Submitting on ground numbers 1, 4 and 7, counsel for the appellants argued that, to succeed in a claim founded on fraud, the respondent needed to plead and particularize fraud, adding that he also needed to lay out water tight evidence upon which the court would make a finding in his favour. Citing the Court of Appeal pronouncements in **Kuria Kiarie & 2 Others -v- Sammy Magera [2018]**, counsel submitted that the respondent failed to prove fraud to the required standard. Counsel argued that decisions made in the A/R Objections that were filed by the appellants were all in their favour, adding that it was the implementation of those decisions that culminated in the parcels that the appellants held. Counsel argued that there was no iota of fraud.
- 15.** Counsel argued that the trial court ought to have compelled the DLASO to produce the AR (Adjudication Register) Objection documents which were in his custody. Counsel argued that the holding by the trial court to the effect that no AR Objections existed was reckless and uncalled for. Counsel argued that the respondent merely inferred fraud on the part of the appellants.
- 16.** On the contention that the trial court erroneously shifted the burden of proof from the respondent to the appellants, counsel cited various cases and argued that since the respondent did not

adduce evidence demonstrating that the appellants “fraudulently colluded and encroached on his land,” it was correct to say the appellants’ titles were lawful. Counsel argued that the appellants were entitled to the protection under Article 40 of the Constitution.

- 17.** On the contention that the trial court erred in issuing a blanket judgement against all the appellants without considering that the 8th defendant [**Peter Kaibiria Baithiria**] died in the course of the hearing and he was not substituted, counsel submitted that the trial court disregarded the requirements of **Order 24 rule 4** of the **Civil Procedure Rules**.
- 18.** On the contention that the trial court erred in failing to find that the respondent’s suit was time-barred, counsel cited **Section 7** of the **Limitation of Actions Act** and submitted that the trial court ought to have found that the plaintiff’s claim was time-barred.
- 19.** On the contention that the trial court erred in entering judgment in the absence of the Attorney General and the Land Registrar in a claim founded on fraud in relation to land registration, counsel cited **Order 1 rule 10** of the **Civil Procedure Rules** and submitted that the Land Adjudication and Settlement Officer played a major role in the impugned registrations hence the Attorney General ought to have been made a party to the case.
- 20.** Counsel argued that the trial court erred in denying the appellants the opportunity to testify despite them having filed and served written witness statements. Counsel argued that the judgment of the trial court had the effect of bastardizing the implementation of the provisions of the Land Consolidation Act

(sic), (adding that, on their own, the appellants had no powers to prepare demarcation maps and adjudication records. Counsel argued that the respondent should have exhausted the mechanisms provided under Sections 11 - 14 of Cap 283. Counsel argued that the judgment of the trial court threw away the process of land adjudication. Counsel urged the court to allow the appeal.

Respondent's Submissions

- 21.** The respondent opposed the appeal through written submissions dated **26/11/2024**, filed by **Haron Gitonga & Company Advocates**. Counsel for the respondent identified the following as the issues that fell for determination in the appeal: (i) Whether the respondent's suit was properly before the lower court; (ii) Whether the respondent's suit was time-barred; (iii) Whether failure to join the Land Adjudication Officer and the Attorney General rendered the suit fatally defective; (iv) Whether the respondent proved his case on a balance of probabilities; and (v) Whether the suit was properly before the trial court.
- 22.** Counsel argued that at paragraph 1 of the plaint, the respondent pleaded that he had brought the suit as a legal representative of the estate of his deceased father, **M'Mucheke M'Aluma**. Counsel added that in his testimony, the respondent testified that he had obtained a grant of letters of administration relating to the estate of the deceased, and he produced a copy of the grant as an exhibit.
- 23.** Counsel contended that at the time of filing the suit, the area where the suit land was situated was within an adjudication section under the Land Adjudication Act. Counsel argued that the

respondent sought and obtained the consent of the Land Adjudication Officer before filing the suit in compliance with Section 8 (1) of the Act. Counsel submitted that the respondent proved that he had consent of the Land Adjudication Officer to commence the suit, and as such, the suit was properly before the lower court.

- 24.** On whether the respondent's claim was time- barred, counsel argued that the respondent discovered the hiving of his father's land in 2003 and filed the suit on **10/5/2011** after a lapse of 8 years. Counsel relied on Section 7 of the Limitation of Actions Act, Cap 22, and submitted that the suit was brought within the statutory period of 12 years and was not time-barred.
- 25.** On whether the suit was defective for non-joinder of the Adjudication Officer and the Attorney General, counsel argued that the suit was against the appellants who had acquired ownership of portions of the land fraudulently. Counsel contended that he adduced evidence that the subdivision of parcel number **1984** and the subsequent transfer of the subdivisions were fraudulent.
- 26.** Counsel argued that the trial court properly dealt with the matter in controversy between the parties as provided by Order 1 rule 9 of the Civil Procedure Rules, adding that non-joinder of the Adjudication Officer and the Attorney General did not affect the suit in any way and did not render the suit fatally defective.
- 27.** On the contention that the respondent did not prove his case on a balance of probabilities, counsel argued that in support of his case, the respondent tendered viva voce evidence and called two

witnesses who produced documentary evidence. Counsel submitted that the respondent, through PW2, produced the gathering record as exhibit No. 1. Counsel further submitted that the respondent's evidence on ownership was fully corroborated by PW2. Counsel argued that the evidence of PW2 corroborated the respondent's evidence, adding that the appellants' two witnesses did not tender any iota of evidence to controvert the respondent's case in the lower court.

Analysis and Determination

28. I have read and considered the original record of the trial court; the record of appeal; the grounds of appeal; and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and the prevailing jurisprudence on the issues that fall for determination in the appeal. The three key issues that fall for determination in the appeal are: (i) Whether the trial court gravely erred in declining to allow the appellants' plea to testify after they had initially proposed to the court that only two of them were going to testify on behalf of the rest; (ii) Whether the respondent's suit was statute-barred; and (iii) Whether land parcel numbers **2696, 2583, 7580, 5477, 7332, 3299, 4471, 1775, 7332, 3299, 4471, 1775** and **857** located in **Amwathi/Maua Adjudication Section** were subdivisions fraudulently created out of land parcel number 1984 belonging to the late M"Mucheke M'Aluma. I will deal with the three issues sequentially in the above order. Before I do that, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.

29. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The principle was summarized by the Court of Appeal in the case of **Susan Munyi Vs 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 the evidence and arrive at our own independent conclusions.”

30. The above principle was similarly outlined in **Abok James Odera t/a A. J Odera & Associates Vs. 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 determined whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

31. Did the trial court gravely err in rejecting the appellants’ plea to testify after their initial proposal that only two of them would testify on behalf of the rest? The right of a party to be heard in a civil case against him is anchored in **Article 50(1)** of the Constitution which provides as follows:

(1) Right to a Fair Hearing:
Individuals have the right to have their cases heard in a manner that is just and equitable.

(2) Public Hearing:
The proceedings should generally be open to the public, promoting transparency and accountability in the justice system.

- (3) Independent and Impartial Tribunal:**
This right applies to courts and also to other bodies that might resolve disputes, as long as they are independent and impartial.
- (4) Dispute Resolution:**
The provision covers disputes that can be settled through legal means.

32. Our courts have umpteen times made pronouncements on what constitutes a fair hearing in a civil trial in Kenya's legal system. The Court of Appeal in the case of ***Juma Mohamed Tuwano -vs- Mohamed Hamisi Mwabwagizo & 3 Others Civil appeal No. 156 of 1996 eKLR***, stated as follows:

“Justice must not only be done but must manifestly be seen to be done. However weak a plaintiff's case may sound to a judge the judge cannot stop the plaintiff's case half-way through. There was evidence that the plaintiff had three more witnesses to call. Mr. Khaminwa argues that the learned judge acted improperly by terminating the proceedings after hearing only one witness (the Plaintiff) who was not even cross-examined. Order XV11 rule 4 of the Civil Procedure Rules requires a judge to see to it that evidence of witnesses in attendance is taken under his personal direction and superintendence. He has to take down the evidence of each witness in writing. He cannot tell the plaintiff “I do not like your case, I will hear you no more”, when the plaintiff makes it clear that he still has three witness to call.

Mrs. Ndegwa for the respondent agrees that the plaintiff was not cross-examined and that the plaintiff was not allowed to call his witness.

A judge can only decide a suit after hearing all parties properly. In all the circumstances we allow this appeal with costs and order that the suit in the superior court be heard, by another judge, de novo”.

33. Suffice it to state that, generally, a fair hearing in a civil trial under Kenya’s legal system entails ensuring that parties to a dispute are granted the opportunity to: (i) present and receive pleadings; tender evidence in support of their cases; (iii) cross-examine the witnesses tendering evidence against them; and (iv) tender submissions/arguments in support of their cases.

34. In the trial giving rise to the impugned judgment, the respondent testified and led evidence by two witnesses, making a total of three. He closed his case at that point. On their part, all the appellants who tendered pleadings filed and served witness statements and trial bundles. They attended court for the purpose of defence hearing. However, at the commencement of defence hearing, the defence counsel, Mr. Mbogo, made the following remarks:

“Due to the time factor, we have agreed to have 2 defendants to give evidence on behalf of the others”.

35. The trial court did not adopt the above presentation and condense it into a binding court order. After the testimony of one defendant [**William M’Mbura Nabea - 4th defendant**] the defence counsel changed mind and made the following verbatim request.

“I want to call the defendants as I think they are important”.

36. Mr. Gitonga, counsel for the plaintiff [the respondent in this appeal], opposed the request in the following verbatim terms:

“I object. The defendant indicated that 4th defendant will give evidence on behalf of the other defendants except No. 2. The witness

herein has been cross-examined and it would be unfair to call the other to fill the gaps which have emerged”.

37. Mr. Mbogo, counsel for the defence, replied as follows:

“During the proceedings I have realized it is important for the 1st defendant, 8th and 9th defendants because their parcels have been mentioned adversely. The convenience of the court and the advocate should not override the interest of the court”.

38. The trial court thereafter made the following verbatim decision:

“Comments noted. I note this is a 2011 matter. This matter is being expedited due to the age. The defendant opted to have the 4th defendant give evidence on behalf of other defendants except 2nd defendant. He has been cross-examined extensively on the issues related to the said defendant, allowing the said defendant to give evidence after cross-examination on their behalf would give the said defendant unfair advantage. Application to have the said defendant testify declined”.

39. In total, there were 9 defendants. Claims were withdrawn against 2 defendants. Each one of the remaining defendants was entitled to tender evidence to advance their respective defences. There was no dispute about the fact that they had, at the commencement of the defence hearing, proposed to have only two of them testify on their behalf. Their proposal was, however, not adopted by the court and condensed into a binding court order by the court.

40. Secondly, the defence was not asking for an adjournment. They wanted to present evidence by defendants who had tendered

pleadings and witness statements and had attended the trial for the purpose of testifying. They were not asking to be given time to file and serve fresh witness statements. They had already filed and served witness statements prior to commencement of trial.

- 41.** By declining the plea by the defendants, the trial court denied those defendants (appellants) the opportunity to explain how each of them obtained their respective registrations in the adjudication register. In my view, the manner in which the trial court exercised discretion violated the key tenets of a fair trial in Kenya's civil legal system. The trial relating to the dispute related to the emotive resource called land. Article 50 and the guiding principles outlined above dictated that the defendants whose registrations were threatened with cancellations be granted the opportunity to present their respective individual evidence.
- 42.** For the above reasons, it is the finding of this court that the trial court gravely erred in its decision declining the plea by the defendants to tender their individual evidence.
- 43.** Having reached the above finding on the first issue, it follows that fresh trial will have to be conducted in the dispute. Consequently, this court will not pronounce itself on the other issues in the appeal because doing so may prejudice the parties when they go for fresh trial.
- 44.** Noting that the above error was committed by the trial court, there will be no award of costs.

45. For the above reasons, this appeal succeeds and is disposed in the following terms: -

- (a) *The trial proceedings and the judgement rendered on 31/12/2018 in Maua CMC Civil Case No. 79 of 2011 are set aside wholly.***
- (b) *Fresh trial shall be conducted by a different magistrate.***
- (c) *Parties shall bear their respective costs of this appeal.***

DATED, SIGNED AND DELIVERED AT MERU THIS 29TH DAY OF SEPTEMBER, 2025

**B M EBOSO [MR]
ELC JUDGE**