



**Masila v Mutungi & another; Mutungi (Interested Party) (Environment and Land Appeal E093 of 2022) [2025] KEELC 6917 (KLR) (13 October 2025) (Judgment)**

Neutral citation: [2025] KEELC 6917 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND APPEAL E093 OF 2022  
CA OCHIENG, J  
OCTOBER 13, 2025**

**BETWEEN**

**ELIZABETH KANINI MASILA ..... APPELLANT**

**AND**

**LYDIAH KALONDU MUTUNGI ..... 1<sup>ST</sup> RESPONDENT**

**LILIAN MUMBUA KALONDU ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**PAUL NYAMAI MUTUNGI ..... INTERESTED PARTY**

*(Being an Appeal of the judgment delivered on 30th July, 2021 by the Honourable Mrs. L. L. Gicheha in Milimani Commercial Court Civil Case No. 5447 of 2017)*

**JUDGMENT**

1. This appeal, commenced vide the Memorandum of Appeal dated 12<sup>th</sup> October 2022 filed against the judgement of Hon. Mrs. L.L Gicheha (Chief Magistrate), delivered on 30<sup>th</sup> July 2021, in Milimani Commercial Court Civil Case No. 5447 of 2017. The Learned Magistrate dismissed the Appellant (Plaintiff's) suit and ordered her to vacate LR No. NRB/Block 75/516 Nairobi and Athi River Plot Number 359 within sixty (60) days of the judgment and in default an eviction order to issue as she had no authority from the 1<sup>st</sup> Respondent to remain thereon.
2. For context, the Appellant had sued the 1<sup>st</sup> and 2<sup>nd</sup> Respondents herein who are her mother in law and sister in law respectively, the 1<sup>st</sup> Respondent being the mother to her late husband, one Richard Kioko Kalondu (deceased). At the Lower Court, she sought an order of injunction restraining them from evicting her from L.R. Number Nairobi/Block 75516 Buruburu and Athi River Plot Number 359. She pleaded that she was entitled to the use of both properties and in particular the three (3)



- bedroomed house erected on L.R. Number Nairobi/Block 75516 Buruburu as her residential house until her two (2) children with her husband Richard Kioko (deceased) get employment.
3. It was her contention that she had an oral agreement with her deceased husband and his parents (the 1<sup>st</sup> Respondent and the Interested party) herein, that she would bear children for him while the 1<sup>st</sup> Respondent would allow them to have exclusive use of LR No. NRB/Block 75/516 (Buru buru) and half a portion of Plot No. 359 /Mavoko permanently. She claims that the arrangement was reached since her husband had no gainful employment and he relied on his parents for upkeep. She insists that she kept her part of the bargain by bearing two children with her deceased husband. However, upon his unfortunate demise in 2016, the Respondents sought to evict her from the said suit premises. The Learned Magistrate after considering the evidence tendered by both parties dismissed the Appellant's suit.
  4. The Appellant being dissatisfied with the whole of the said Judgment filed her Memorandum of Appeal, which is premised on the following grounds:
    - a. The learned magistrate erred in fact and in law in failing to find and hold that the Appellant was entitled to an order of injunction restraining the Respondents from evicting the Appellant from LR No's NRB/Block 75/516 and Athi River Plot No. 359.
    - b. The learned magistrate erred in fact and in law in failing to find and declare that the Power of Attorney in possession of the 2<sup>nd</sup> Respondent was not registered and thus invalid.
    - c. The learned magistrate erred in fact and in law in failing to find and declare that the actions of the 2<sup>nd</sup> Respondent and the auctioneers appointed by the 2<sup>nd</sup> Respondent in respect of the claim for rent arrears arising out of the use of LR No. NRB/Block 75/516 were unlawful.
    - d. The learned magistrate erred in fact and in law in failing to find and declare that the Appellant was entitled to use LR No. NRB/Block 75/516 as her residential house until the children of the late Richard Kioko and the Appellant attained the age of majority and got employed and, that the Appellant and her children are permanently entitled to Plot No. 359 Athi River.
  5. She hence seeks the following Orders:
    - a. This appeal be allowed.
    - b. The judgment of the Milimani Commercial Chief Magistrate court delivered on 30<sup>th</sup> July 2021 be set aside and judgment be entered as prayed for in the statement of claim before the lower court.
    - c. That the costs of this appeal and the High Court be awarded to the Appellant.
  6. The appeal was canvassed by way of written submissions.

### **Submissions**

7. The Appellant submits that by allowing her late husband including herself to use the suit properties under the terms aforementioned, the 1<sup>st</sup> Respondent, through her conduct, created a contractual and equitable ownership relationship with legal consequences that she cannot evade as the arrangement imposed upon her, a substantial financial obligation, the consequences of which should have established a legal right in her favor.
8. She points out that as a consequence of their agreement, her late husband is buried on Athi River Plot No. 359. Further, that the residential house in Buru Buru and the Athi River property have heavily



assisted with the shelter and food aspect besides generating a bit of income, thus easing the financial burden on her. She insists that the issue ought to have weighed heavily on the learned magistrate but she only viewed the arrangement as trespass.

9. The Appellant also submits that while the 2<sup>nd</sup> Respondent admitted in evidence that she was unaware of the arrangement between the 1<sup>st</sup> Respondent and herself, she nonetheless confirmed that she moved into the Buru Buru house after giving birth to their first child and has been in continuous occupation since then. Further, that she also confirmed that together with her late husband, they began using the Athi River property at the same time. She contends that despite this evidence confirming the arrangement between the 1<sup>st</sup> Respondent and herself, the learned magistrate was fixated on one thing, being ownership thus she found that together with her children, they were trespassers.
10. She also submits that the learned Magistrate failed to find that the 2<sup>nd</sup> Respondent's actions on behalf of the 1<sup>st</sup> Respondent who resides in the United States of America were all without legal backing since the alleged Power of Attorney from her was not registered. She also faults the learned Magistrate for failing to question the 2<sup>nd</sup> Respondent's conduct in that she wanted to throw out her late brother's family barely four (4) months after his burial.
11. On their part, the Respondents submit that the Appellant's right to remain on the suit premises was not express or implied but it was a family arrangement by virtue of marriage to the 1<sup>st</sup> Respondent's son who is now deceased. Further, that her occupation was not formalized by any legal lease or tenancy agreement, since it was not a legal agreement that grants her any proprietary or possessory rights over the suit premises thus her refusal to vacate the property when requested to do so, amounts to trespass, which the trial court correctly found to be.
12. On the issue of the 1<sup>st</sup> Respondent's Power of Attorney, the Respondents' submit that the same is valid as it was duly executed and registered on 7<sup>th</sup> August 2018, in compliance with Sections 43, 44, 45 and 46 of the *Land Registration Act*. Further, that there was no evidence to the Contrary from the Registrar of Documents thus the 1<sup>st</sup> Respondent had the legal authority to deal with the property on behalf of the 1<sup>st</sup> Respondent including the legal capacity to evict the Appellant from the said premises.
13. They also submit that the Appellant has not proved her allegations of any existing contract between the 1<sup>st</sup> Respondent and herself, to be in occupation of the suit properties freely without paying rent.
14. To buttress their averments, they relied on the following decisions: *La Nyavu Gardens Limited v Wilson Munguti Mbithi alias Kavuti & 2 Others* [2012] eKLR; *Backstone Otieno Angana v Bernard Amasaka* [2018] KEELC 4227 (KLR); *Samuel Muciri W'njuguna v Francis Mwanika Njuguna & Another* [2013] eKLR and *McPhail v Persons Unknown*, 1Ch.447, 456B (1973).
15. The Interested party did not participate in the appeal.

### **Analysis and Determination**

16. Upon consideration of the Memorandum of Appeal, Record of Appeal and rivalling submissions, the following are the issues for determination:
  - a. Whether the Appellant acquired proprietary interest over the suit properties.
  - b. Whether the Power of Attorney donated by the 1st Respondent to the 2<sup>nd</sup> Respondent was valid and properly registered in accordance with the law
  - c. Whether the Appeal is merited.



17. This being a first appeal, this Court’s role is to subject the materials presented before the lower court to a fresh analysis so as to reach an independent conclusion and at the same time evaluate whether or not the conclusions arrived at, by the trial Magistrate were justified. The Appellate Court will not unnecessarily interfere with the findings of the trial court. See the decisions of *Selle vs Associated Motor Boat Co.* [1986] EA 123.

As to whether the Appellant acquired proprietary interest over the suit properties and if the Power of Attorney donated by the 1<sup>st</sup> Respondent to the 2<sup>nd</sup> Respondent was valid and properly registered in accordance with the law.

18. The Appellant claims she entered into an oral agreement with her now deceased husband (Late Richard Kioko) and his parents that she would reside on LR No. NRB/Block 75/516 (Buruburu house) registered in the name of 1<sup>st</sup> Respondent and utilize Athi River Plot Number 359 until her children attained the age of eighteen (18) years. She contends that in the said arrangement, she was required to bear children for her husband. She explains that she performed her part as she bore two children, thus she is entitled to utilize the suit properties. She argues that the alleged Power of Attorney used by the 2<sup>nd</sup> Respondent to evict her, is not valid as it is not registered.
19. On their part, the Respondents contend that the Appellant has no right over the suit properties based on her late husband’s family ties and license and that her alleged agreement is insufficient to establish any legal claim. They also contend that possession does not equate ownership.
20. On proprietary rights of an owner, Section 24 of the [Land Registration Act](#) provides that:  
‘Subject to this Act—(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and (b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.’
21. From the evidence tendered in the lower Court, I note the Appellant did not furnish Court with any agreement or license with the 1<sup>st</sup> Respondent where she was allowed to occupy the suit properties so long as she got children with the deceased. I also note the Appellant actually admitted that at the point of marriage, the deceased used to reside on the property in Buruburu with his siblings. Further, that the deceased did not have an income of his own but was supported by the parents. The Appellant argued that she is entitled to occupy the suit properties together with her children until they reach the age of majority and become independent.
22. It is not in dispute that the two properties are registered in the name of the 1<sup>st</sup> Respondent. Further, that the deceased was buried on one of the properties at Athi River. From the evidence tendered in the lower Court, the Appellant seems to argue that since she got two children with the deceased, she is entitled to the suit properties as the owner of the said properties was a parent, to her late husband. The Appellant did not provide any evidence that the 1<sup>st</sup> Respondent had gifted her late husband the suit properties. Further, there was no demonstration that the 1<sup>st</sup> Respondent held the properties in trust for her children.
23. It further emerged in evidence that the 1<sup>st</sup> Respondent actually acquired the Buruburu property through a mortgage and purchased the Athi River property. The Appellant argued that the 2<sup>nd</sup> Respondent who was her sister in law did not have a proper Power of Attorney to deal with the suit properties but on perusal of the Power of Attorney, donated by the 1<sup>st</sup> Respondent Lydia K. Mutungi



to the 2<sup>nd</sup> Respondent Lillian Kalondu, it is indeed registered on the 7<sup>th</sup> August, 2018. I hence find that the said Power of Attorney was valid and was indeed registered in accordance with the law. The question we now need to ponder is whether the Appellant's and deceased possession of the suit premises, which are owned by the 1<sup>st</sup> Respondent, culminated in her acquisition of proprietary rights over them.

24. In the case of Nahashon Karengi & Another v Lawrence Karengi, Court of Appeal at Nyeri, Civil Appeal No. 222 of 2010, [2014] eKLR, the Court held that:

“There is no vested right to inheritance during the lifetime of parents. Let it be known that during the lifetime of their parents, and subject to beneficial and occupation rights, a child cannot force parents to sub-divide and distribute their land or assets unless the said land or assets were acquired and held in trust prior to the parents acquisition of title to the same.”

25. While in the case of Edward Makori Oganga & Another vs John Ayienda Orangi & Others, Kisii ELC No. 466 of 2015 it was held as follows:

“It is time that children stopped having a notion, that what belongs to their parents also belongs to them in equal measure, and that their parents must subdivide and distribute land to them in a particular manner.”

26. Further, the Court of Appeal also stated as follows in Okiro v Gatatha Farmers; Kaitet Tea Farmers (1977) Limited (Interested Party) [2022] KECA 748 (KLR):

“After re-evaluating the entirety of the evidence from both parties, I find that the respondent proved its case on a balance of probabilities. The evidence adduced supported the assertion that; the respondent was a bona fide purchaser of the suit property; the deceased was only allowed to occupy 6 acres of the suit property; and the licence was on the deceased's personal capacity due to his service. Therefore, the said licence ended upon the death of the deceased. As a result, the appellant did not have any claim to any portion of the suit property.”

27. Based on the evidence in the lower court while associating myself with the decisions cited, I find that the Appellant only entered the said suit properties as a licensee under the deceased, which license terminated upon the death of her deceased husband. I opine that her occupation of the suit properties cannot negate the 1<sup>st</sup> Respondent's rights as the registered owner of the said properties. In my view, her continuous insistence on occupying the properties actually amounts to trespass as defined at Section 3 (1) of the *Trespass Act*, as follows:

“Any person who without reasonable excuse enters, is or remains upon, or erects any structure on... private land without the consent of the occupier thereof shall be guilty of an offence.”

28. Further, I find the claim by the Appellant that together with her deceased husband, they were permanently entitled to half a portion of the Athi River land preposterous, as they had no vested right to inheritance during the lifetime of the 1<sup>st</sup> Respondent, who was the registered proprietor of the suit properties.

29. In the foregoing I find that the learned Magistrate did not err in fact and in law in finding that the Appellant was not entitled to an order of injunction restraining the Respondents from evicting her from LR No's NRB/Block 75/516 and Athi River Plot No. 359. I find that the Learned Magistrate did not err in fact and in law in holding that the Power of Attorney in possession of the 2<sup>nd</sup> Respondent



was registered and valid. In my view since the Appellant did not have any proprietary interest over the suit properties with the license having been determined upon the demise of her husband, the learned Magistrate was correct in declining to find any illegality in the actions of the 2nd Respondent and the auctioneers she appointed in respect of the claim for rent arrears arising out of the use of LR No. NRB/BLOCK 75/516.

30. It was hence correct for the learned Magistrate to find and declare that the Appellant was not entitled to use LR No. NRB/BLOCK 75/516 as her residential house until the children of the late Richard Kioko and the Appellant attained the age of majority and got employed. Further, that the Appellant and her children were not permanently entitled to Plot No. 359 Athi River.
31. On costs, since both the Appellant and Respondents are related, each party should bear their own costs.
32. In the circumstances, I find the Appeal unmerited and will proceed to dismiss it and uphold the Judgment delivered on 30<sup>th</sup> July, 2021 by the Hon. L. L. Gicheha in Milimani Commercial Court Civil Case No. 5447 of 2017.
33. I so Order.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF OCTOBER, 2025**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Siagi for Appellant

Odhiambo for Respondent

Court Assistant: Joan

