



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ELCA NO. E052 OF 2023

FRANCIS KINYANJUI MWANGI.....
.....APPELLANT

VERSUS

SARAFINA WANJIRU IKAHU.....
.....RESPONDENT

(Being an appeal against the Judgment delivered by Hon. B.M EKHUBI (PM) on 30th April 2020 in Chief Magistrate's Court at Thika in Civil Case Number 966 of 2013)

BETWEEN

SARAFINA WANJIRU IKAHU.....
PLAINTIFF

VERSUS

FRANCIS KINYANJUI MWANGI.....
DEFENDANT

JUDGMENT

- 1) This Appeal was precipitated by the Judgment of the Subordinate Court that was rendered on 30/04/2020 in respect to the Respondent's suit filed via Complaint dated 15/11/2013 that was seeking to have the Defendant ordered to vacate the suit property, eviction order against the

Defendant, permanent injunction and award of damages for trespass.

- 2) The Appellant failed to enter appearance or file a Defence despite filing a Notice of Appointment. The Plaintiff applied for interlocutory Judgment which was entered on 8/05/2014. The Defendant was granted a conditional leave to file their Defence way back in 2015 but they never did as stated in the Ruling delivered by Hon. Bartoo on 18/01/2017.
- 3) The Court set the suit down for hearing on 22/08/2019 and the Defendant did not attend the hearing despite being served with a Hearing Notice as evidenced by the Affidavit of Service sworn by Wilson Wambua Nguta on 4/04/2019. Although he failed to attend, the matter proceeded and the Plaintiff relied on and adopted her witness statement filed on 15/11/2013 as her evidence in chief. She also produced a Certificate of Lease to support her claim.
- 4) In the end the Court entered Judgment for the Plaintiff against the Defendant in the following terms:

1) The Defendant be and is hereby ordered to vacate and deliver vacant possession of land parcel LR RUIRU/KIU BLOCK 12/329 to the Plaintiff within 30 days from the date of service of the Decree herein upon him.

2) In default of compliance with (1) above as aforestated the Plaintiff shall be entitled to an order of eviction for the forcible removal of the

Defendant, his agents and/or servant from land parcel LR RUIRU/KIU BLOCK 12/329 upon application.

3) A permanent injunction be and is hereby issued restraining the Defendant whether by himself, or his servants or agents or otherwise howsoever from remaining on or continuing in occupation of the suit property.

4) The Plaintiff is awarded Kesh 200,000 general damages for trespass together with interest at Court rates from the date of Judgment until payment in full.

5) The Plaintiff shall have the costs of the suit.

5) It is this Judgment that is the subject of this Appeal. The Defendant being dissatisfied with the impugned Judgment filed a Memorandum of Appeal dated 26/10/2023 raising 17 Grounds of Appeal against the decision of Hon. B.M. Ekhubi. He therefore sought the following prayers in the Appeal:

- a. That the Appeal be allowed.
- b. That the decision of the trial Court be set aside in its entirety.
- c. That the Appellant be granted unconditional leave to defend the suit on merits before a different trial Court.
- d. The Appellant be awarded costs of this Appeal.

6) The Appellant filed the application dated 30/3/2023 seeking to set aside the Judgment whose ruling is the subject matter

of this appeal. In the application, he did not deny that he was served with the Summons to enter appearance but explained that he failed to enter an appearance or file a Defence because his Advocate failed to do so on his behalf despite him instructing him to do so.

- 7) The parties were directed to file their submissions which they did. The Appellant's submissions are dated 28/10/2025 and the Respondent's submissions are dated 5/11/2025.
- 8) The gist of the Appellant's submissions strategically combines procedural grievances (how the case was handled) with substantive legal challenges which touch on the validity of the land ownership.
- 9) The Appellant's primary argument is that he was a victim of his Advocates' professional negligence. He frames this not as a mere delay, but as a violation of his Constitutional Right to a Fair Hearing under Article 50.
- 10) In the submissions the Appellant acknowledges the trial Court's own observation that the previous Advocates chose to go to slumber after being granted conditional leave in 2015.
- 11) Citing the landmark case of **Philip Keipto Chemwolo vs. Augustine Kubende, [1986] KECA 87 (KLR). Reported. 30 October 1986** the Appellant argues that blunders by an Advocate should not result in a party losing their land without a hearing, especially when the situation can be remedied by paying costs.

- 12) Further the Appellant argues that he was not indolent. He shows that as soon as he discovered the failures of his Lawyers, first **Njiru Boniface** and then **K.K. Nyakundi**, he took immediate action first by hiring new Counsel and eventually by acting in person.
- 13) Critically the Appellant also argues that the trial Court paid too much attention to the Certificate of Lease waved by the Respondent without looking at the underlying facts. The Appellant relies heavily on **Munyu Maina v Hiram Gathiha Maina, Civil Appeal 239 of 2009) [2013] KECA 94** which establishes that a registered owner cannot simply dangle a title deed if the root of that title is challenged. They must prove that the acquisition was legal and formal. The Appellant points out that the Respondent's evidence was shallow. She claimed to be a Shareholder in Ngara Mucokaniriria Ltd but produced no evidence of her allocation or payment receipts only the final Lease.
- 14) In line with the Principle of First in Time the Appellant claims he purchased the land from **Celestino Mwangi Kinuthia** long before 2012. He argues that by the time the Respondent was getting her Lease, the land was no longer available for allotment because he already owned it. He emphasizes that he has been in physical possession of the land for over 12 years and has acquired overriding interest by possession.

- 15) The Appellant questions the Respondent's silence and states that if the Respondent truly owned the land since 2012/2013, then why did she allow the Appellant to remain in possession and build structures for years before seeking eviction?
- 16) He argues that the award of Ksh 200,000 for trespass is baseless because he entered the land as an owner, not an intruder.
- 17) The Appellant's argument rests on the Principle of Proportionality where he states that the risk of a man losing his home and land because of a Lawyer's mistake is a higher risk of injustice than the risk of the Respondent having to prove her case in a full trial.
- 18) In response, the Respondent's submissions is a firm defense of procedural finality and the sanctity of title. While the Appellant asks for mercy due to his Lawyers' mistakes, the Respondent asks the Court for Justice through certainty.
- 19) She raises four points in her submissions. The first one being the principal-agent liability. She argues critically that the Appellant is legally responsible for the actions or inactions of his chosen Advocates. She referred to the case of **Duale Mary Ann Gurre v Amina Mohamed Mahamood & Another [2014] KEHC 7646 (KLR)** and she argues that a suit belongs to the litigant, not the Lawyer. This case is often cited for establishing that litigants hold a personal responsibility to monitor their legal Counsel. The

Ruling emphasized that clients must actively follow up on their cases, as they cannot solely blame Advocates for negligence in case progression.

- 20) The Respondent points out that this was not a one-time mistake. The Appellant was given a second chance in 2015 when the first default Judgment was set aside. To ask for a third chance in 2026 is, in the Respondent's view, an abuse of the Court's patience.
- 21) The second point she brings up is the shield of Section 26 of the Land Registration Act. The Respondent relies on the inviolability of a Government issued title. Under Section 26 of the Land Registration Act, a Certificate of Title/Lease is conclusive evidence of ownership.
- 22) The Respondent argues that she has a clean title issued by the Registrar. Since the Appellant did not formally plead or prove fraud or misrepresentation, the Court has no legal basis to look behind the document.
- 23) The third point that she argues about in her submissions is that the Appellant's character is not one of diligent litigant. It is her submission that the Respondent for over a decade, has been unable to use her land while paying rates and legal fees. She contends that the Appellant's sudden discovery of the case only when eviction was imminent proves that his goal is delay, not justice. She highlights the 13-year timeline 2013-2026.

24) On the fourth and last point, the Respondent submits that the Appellant failed to prove a competing interest over the suit property. She states that the Appellant's claim of ownership is baseless. That under Section 107 of the Evidence Act, the Respondent argues she proved her case by producing the Lease and the Search but that the Appellant has no paper trail. That the Appellant claims to have bought land from one **Celestino Mwangi**, but he has not produced a Sale Agreement or a Share Certificate. Therefore, even if the case were reopened, the Respondent argues the Appellant would still lose because he who alleges must prove.

Analysis and Determination

25) This Appeal invites the Court to balance two competing interests which are the Appellant's desire to be heard on the merits of a land claim and the Respondent's right to enjoy the fruits of a Judgment obtained after a decade of litigation. The Court is guided by two maxims *Semper praesumitur pro negante*, the burden of proof lies on the one who alleges and *Interest reipublicae ut sit finis litium*, it is in the interest of the state that there be an end to litigation.

26) I therefore find that the issues for determination emerging from the appeal are as follows:

- i. Whether the Respondent discharged her burden of proof under Section 107 of the Evidence Act to warrant the trial Court's Judgment.*

- ii. *Whether the Appellant's claim of prior purchase constitutes a triable issue in the absence of documentary evidence.*
- iii. *Whether, after multiple procedural defaults, the interests of justice are served by reopening a 13-year-old dispute.*
- 27) The Appellant argues that the trial Court erred by accepting a dangled title. However, the law on burden of proof is statutory. Sections 107, 108 and 109 of the Evidence Act mandate that the party seeking a legal right must prove the facts supporting that right.
- 28) In the case of **Kenya Power & Lighting Company Limited v Nathan Karanja Gachoka [2016] eKLR**, the Court emphasized that even uncontroverted evidence must be interrogated.
- 29) So, at the hearing the Respondent produced a Certificate of Lease, payment receipts to **Ngara Mucokaniriria Co. Ltd** and a Certificate of Search. In land law, this creates a *prima facie* case. The burden then shifted to the Appellant to prove his prior purchase. The Appellant missed the opportunity by not filing a Defence or attending the hearing.
- 30) The Appellant relies on **Munyu Maina v Hiram Gathiha Maina [2013] eKLR**. While it is true that a title holder must go the extra mile if their root is challenged, a challenge must be more than a mere statement. In **A.**

Raghavamma v. A. Chenchamma (1964) AIR 136, the Supreme Court of India noted that there is an essential distinction between burden of proof which never shifts and the onus of proof which shifts from side to side.

- 31) In other words, once the Respondent proved her registration, the onus shifted to the Appellant to produce a Sale Agreement or Share Certificate from the same Company. He produced none. He who alleges a prior purchase must prove it; the Appellant failed this test.
- 32) There is the issue of finality in litigation and the Oxygen Principle. The Appellant argues his Lawyers failed him. This Court notes that the litigation began in 2013. In the case of **Board of Trustees National Social Security Fund v Cheisano [2015] eKLR**, the Court held that the right to a hearing is not an absolute license to be indolent.
- 33) In **CMC Holdings Ltd v James Mumo Nzioki [2004] KECA 143 (KLR)** the Court of Appeal held that in an application for setting aside ex parte Judgement, the Court exercised its discretion and that the discretion must be exercised upon reasons and must be exercised judiciously. Further, that this was meant to ensure that a litigant did not suffer injustice or hardship as a result of an excusable mistake or error. The Court went on to state that it would not be proper use of such discretion if the Court were to turn its back to a litigant who clearly demonstrated an excusable mistake, inadvertence, accident or error.

34) Further in **James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another [2016] KECA 470 (KLR)**, the Court of Appeal made a distinction between a regular and an irregular Judgment and the factors to be considered in setting aside such Judgments. The Court observed that in a regular default Judgment, the Defendant was served with Summons to enter appearance but failed to enter appearance or file Defence resulting in default Judgment. Such a Defendant was entitled under Order 10 Rule 11 of the Civil Procedure Rules, to move the Court to set aside the default Judgment and grant him leave to defend the suit. The Court has unfettered discretion in determining whether or not to set aside the default Judgment, and will take into account factors such as the reason advanced for the failure by the Defendant to file his Memorandum of Appearance or Defence, the length of time that has elapsed since the default Judgment was entered, whether the intended Defence raised triable issues, the prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default Judgment.

35) The Appellant was properly served with Summons to enter appearance and the trial Court's Judgment was entered regularly. The reason the Appellant gave for failing to enter an appearance or file a Defence was that his Advocate failed to file the Defence. Although an Advocate's negligence or omission may in some instances justify setting

aside a Judgment, litigants are expected to follow up on their cases diligently as already stated.

36) Further, the Oxygen Principle under Sections 1A and 1B of the Civil Procedure Act, state that it is the Court's duty to ensure cases are settled cost-effectively and expeditiously. In the case of **Henderson v Henderson [1843], 3 Hare 100, 67 ER 313** the Court established the rule against re-litigating, stating that parties must bring their whole case forward at once rather than in installments over decades. The Appellant has not shown a triable issue that would defeat a registered Lease. Litigation must come to an end to maintain the integrity of the land registration system and the Court's own processes.

37) The Judgement of the lower Court was delivered on 30/04/2020. Setting aside the Judgment at this stage would greatly prejudice the Respondent who have already secured a valid Judgement in their favour. The overriding objective of the Court is to do justice to both parties. The Appellant failed to act diligently after he was served with the suit papers. There is no basis to interfere with the Magistrate's Court's decision.

Disposal Orders

38) Given the foregoing I make the following final orders:

i. The Appeal is dismissed with costs.

ii. The Judgment and Decree of the Subordinate Court in Thika MCCC No. 966 of 2013 is hereby affirmed.

iii. The Appellant is granted 45 days to remove his structures and building materials from LR RUIRU/KIU BLOCK 12/329, in default of which the Respondent is at liberty to execute the Eviction Order.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF FEBRUARY 2026.

.....
**MOGENI J
JUDGE**

In the presence of:-

..... for the Appellant

..... for the Respondent

Melita Court Assistant

.....
**MOGENI J
JUDGE**