

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA

ELCA NO 56 OF 2023

FRANCIS GIKONYO MACHARIA.....1ST APPELLANT

HUMPHREY NGATIA MACHARIA.....2ND

APPELLANT

VERSUS

MARY GACHAMBI

MURUITHIA.....RESPONDENT

JUDGMENT

The Respondent filed a suit in the Chief Magistrate’s Court, Nyahururu CMELC No. E016 OF 2021 against her sons, the Appellants herein alongside the Land Registrar, Nyandarua County who is not a party in this Appeal. The Respondent averred in the Complaint dated 23/2/2021 that she was the registered absolute owner of L.R No. NYANDARUA/ NDEMI/1359 and that on or about 22/8/2013 and 7/7/2014 respectively , the Appellants herein unlawfully and without any colour of right lodged a caution and a restriction over the said land with the grievances that their sisters were not entitled to inherit the land due to their gender which the Respondent claimed was based on archaic customary beliefs and practices which are unconstitutional, discriminatory, oppressive and unfair. She therefore prayed that the caution and restriction lodged against the land be removed and that the Land Registrar, 3rd

Defendant in the lower Court be ordered to remove the caution and restriction. She also asked for the costs of the suit plus interest.

On 15/3/2021, the Appellants herein filed a Statement of Defence dated 11/3/2021 in which they admitted that the Respondent was the registered proprietor of the suit land, NYANDARUA/NDEMI/1359 but that she was not the absolute proprietor and while admitting that they had lodged a caution against the suit land they said that they did so in order to prevent the suit land being disposed of by the Respondent or wasted without their consent. They also claimed that the Respondent had filed a similar suit against the Appellants in ELC Court at Nakuru where the subject matter was still the lifting of the caution and restriction lodged by themselves against the same suit land i.e. NYANDARUA/NDEMI/1359 and that therefore the suit was *res judicata*.

They also claimed that the suit land had been allocated to their late father Michael Muriithi Githua on 26/9/1979 by the Settlement Fund Trustees, leaving an unsettled loan which was cleared by the Appellants paving way for the discharge of the Title. They averred that the Respondent held the Title Deed as a Trustee for the benefit of the Appellants after finalization of Nakuru High Court Succession Cause No. 22 of 2009 in the Estate of the late Michael Muriithia Githua. This therefore explained why the Appellants had placed a caution over the suit land.

On his part, the Land Registrar on 26/4/2021 filed a Statement of Defence dated 22/4/2021 averring that he was a stranger to the

Respondent's claim(s) and that if the Respondent's claim was legitimate, then she ought to have followed the procedure laid down under Section 73 of the Land Registration Act before filing the suit. The Appellants denied that the lower Court had jurisdiction to try the matter in dispute.

A Reply to the Appellants' Defence reiterated all the averments in the Plaint and also claimed that in Nakuru High Court Succession Cause No 27 of 2009, the Appellants misled the Respondent to urge the Court to exclude their siblings who were married but that after the Grant was issued, the Respondent convened a meeting where it was resolved that each of the beneficiary was to get an entitlement of $\frac{1}{2}$ Acre of the suit property. She also explained that the suit was not *res judicata* since Nakuru ELC No. 103 of 2015 had been terminated for want of prosecution. She said that if the Appellants were dissatisfied with the mode of distribution of the Estate of their father, then they ought to have moved the Succession Court for revocation. She said as the Administratrix she has all along been ready to complete the administration of the Estate of their father.

In an Application dated 15/2/2022, the Respondent asked the Chief Magistrates' Court to strike out with costs the Appellants' Defence and enter Judgment in favour of the Respondent as prayed for in the Plaint for the said Defence was scandalous, frivolous and vexatious, an abuse of the Court process and that it would prejudice, embarrass and delay the fair trial of the suit. She further urged that the Appellants' admission that the caution was lodged

in protest of the mode of distribution of the Estate of the late Michael Muruithia Githua made this Court the wrong forum to ventilate their grievances in respect of the distribution of the Estate since the grievances were as a result of the dissatisfaction by the Appellants on the distribution of their father's Estate and that the Court lacked jurisdiction to determine disputes relating to the distribution of the Deceased's Estate. All this was contained on the face of the Application dated 15/3/2021 and the Respondent's Affidavit in support of the same, sworn on even date.

In their joint Affidavit in Reply to the Application, same sworn on 21/2/2022, both Appellants Francis Gikonyo Macharia and Humphrey Ngatia Macharia deponed that the Application was incompetent, misconceived and bad in law and that the same ought to have been dismissed with costs. They also said that an earlier Order of Court dated 1/3/2021 had directed that the case be heard on merit after dismissing the Application dated 22/2/2021. They invoked Article 50 of the Constitution of Kenya, 2010 for a right to a fair hearing and that their Defence did disclose reasonable and triable issues and that they had an interest in the said land, since the Title Deed was held in trust. The fact that the Court has no jurisdiction is also a triable issue. And this must be settled and also the issue raised on non-compliance with Order 4 Rule 1 (f) of the Civil Procedure Rules. They felt that the only way to resolve the matter is for all of them to agree on everybody's entitlement and its location after which the caution can be removed.

After the parties were allowed to file their submissions, the Court made a Ruling on the Application on 10/11/2022. The learned trial Magistrate rightly held that all that a Defendant is supposed to show is that a Defence on record raises triable issues which ought to go for trial. A Defence which raises triable issues does not mean a Defence that must succeed.

The Respondent said that the Appellant's Defence amounted to an admission. The Magistrate observed: -

After being dissatisfied with the said Ruling, the Appellants appealed to this Court for orders that:

(a) That the Ruling of 10/11/2022 striking or dismissing the Appellants' Statement of Defence in Nyahururu CM E.L.C No. EO16of 2021 and entering judgment for the Plaintiff be reversed and /or set aside and an order be issued and the suit be heard on merit before another Magistrate.

(b). That the costs of this Appeal be borne by the Respondent.

The same were grounded on the following:

1. The learned trial Magistrate erred in law and fact in finding that the Appellants' Statement of Defence filed in the trial Court did not disclose any triable issues which should be heard in Court in the usual manner.

2. The learned trial Magistrate erred in law and fact in entering judgment for the Respondent when no evidence had been adduced in support of the claim and no trial whatsoever was conducted as if the Plaintiff's claim was a liquidated claim.
3. The learned trial Magistrate erred in law and fact in depriving the Appellants their right of being heard in a fair and impartial way in a case they had an interest in as dictated by the Constitution of Kenya without any sufficient lawful reason.
4. The learned Honorable Magistrate erred in law and fact in holding that the Appellants' grievances or interest in the subject land could only be redressed in a succession Court when it was very clear from the pleadings that the Appellants' claim was that of trust and/or beneficial ownership.
5. The learned trial Magistrate erred in law in summarily dismissing the Appellants' claim, entitlement and Defence with regard to the suit land without having even heard/ listened to them.
6. The learned trial Magistrate erred in law in adopting and using a procedure unknown in law to circumvent the mandatory requirements for hearing of the land case but eventually rendering what amounted to a final judgment.
7. The learned trial Magistrate erred in law and fact in allowing the Respondent's Notice of Motion Application dated 15th February 2021 even when the same was not prosecuted.
8. The learned trial Magistrate erred in law and fact in hearing and allowing the Notice of Motion Application dated 15th

February 2021 which was *res judicata* and ostensibly overturning and overruling a previous Magistrate's Order that had directed the said case should be heard and determined in the normal way.

9. The Ruling by the learned trial Magistrate was against the substance and weight of the depositions placed before her and the law and hence she completely failed to render a fair and just ruling in accordance with the law.

Unfortunately, in my view, the fact that the Appellants admitted that they had filed a caution against the suit land and for what reasons does not mean that they admitted the Respondent's claim to be genuine. All they said and meant is that they had rightly lodged a caution against the suit land to force certain conditions to be met and as long as the same were not met, the caution should remain in place.

Secondly, the prayer before the Court was not for Judgment on admission. This was a prayer for the Court to strike out the Defence for the same disclosed no cause of action and is unreasonable. The Court rightly held, quoting the case of D.T Dobie & Co Ltd -vs- Muchina [1998] KLR that:

“ No suit or Defence should be terminated summarily unless it is so hopeless that it plainly discloses no reasonable cause of action or it is so weak to be beyond redemption or cured by an amendment. If it can be injected with life by an amendment, it ought to proceed for the

Court to consider the facts at the trial. The exercise of the Court's draconian powers of summary procedure should be hesitantly exercised. It is a jurisdiction in the clearest of cases only.....”

The Defence filed by the Applicants as I can fathom it raises the following issues: -

“.....Hey your honour, wait, our mother is in the process of dealing with our late father's Estate in a manner that we do not agree with. We urge you to stop her until and unless it is either clear to us what she is doing or until we are in agreement with her. Learned Magistrate, this is why we registered a caution and the Land Registrar agreed with us. Now, our mother is pleading with you to remove it yet we still cannot agree on the mode of distribution. Only this Court can decide on the sustainability of the caution. Please, do allow the caution to remain in the Register so that as the caution remains in place, we go back to the Succession Court and finalize the distribution of our father's Estate which has no place in this Court. Please you Honour we respectively urge you.....”

I believe this is a triable issue. Whether the caution ought to be removed or to stay in place and for how long. I need say no more. The Appeal succeeds and since this is a family dispute, I do not want to widen the fissure by ordering any party to pay any costs.

Finally, my advice to the parties is that they need to sit down and agree on the distribution of the suit property. In fact, as I went through the proceedings herein, I felt that the matter should have gone to mediation or arbitration long time ago and I plead with the 2 very able and seasoned Counsel to take that path.

Judgment read and delivered at Nyandarua this 5th Day of March 2026.

**MUGO KAMAU
JUDGE**

In the Presence of: -

Court Assistant: Samson.

Advocate for the AppellantMr. Kaburu.

Advocate for Respondent.....Mr. Muchangi.