

REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT MILIMANI
ELCA NO. E078 OF 2024

FIRANJA MAKAYA LUKIO

[suing the estate, NDUNGU

KENNETH KIARIE, Deceased]

VS

- APPELLANT

JAMES NJUGUNA GITAU

EMBAKASI RANCHING CO LTD

RESPONDENT

THE HON ATTORNEY GENERAL

RESPONDENT

THE CHIEF LAND REGISTRAR

- 1ST RESPONDENT

- 2ND

- 3RD

- 4TH RESPONDENT

**[Being an appeal from the judgment of Hon S A OPANDE PM
delivered on 29/5/2024 in MCELC NO E033 of 2023]**

JUDGMENT

1. Vide a plaint dated 26/1/2023 the Appellant [who was the plaintiff in the trial Court] moved the Court for orders that;
 - a. A declaration that the issuance of Title No. Nairobi Block 105/13119 [formerly Plot No. 985 Embakasi Ranching Co. Ltd] in the name of the 1st Defendant James Njuguna Gitau by the 4th Defendant Chief Land Registrar was illegal, unlawful and contrary to 2 Court Order issued in Kiambu CMC Cause No. 446/2018 in the matter of the Estate of Kenneth Ndung'u Kiarie [Deceased] and Nairobi ELC No. 604 of 2013 James Njuguna Gitau vs Kenneth Ndung'u Kiarie & Embakasi Ranching Co. Ltd.

- b. An Order for Cancellation of Title No. Nairobi Block 105/13119 [formerly original Plot No. 985 Embakasi Ranching Co. Ltd.] in the name of the 1st Defendant James Njuguna Gitau by the 4th Defendant Chief Land Registrar forthwith.
- c. An order that the 4th Defendant the Chief Land Registrar do issue a new Title No. Nairobi Block 105/13119 in the name of the Plaintiff Firanjah Makaya Lukio.
- d. A permanent injunction be issued against the 1st Defendant, his family, personal representatives, servants, labourers, agents, assigns and any third party and/or other person authorized by him restraining them from occupying, entering, trespassing, selling, constructing or erecting all structures and/or entering with the Plaintiff's ownership, occupation, possession and use of Title No. Nairobi Block 105/13119.
- e. The 1st Defendant to render vacant possession of the parcel of land within Thirty [30] days from the date of judgment.
- f. An Eviction Order be issued against the 1st Defendant to vacate the suit premises title No. Nairobi Block 105/13119 within Thirty [30] days failing which the Plaintiff should forcefully evict the 1st Defendant and remove or demolish all the 1st Defendant's illegal structures and the 1st Defendant to bear the demolition and removal costs.
- g. The Plaintiff awarded the General damages for fraud, trespass to property and erection of illegal structures against the intended 1st Defendant.

- h. The Defendants be jointly condemned to pay costs of the suit and interest.
 - i. Any other relief that the Honourable Court may deem just to grant.
 - j. Any other relief that the Honourable Court may deem just to grant.
2. The Appellant argued that the deceased was a shareholder and member of the 2nd Respondent, and was allocated Plot No 985 [now LR No Nbi/Block105/13119] in 1987. The deceased possessed original documents, including the letter of allotment, payment receipts, survey fees, and engineering fees receipts, all issued by the 2nd Respondent. In 2009, when the deceased and the 1st Respondent were taken to view the plots numbered 985 and 1-262, it was realised that the 1st Respondent had mistakenly settled on the deceased's Plot No 985 instead of Plot No 1-262, and he was asked to vacate the plot after being given a reasonable period to do so. Rather than vacate, he filed a suit, namely ELC No 604 of 2013 - James Njuguna Kiarie Vs Kenneth Ndungu Kiarie, claiming ownership of the plot No 985. In 2017, the parties recorded a consent to settle the suit in the following terms;
 - a. That the Plaintiff [Gitau] shall transfer his plot No 1-262 to the 1st Defendant, Kenneth Ndungu Kiarie.
 - b. That Kiarie shall transfer his plot No 985 to the Plaintiff, Gitau
 - c. That Embakasi Ranching Co. Limited shall facilitate the transfer of the exchanged plots forthwith.
 - d. That Gitau shall bear the costs for the two transfers at Embakasi Ranching Co Limited offices.
 - e. The suit shall be marked as settled.
3. In 2017, another site visit was conducted in the presence of the 2nd Respondent's surveyor and the disputing parties. It was found that Gitau's plot No 1-262 was claimed by a third party, so the exchange

did not occur in accordance with the parties' consent orders. Later, in 2020, the Appellant visited the 2nd Respondent and requested a title for plot No 985 to comply with the consent orders. He was surprised to learn that the 4th Respondent had unlawfully issued a title to the 1st Respondent for plot No 985 [now LR Nbi/Block 105/13119], contrary to Court orders. Subsequently, the 1st Respondent began erecting a permanent house on the Appellant's land, leading to the filing of this suit and the orders sought.

4. The 1st and 2nd Respondents failed to enter an appearance or file a defence, and the Appellant sought an interlocutory judgment.
5. The 3rd and 4th Defendants [Respondents] filed a statement of defence dated 17/2/23 wherein they preferred a general denial of the Appellants' claims.
6. On 9/4/24, the matter was fixed for formal proof, where the Appellant testified, and the case was closed.
7. Upon hearing the suit, the trial Court returned its verdict on 29/5/2024, where the suit was struck out with no orders as to costs.
8. Aggrieved by the decision of the Court the Appellant proffered this appeal on the grounds;
 - a. The Learned Magistrate erred in Law and in fact by failing to decide the Plaintiff's suit on the evidential yardstick of balance of probabilities based on the uncontested facts, unrebutted evidence and unchallenged evidence of the Appellant on record before him.
 - b. The Learned Magistrate erred in Law and in fact by not recognizing that Interlocutory Judgment having been entered on 14/2/2024 against the 1st and 2nd Respondents, there was no legal basis of striking out the Appellant's suit as the Interlocutory Judgment was not set aside in the short and scanty personal biased judgment.
 - c. The Learned Magistrate erred in Law and in fact by ignoring the facts that the 3rd Respondent and 4th Respondents were new parties in the new separate suit. Hence it was a grave mistake,

a grave judicial error and grave judicial hostility to strike out the Appellant's new separate land suit which sought very different 8 prayers which were not pleaded in the earlier suit by her late husband who was the 1st Defendant whatsoever.

- d. The Learned Magistrate erred in Law and in fact as he did not even bother to set out the final orders dated 23rd October, 2017 and marked exhibit P4 where the Superior Court and the Superior Judge J. Eboso ordered in Order No. 4 and 6 as follows;

“That the suit be marked as settled. Order No. 5- That each Party to bear the costs of its own suit.

Further orders; -Order No. 6, That the file is hereby closed”

- e. The Learned Magistrate erred in Law and in fact by defaulting, refusing and failing to be simply bound by the final Orders of the Superior ELC Court which were before his eyes in both exhibits P3 (Consent Letter dated 17th October, 2017) and P4 final Order dated 23rd October 2017). Hence his judgment dated 29/5/2024 should be set aside on the ground of his grave judicial error.

- f. The Learned Magistrate erred in Law in fact by misdirecting himself that the Appellant should have executed and enforced the obviously aborted and frustrated Consent dated 17/10/2017 and final Orders dated 23/10/20177 whereas in the current separate suit it was clearly pleaded that the subject matter Plot No. 985 and Plot No. 162 no longer legally existed. Furthermore, it was clearly pleaded that one of the parties Kenneth Ndung'u had long died way back on 23/5/2017 as evidence by Exhibit P1 (Grant of Letter of Administration 6/3/2019 and Exhibit P 2 (Certificate of Confirmation Grant amended on 3/8/2022 vide Kiambu CMC Succession Cause No. 446/2018 in the Matter of the Estate of Kenneth Ndung'u Kiarie (Deceased). Hence there was no legal possibility of enforcing the aborted Consent which had been overtaken by events when

the 1st, 2nd, 3rd and 4th Respondents fraudulently processed Title No. Nairobi Block 105/13119 thereby dispossessing the Appellant.

- g. The Learned Magistrate erred in Law and in fact by misdirecting himself on the 8 new Causes of Action the Law mandated the Appellant vide the Grant of Letters of Administration dated 6/3/2019 and the Certificate of Confirmation of Grant dated 9/3/2020 issued in Kiambu CMC Succession Cause No 446/2018 in the matter of the Estate of Kenneth Ndung'u Kiarie (Deceased) to ensure that she pursued all the assets of the Estate physically and by Court action to ensure compliance with the final Grant. In the current land suit involving a fraudulently obtained Title No. Nairobi block 105/13119 (Formerly Plot No. 985 Embakasi Ranching). The Appellant moved to the ELC Court to recover the family parcel of land and to have the Chief Land Registrar compelled/ordered to cancel the wrongly issued Title in the name of the 1st Respondent.
- h. The Learned Magistrate erred in Law and in fact by not even evaluating the Appellant's evidence and all the 8 exhibits meaning he refused to address himself to the case before the ELC Court and the 8 prayers for redress. Had the Learned Magistrate attempted to discuss the Appellant's exhibits P 3 [Consent Letter] and P4 [final Court Order by a Superior Court and Superior Judge J. Eboso], the Learned Magistrate would not have struck out the Appellant's suit and throw mud at it and create the untidy mess in a straightforward land case where the widow was fighting dispossession and pleading for cancellation of a fraudulently obtained Title No. Nairobi Block 105/13119 (formerly Plot No. 985 Embakasi Ranching), through collusion of the 4 Respondents, and that is why the 4th Respondent could not dare to defend their illegality in Court.
- i. The Learned Magistrate erred in Law and in fact by his preposterous reasoning that the Appellant should have pursued

her new causes of action in a closed Court file as decreed by a Superior Court and a Superior Judge. There was an irreversible final Court Order and there was no way 3 new parties could be added in a closed Court file.

- j. The Learned Magistrate erred in Law and in fact by stating that the suit before him was for execution of the Consent in an earlier suit under Section 34 of the Civil Procedure Rules which was not cited by any party in the pleadings or in the Formal Proof Hearing and proceedings on 9th April, 2024.
- k. Further, the Learned Magistrate erred in law and in fact by ignoring and disregarding the oral submissions made by the Appellant's Counsel on the same day, 9/4/2024, when it was clearly submitted that the Plaintiff's case and evidence on record were in law unchallenged, not rebutted or controverted by all the 4th Respondents. Hence, it is trite law and trite practice that, on a balance of probabilities, judgment should be given to the Appellant as prayed for in the 8 prayers in the plaint dated 26/1/2023.
- l. The Learned Magistrate erred in Law and in fact by failing to grasp the Appellant's pleading and the 8 causes of action in the separate suit that it was impossible to enforce a Consent where one of the parties died on 23rd May, 2017, and the 2 plots No. 985 and 162 did not exist anymore as one was given a new Title No. Nairobi Block 105/13119, and the other did not physically exist anywhere on the ground.
- m. The Learned Magistrate erred in Law and in fact by failing to find the Plaintiff's suit was founded on 8 different cause of action and 8 new prayers which were not in the earlier CLOSE suit NRB MILILANI ELC NO. 604 OF 2013 JAMES NJUGUNA GITAU VS KENNETH NDUNG'U KIARIE & EMBAKASI RANCHING CO. LTD whatsoever.

- n. The Learned Magistrate erred in Law and in fact by not finding that Section 34 of Civil Procedure Act did not even provide for dismissal of any separate suit.
 - o. The Learned Magistrate erred in Law and in fact by misdirecting himself as no Trial Court would just dismiss or strike out an uncontested suit, unchallenged suit and uncontroverted suit by the Respondents, particularly where an interlocutory judgment was entered and was not even set aside in the final judgment itself.
 - p. The Learned Magistrate erred in Law and in fact by turning himself to water down the Appellant's suit and the Appellant's unchallenged, unrebutted, uncontroverted, uncontradicted evidence on record, as nobody submitted on Section 34 of the Civil Procedure Act, which the Learned Magistrate unjustly and erroneously imported to the Appellant's separate suit.
9. Consequently, the Appellant sought the orders as follows;
- a) A declaration that the issuance of Title No. Nairobi Block 105/13119 (formerly Plot No. 985 Embakasi Ranching Co. Ltd) in the name of the 1st Defendant JAMES NJUGUNA GITAU by the 4th Respondent CHIEF LAND REGISTRAR was illegal, unlawful and contrary to 2 Court Order issued in KIAMBU CMC SUCC CAUSE NO. 446/2018 IN THE MATTER OF THE ESTATE OF KENNETH NDUNG'U KIARIE (DECEASED) and NRB ELC NO. 604 OF 2013 JAMES NJUGUNA GITAU VS KENNETH NDUNG'U KIARIE & EMBAKASI RANCHING CO. LTD.
 - b) An Order for Cancellation of Title No. Nairobi Block 105/13119 (formerly Plot No. 985 Embakasi Ranching Co. Ltd.) in the name of the 1st Defendant JAMES NJUGUNA GITAU by the 4th Respondent CHIEF LAND REGISTRAR.
 - c) An Order that the 4th Respondent the Chief Land Registrar do issue a new Title No. Nairobi Block 105/13119 in the name of the Appellant FIRANJAH MAKAYA LUKIO forthwith.

- d) A permanent injunction be issued against the 1st Respondent, his family, personal representatives, servants, labourers, agents, assigns and any third party and/or other person authorized by him restraining them from occupying, entering, trespassing, selling, constructing or erecting all structures and/or entering with the Appellant's ownership, occupation, possession and use of TITLE NO. NAIROBI BLOCK 105/13119.
 - e) The 1st Respondent to render vacant possession of the parcel of land within thirty (30) days from the date of Judgment.
 - f) An Eviction Order be issued against the 1st Respondent to vacate the suit premises TITLE NO. NAIROBI BLOCK 105/13119 within THIRTY [30] days filing which the Appellant should forcefully evict the 1st Respondent and remove or demolish all the 1st Respondent's illegal structures and the 1st Respondent to bear the demolition and removal costs.
 - g) The Appellant be awarded the General Damages for fraud, trespass to property and erection of illegal structures against all the Respondents jointly and severally.
 - h) The Respondents be jointly condemned to pay costs of the suit in the Magistrate's Court and Costs of this Appeal.
 - i) The Respondents be jointly condemned to pay interest on (g) and (h) from the date of filing the Complaint dated 23/1/2023 to the date of the judgment herein and until payment in full.
 - j) Any other relief that the Honourable Court may deem just to grant.
10. On 14/10/25, the parties elected to canvass the appeal by written submissions. The Appellant's submissions are dated 24/10/25. The Respondents failed to comply with the Court's directions. I have read and considered the submissions.

Analysis and determination

11. The key issues for determination are;
 - a. Whether the trial Court erred in striking out the suit of the Appellant

- b. What orders should the Court issue
 - c. Costs of the appeal.
12. Section 78 of the Civil Procedure Act states;
- (1) Subject to conditions and limitations as may be prescribed, an appellate Court shall have power -
 - a) to determine a case finally;
 - b) to remand a case;
 - c) to frame issues and refer them for trial;
 - d) to take additional evidence or to require the evidence to be taken;
 - e) to order a new trial.
 - (2) Subject as aforesaid, the appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on Courts of original jurisdiction in respect of suits instituted therein.
13. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as thus:
- "...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this 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...."
14. Bearing in mind the duty of the Court aforestated, I shall evaluate the appeal as follows;
15. Without delving into the controversies of the dispute, it suffices to state that the Appellant's grievance, as I understand it, is that the title

of the suit land was transferred and registered in the name of the 1st Respondent illegally, contrary to the consent orders that the parties had recorded before the Court. In fact, the Appellant's case is that, contrary to the Court orders, the 1st Respondent and the 2nd-4th Respondents went against her and registered the title illegally in the name of the 1st Respondent instead of the deceased. This is essentially the core of the dispute before the trial Court.

16. The Trial Court, in my view, erred in holding that the suit before it ought not to have been filed in the first place and that the parties ought to have approached the ELC Court for execution instead. I hold a different view.

17. I am of the view that this suit be remitted to the trial Court for a fresh hearing by another magistrate other than the Hon SA Opande, PM.

18. I make no orders as to costs.

19. Orders accordingly.

DATED, SIGNED & DELIVERED AT NAIROBI VIA MICROSOFT TEAMS THIS 16TH DAY OF APRIL 2026.

J G KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr Gitau for the Appellant
2. N/A for the Respondents
3. CA - Ms. Elizabeth