



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC APPEAL NO. 18 OF 2016

JOSEPH GACHERU GATUNE.....APPELLANT

VERSUS

DAVID NDERITU GATUNE.....1ST RESPONDENT

MICHAEL MURERIA.....2ND RESPONDENT

DANSON MACHARIA.....3RD RESPONDENT

**(BEING AN APPEAL FROM THE JUDGMENT DELIVERED ON 15TH NOVEMBER, 2016 BY
HON. P.M. KIAMA – P.M AT WANG’URU SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL
CASE NO. 146 OF 2015)**

JUDGMENT

The subject of this appeal is rice holding No. 185 Tebere Section Unit 7 (the rice holding). The appellant (as plaintiff) filed at the **WANGURU PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No. 146 of 2015** against the respondents (as defendants) seeking to evict them from the said rice holding and an order restraining them from interfering with his occupation thereof. That dispute was heard by **P.M. KIAMA** Principal Magistrate and in a judgment delivered on 15th November 2016, the trial magistrate found that the suit had been litigated before and proceeded to dismiss it for being an abuse of the Court process.

Aggrieved by that decision, the appellant filed this appeal on 21st November 2016 seeking to set aside that judgment. He raised the following grounds of appeal:

- 1. That the learned magistrate erred in law and in fact in dismissing with costs WANGURU CIVIL CASE No. 146 of 2015 dated 24th November 2015 without sufficient (sic) giving reasons to warrant the dismissal.***
- 2. That the learned magistrate in arriving at his decision misdirected himself in law and applied wrong legal principals (sic).***
- 3. That the learned magistrate in arriving at his decision wrongly exercised his discretion without fully taking into account that the land in dispute was illegally transferred to strangers by the respondents herein.***
- 4. That the learned magistrate erred in law and in fact the land dispute was registered under the holding of my father GATUNE NDEGWA (deceased) and I was the nominated person to***

succeed holding No. 185 attached with Tebere Section Unit 7.

5. That the learned magistrate erred in law and in fact did not put into account that the respondents transferred plot attached with the card holding to stranger who always threat me (sic) with unknown consequences.

As the parties are acting in person, the appeal was canvassed by way of oral submissions with the appellant arguing that the trial magistrate did not deliver justice as he did not consider how the parties, who are brothers, will live on the land.

The respondent on the other part supported the judgment stating that each of the parties herein was given a portion of the rice holding yet the appellant wants to take all of it for himself and has engaged them in Courts for 23 years.

I have considered the record of appeal and the oral submissions by the parties.

The parties herein are siblings and from the record, it appears that they have litigated over the rice holding which was originally registered in the names of their late father **LUKA GATUNE NDEGWA** (deceased) who died on 10th October 1992 having nominated the appellant to succeed him in terms of **Regulation 7 (1) of the Irrigation (National Irrigation Schemes) Regulations 1977**. In accordance with the provisions of **Regulation 7 (4)**, the Manager of the Mwea Irrigation Scheme wrote to the District Magistrate at Wanguru Court on 29th March 1994 to approve the nomination of the appellant. Miscellaneous Case No. 19 of 1994 was therefore filed and on 18th June 1998, **S.M. JUMA** District Magistrate made the following order:

1. “The licensee of rice holding No. 185 is the eldest son who is ID/0970581 DAVID NDERITU GATUNE”

2. “The paddy field is to be managed by every son in the family each one acre”.

The Magistrate also proceeded to make the following remarks after making those orders:

“The claimant JOSEPH GACHERU is only causing misunderstanding since he is the last child he cannot lead other members of the family”.

Those comments were really un-called for because the deceased had nominated the appellant as his successor in the rice holding and all that the Manager of the Mwea Irrigation Scheme was required to do was to approve him as the successor as provided in **Regulation 7 (2) of the Regulations** as there appears to have been no appeal against that nomination.

Unfortunately for the appellant however he did not appeal against the decision and order of **S.M. JUMA** District Magistrate made on 18th June 1998. Instead, he filed **EMBU CHIEF MAGISTRATE CIVIL CASE No. 22 of 2002** against the same respondents herein over the same rice holding. That suit was dismissed by **F.M. MACHARIA** Resident Magistrate. An appeal against that dismissal was dismissed by **JUSTICE H.I. ONG’UDI** on 14th November 2011 in **EMBU HIGH COURT CIVIL APPEAL No. 118 of 2009**.

Not content with that decision, the appellant again filed at the **WANGURU SENIOR PRINCIPAL MAGISTRATE’S COURT CIVIL CASE No. 146 of 2015** seeking to evict the respondents from the rice holding. That case was again dismissed by **P.M. KIAMA** Principal Magistrate on 15th November 2016 who found it to be an abuse of the Court process. That resulted in this appeal.

There can be no merit in this appeal given the above history of this dispute. The trial magistrate did not error both in law and fact neither did he arrive at the wrong decision when he held that the suit filed at Wanguru Court was an abuse of the process of the Court. While it is true that the rice holding was registered in the deceased’s names and the appellant was the nominee, what the appellant ought to have

done was to appeal against the decision and orders issued by **S.M. JUMA** District Magistrate on 18th June 1998 some nineteen (19) years ago. It was not open to him to file other suits as he did including filing Wanguru Principal Magistrate's Court Civil Suit No. 146 of 2015 which is the subject of this appeal. That suit was clearly in breach of the rules of res-judicata provided for under **Section 7 of the Civil Procedure Rules** and was an abuse of the process of the Court as the trial magistrate rightly held.

Having found that the appellant's suit in the subordinate Court was an abuse of the process of the Court, the trial magistrate was not obliged to consider the evidence adduced by the parties because the rules of res-judicata barred him from doing so. Therefore the issues raised in his appeal about the trial magistrate having erred in law and in fact, having misdirected himself in law and applied wrong principles, having exercised his discretion wrongly etc did not really fall for consideration by the trial magistrate and cannot now be raised in this appeal. The appellant's fate was effectively sealed when he failed to appeal against the decision of **S.M. JUMA DISTRICT MAGISTRATE** delivered 19th years ago. This was made abundantly clear to the appellant on 14th November 2011 when **ONG'UDI J.** delivered her judgment in **EMBU HIGH COURT CIVIL APPEAL No. 118 of 2009.**

In the circumstances, this appeal is devoid of merit and is dismissed. As the parties are siblings, each will bear their own costs.

B.N. OLAO

JUDGE

21ST APRIL, 2017

Judgment dated, delivered and signed in open Court this 21st day of April 2017

Appellant present in person

Respondents present in person.

B.N. OLAO

JUDGE

21ST APRIL, 2017