



**Mwangi v Wambugu & another (Environment and Land Appeal
E038 of 2022) [2025] KEELC 894 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 894 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E038 OF 2022
JO OLOLA, J
FEBRUARY 27, 2025**

BETWEEN

CONSOLATA NJERI MWANGI APPELLANT

AND

DICKSON MATHENGE WAMBUGU 1ST RESPONDENT

GEORGE KINYUA MATHENGE 2ND RESPONDENT

JUDGMENT

Background

1. This is an Appeal arising from the Judgment of the Hon E. Kanyiri, PM delivered on 7th November, 2022 in Karatina ELC Suit No.44 of 2018.
2. By the Originating Summons dated 7th June, 2018 the Appellant as the Plaintiff/Applicant in the Lower court had sought orders that:
 1. The Applicant be declared to have become the legal owner entitled by adverse possession of over twelve (12) years since 2007 of all that parcel of land comprised in land parcel No. Konyu/Baricho/1583 situated in Nyeri County;
 2. In the alternative, the Applicant be declared to have become the legal owner having purchased from the 2nd Respondent his beneficial interest in all that parcel of land comprised in land Parcel No. Konyu/Baricho/1583 situated in Nyeri County;
 3. The said Plaintiff be registered as the sole proprietor of the said parcel of land namely land parcel No. Konyu/Baricho/1583 in place of the above named 1st Respondent in whose favour the land is currently registered; and
 4. Costs of this Application be provided for.



3. On 5th January, 2022, when the suit came up for hearing before the Honorable K.M. Njalale, P.M. the Counsel for the Appellant informed the court that he had miscalculated the years when he made a claim for adverse possession. Accordingly, he sought and was allowed to abandon the claim for adverse possession and to proceed with the claim in the alternative as sought out at Paragraph 2 of the Appellants prayers.
4. The matter subsequently proceeded for hearing before Honorable E. Kanyiri, PM. Having heard the parties and in the impugned Judgment delivered on 7th November, 2022, the Learned Trial Magistrate did not find any merit in the Appellant's claim and ordered as follows:
 1. That the Plaintiff has not become entitled by adverse possession to the suit land in land parcel No. Konyu/Baricho/1583 and registered in the name of the late Mathenge Icharuihu or the 1st Defendant herein;
 2. That the 1st Defendant is the legal owner of the suit land being land parcel No. Konyu/Baricho/1583;
 3. The Plaintiff's suit is dismissed with cost to the Defendants herein.
5. Aggrieved by the said determination, the Appellant moved to this court vide a Memorandum of Appeal dated and filed herein on 22nd December, 2022 urging this court to set aside the said Judgment on some six (6) grounds framed as follows:
 1. That the Learned Trial Magistrate erred in law and fact by failing to find that the Appellant had a binding legal contract by way of sale agreement of land parcel number Konyu/ Baricho/1583;
 2. The Learned Trial Magistrate erred in law and fact by failing to consider that the Appellant had been given possession of the suit land after entering into a sale agreement;
 3. The Learned Trial Magistrate erred in law and fact by failing to declare the Appellant as having become the legal owner by way of purchasing the suit land;
 4. The Learned Trial Magistrate erred in law and fact by failing to sanction the 2nd Respondent after terming him as an intermeddler;
 5. The Learned Trial Magistrate erred in law and in fact by failing to find that the Appellant had constructed a storey building, other permanent houses and extensively developed the suit land; and
 6. The Learned Trial Magistrate erred in law and fact by failing to find that the 2nd Respondent was registered as proprietor of the Suitland in order to defeat the Appellant's interests as a purchaser of the Suitland.
6. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on the facts and the law and arrive at its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand [see *Selle & Another –vs- Associated Motor Boat Co. Ltd & Others* (1968) EA 123].
7. I have accordingly carefully perused and considered the Record of Appeal, as well as the Judgment rendered in the Lower Court. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
8. By her suit as filed before the Trial Court, the Appellant had sought to be declared to have become the legal owner of all that parcel of land known as Konyu/Baricho/1583 on account that he had



purchased from the 2nd Respondent his beneficial interest in the land situated within Nyeri County. As a consequence of the said declaration, the Appellant sought to be registered as the proprietor of the said parcel of land in place of the 1st Respondent who is currently registered as the proprietor thereof.

9. Having heard the parties and in his Judgment delivered on 7th November, 2012, the Learned Trial Magistrate did not find merit in the Appellant's case and made orders as follows:
 1. That the Plaintiff has not become entitled by adverse possession to the Suitland in land parcel No. Konyu/Baricho/1583 and registered in the name of the late Mathenge Icharuihu or the 1st Defendant herein;
 2. That the 1st Defendant is the legal owner of the suit land being parcel No. Konyu/Baricho/1583; and
 3. That the Plaintiff's suit is dismissed with costs to the Defendant.
10. A perusal of the said judgment reveals that at the end of the trial, the Learned Trial Magistrate did identify four (4) issues for determination. Those issues were listed as follows:
 1. Who was the registered owner of the suit land at the time the plaintiff leased the same from the 2nd Defendant and thereafter entered into a sale agreement with the 2nd Defendant?
 2. Whether the plaintiff acquired (the) Suitland through adverse possession as alleged?
 3. Whether there was a constructive trust established in favour of the plaintiff; and
 4. Whether the plaintiff was entitled to the relief sought?
11. Arising from the second issue for determination, a considerable part of the Judgment (pages 4 to 13 thereof) was spent on trying to establish whether or not the Appellant had established a case for adverse possession over the suit property. As it were, there was in actual sense no basis for that determination. I say so because while the Appellant had initially raised the issue of adverse possession, that claim was abandoned by the Appellant on 5th January, 2022 when the trial commenced before a different Magistrate who did not however hear the matter to the end (See page 130 to 131 of the bundle).
12. That being the case, the lengthy analysis on the issue of adverse possession and the ultimate finding by the Learned Trial Magistrate that the Appellant had not proved that he was entitled to the suit property under the doctrine of adverse possession was already moot and clearly unnecessary.
13. The issue that was ideally before the trial court was whether or not the Appellant had proved that she had acquired the 2nd Defendant's beneficial interests in the suit property and whether by dint of such acquisition she had become entitled to be registered as proprietor of the suit property.
14. After considering certain aspects of that issue the Learned Trial Magistrate concluded as follows at Page 15 of the Judgment:

“The agreement between the Plaintiff and the 2nd Defendant was made at a time when the 2nd Defendant had no authority to deal with the land a fact which was known to the Plaintiff in this matter. She was allowed to enter into the land since she was to pay the full purchase price which as a court I found had never been paid. There was no trust established in the matter.”



15. And in coming to the conclusion that the 1st Defendant is the legal owner of the suit land, the Learned Trial Magistrate found as follows at Page 17 of the Judgment.

“The 1st Defendant acquired the land after the succession proceedings in Karatina Succession (Case) Number 128 of 2017 were done. The action of the 2nd Defendant in dealing with the suit land as an administrator were tantamount to intermeddling with the estate of the late father the late Mathenge Icharuihu. The title that had been produced as one of the 1st Defendant shown that he is the owner of the Suitland (sic). That title has not been questioned in any way that it was acquired by fraud or misrepresentation to which the 1st Defendant was proved to be a party; or the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme by the 1st Defendant. (The) 1st Defendant is the legal owner of the suit land.”

16. The basis of the Court’s finding that the sale agreement between the Appellant and the 2nd Respondent was entered into when the 2nd Respondent had no authority to deal with the land certainly arose from the fact that while the sale took place in the year 2007, the 2nd Respondent did not get Letters of Administration for the estate of his father until some ten (10) years later in the year 2017. According to the Learned Trial Magistrate, the acts of the 2nd Respondent in dealing with the Suitland as an administrator were tantamount to intermeddling with the estate of his father, the late Mathenge Icharuihu.
17. In the circumstances of this case, it was however clear to me that such a finding could only lead to an absurdity. In the matter herein, the 2nd Respondent was the sole beneficiary of his father’s estate. From the material presented to the court, he entered into a sale agreement with the Appellant on 30th October, 2007 for the sale of the property in the sum of Kshs. 350,000/=.
18. In her testimony before the Lower Court, the Appellant asserted that he had paid the entire purchase price in various installments to the 2nd Respondent. Despite being sued in the matter herein, the 2nd Respondent did not file anything in response. The assertion by the Appellant that she had paid the entire purchase price was therefore not denied and remained uncontroverted to the very end. I was therefore unable to see how the Court came to the conclusion that the 2nd Respondent had not been paid.
19. It was also clear that it was the same 2nd Respondent who instituted Karatina SPM Succession Cause No. 128 of 2017. On 16th October, 2017, the 2nd Respondent was issued with a Grant of Letters of Administration Intestate for the Estate of his father Mathenge Icharuihu.
20. It was further clear from a copy of the Green Card of the suit property (page 125 of the Record) that upon confirmation of the Grant, the suit property was initially registered in the 2nd Respondent’s name on 7th May, 2018 before it was transferred to the 1st Respondent’s name on the same day.
21. Arising from the foregoing, it was clear to me that this was a case wherein the 2nd Respondent had caused his nephew (the 1st Respondent) to be registered as proprietor of the suit property in order to escape the consequences of the sale agreement that he had entered into with the Appellant.
22. Asked in cross-examination about the whereabouts of the 2nd Respondent, the 1st Respondent told the court that his uncle was unwell and unable to attend court on that day. That did not however explain why the 2nd respondent did not respond to the suit herein. It certainly did not explain why or how the 1st Respondent came to be registered as the proprietor of the suit property.



23. After a close review of the evidence on both sides, I am satisfied, on a balance of probabilities, that the 2nd Respondent had sold the Suitland to the Appellant. As at the time of the sale, the 2nd Respondent was the sole beneficiary of that share having inherited the same from his deceased father. The 2nd Respondent went ahead to obtain Letters of Administration for the Suitland but for purposes of defeating the sale, the 2nd Respondent caused the suit property to be transferred to the name of his nephew, the 1st Respondent herein.
24. In the circumstances herein, it would be greatly inequitable for this court to allow the 1st Respondent to come to court and accuse his uncle who was eventually confirmed as the Administrator of the Estate of Mathenge Icharuihu of intermeddling with the estate.
25. In the premises I allow the Appeal, set aside the judgment delivered in the Lower Court on December 7, 2022 and in its place substitute the same with an order allowing the Appellant's suit in terms of prayers 2 and 3 of the Originating Summons dated June 7, 2018.
26. The Appellant shall have the costs of both this Appeal and the suit in the Lower Court.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 27TH DAY OF FEBRUARY, 2025.

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J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. No appearance for the Appellant
- c. Mr. Wamwenji Advocate for the Respondents

