



**Watetu & another v Kabura & another (Environment and Land Appeal
26 of 2022) [2024] KEELC 1622 (KLR) (27 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1622 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL 26 OF 2022**

**BM EBOSO, J
MARCH 27, 2024**

BETWEEN

MARGARET WATETU 1ST APPELLANT

TITUS NGUNJIRI 2ND APPELLANT

AND

MARY GORETTI KABURA 1ST RESPONDENT

MARY MUKUHI 2ND RESPONDENT

*(Being an Appeal against the Ruling of Hon J. AGONDA, Principal Magistrate,
delivered on 6/4/2023 in Ruiru Principal Magistrate Court E & L Case No. 122 of 2019))*

JUDGMENT

Background

1. This appeal challenges the post-judgment ruling rendered on 6/4/2023 by Hon J. A Agonda, Principal Magistrate, in Ruiru SPMC E & L Case No 122 of 2019. Mary Goretti Kabura Waigwa [the 1st respondent in this appeal] was the plaintiff in the said case. Mary Mukuhi [the 2nd respondent in this appeal] was the defendant. Mary Mukuhi's name had initially been captured as "Mercy Mukuhi" but was changed through an amendment to the plaint to read "Mary Mukuhi". It does, however, emerge from the Judgment and the Decree of the trial court that the trial court did not notice the changes when it rendered its Judgment on 17/8/2021.
2. Through the amended plaint, the 1st respondent contended that she was the registered proprietor of land parcel numbers Ruiru/Ruiru Kiu Block 12/487 and 488 [the suit land] It was her case that the 2nd respondent had encroached on the suit land and had erected a building on it. She urged the trial court to grant her eviction orders, mesne profits, general damages and interest at court rate.



3. The 2nd respondent filed an amended defence and a counterclaim dated 24/11/2020 in which she denied the 1st respondent's claim, contending that she was a stranger to the parcels of land. She denied being in occupation of the suit land. It was her case that she was at all material times in occupation of Plot No 496A which she bought in 1982 from Ngara Muchokaniriria Company Limited who issued her with Share Certificate No 165. She contended that her plot was excised from Land Reference Number 87886, adding that she had build a permanent house on her plot and she had been in occupation of her plot, measuring 1/8 of an acre, since 1982.
4. Through her counterclaim, the 2nd respondent sought; (i) a declaration that she had been wrongfully sued since she was a stranger to the suit properties; (ii) a declaration that she was the rightful beneficial owner of Plot No 496A, having bought it from M/s Ngara Muchokaniriria Company Limited; (iii) in the alternative, an order declaring her to have acquired title to Plot No 496A through adverse possession; and (iv) costs of the suit.
5. Upon conducting trial and receiving submissions from the parties, the trial court rendered a Judgment dated 17/8/2021 in which it declared the 1st respondent the legitimate owner of the suit properties and restrained the 2nd respondent against interfering with the suit properties. The trial court further decreed the 2nd respondent to vacate the suit properties. It is not clear if the 2nd respondent lodged an appeal against the said Judgment.
6. Subsequent to that, on 21/11/2022, the 1st respondent filed an application dated 21/11/2022 seeking the following verbatim post-Judgment orders:
 1. That the defendant, her servants agents and any other person residing in LR Numbers Ruiru/ Ruiru/ Kiu Block 12/487 and 488 claiming under the defendant be evicted forthwith.
 2. That the OCS Githurai Police Station do provide security during the eviction exercise.
 3. That the costs and expenses occasioned by and incidental to the eviction of the defendant from the suit properties be borne by the Defendant.
7. The application was allowed by the trial court through a ruling rendered on 18/1/2023 in the following verbatim terms:

“The upshot of the foregoing is that the court finds the plaintiff's notice of motion dated 21st November, 2022 is merited and I proceed to make the following orders:

 1. Eviction orders be and is hereby issued against the defendant, her servants, agents and any other person residing on suit property L.R Ruiru/Ruiru Kiu Block 12/487 and 488 claiming under the defendant forthwith.
 2. That the OCS, Githurai Police Station ordered to provide security during the eviction exercise.
 3. The plaintiff is hereby awarded costs of the application.”
 4. The Officer Commanding Mugutha Police Station is ordered to supervise to ensure law and order.
 5. The plaintiff is hereby awarded costs of the application.”
8. The 1st respondent proceeded to enforce the decree of the court and the above consequential orders.



9. On 20/1/2023, the two appellants filed in the trial court an application dated 19/1/2023 seeking a post-judgment order of joinder. They also sought an order of stay of execution. Upon hearing the application, the trial court rendered a ruling dated 6/4/2023 [the impugned ruling] through which it dismissed the appellants' plea for a post-judgment order of joinder.

Appeal

10. Aggrieved with the ruling of the trial court, the appellants brought this appeal advancing the following verbatim grounds:
 1. That the learned trial magistrate erred in law and in fact by allowing the appellants from filing their defence and preliminary objection to the suit.
 2. That the learned trial magistrate erred and failed to fully analyze, appreciate and evaluate the nature of the case and evidence before her and the issue for determination and consequently fell in error and arrived at a wrong determination of the case.
 3. The learned trial magistrate abdicated her statutory duty in failing to address the substantial issues raised regarding right to a fair hearing and thus causing a miscarriage of justice and reaching a wrong verdict.
 4. That the Hon magistrate erred in law and fact by failing to allow the appellants file their defence and set aside the Judgment whereas the law allows an aggrieved person to seek relief in the nature of setting aside the Judgment.
 5. That the Hon magistrate, erred in law and fact when she held that the court was functus officio after delivering the judgment and ruling, whereas the law provides for the application to set aside a judgment.
 6. That the Hon magistrate, erred in fact and in law by failing to determine the application dated 18/1/2023 to the finality, whereas the application clearly indicated that there was a pending suit at the Environment and Land Court Thika being Originating Summons No E003 of 2023.
 7. That the Hon magistrate erred in fact and law by allowing and granting orders that had not been sought by the 1st respondent, the orders granted in the Ruling dated 18th January not being the orders prayed in the notice of motion dated 21/11/2022.
11. The appellants urged this Court to allow the appeal; set aside the impugned ruling; and substitute the ruling with an order barring the 1st respondent from selling, subdividing, constructing, occupying or dealing with land parcel number Ruiru/Ruiru 487 and Ruiru/Ruiru 488 by herself or through agents pending hearing and completion of the trial court suit. They urged the court to allow the appeal and award them costs of the appeal.

Appellants' Submissions

12. The appeal was canvassed through written submissions dated 9/6/2023, filed by M/s Kamuiru Muibu & Company Advocates. Counsel for the appellants identified the following as the two issues that fell for determination in the appeal: (i) Whether the appeal is meritorious; and (ii) Whether the appellants had met the grounds for setting aside the Judgment.
13. On whether the appeal is meritorious, counsel submitted that the trial court erred in its post-judgment ruling when it declined to set aside the judgment rendered on 17/8/2021 and join the appellants yet they had been evicted from the suit property without being heard or being parties to the suit. Counsel



further faulted the trial court for failing to allow the application to set aside the judgment, noting that the appellants had attached their defence in the form of a preliminary point of law. Counsel relied on Order 10 rule 10 (2) of the [Civil Procedure Rules](#) and the decisions in the cases of [Nathan Ngumabo Kata v Attorney General & another](#) [2022] eKLR and [David Gicheru v Gicheba Farms Limited & Another](#) [2020] eKLR.

14. On whether the appellants had met the grounds for setting aside a Judgment, counsel relied on the provisions of article 159 (2) (d) of the [Constitution](#) and Sections 1A and 1B of the [Civil Procedure Act](#). Counsel submitted that the appellants lived on the suit property up to the time they were evicted. Counsel added that the appellants were prejudiced given that the suit proceeded in their absence and they were not accorded an opportunity to defend themselves. Counsel faulted the trial court for finding that it was *functus officio* and hence it could not set aside the impugned Judgment. Counsel argued that the judgment and eviction orders were irregular given that they were directed against people who were not parties to the suit contrary to the right to a fair hearing and the principle of natural justice. Counsel relied on the case of [Mwala v Kenya Bureau of Standards](#) EA LR [2001]1 EA 148.

1st Respondent's Submissions

15. The 1st respondent opposed the appeal through written submissions dated 28/8/2023, filed by M/s Karanja Otunga & Associates Advocates. Counsel for the 1st respondent identified the following as the key issues that fell for determination in the appeal: (i) Whether the appellants were deserving of the court's discretion; (ii) Whether the appellants properly moved the court in the prayer for review of the court's Judgment; and (iii) Whether the court was *functus officio* by the time the appellants filed their application.
16. On whether the appellants were deserving of the court's discretion, counsel for the 1st respondent submitted that this Court should determine whether the appellants had demonstrated sufficient cause to warrant the exercise of the Court's discretion in its favour. Counsel submitted that the appellants approached the court with unclean hands by falsely stating that they were not aware of the suit. Counsel added that during hearing, the land surveyor gave evidence that the appellants were all along aware of the suit land ownership dispute. Counsel submitted that the land surveyor identified the 1st appellant as one of the people who were present at the point of determining the boundaries and ownership issues. Counsel further submitted that the land surveyor testified that the 1st appellant was in occupation of the suit land alongside the 2nd respondent. Counsel added that the report by the Thika Land Surveyor indicated that the appellants were aware of the existence of the suit,
17. On whether the appellants properly moved the court in the prayer for review of the court's Judgment, counsel submitted that the appellants erred in moving the Court by way of review instead of an appeal. Counsel argued that the appellants decision to file the review was bad in law and therefore the trial court was not at fault by denying them the opportunity to set aside the Judgment. Counsel added that the grounds for review relate to parties as at the time of the determination and not new parties. Counsel relied on the decision in the case of [Hosea Nyandika Mosagwe & 2 others v County Government of Nyamira](#) [2022] eKLR in support of his submissions.
18. On whether the court was *functus officio* by the time the appellant's filed their application, counsel for the 1st respondent submitted that the trial magistrate had already determined the suit on merit and was no longer seized of jurisdiction to re-open it on the grounds raised by the appellants. Counsel relied on Section 99 of the [Civil Procedure Act](#) and the decision in the case of [Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others](#) [2013] eKLR. Counsel urged the Court to dismiss the appeal with costs to the 1st respondent.



2nd Respondent's Submissions

19. The 2nd respondent opposed the appeal through written submissions dated 19/10/2023, filed by herself. She identified the following as the two main issues that fell for determination in the appeal: (i) Whether the instant appeal is meritorious; and (ii) Whether the appellants had met the grounds for setting aside a Judgment.
20. On whether the appeal is meritorious, the 2nd respondent faulted the trial court's finding that it was *functus officio* and thus could neither set aside the impugned Judgment nor join the appellants in the trial suit. The 2nd respondent further faulted the trial court for granting the first respondent orders allowing her to evict people including the appellants who were not parties to the suit. The 2nd respondent added that the said orders were against the rules of natural justice given that the appellants were not accorded an opportunity to be heard. The 2nd respondent relied on Order 1 rule 10 (2) of the Civil Procedure Rules and the decision in the cases of *Nathan Ngumabo Kata v Attorney General & Another* (supra) and *David Gicheru v Gicheha Farms Limited & Another* (supra) in support of her submissions.
21. On whether the appellants met the grounds for setting aside a judgment, the 2nd respondent submitted that the Court should be guided by Article 159 (2) (d) of the *Constitution* of Kenya and Section 1A and 1B of the *Civil Procedure Act* in administering justice. The 2nd respondent submitted that the appellants were persons who had an interest in the suit properties given that they resided on the suit properties until they were evicted. She added that the appellants were prejudiced by the proceedings and the Judgment that were procured in their absence.
22. She faulted the trial court for misdirecting itself by declaring that it was *functus officio* and hence could not set aside the Judgment when the appellants challenged the Judgment together with the orders of eviction. The 2nd respondent added that the Judgment and the eviction orders were irregular given that they were issued against people who were not parties to the suit. She argued that the trial court's decision too denied the appellants the right to attend the trial was against the right to fair hearing and the principles of natural justice. She relied on the case of *Mwala v Kenya Bureau of Standards* EA LR [2001] 1EA 148.

Analysis and Determination

23. I have read and considered the entire original record of the trial court; the record filed in this appeal; the memorandum of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The key issue in this appeal is whether the application dated 19/1/2023 satisfied the criteria for grant of an order of post-judgment joinder to a suit. Before I dispose the issue, I will briefly outline the principle that guides this court when exercising appellate jurisdiction. I will also outline the principle that guides our courts when exercising jurisdiction to grant a post-judgment order of joinder to a suit.
24. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



25. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

26. In *Merry Beach Limited v Attorney General and 18 others* (2018) eKLR, the Court of Appeal outlined the following principle which guides our courts when exercising jurisdiction to grant a post-judgment order of joinder to a suit:

“However, there are exceptional circumstances that could justify a court to enjoin a party even after judgment has been passed. One such exception is where a matter has been determined and adverse orders have been issued against a party who was neither given notice of the suit nor heard on the issue in dispute. The order enjoining a party would also have to set aside the judgment entered to give him/her an opportunity to be heard.”

27. Did the application dated 19/1/2023 satisfy the above criteria? A perusal of the record of the trial court reveals that the judgment and decree of the trial court were issued against one person, Mary Mukuhi [the 2nd respondent], whose name, as earlier observed, was erroneously captured in the Judgment and in the Decree as Mercy Mukuhi. The judgment and the decree were not directed against any other person. However, the subsequent post-judgment enforcement proceedings that ensued gave the suit a completely new trajectory.

28. Vide a post-judgment application dated 21/11/2022, the 1st respondent [the decree holder] sought the following verbatim orders:

1. That the defendant, her servants, agents and any other person residing in LR Numbers Ruiru/Ruiru Kiu Block 12/487 and 488 claiming under the defendant be evicted forthwith. [underlining is by this Court]
2. That the OCS Githurai Police Station do provide security during the eviction exercise.
3. That the costs and expenses occasioned by and incidental to the eviction of the defendant from the suit properties be borne by the defendant.”

29. Upon hearing the application dated 21/11/2022, the trial court issued the following verbatim orders through its ruling dated 18/1/2023.

“The upshot of the foregoing is that the court finds the plaintiff’s notice of motion dated 21st November, 2022 is merited and I proceed to make the following orders:

1. Eviction orders be and is hereby issued against the defendant, her servants, agents and any other person residing on suit property L.R Ruiru/Ruiru Kiu Block 12/487 and 488 claiming under the defendant forthwith.
2. That the OCS, Githurai Police Station ordered to provide security during the eviction exercise.
3. The plaintiff is hereby awarded costs of the application.”



30. It is clear from the framing of the reliefs that were sought in the application dated 21/11/2022 that the 1st respondent having obtained a judgment and a decree that were directed against the 2nd respondent alone, she sought to enforce the judgment and the decree against “any other person residing on LR Numbers Ruiru/Ruiru Kiu Block 12/487 and 488”. The trial court did not detect the decree holder’s mischief and proceeded to grant the post-judgment orders. Waving the new post-judgment orders that now targeted any other person residing on the suit properties, the 1st respondent sought to enforce the judgment and the decree of the trial court against the appellants yet the appellants were not parties to the suit. Indeed, the 1st respondent used the post-judgment orders to evict the appellants yet the appellants were not parties to the suit.
31. Secondly, the appellants contended that the suit land was allocated to Margaret Watetu [the 1st appellant] by M/s Ngara Muchokaniriria Company Limited way back in 1979. It was their case that they had resided on the suit land since 1979. They contended that they owned the land.
32. Given the above circumstances, the two appellants were clearly people who were adversely affected by the Judgment, the Decree and the post-judgment orders of the trial court. They were entitled to be joined to the suit post-judgment and to be heard on the dispute relating to ownership and occupation of the suit land.
33. It is clear from the foregoing that the application dated 21/11/2022 was informed by the decree holder’s ill-intended motive of using the judgment and the decree of the trial court to evict persons whom she had failed to join as defendants in the suit. That is why the decree-holder [the 1st respondent] introduced the element of “any other person residing on LR Numbers Ruiru/Ruiru Kiu Block 12/487 and 488” through the application dated 21/11/2022.
34. For the above reasons, the court is satisfied that the appellants’ application dated 19/1/2023 fully met the criteria for grant of an order of joinder to a suit post-judgment. The effect of a post-judgment order of joinder is that the judgment, the decree and all the consequential orders of the trial court stood to be set aside to allow the two parties to be heard on the dispute. It is therefore the finding of this court that the trial court erred in dismissing the appellants’ application dated 19/1/2023.
35. Consequently, this appeal has merit and succeeds. The plea for orders preserving the suit land should be canvassed before the trial court. For avoidance of doubt, the suit will be heard afresh before a different magistrate.
36. On costs of this appeal, it is clear that the errors leading to this appeal were committed by the trial court; first by allowing the decree-holder to change the trajectory of the proceedings through the post-judgment orders which introduced the element of “any other person residing on the LR Numbers Ruiru/ Ruiru/ Kiu Block 12/487 and 488; and second, by declining to grant the appellants the right to be heard on the dispute relating to ownership and occupation of the suit land. For the above reason, parties will bear their respective costs of the appeal.
37. In the end, this appeal is allowed in the following terms:
 - (a) The ruling of the trial court rendered on 6/4/2023 in Ruiru SPMC E & L Case No 122 of 2019 is hereby set aside and is substituted with the following orders:
 - (i) An order joining Margaret Watetu and Titus Ngunjiri as 2nd and 3rd defendants, respectively, in the said suit;
 - (ii) An order setting aside the Judgment of the trial court dated 17/8/2021 together with the decree and all the consequential orders in order to give the two new defendants the



opportunity to be heard in the dispute relating to ownership and occupation of the suit land.

(b) Parties to this appeal shall bear their respective costs of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 27TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the presence of:

Ms Nganga for the Appellant

Mr Njogu for the 2nd Respondent

Court Assistant: Hinga

