



**Kagure v Mwangi & another (Legal Representatives of the Estate of Mwangi Waweru - Deceased) (Civil Appeal 46 of 2019) [2025] KECA 365 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KECA 365 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 46 OF 2019  
S OLE KANTAI, JW LESSIT & A ALI-ARONI, JJA  
FEBRUARY 28, 2025**

**BETWEEN**

**ESTHER KAGURE ..... APPELLANT**

**AND**

**HENRY WAWERU MWANGI ..... 1<sup>ST</sup> RESPONDENT**

**PETER MAINA MWANGI ..... 2<sup>ND</sup> RESPONDENT**

**LEGAL REPRESENTATIVES OF THE ESTATE OF MWANGI WAWERU - DECEASED**

*(Being an appeal from the Judgment of the Environment and Land Court at Nyeri (Waitthaka, J.) delivered on 19th December, 2018 in E.L.C Case No. 211 of 2014.)*

**JUDGMENT**

1. This appeal arises from the judgment delivered on 19<sup>th</sup> December, 2018 by the Environment and Land Court (hereinafter “ELC”) in Nyeri ELC No. 211 of 2014. The said ELC suit was filed by Mwangi Waweru (deceased), who is now represented by Henry Waweru Mwangi and Peter Maina Mwangi, following their substitution via a ruling of this Court dated 28<sup>th</sup> March, 2023. In the impugned judgment of the ELC, the Court held in favour of the respondent’s suit and directed that the appellant vacates the suit property in issue, known as LR Thegenge/Karia/803 (hereinafter “the suit property”) within 90 days of the date of judgment.
2. Being a first appeal, our mandate was well stated in the case of *Nairobi Bottlers Limited vs. Imbuga* (Civil Appeal E661 of 2022) [2024] KECA 434 (KLR) as follows:

“Our mandate in a first appeal as donated by rule 31 of the Court of Appeal Rules, 2022 is to re- appraise the evidence and to draw inferences of fact; to retry the case. That mandate has been the subject of various judicial pronouncements in such cases as *Nicholas Njeru*



*vs. Attorney General & 8 Others* [2013] eKLR where it was stated: “[In] a first appeal, we are required to re-evaluate the evidence and arrive at our own independent findings and conclusions of the matter.”

3. We shall set out a brief background of the issues between the parties.
4. The appellant herein, Esther Kagure, and the respondent, the late Mwangi Waweru were stepbrother and stepsister. The appellant is therefore an aunt to the respondents herein.
5. The late Mwangi Waweru filed Nyeri ELC No. 211 of 2014 seeking an order of eviction against the appellant herein from the suit property LR Thegenge/Karia/803. The respondent’s case was that he was the registered owner of the suit property, having obtained it in a succession cause in which the succession court ordered that the original property known as Thegenge/Karia/259 be divided into equal shares between him and his stepbrother (Kahunyo Henry Waweru, deceased). The succession court held that each of the said brothers would cater for their respective sisters. The respondent also compensated his stepbrother for some coffee trees and a house built by their father, which fell on the respondent’s portion, as ordered by the High Court in an appeal filed by Kahunyo Henry Waweru against the respondent Mwangi Waweru.
6. The respondent approached the ELC with the complaint that his stepsister, the appellant, moved into the aforementioned house, and refused to vacate, claiming it to be her brother’s house, even after the demise of the said brother. The respondent sought to have the appellant evicted and stopped from trespassing.
7. The appellant’s case at the ELC was that the house she resided in belonged to her late father; that she had lived in it since childhood, and that she was not aware of any suits involving her late brother and the respondent herein. She also stated that she was erroneously sued, as the matter should have involved the legal administrator of her late brother’s estate.
8. The ELC delivered judgment on 19<sup>th</sup> December, 2018 where it stated that the appellant herein should have followed up on any succession issues with the succession court. On the contention as to whether the appellant was rightly sued, the court held that she was; because the claim was an issue of trespass. The court also held that the respondent was registered as owner of the suit property through a legal unimpeached process and he was entitled to his rights. The suit was determined in favour of the respondent.
9. Being aggrieved by the judgment of the ELC, the appellant preferred this appeal. The notice of appeal is dated 7<sup>th</sup> January, 2019 and the memorandum of appeal is dated 5<sup>th</sup> March, 2019 asking the court to allow the appeal and dismiss the suit filed at the ELC with costs.
10. In the memorandum of appeal, the appellant argues that the court erred in failing to find that the respondent held the suit land in trust for her family, that the respondent’s claim for trespass was statute barred, and that her rights as the possessor of the suit property should have been upheld. She also states that the court ordered her eviction based on succession proceedings to which she was not a party and that the judgment delivered was against the weight of evidence. The appellant has filed submissions dated 12<sup>th</sup> June, 2024 in support of her appeal.
11. The respondents have filed grounds to affirm the decision. They have also filed two similar sets of submissions dated 4<sup>th</sup> February, 2022 and 13<sup>th</sup> June, 2023. The respondents state that the record of appeal does not contain all documents as per the Rules that the appellant’s interest was to be catered for within her brother’s land and that the appellant did not justify her occupation of the land.



12. This matter was heard on 11<sup>th</sup> November, 2024 in open court on the virtual platform. The appellant was represented by learned counsel Mr. Gakuhi Chege, while one of the respondents, Henry Mwangi Waweru appeared in person. The parties relied on their written submissions and opted not to highlight the same.
13. We have considered the record of appeal, the submissions by the parties and the law.
14. The main issues for determination are whether the property was held by the late Mwangi Waweru in trust for the appellant and whether the appellant had enforceable rights as a possessor of the property.
15. Regarding the issue of whether the respondents' late father was holding the property in trust for the appellant, this Court in *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley* [2017] eKLR stated that:

It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
16. It is undisputed that the late Mwangi Waweru received the property following Ruringu Succession Cause No. 24 of 1969 and the matter concerning developments on the land was fully settled in a judgment dated 16<sup>th</sup> July, 1992 in Nyeri HCCC No. 146 of 1987. Following the judgment, the late Mwangi Waweru compensated his step brother, the late Kahunyo Henry Waweru, for developments falling on the former's portion of land. Each brother then moved to their respective portions of land.
17. The record does not show if there was any challenge to the decision of the Succession case or to the judgment on compensation by the High Court. Consequently, both those judgments remain in force. This essentially means that the appellant was in occupation of the respondent's portion of land contrary to two valid judgments of the Courts. We therefore cannot agree that she had any enforceable rights as a possessor of the property. That ground of appeal fails.
18. Additionally, the appellant did not prove, by way of evidence, the existence of any trust in the family, and we see no evidence to find in her favour on that ground of appeal. The same fails.
19. The other matter being raised by the appellant, is that the suit at the ELC was time-barred. The record of proceedings before the ELC does not mention that this issue was ever raised before the trial court. There is no preliminary objection on the record, which is how the appellant should have brought out this issue. In any case, it is trite law that a preliminary objection, which by nature raises an issue that a Court should not handle a matter, ought to be raised at the earliest opportunity. We echo the words of Nyarangi JA in the case of *Owners of the Motor Vessel "Lillian S" vs. Caltex Oil (Kenya) Ltd* [1989] eKLR;

I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.”
20. The appellant has raised the issue of statutory time limitation, during this appeal and the same is irregular. That ground of appeal is dismissed.
21. We shall briefly mention an issue raised by the respondents, to the effect that the record of appeal is not properly filed as required by the rules of this Court. The respondents did not file an application to strike out the appeal and therefore we shall say no more on that.



22. In conclusion, we find no reason to vary the findings of the ELC. We affirm the judgment of the court and dismiss this appeal with costs to the respondents.

**DATED AND DELIVERED AT NYERI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

**J. LESIIT**

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**JUDGE OF APPEAL**

**ALI – ARONI**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**Signed**

**DEPUTY REGISTRAR**

