



REPUBLIC OF KENYA



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**Kiiru v Muguiyi (Environment and Land Appeal E018 of 2021)
[2024] KEELC 1464 (KLR) (20 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E018 OF 2021**

JO OLOLA, J

MARCH 20, 2024

BETWEEN

JOEL KAMITHA KIIRU APPELLANT

AND

BEATRICE WANJIRU MUGUIYI RESPONDENT

(Appeal arising from the Judgment of the Honourable D. M. Ileri, Senior Resident Magistrate delivered on 28th April, 2021 in Othaya ELC Case No. 9 of 2019)

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable D. M. Ileri, Senior Resident Magistrate delivered on 28th April, 2021 in Othaya ELC Case No. 9 of 2019.
2. By a Complaint dated 4th February, 2019 Joel Kamitha Kiiru (the Appellant herein) had sought orders that the Court be pleased to issue an order to separate his parcel of land measuring approximately 1.57 Ha. from that of the Respondent.
3. The basis of that prayer was the Appellant's contention that the Respondent and her deceased husband had taken advantage of his absence while serving sentence at Naivasha Maximum Prison to amalgamate his parcels of land known as Othaya/Kihuguru/131 with their own parcels of land.
4. In her Statement of Defence dated 15th March, 2019 Beatrice Wanjiru Muguiyi (the Respondent) denied the Appellant's accusations. It was the Respondent's case that the Appellant had executed a duly registered Power of Attorney dated 9th October, 1973 which he donated to the Respondent's husband Gerald Muguiyi Wambugu in respect to the said parcels of land.
5. The Respondent further asserted that the Appellant had sold the said land parcel numbers Othaya/Kihuguru/130 and 131 to the said Gerald Muguiyi Wambugu and that as such the Appellant could not turn around and claim anything from herself in her personal capacity.



6. Upon hearing the matter and in his Judgment delivered on 28th April, 2021 aforesaid, the Learned Trial Magistrate came to the conclusion that the Appellant had failed to prove his case on a balance of probabilities and proceeded to dismiss the same with

costs to the Respondent.

7. Aggrieved by the said determination the Appellant moved to this Court and lodged a Memorandum of Appeal dated 26th May, 2021 urging the Court to set aside the said Judgment on the grounds:
 1. That the Learned Trial Magistrate erred in law and fact by failing to appreciate that the Appellant's case had been proved on a balance of probability and that there was evidence to support the same;
 2. That the Learned Trial Magistrate erred in law and fact when he failed to address himself on the issue of fraudulent transfer and registration of the suit property, as evidence of ownership of assets (sic) was absent;
 3. That the Learned Trial Magistrate erred in law and in fact in entirety dismissing the Appellant's case without addressing himself on the issues raised by the Appellant in his filed Statements and submission excluding the annexed documents in the submissions. That he failed to find that there is a skipped process (sic) in (the) transaction of changing the disputed suit property;
 4. That the Learned Trial Magistrate erred in law and fact in failing to evaluate the entire evidence presented to him by the Appellant and (to) revert his land to him;
 5. That the Learned Trial Magistrate erred in law and fact when he failed to disclose that he lacks the jurisdiction to declare the whole process as null and void;
 6. That the Learned Trial Magistrate erred in law and fact by failing to find that the Appellant had suffered unnecessary pain;
 7. That the Learned Trial Magistrate erred in law and fact in (basing) his judgment on the wrong principals of law; and
 8. That the Learned Trial Magistrate erred in fact and law (by) awarding costs of the suit to the Respondent against the Appellant despite the circumstances that led to the suit.
8. As a first appellate Court, this Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and to arrive at its own independent Judgment on whether or not to allow the Appeal. A first appellate Court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. [Selle & Another -vs- Associated Motor Boat Company Limited & Others (1968) EA 123].
9. Accordingly, I have carefully perused and considered the Record of Appeal as well as the impugned Judgment. I have similarly perused and considered the submissions placed before the Court by the Parties herein.
10. By his Memorandum of Appeal filed herein and dated 16th May 2021, the Appellant has raised eight (8) grounds of Appeal. In my considered view, all those grounds only raise two issues for consideration. Those issues are:
 - (a) Whether the trial Court erred in law and in fact by failing to appreciate that the Appellant's case had been proved on a balance of probabilities; and



- (b) Whether the trial Court erred in law and in fact in failing to disclose that it had no jurisdiction to declare the whole process null and void.
11. Starting with the second issue, Section 9(a) of the Magistrates Courts Act, 2015 provides as follows:
- “A Magistrates Court shall –
- (a) in the exercise of jurisdiction conferred upon it by Section 26 of the [Environment and Land Court Act](#) (Cap. 12A) and subject to the pecuniary limits under Section 7(1) hear and determine claims relating to –
 - (i) environment planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, minings, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally.”
12. The said Section 26 of the [Environment and Land Court Act](#), provides as follows at Sub-sections 3 and 4:
- “(3) The Chief Justice may, by notice in the Gazette, appoint a certain Magistrate to preside over cases involving environment and land matters in any area of the Country.
 - (4) Subject to Article 169(2) of [the Constitution](#), the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle –
 - (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - (b) matters of a civil nature involving occupation and title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates Court’s Act.”
13. In the matter before me, while the Appellant at ground No. 5 of the Memorandum of Appeal asserts that the Court lacked jurisdiction to deal with the matter, no explanation has been offered in the said ground and/or in his submissions as to why the Court lacked the jurisdiction. In the absence of any evidence that the Court was not duly gazetted as envisaged under Section 26(3) of the [Environment and Land Court Act](#) as seen above and/or that the Court lacked pecuniary jurisdiction to deal with the issues, there was no basis on which that ground can be upheld by this Court.
14. Turning to the first issue, it was the Appellants case before the trial Court that the Respondent and her deceased husband one Gerald Muguiyi Wambugu had taken advantage of his incarceration at the Naivasha Maximum Prison between the years 1971 and 1985 to illegally and fraudulently seize and take possession of his two parcels of land known as Othaya/Kihugiru/130 and Othaya/Kihugiru/131.



15. It was the Appellant's case that the Respondent and her deceased husband had proceeded to combine and consolidate the two parcels of land measuring approximately 1.57 Ha. with their own parcels of land. It is on that account that the Appellant urge the Court to "separate" his portion of land from that belonging to the Respondent.
16. On her part the Respondent denied any wrong doing. It was her case that it was the Appellant who had donated a Power of Attorney to her husband and proceeded thereafter to sell the said parcels of land to her husband.
17. Having analysed the evidence adduced by both Parties, the Learned Trial Magistrate concluded as follows at Page 18 of the Judgment:

"As can be seen from authorities referred to elsewhere in this Judgment, the burden was on the Plaintiff to prove that the two subject lands (sic) were acquired illegally and/or fraudulently from him by the Defendant and her late husband but he has failed to do so. It was not enough for the Plaintiff to merely allege that the lands (sic) were unlawfully taken away from him; he had the ultimate burden of proving with cogent evidence that the late Gerald Muguiyi in conjunction with the Defendant fraudulently and unlawfully obtained the lands (sic) from him but he has failed to discharge that burden within the legally laid down standards of proof.

The Plaintiff has also failed to prove that the Defendant and her late husband altered or forged any lands records in respect of the parcels of land as alleged in the absence of any evidence or records from the land office to that effect. In conclusion, the Plaintiff has failed to prove that the Defendant and her late husband fraudulently and/or illegally obtained land parcels Nos. Othaya/Kihugiru/130 & 131 from him and as such he has thus failed to convince the Court for the grant of prayer (a) of his Plaint.

After carefully considering the totality of the Plaintiff's evidence on record together with his exhibits and weighting it against the evidence put forth by the Defendant this Court finds that the Plaintiff has failed to prove his case on a balance of probabilities. The Plaintiff's case must therefore fail and is hereby dismissed."

18. In support of his case, the Appellant had called two witnesses. That was himself and his wife Lucy Wanjiku Wokabi (PW2). As his testimony-in-chief before the trial Court, the Appellant relied solely on his Statement as recorded on 4th February, 2019 and filed in Court on 26th February, 2019. In the relevant portion of that Statement, the Appellant states as follows:

"I am the rightful and the registered owner of the land parcel No. Othaya/Kihugiru/131 and Othaya/Kihugiru/130, which I bought in the year 1966 from two (2) brothers, namely Wamugi s/o Maragua (131) and Kuru s/o Maragua (130). I have never sold or transferred the two (2) parcels of land to anyone else up to date.

Beatrice Wanjiru Muguiyi is my immediate neighbor, she together with her late husband Gerald Muguiyi Wambugu have been interfering with my quiet possession of my two (2) parcels of land. I have been denied possession of the said parcels of land by the Defendants' wrongful occupation. Between March, 1971 and September, 1985 I was in jail at

Naivasha Main Prison. During this period, the Defendant together with her late husband Gerald Muguiyi Wambugu altered and interfered with the land records at Nyeri Land Registry.



By a letter dated on 18th December, 1973, by prisons Authorities (Headquarters) Nairobi, the late Gerald Muguiyi was stopped from visiting me at Naivasha Main Prison and stopped from interfering with my quiet and peaceful life as a prisoner.

On 11th days of October, 1988 at Nyamari Village, Othaya, my family was forcefully stopped from cultivating the two (2) parcels of land by the late Gerald Muguiyi Wambugu and charged in a Court of law for trespass. My wife Lucy Wanjiku Wokabi was later acquitted by the Court at Mukurwe-ini Law Court for lack of proof.

On the 14th day of September, 2018 (14/09/2018); the Land Registrar Nyeri County issued me with a green card, which revealed to me the wrongful actions that the Defendant Beatrice Wanjiru Muguiyi had done without my knowledge.”

19. From a perusal of that Statement, the responses given by the Appellant during his cross-examination as well as the exhibits produced at the trial by both the Appellant and the Respondent, it was not difficult to see why the Learned Trial Magistrate came to the conclusion that the Appellant had failed to prove his case.
20. As it were, there was no dispute that the Appellant was incarcerated in prison between 26th March, 1971 and 24th September 1985 when he was released. While he denied selling the two parcels of land to the Respondent or her deceased husband, the Appellant admitted during cross-examination that before he went to prison, he had had a discussion with the Respondent’s husband regarding the sale of one of the parcels of land.
21. Again, as the trial Court properly observed, while the Appellant denied entering into any communication over the said parcels of land while he was serving sentence, it was apparent that he was in constant communication with the Respondent’s husband who used to visit him in prison. If that was not the case there would be no basis for the letter dated 18th December, 1973 produced by the Appellant in which the Prison Authorities gave instructions stopping the Respondent’s husband from visiting the Appellant at the Naivasha Maximum Prison.
22. Indeed, during his cross-examination in Court, it became apparent that it was the Respondent’s husband who, on the instructions of the Appellant, did engage an Advocate to appeal his conviction to prison and even paid Ksh.1,500/- to the said Advocate as instruction fees. While the Appellant was quite shifty in his responses during cross-examination, this is what the Record captures him to have stated at Pages 17 and 18:

“... I know S. M. Otieno & Company Advocates. S. M. Otieno tried to reach me while in Prison. I was not in communication with Gerald between 1971-1973. The Advocate wrote a letter to me while in prison whereby he sought to represent me. Gerald is the one who had contacted S. M. Otieno. I had talked to Gerald in 1971 before I went to prison. I was discussing the issue of sale of land with Gerald. I talked with Gerald before my arrest. I have never authorized Gerald to contact S. M. Otieno Advocate on my behalf.

On 4th October 1973, I was at Kamiti Prison but going to Naivasha Prison. While at Naivasha Prison, I received a letter from Gerald dated 4th October, 1973. The letter was read to me. The letter shows that there was communication between me and Gerald and I had instructed Gerald to contact S. M. Otieno Advocate.



... I also received the letter dated 4th December, 1973 by Gerald Muguiyi. I was to refund the money which Gerald had paid to Mr. S. M. Otieno ... I saw these receipts for Kshs.1,500/-. I did not respond to that letter since I was not satisfied with that letter.”

23. As it were, the Respondent had maintained that the two parcels of land had been sold to her family through a Power of Attorney donated by the Appellant to her husband. During his cross-examination on the issue of the Power of Attorney (Page 16 of the Record), the Appellant responded as follows:

“... I have never given Gerald any Power of Attorney. (Referred to the Power of Attorney). The signature indicted therein is not my signature. I did not sign any document while in prison. I have never seen the said Power of Attorney there before. I have seen the document for the first time today. I did not give Gerald any Power of Attorney over parcels No. 130 and 131.”

24. This position taken by the Appellant was rather interesting for it was in complete contrast with his own pleadings. Upon being served with the Respondent’s Statement of Defence, the Appellant proceeded to file a lengthy Reply to the Statement of Defence on 17th May, 2019. In regard to the issue of the Power of Attorney, this is what he states at Paragraph 7 of the Reply:

“7. In response to Paragraph 7 of (the) defence, the Plaintiff wish(es) to remove the avoidance of doubt and state that the late Gerald Muguiyi had no authority over the Plaintiffs parcels of land. That Power of Attorney he claims to possess was revoked on 12th November 1973; by a letter dated on 22nd December, 1973 he confirms that the Power of Attorney was revoked; he requested lawyer S. M. Otieno to refund him the amount of Kshs.1,500/- and requests him further to cancel the appeal allegedly made to assist the Plaintiff; he also requested him to cut less (sic) all his expenses.”

25. Arising from the foregoing, it was apparent that the Appellant was being less than candid when he insisted during cross-examination that he was seeing the Power of Attorney said to have been donated by himself to the Respondent’s husband for the first time. In that Reply to the Defence he does not deny being the author of the Power of Attorney but instead insists that it was revoked on 12th November, 1973. As the Learned Trial Magistrate did find, the Appellant did not produce any evidence of the said revocation. The Power of Attorney dated 5th October, 1973 was produced in Court (Dexh 1) and it gave the Respondent’s husband the Power to do anything and everything that the Appellant could do with the two parcels of land and to execute all instruments necessary in dealing therewith.

26. It would then appear as stated by the Respondent that it is indeed that Power of Attorney that was used to transfer L.R No. Othaya/Kihugiru/130 to the name of the Respondent’s husband on 22nd November, 1975 while Othaya/Kihugiru/131 was transferred on 7th May 1976. While the Appellant was emphatic that he was unaware how the transfers were done, he must have known of the same at least some three years after his release from prison when as he states in his evidence-in-chief, his wife (PW2) and himself were arrested and charged on 11th October, 1988 for trespassing upon and stealing from the said parcels of land. From a perusal of copies of the charges produced as Pexh 7 and 9, it was evident that the complainant was none other than Gerald Muguiyi Wambugu who was the Respondent’s husband.

27. As it turned out, the Appellant did not make any effort to recover the two parcels of land from the Respondent’s husband. By the time Gerald Muguiyi Wambugu passed away in the year 2007, some 19



years had passed since the Appellant and his wife were arrested over the trespass and stealing incident in 1988. When asked why he failed to take any legal action against the Respondent's husband while he was alive, the Appellant's lame response was that he was still resting from his incarceration.

28. It was rather interesting that even after the death of the Respondent's husband in 2007, it took the Appellant another 12 years to wake up from his rest and to institute this case against the Respondent. In the circumstances of this case it was clear that the same was, as stated by the Learned Trial Magistrate a complete afterthought and instituted in bad faith.
29. From the material placed before the Court, the Respondent came to own the two parcels of land not from an act of fraud but upon filing succession proceedings following the death of her husband. Contrary to the claim that she altered any documents at the Nyeri Lands Registry, it was evident that she acquired the two parcels of land pursuant to the Certificate of Confirmation of Grant issued to her on 20th December, 2022 in Nairobi High Court Succession Cause No. 1150 of 2007.
30. It was also evident to me that this suit was filed in abuse of the Court process. From his own evidence before the Court, the Appellant left prison in 1985. This suit was filed without leave of the Court some thirty three (33) years from the time the Appellant knew or ought to have known that the suit property had been transferred to the name of the Respondent's husband. Under Section 7 of the *Limitation of Actions Act*, an action to recover land must be instituted within 12 years from the date when the cause of action accrued. It follows that as at the time the suit was instituted in 2019, the same was stale and barred by Statute. The suit was a non-starter from the very beginning and was nothing but a waste of precious judicial time.
31. In the premises I find no merit whatsoever in the Appeal. The same is dismissed with costs to the Respondent.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 20TH DAY OF MARCH, 2024.

In the presence of:

Mr. Joel Kamitha Kiiru – the Appellant in person

Mr. Ng'arua for the Respondent

Court assistant - Kendi

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J. O. OLOLA

JUDGE

