



Mahiuha v Mwangi alias Margaret Wangari Mung'ara (Environment and Land Appeal E023 of 2022) [2024] KEELC 1653 (KLR) (20 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1653 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL E023 OF 2022
JO OLOLA, J
MARCH 20, 2024**

BETWEEN

JOSEPH GICHURU MAHIUHA APPELLANT

AND

**MARGARET WANGARI MWANGI ALIAS MARGARET WANGARI
MUNG'ARA RESPONDENT**

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable J. Macharia, Senior Principal Magistrate delivered on 23rd August, 2022 in Nyeri CMELC Case No. 42 of 2020.
2. By a Plaint dated 13th August, 2020 as amended on 5th November 2020, Joseph Gichuru Mahiuha (the Appellant) had sought as against the Respondent herein:
 - (a) A declaration that by virtue of Section 4(4) of the *Limitation of Actions Act*, the Defendant cannot take any action including execution of the decree of Nyeri Senior Resident Magistrate's Court Civil Case No. 151 of 1990;
 - (b) A declaration that the Defendant's rights over land parcel No. Ruguru/Kiamariga/461 has been extinguished by operation of the Law of *Limitation of Actions Act*, and her marriage to one Eliud Mung'ara Kimondo;
 - (c) Costs of this suit; and
 - (d) Any further or better relief that the Honourable Court may deem fit to grant.
3. Those prayers arise from the Appellant's contention that the Respondent had sued him over the suit property in Nyeri SRMCC No. 151 of 1990 upon which it was decided after arbitration that he be given 2.8 acres of the said L.R No. Ruguru/Kiamariga/461 while the Respondent would get 1.8 acres



- thereof. It was the Appellant's case that the Respondent was given the said 1.8 acres on condition that she would not sell the same or marry.
4. The Appellant asserted that in the mid 1990s, the Respondent married one Eliud Mung'ara Kimondo thereby losing her claim over the said 1.8 acres. It was further the Appellant's case that since the Judgment was entered in her favour on 29th September 1993, the Respondent had never taken any steps towards execution of the Judgment and the right to do so was now barred by virtue of Section 4(4) of the Law of *Limitation of Actions Act* and her claim over the land had been extinguished.
 5. But in her Statement of Defence and Counterclaim dated 16th September 2020, Margaret Wangari Mwangi alias Margaret Wangari Mung'ara (the Respondent) while admitting having sued the Appellant in the said Nyeri SRMCC No. 151 of 1990 denied being married to the said Eliud Mung'ara Kimondo or any other person.
 6. The Respondent avers that any failure to continue her occupation of the suit land has been caused by the sheer force and malicious destruction of property visited upon her by the Appellant who has frustrated the entry of judgment and the sub-division of the suit land. The Respondent further asserted that the suit as filed disclosed no cause of action, amounted to a gross abuse of the Court process and was res judicata.
 7. By way of her Counterclaim, the Respondent accused the Appellant of fraudulently sub-dividing the suit land into title Nos. Ruguru/Kiamariga/2405 and 2406 in an attempt to remove the land from the purview of the orders issued by the Courts. It is her case that the records for the said Nyeri SRMCC No. 151 of 1990 have become lost, misplaced and incapable of being found and that the same cannot be a ground for denying her justice.
 8. Accordingly the Respondent sought the following orders as against the Appellant:
 - (a) Rectification of title number Ruguru/Kiamariga/461 by cancellation of the entries made lis pendens SRMCC 151 of 1990;
 - (B) Entry of Judgment in terms of the award in the aforementioned suit; and
 - (c) Costs of the Counterclaim.
 9. Upon hearing the dispute and in his Judgment delivered on 23rd August, 2022 aforesaid, the Learned Trial Magistrate proceeded to dismiss the Appellants case with costs to the Respondent. The Respondent's case was equally dismissed with no order as to costs.
 10. Aggrieved by the said determination, the Appellant proceeded to this Court and lodged the Memorandum of Appeal herein dated 19th September, 2022 seeking to have the Judgment set aside on the grounds that:
 1. The Learned Trial Magistrate erred in law and in fact in misconstruing the Appellant's claim as one of adverse possession;
 2. The Learned Trial Magistrate further erred in law and in fact by failing to make any finding on whether the Respondent can execute the decree in Nyeri SRMCC Civil Case No. 151 of 1990 after the expiry of 12 years from the date of the Judgment in that case;
 3. The Learned Trial Magistrate erred in law and in fact in failing to make any finding on whether the Respondent's right over L.R No. Ruguru/Kiamariga/461 had been extinguished by virtue of her failure to execute the decree within 12 years and her marriage to one Eliud Mung'ara Kimondo.



4. The Learned Trial Magistrate erred in law in his failure to appreciate that the Appellant's claim before him was distinct from Nyeri SRMCC No. 151 of 1990 and could thus not be res judicata;
 5. The Learned Magistrate erred in law in declaring the Appellant's cause res judicata; and
 6. The Learned Trial Magistrate erred in law in failing to consider the evidence on record and render Judgment based on the said evidence.
11. As Mativo J (as he then was) stated in *Mursal & Another - v- Manese* (2022) KEHC 282 (KLR:

 "A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the Judgment and 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. This duty was stated in *Selle & Another - v- Associated Motor Boat Company Limited & Others* (1968) EA 123."
12. As it were, a first appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the Parties and unless restricted by law, the whole case is therein open for re-hearing both on questions of fact and law.
 13. In the premises, I have carefully perused and considered the Record of Appeal as well as the Judgment rendered by the Trial Court. I have similarly perused and considered the submissions and authorities placed before the Court by the Learned Advocates representing the Parties herein.
 14. By his claim as filed in the Lower Court, the Appellant had sought for a declaration that by virtue of Section 4(4) of the *Limitation of Actions Act*, the Respondent cannot take action including execution of the decree arising from Nyeri SRMCC No. 151 of 1990. In addition the Appellant sought for a declaration that the Respondent's rights over the parcel of land known as Ruguru/Kiamariga/461 had been extinguished by operation of the Law of *Limitation of Actions Act* and the Respondent's marriage to one Eliud Mung'ara Kimondo.
 15. The gist of the Appellant's claim was that since the Respondent obtained Judgment against himself on 29th September 1993, the Respondent had never taken any steps towards execution of the Judgment and that by virtue of Section 4(4) of the *Limitation of Actions Act*, her right to do so was now barred and her claim over the land had been extinguished.
 16. Having considered the dispute before him the Learned Trial Magistrate delivered himself as follows at Pages 2 to 3 of the Judgment:

 "I note that the Plaintiff in this case did not comply with the orders granted in the SRMCC No. 151 of 1990. The Plaintiff filed an Appeal in the High Court which was dismissed in the year 2002. Can the Plaintiff now file another separate suit and claim that the Defendant's right over the parcel of land have been extinguished by virtue of Section 4(4) of the Law of *Limitation Act*? Can the Plaintiff now claim ownership by way of adverse possession after failing to comply with the orders of this Court? The answer to the 2 questions is NO. Is this matter res judicata now? The answer is Yes ."



17. Upon further analysing what constitutes a claim for adverse possession, the Learned Trial Magistrate concluded as follows:

“In this case the Plaintiff seeks adverse possession on the basis emanating from non-compliance of the orders and judgment of the Court. It was for the Plaintiff to comply with the orders after its appeal (sic) in the High Court was dismissed. It has not been disputed that the original parcel of land No. 461 was subdivided by the Plaintiff to form No. Ruguru/Kiamariga/2406 and 2405. This has not been challenged. Can the plaintiff now seek adverse possession on different parcels of land which were not the subject of the Judgment in the Magistrates Court? The answer is No.

It is trite law that a party cannot benefit from its own wrongdoing or non-compliance with the orders of the Court. The Plaintiff has done nothing to explain why in the first place he did not comply with the Judgment. He has therefore approached this Court with dirty hands. He who seeks equity must do equity. The issues herein are also res judicata. The issue of ownership having been duly determined substantially and being indirectly (sic) in issue in the Courts.”

18. The said Section 4(4) of the [Limitation of Actions Act](#), Cap. 22 Laws of Kenya provides as follows:

“4(4) An action may not be brought upon a Judgment after the end of twelve years from the date on which the Judgment was delivered, or [where the Judgment or a subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods] the date of the default in making the payment or delivery in question, and no arrears of interest in respect of a Judgment debt may be recovered after the expiration of six years from the date on which the interest became due.”

19. My reading of the above provision is that once a Judgment has been rendered, execution of that Judgment must be commenced within the 12 year period. In other words, one cannot obtain a Judgment and fail to do anything about it and then after the 12 years have expired, seek to execute the same. Unless an application has been brought for enforcement of the Judgment and has been concluded within the 12 years, no fresh action for the enforcement of the Judgment can be entertained by the Court.

20. Considering a similar situation in [M'Ikiara M'Rinkanya & Another - v- Gilbert Kabeere M'Mbijiwe](#) (2007) eKLR, the Court of Appeal observed as follows:

“... it is logical from the scheme of the Act, that a Judgment for possession of land, in particular should be enforced before the expiration of 12 years because Section 7 of the Act bars the bringing of action for recovery of land after the end of 12 years from the date in which the right of action accrued. By the definition of Section 2(2)(3) of the [Limitation Act](#):

“Reference in this Act to a right of action to recover land include reference to a right to enter into possession of the land and reference to the bringing of an action in respect of such right of action include reference to making of such an entry.”

According to that definition, the institution of proceedings to recover possession of land including proceedings to obtain a warrant for possession is statute-barred after the expiration of 12 years.”



21. The Court of Appeal went on to conclude after an analysis of the import of Section 4(4) of the Limitation of Actions Act as follows:

“From the above analysis, it is clear that a Judgment for possession of land should be enforced before the expiry of the 12 years limitation period stipulated in Section 7 of the Act. If the Judgment is not enforced within the stipulated period, the rights of the decree holder are extinguished as stipulated in Section 7 of the Act and the Judgment debtor acquires possessory title by adverse possession which he can enforce in appropriate proceedings. So, quite apart from the authority of *Lougher - v- Donovan*, which we consider as still good law in this country, and the previous decisions of this Court, there is a statutory bar in Section 7 of the Act for recovery of land including the recovery of possession of land after expiration of 12 years. It follows therefore, that, to hold that execution proceedings to recover land are excluded from the definition of “action” in Section 4(4) of the Act would be inconsistent with the law of adverse possession.”

22. In the matter before the trial Court, it was not in dispute that the Respondent had obtained an arbitration award in her favour granting her 1.8 acres of land from the parcel of land known as Ruguru/Kiamariga/461. The said award was endorsed as an order of the Court in Nyeri SRMCC No. 151 of 1990 on 8th July, 1992.

23. It was also not in dispute that the said Judgment was never executed by the Respondent. Some 28 years later on 3rd August, 2020, the Respondent caused the Deputy County Commissioner Mathira West to write to the Parties herein as follows (Page 66 of the Record):

RE: Land Dispute Between Yourselves

The above subject refers.

Please be reminded about our meeting and subsequent deliberations on 5th May, 2020 and 7th July 2020, regarding Land Parcel No. Ruguru/Kiamariga/461.

As you are aware, the land in question was duly awarded by the District Officer assisted by elders representing both of you as follows:

1. Margaret Wangari Mwangi – 1.8 acres
2. Joseph Gichuru Mahinda – 2.8 acres

This was further endorsed and ratified by the Magistrate on 8th July, 1992.

Mr. Joseph Gichuru appealed unsuccessfully against the award vide HCCA No. 22 of 1994, but his application was rejected vide Judge J.V.O. Juma’s Ruling on 23rd April 2002, subsequently the initial award as stated herein was withheld (sic).

During our meetings/arbitrations, I have called up Mr. Joseph Gichuru to present any documents to the effect that the matter is pending in Court or is a subject of review in a higher Court but to no avail.

In the circumstance, this office finds it fit to stand with the existing Ruling and hereby advise Margaret Wangari Mwangi to proceed and procure the services of a surveyor to ensure that the award given by the Court is pursued without any further delay.

The Assistant County Commissioner Ruguru Division to provide security to ensure that justice is served.”



24. It was apparent that it is the attempt to enforce this advise that prompted the Appellant to come to Court seeking inter alia, a declaration that the Respondent could no longer execute the Judgment endorsed by the Court on 8th July, 1992. While the letter by the Deputy County Commissioner was well-intentioned and commendable, it was clear that it had arrived too late in the day.
25. As we have seen hereinabove the Respondent had 12 years from 8th July, 1992 to enforce the Judgment that was delivered in her favour. Even where one was to take into consideration the fact that the Appellant's appeal from that Judgment remained in Court until 23rd April, 2002 when the same was dismissed, the attempt to enforce the Judgement in the year 2020 was coming some 18 years late.
26. In her recorded statement before the Lower Court, the Respondent contended that the delay was caused by the fact that the Court records went missing. On cross examination before the Court (page 16 of the Record), she told the Court she was unable to follow up the execution of the Judgment as she had children in school. Whatever was the case, and while this Court greatly sympathises with the Respondent, the attempt to enforce the Judgment in the year 2020 was statute-barred and could no longer be entertained by the Court.
27. It follows that I was persuaded that the trial Court misdirected itself and erred in law in finding that the matter was res judicata and that the Appellant could not benefit from his own wrong doing or non-compliance with the Court orders. The law had imposed a duty upon the Respondent to enforce the Judgment in her favour within 12 years. She did not do so and the Appellant was thus right in seeking a declaration that the Judgment was no longer enforceable.
28. In the premises, this Appeal succeeds. Accordingly, I hereby set aside the Judgment and decree dated 23rd August, 2022. The same is substituted with an order allowing the Appellant's suit with no order as to costs.
29. Each Party shall bear their own costs on the Appeal.
30. It is so ordered.

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

J. O. OLOLA

JUDGE

In the presence of:

Ms Lucy Mwai for the Appellant

Mr. Ng'arua holding brief for Nderi for the Respondent

Court assistant - Kendi

