



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kiura v Mugane & another (Civil Appeal 248 of 2019)  
[2025] KECA 1009 (KLR) (4 April 2025) (Judgment)**

Neutral citation: [2025] KECA 1009 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 248 OF 2019  
JW LESSIT, A ALI-ARONI & GV ODUNGA, JJA  
APRIL 4, 2025**

**BETWEEN**

**HENRY NDWIGA KIURA ..... APPELLANT**

**AND**

**CHARLES NJERU MUGANE ..... 1<sup>ST</sup> RESPONDENT**

**JOSEPH MUTHEE MURATHI ..... 2<sup>ND</sup> RESPONDENT**

*(Being an appeal from the judgment of the Environment and Land Court at Embu (Angima, J.) dated 11th July 2019 in Embu ELC No. 210 of 2015 (formerly Kerugoya ELC No. 467 of 2013))*

**JUDGMENT**

1. By a plaint dated 17<sup>th</sup> August 2007, filed before the Environment and Land Court in Kerugoya ELC No, 467 of 2013, which was later transferred to Embu Environment and Land Court as ELC Case No. 210 of 2015, the respondents, as plaintiff, sought the following reliefs against the appellant:
  - a. Eviction of the appellant from parcel of land No. Gaturi/Nembure/2657.
  - b. Costs of this suit.
  - c. Interest on (a) and (b) at court rate.
  - d. Any further relief this honourable court may deem fit to grant.
2. The respondents' case was that Title No. Gaturi/Nembure/2657 (hereinafter referred to as the suit property) belonged to their father, William Patrick Mugane, who was registered as proprietor in common with Njeru Wamichi. Following the death of their father, they filed succession proceedings in respect of the estate and were issued with a Grant of Letters of Administration. However, the appellant, who was occupying the whole land, continued in possession and denied them access thereto. They sought to have the appellant evicted from the suit property.



3. In his defence and counterclaim, the appellant denied the respondents' proprietary interest in the suit property. According to the appellant, the respondents' claim of half share of the suit property was without lawful justification and that at no time did the original owner of the suit property, Njeru Wamichi (hereinafter Wamichi) ever transfer half share to the respondents' father, William Mugane (hereinafter Mugane). It was his case that the transfer of  $\frac{1}{2}$  share to Mugane was fraudulent and that the respondents were trying to relitigate a matter that had already been determined in Embu High Court Succession No. 886 of 2002 – In the Matter of the Estate of Njeru Wamichi. He further contended that the respondents' claim was based on the misrepresentation of material facts in Succession Cause No. 1251 of 1999 – In the matter of the Estate of William Patrick Mugane. He sought the following reliefs in the counterclaim:
  - a. An order for cancellation of the names of Charles Njeru Mugane and Joseph Muthee Murathi from the register of land parcel No. Gaturi/Nembure/2657.
  - b. A declaration that Njeru Wamichi was the bona fide registered proprietor of land parcel No. Gaturi/Nembure/2657.
  - c. Costs of the suit and counter claim.
4. The 1<sup>st</sup> respondent (PW1) who testified on behalf of the respondents averred: that the respondents inherited  $\frac{1}{2}$  of the suit property from their late father (Mugane) who was a co- proprietor in common with Wamichi in Succession Cause No. 9 of 2016 (formerly Nairobi High Court Succession No. 1251 of 1999) upon confirmation of grant; that on the advice of the Land Registrar they prepared a mutation for sub-division of the suit property into two but it could not be registered due to some encumbrances in the land register placed by the appellant; that since the appellant, who the administrator of the estate of Wamichi in Embu High Court Succession Cause No. 345 of 2007 (now Succession Cause No. 886 of 2002), was in occupation of the entire suit property, they were unable to access their share thereof; that in that succession cause the distribution of the estate of the deceased was in dispute with at least 6 protestors challenging confirmation of the grant; that the respondents were only interested in their  $\frac{1}{2}$  share in the suit property since its distribution was not in dispute; that he was not aware of the fraudulent allegations made by the appellant against their late father; that he was still a young boy in 1973 when Mugane acquired  $\frac{1}{2}$  share of the suit property and he was not privy to any transactions which may have taken place between Mugane and Wamichi; that Mugane died in 1992 whereas Wamichi died in 1981 and during their lifetime, there was no dispute over the suit property.
5. On his part the appellant testified: that the suit property belonged to his late grandfather, Wamichi and that the respondents were not entitled to any share thereof; that Wamichi's signature on the transfer form was forged; that the transfer of  $\frac{1}{2}$  share was effected without the requisite consent of the Land Control Board, and that the ID card number quoted in the land register did not belong to Wamichi; that the High Court in Embu Principal Magistrate's Succession Cause No. 87 of 1985 had found that the 1973 transfer of  $\frac{1}{2}$  share to Mugane was unprocedural and fraudulent; that he was about 10 years old in 1973 when the transfer to Mugane (entry No. 4 in the land register) was effected; that he was not privy to what Wamichi may have done in 1973 and that he did not always accompany him wherever he went.
6. In his judgement, the learned Judge found: that the respondents and the appellant were young children at the time the disputed entry No. 4 in the land register was made on 29<sup>th</sup> June 1973; that the appellant mainly relied on circumstantial evidence in his bid to impeach the transfer of  $\frac{1}{2}$  share to Mugane; that regarding the allegation of fraud, the burden of proof was upon the appellant; that without the evidence of a handwriting expert, the appellant, himself not being one, could not testify as to the forgery of Wamichi's signature; that there was no evidence from the appellant's side to back up the



- allegation of forgery; that the documents produced by the Land Registrar's evidence was that there was nothing irregular about entry No. 4 since all the documents in support thereof were available in the parcel file; that the copy of the consent letter dated 1979 which the appellant produced was not certified or stamped by any public authority and its origin and authenticity remained unknown; that the documents which the Land Registrar produced in support of entry No. 4 in the land register were authentic and that the consent of the Land Control Board was obtained on 21<sup>st</sup> June 1973 before registration of the transfer and not 6 years later as alleged by the appellant.
7. According to the learned Judge, since the appellant conceded that he was a young boy of about 10 years in 1973 and was not privy to all transactions and dealings which Wamichi may have had, his bare statement contradicting the giving of the gift as recorded in official records by both the Land Control Board and the Land Registrar was not supported by evidence; that the copy of the ID card that was relied upon by the appellant was not certified by any public authority or even a commissioner for oaths as a true copy of the original; and that the copy in the appellant's possession was used in 1979 whereas the transfer in issue took place in 1973.
  8. The trial court found that none of the particulars of the alleged fraud on the part of Mugane were proved to the required standard and there was no reason to disturb entry No. 4 in the land register. According to the learned Judge since there was adequate evidence on record to demonstrate that the respondents acquired the suit property through Succession Cause No. 9 of 2016 – In the Matter of the Estate of William Mugane, the only interest they could possibly acquire was only ½ share which their late father had in the suit property. He found that in their application for a grant in Succession Cause No. 9 of 2012, the respondents made a truthful declaration that the late Mugane held ½ share in the suit property as opposed to the entire suit property and that the only error which took place thereafter was the omission by the succession court to specify in the certificate of confirmation of grant that the Estate of Mugane was only entitled to ½ share, a mistake which did not mislead the Land Registrar as he entered the correct details in the land register. Consequently, the estate of Wamichi did not suffer loss of property or any other prejudice by reason of the omission in the certificate of confirmation of grant. That error, the learned Judge found, could be corrected in such manner and on such terms as the succession court deemed fit. He found that if there were any irregularities or misrepresentation by the respondents in obtaining the grant or certificate of grant in the said matter, it was a matter within the competence of the succession cause to remedy.
  9. As regards the contention that the Principal Magistrate's Court Succession Cause No. 87 of 1985 determined that Mugane's registration as co-proprietor of the suit property in 1973 was irregular, the learned Judge was unable to find any judgement, ruling, decree or order where such declaration was made. Instead, the record showed that the appellant's father who was appointed an administrator of the estate of Wamichi had challenged an arbitration award made by some elders in favour of Mugane who was the objector in the proceedings and by consent of the advocates for the parties the elders' award was set aside on 1<sup>st</sup> March 1996 but there was no evidence as to what happened thereafter and both the respondents' father and the appellant's father died before the matter could be resolved. There was, therefore, no evidence to support the appellant's contention that Mugane's acquisition of ½ share in the suit property vide entry No. 4 of the land register was ever declared to be irregular by the succession court.
  10. On the issue of res judicata, on account of the existence of Embu H.C. Succession Cause No. 886 of 2002, the learned Judge found that the issue was not pursued at the hearing and in the submissions and deemed the issue as having been abandoned since the appellant did not produce the judgement or decree in that succession cause to demonstrate that the instant suit was res judicata or otherwise barred by virtue of any other law. To the contrary, the material on record indicated that the appellant



was the administrator in that succession cause and that the grant had never been confirmed as there were several protestors challenging the confirmation.

11. It was held that since the ownership of the suit property was in common as opposed to joint ownership, the respondents were registered as proprietors of  $\frac{1}{2}$  of the suit property being the share Mugane held in the suit property and they were entitled to enjoy their proprietorship rights without waiting for the conclusion of the confirmation hearing in Succession cause No. 886 of 2002 – In the matter of the estate of Njeru Wamichi. The trial court ordered the eviction of the appellant from  $\frac{1}{2}$  of the suit property since there was evidence on record that a survey of the suit property was undertaken by a licenced surveyor and the relevant mutations prepared but the beacons were removed by the appellant who was in possession of the entire land. Consequently, the court found that the appellant was not entitled to the orders sought in the counterclaim. He awarded the costs to the respondents. He disposed of the suit by issuing:
  - a. An order of eviction of the appellant from one half of Title No. Gaturi/Nembure/2657 subject to the County Land Surveyor pointing out the boundaries separating the portions marked as parcel Nos. 13247 and 13248 as per the mutation form dated 11<sup>th</sup> January 2013.
  - b. Dismissed the appellant’s counterclaim.
  - c. Awarded the respondents the costs of the suit and costs of the counterclaim with interests thereon at court rates.
12. Aggrieved by the decision, the appellant has challenged the same on the grounds:
  1. The Learned Judge erred in law and fact by failing to evaluate and analyze the entire evidence on record to the required standards as provided by the law and thus arrived on a wrong decision in the circumstances.
  2. The Learned Judge erred in law and fact by not finding that entry No.4 registered in the land register was irregular, fraudulent and a forgery having lacked the requisite documents to support the same.
  3. The Learned Judge erred in law and fact in relying on the certificate of confirmation of grant dated 28<sup>th</sup> February 2000 in Succession Cause No. 1251 of 1999 which certificate was erroneous/fault and thus further ignored the pending Succession Cause No. 9 of 2016 (formerly Succession Cause No.1251 of 1999)- Nairobi and Succession Cause No.886 of 2002 (formerly Succession Cause No.87 of 1985- Embu) and hence arrived at an erroneous decision.
  4. The Learned Judge erred in law and fact by considering extraneous matters which were not before the court and thus upsurge the jurisdiction of Succession Courts in the circumstances.
  5. The Learned Judge erred in law and fact by deciding the suit in favour of the Respondent without sufficient evidence on record.
13. We heard the appeal on the Court’s virtual platform on 26<sup>th</sup> November 2024 when the appellant appeared in person while the respondents were represented by learned counsel, Mr Kamochu who held brief for Ms Muthoni.
14. We have considered the submissions made by the parties. This being a first appeal, we are not just mandated, but enjoined to re-evaluate the evidence adduced before the trial court and arrive at our



independent judgment on whether or not to allow the appeal. In so doing, we are expected to subject the whole of the evidence to fresh and exhaustive scrutiny and draw our own conclusions thereon, bearing in mind that we did not have the opportunity of seeing and hearing the witnesses first-hand. See *Selle & another v Associated Motor Boat Co. Ltd. & others* [1968] EA 123 .

15. While we appreciate that we may, in appropriate cases, reverse or affirm the findings of the trial court in *Peters v Sunday Post Limited* [1958] EA 424, the predecessor to this Court, stated that:

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide.”

16. With respect to findings of fact by the trial court, this Court’s position as stated by Hancox, JA (as he then was), in *Mohammed Mahmoud Jabane v Highstone Butty Tongoi Olenja* [1986] KLR 661; [1986-1989] EA 183 is that:

“The appellate Court only interferes with the trial Court’s findings of fact if it is shown that he took into account facts or factors which he should have not taken into account, or that he failed to take into account matters of which he should have taken into account, that he misapprehended the effect of the evidence or that he demonstrably acted on wrong principles in reaching the findings he did.”

17. In this case, the title to the suit property was in the name of William Patrick Mugane, who owned one half of the suit property, while the other half was owned by Njeru Wamichi. The respondents, in their capacity as the administrators and beneficiaries of the estate of Mugane are seeking that half of the suit property be registered in their names and that the appellant should vacate that half. The appellant, on the other hand, contended that the registration of the half in the name of Mugane was fraudulent. However, the Land Registrar confirmed that the registration was, according to the records held by the land office, proper. To the contrary, it was the evidence relied upon by the appellant as evidence of fraud that was not supported by the records. It is also clear that the transaction that led to the registration of the suit property in the joint names took place when both the appellant and the respondents were very young. None of them could positively swear as to how it took place. Section 26 of the *Land Registration Act* provides that:

1. The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except-
  - a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
  - b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

18. The position was similar even prior to the enactment of the *Land Registration Act*, since similar provisions were to be found in the repealed Registered *Land Act*. Accordingly, in order for the appellant to successfully impugn the title, he had to prove that the registration in the names of Mugane was obtained through fraud. The standard of proving fraud is higher than on the balance of probabilities,



although lower than beyond reasonable doubt. The predecessor to this Court in the case of R.G. Patel v Lalji Makanji [1957] EA 314, stated thus:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

19. Before the learned Judge were mere allegations of fraud with no tangible evidence in support. Moreover, there was no evidence that during their lifetime, Mugane and Wamichi ever had any issues regarding their respective registration as proprietors of the suit property. Clearly, the appellant, who was not of age at the time the suit land was being registered in the names of Wamichi and Mugane could not, unless he adduced evidence on how the registration was done, successfully challenge the prima facie indefeasibility of title.
20. The allegations of forgery were similarly not proved. Whereas the appellant contended that the signature of Mugane was forged, no serious attempt was made to prove that allegation. As already noted, the appellant was very young at the time of the transaction and conceded that he did not know the circumstances under which the transaction took place. His evidence of forgery was based on his own views about the handwriting, yet he had no expertise in matters handwriting. His evidence fell short of what is expected in cases where such allegations are made.
21. As correctly noted, this was a case where the respondents were simply claiming what belonged to Mugane, of whose estate they were beneficiaries. They were not interested in the estate to which the appellant was entitled, whose dispute was still raging. Accordingly, the learned Judge was right in finding that the respondent did not have to wait for the appellant and those with whom they were litigating over the estate of Wamichi before they could receive their entitlement. We agree that mistakes, if any, made in the issuance of the Grant were inconsequential since the Land Registrar only implemented what was rightly due to the respondents.
22. We also agree with the learned Judge that based on the evidence as presented, there was no proof that the matter which was contended to have been determined earlier on was determined in order to give rise to the plea of res judicata.
23. Having considered the material placed before us, we arrive at the decision that the learned Judge’s findings cannot be faulted. We find no merit in this appeal, which we hereby dismiss with costs to the respondents.
24. Judgement accordingly.

**DATED AND DELIVERED AT NYERI THIS 4<sup>TH</sup> DAY OF APRIL, 2025.**

**J. LESIIT**

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**JUDGE OF APPEAL**

**ALI – ARONI**

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**JUDGE OF APPEAL**

**G. V. ODUNGA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

