



REPUBLIC OF KENYA



**Njeru v Njiru & another (Civil Appeal 156 of 2018)
[2025] KECA 1247 (KLR) (27 June 2025) (Judgment)**

Neutral citation: [2025] KECA 1247 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 156 OF 2018
S OLE KANTAL, JW LESSIT & AO MUCHELULE, JJA
JUNE 27, 2025**

BETWEEN

JOYCE MUTHIGA NJERU APPELLANT

AND

PETERSON NYAGA NJIRU 1ST RESPONDENT

LAND REGISTRAR EMBU 2ND RESPONDENT

(Being an appeal from the judgment and decree of the Environment and Land Court at Embu (Y. Angima, J.) dated 5th July 2018 in ELC NO. 306 of 2015 (Formerly HCCC No. 79 of 2000))

JUDGMENT

1. The deceased Njeru Njue was the husband of the appellant Joyce Muthiga Njeru. Between 25th May 1982 and 17th March 2000 the deceased was the registered proprietor of land parcel Ngandori/Kiriari/2151 (the suit property). On 17th March 2000 the suit property was transferred to Peterson Nyaga Njiru (1st respondent) in exchange for land parcel Ngandori/Kiriari/2565 which belonged to the 1st respondent. The 1st respondent paid the deceased Kshs.370,000/= on top of the exchange over the suit property. The 1st respondent became the registered owner of the suit property. The exchange agreement was signed on 10th February 2000 between the deceased and the 1st respondent. The arrangement received the blessings of the Land Control Board.
2. The appellant and her family were living on the suit property. When she learned of the transaction between her husband (the deceased) and the 1st respondent, she placed a caution against the title which was already in the name of the 1st respondent. The 1st respondent asked her to vacate the suit property. The deceased had asked her to move to Ngandori/Kiriari/2565. She refused to relocate.
3. The appellant sued the deceased, the 1st respondent and the Land Registrar Embu (2nd respondent) at the Environment and Land Court (ELC) at Embu seeking a declaration that the exchange of the



land parcels was fraudulent, illegal and void. She wanted that the suit property reverts to the deceased and that Ngandori/Kiriari/2565 reverts back to the 1st respondent. Her case was based on fraud whose particulars were that the deceased had not sought her permission to exchange the suit property, which was family property in which she had an interest; that the deceased had presented another woman, whom he claimed to be his wife, at the time he approached the Land Control Board for consent to exchange the parcels; and that it was always known that the appellant and her children were living on the suit property.

4. What was also not in dispute was that sometimes in 1992 the deceased had sold the suit property to one Wilson Mbogo Kiura for Kshs.52,775/= . The appellant and the deceased's family opposed this transaction. It was agreed that the sale be stopped, the appellant refunds the Kshs.52,775/= and she keeps the title in safe custody. Her case was that, it was agreed that the deceased would eventually transfer the suit property to her, which he refused to do. It was also not in dispute that, prior to the exchange of the two parcels above, the deceased went to the Land Registrar and reported that his title deed to the suit property was lost. The loss was advertised in the Kenya Gazette. He was issued with a new title deed which he used to transact with the 1st respondent. Throughout, the appellant was in possession of the original title deed.
5. The deceased (as 1st defendant in the claim before the ELC) and the 1st respondent (who was the 2nd defendant) denied the claim and stated that the events leading to the exchange of the titles was above board, lawful and not fraudulent; and that the title held over the suit property by the 1st respondent was a valid one. The 1st respondent response contained a counterclaim in which it was claimed that the appellant was a trespasser on the suit property. An order was sought for her to vacate or be forcefully removed. A permanent order of injunction was sought against her. The 2nd respondent opposed the appellant's claim.
6. The dispute was heard by the learned Y. Angima, J. who on 5th July 2018 found against the appellant in the claim and for the 1st respondent in the counterclaim. The learned Judge found that the exchange of the two parcels was lawful, there was no fraud and that the 1st respondent had indefeasible title to the suit property. The appellant was given 60 days to vacate, failing which she would be evicted. The appellant was ordered to pay the costs of the suit and the counter claim.
7. The appellant was aggrieved by the decision and appealed to this Court on the following grounds:-

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- “ 1) The learned judge erred in law and fact in dismissing the appellant's suit.
2. The learned judge erred in law and fact in holding that the 1st defendant did not mislead or deceive the land registrars on the loss of the title deed.
3. The learned judge erred in law and fact in not considering the fact that this was ancestral land where the appellant and her children had lived and developed for over 40 years.
4. The learned judge erred in law and fact in considering the circumstances under which the exchange of the two land parcels was done.
5. The learned judge erred in law and fact making a finding that the exchange was not only irregular but also unlawful.
6. The learned judge erred in law and fact in not making a finding that the exchange was not only irregular but also unlawful.



7. The learned judge erred in law and fact in holding that there was no legal obligation at the material time for the appellant to accompany the 1st defendant to the Land Control Board.
8. The learned judge erred in law and fact in not considering that the land was ancestral which the 1st defendant had earlier sold but was redeemed by the appellant and other family members and therefore had no absolute right over it.
9. The learned judge erred in law and fact in holding that the appellant had an opportunity of putting the record straight after publication of notification in the Kenya Gazette without considering that the Kenya Gazette is not a newspaper that is easily available to everybody and further that appellant did not alert the Land Registrar that she had the title deed.
10. The learned judge erred in law and fact in holding the appellant did not give any evidence to support the assertion that the 1st defendant presented a different woman at the land control board.”

It was sought that the judgment of the ELC be set aside and she be paid costs of the ELC and of the appeal.

8. When the appeal came before us for hearing, learned counsel Mr. Momanyi was holding brief for Mr. Oonge for the appellant while learned counsel Mr. Okwaro was present for the 1st respondent. They had each filed written submission which they elected to rely on without highlighting. There was no appearance for the 2nd respondent. The learned the Attorney General for the 2nd respondent had been served with a hearing notice.
9. We asked learned counsel Mr. Momanyi for the appellant who conceded that, although the deceased had died before the trial commenced on 21st November 2017, he was not substituted.

Indeed, the record shows that on 19th September 2017 the trial court was informed that the deceased, who was the 1st respondent, had passed on. Hearing nonetheless proceeded in his absence up to conclusion and judgment.
10. We are the first appellate court. Our duty is to re-evaluate the evidence presented in the trial court, both on points of law and fact, and arrive at our own conclusions. We must do this while bearing in mind that we did not have the opportunity to see and hear the witnesses as they testified. (See *Peters v Sunday Post Limited* [1958] EA 424).
11. We are concerned that, while the suit was pending before the ELC the deceased died. He was the 1st defendant in the suit. The case by his wife (the appellant), who was the plaintiff, was that the deceased had fraudulently and illegally transferred the suit property to the 1st respondent in a land exchange arrangement; that she had a beneficial interest in this suit property. Order 24 Rule 4 of the Civil Procedure Rules provides as follows:-

“ 1 Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.



2. Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
3. Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.”

12. We consider that, under Order 24 Rule 4, the cause of action survived the deceased. Upon his death, and the suit was pending, he needed to be substituted by the legal representative of his estate to be able to protect the interests of the estate. There was no substitution. Order 24 Rule 4(2) allows the legal representative to make any defence he/she may wish to make. It states –

13. Going by Order 24 Rule 1, the application to substitute the legal representative in place of the deceased (1st defendant) could have been made by any party to the proceedings. It could also have been done by the legal representative. The continuance of the suit against the deceased upon his death, and without substitution, was barred by law, and, the proceedings taken were a nullity. (See *May Wambugu Njuguna v William ole Nabaga & 9 Others* [2018]eKLR.)

14. This Court in *CKM v ENM & Another*, Civil Appeal No. 250 of 2019 [2024]KECA 293 (KLR) observed as follows:-

“It is basic that the rules of natural justice and fair play would require that where a party to a suit dies and the cause of action survives him, his estate has to be heard through the estate’s legal representative before a decision is rendered. In any case, any decision made against such an estate can only be satisfied by the legal representative.”

15. The proceedings and the judgment having been a nullity by the operation of the law, and therefore without jurisdiction, we set them aside. We direct that the dispute shall be heard by another Judge of the ELC at Embu.

16. Costs follow the event, but given the peculiar facts of this appeal, we order that each side bears own costs.

DATED AND DELIVERED AT NYERI THIS 27TH DAY OF JUNE, 2025.

S. ole KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

