



REPUBLIC OF KENYA



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M'Chege v Kamuti (Suing as Legal Representative of Kamuti Kamuingu) (Civil Appeal 139 of 2018) [2025] KECA 1226 (KLR) (11 July 2025) (Judgment)

Neutral citation: [2025] KECA 1226 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 139 OF 2018
S OLE KANTAL, JW LESSIT & AO MUCHELULE, JJA
JULY 11, 2025**

BETWEEN

EUGENIO NJAGI M'CHEGE APPELLANT

AND

**CHRISTOPHER NJERU KAMUTI (SUING AS LEGAL REPRESENTATIVE OF
KAMUTI KAMUINGU) RESPONDENT**

*(Being an appeal against the Judgment and Decree of the Environment
and Land Court at Embu (Y.M. Angima, J.) delivered on 12th July,
2018 in E.L.C. No. 50 of 2017 Formerly CMCC No. 151 of 1983.)*

JUDGMENT

1. We agree with the trial Judge (Angima, J.) in the judgment appealed which was delivered on 12th July, 2018 that the suit before the Environment and Land Court of Kenya (“ELC”) at Embu had a long convoluted history and has by now achieved the infamy of being in the court corridors for about 42 years. This has led to the record not being very clear; some documents are illegible while others may have gotten lost or misplaced with the passage of time. Indeed, the record shows that the pleadings had faded or become illegible and had to be retyped and re-filed just before the hearing began before the Judge.
2. The documents and record show that the original dispute was filed before the Resident Magistrate at Embu in RMCC No. 151 of 1983. It was in regard to a parcel of land which was claimed by Julius Mugo but opposed by Eugenio Njagi. It was referred to a panel of elders who considered it and returned an award where the claimant was awarded 4 ½ acres of the 9-acre parcel of land.
3. A challenge to the award was dismissed but the High Court found, on appeal, that the award had not been signed by the chairman of the panel and the award was thus set aside for that irregularity.



4. In an amended plaint filed at the High Court of Kenya at Embu being ELC No. 50 of 2017 Christopher Njeru Kamuti (suing as legal representative of Kamuti Kamuingu) stated that his late father Kamuti Kamuingu and the defendant's father M'Chege Kairana had bought a parcel of land No. 2438 measuring 9 acres from one Gachiani which they were to share equally; that the defendant being literate was mandated to take and record minutes on behalf of Irima Clan; that the defendant was mandated to register parcel of land No. Gaturi/Nembure/2438 in their joint names but had irregularly registered it in his name only. It was further stated that when elders of the said clan realized that the defendant had registered the land in his name only, they summoned him and that he had undertaken in writing to transfer half of the land to the plaintiff but that he had failed to do so; that he had instead sub-divided the land into two portions resulting in title No. Gaturi/Nembure/3684 and 3685; that the plaintiff was in occupation of the latter parcel where coffee had been planted. The plaintiff's brother had filed Embu RMCC No. 151 of 1983 which was referred to a panel of elders. For all that the plaintiff claimed for transfer of the parcel No. Gaturi/Nembure/3685 (hereafter "the suit land") to hold in trust for the Kamuingu family and it was prayed that the defendant's name be cancelled from the register of the suit land and be registered in the plaintiff's name as trustee of the Kamuingu family.
5. In an amended defence Eugenio Njagi M'Chege (the appellant) denied the claim stating, without prejudice, that the suit land was as a result of sub-division of the original parcel No. Gaturi/Nembure/2368 which he was given by his late father M'Chege Kairana in 1961; that the plaintiff's father had planted a few coffee trees on the suit land with permission by the appellant's father; that the plaintiff's father died in 1969 before he could remove the coffee trees to his own land; that the plaintiff and his family had never occupied the suit land and for all that the suit should be dismissed.
6. In witness statements which he had filed at the magistrate's court and which were adopted at the hearing before ELC Christopher Njeru Kamuti (the respondent) stated that he was the substituted party in the case in place of his deceased brother Julius Mugo who had filed the case on behalf of his late father claiming the suit land. He stated that long before 1961 his father and the appellant's father had jointly purchased a 9-acre parcel of land which they were to share equally. The consideration for the suit land was one cow and two goats each contributed by their fathers; the land was to be registered jointly but the appellant's father who was literate and kept records had the land registered in his own name but he later on undertook in writing to transfer half the land to the respondent's father but he did not do so; his father was killed and dumped in a pit latrine by unknown persons forcing the family to live in fear thus delay in following up on their claim. He prayed for appropriate orders.
7. The appellant in his witness statement stated that he was the absolute registered owner of the suit land that was gifted to him by his late father in 1961; he had subdivided the original parcel of land into two; that the respondent's father had planted coffee on the original parcel of land with permission and the suit should be dismissed.
8. The suit came up for hearing on 30th January, 2018 after a long delay when the respondent adopted the witness statement we have already summarized in this judgment and a list of documents.
9. The respondent called Linus Njeri Kamuruana as his witness. This witness had filed a statement which he adopted before the Judge. He stated amongst other things of the suit land:

"The land in question was bought by plaintiff's father in equal shares but the defendant having been the clerk for Irima Clan registered the land in his name instead of his father's and Kamuti's..."
10. Further, that Kamuti Kamuingu gave a portion of the original parcel of land "... to my father Kamuruana Ndarui and Mwaura Kamunyori to plant coffee in 1957..." He also stated that Njeru,



Kamuti and M'Chege belonged to the same house and clan "... so I know everything about the said land..."; that the appellant's father had given a written undertaking to subdivide and transfer half the parcel of land to the respondent's father.

11. The witness stated in cross examination that he was present when the appellant signed an undertaking to subdivide and transfer half the parcel of land to the respondent's father; the other two witnesses to that agreement had since died.
12. In adopting his witness statement the appellant denied writing any undertaking in respect of the suit land and disowned a document produced in evidence by the respondent stating that the signature on it was not his. He stated, in addition, that upon subdividing the original parcel of land into two he had sold title No. Gatari/Nembure/3684.
13. The Judge considered the case made out by both sides and allowed the respondent's claim leading to this appeal through Memorandum of Appeal drawn for the appellant by his lawyers M/s Muthoni Ndeke & Co., Advocates where 8 grounds of appeal are set out. The Judge is faulted for finding the original parcel of land Gatari/Nembure/2438 was jointly bought by Kamuti and M'Chege; that the Judge erred in law when he found that the appellant had given a written undertaking in 1961 to surrender half share of the said parcel of land; that the Judge erred in law in finding that the appellant was unable to prove that he was given the said parcel of land by his father; that the Judge should have found that the respondent had no capacity to sue; that the respondent did not prove the case on a balance of probabilities.
14. The appellant in the penultimate ground of appeal says that the Judge erred in law by ordering costs in favour of the respondent and, finally, that the Judge erred in law in failing to analyse the appellant's evidence.
15. When the appeal came up for hearing before us on 10th March, 2025 the appellant was represented by learned counsel Miss Wanjiku. We were satisfied that the respondent had been served with a hearing notice on 26th February, 2025 and we therefore allowed the appeal to be urged. Learned counsel for the appellant relied entirely on written submissions without finding it necessary to highlight any particular point. The respondent had also filed written submissions.
16. The appellant has in those submissions identified issues for determination which he has segmented into thematic areas:

i. Whether the learned Judge erred in finding that the respondent had legal capacity to file the suit on behalf of Kamuti Kamuingu.

17. It is submitted that the respondent was required to have obtained a grant of representation to the estate of Kamuti Kamuingu; that no grant in respect of the estate was availed to the trial court either by the original plaintiff Julius W. Mugo or by the respondent; that only a limited grant ad litem was produced. The case of Barnes Muema vs. Francis Masuni Kyangangu [2019] eKLR is cited in support of the proposition that without a grant of letters of administration the respondent lacked the necessary locus to bring the suit and that the issue of lack of locus to bring the suit was in the nature of a preliminary objection which according to the appellant, he could take at any time:

ii. Whether the learned Judge erred in finding that the appellant was fraudulently registered as the absolute proprietor of land parcel number Gatari/Nembure/2438.

18. It is submitted that the Judge erred in finding that the appellant was fraudulently registered as proprietor of that parcel of land "...without evidence of the same..." It is submitted that the issue of



fraudulent acquisition and registration of the said land had not been pleaded; that no evidence of fraud was submitted by the respondent. The case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representatives of the estate of Sospeter Mukuru Mbeere (deceased) vs. Stephen Njoroge Macharia* [2020] eKLR is cited in support of the proposition that the onus to prove fraud is on the party alleging it and that where fraud is alleged it is not enough to simply infer fraud from the facts; that fraud must be specifically pleaded.

19. It is submitted for the appellant that where fraud is alleged the standard of proof is higher than in ordinary civil cases which had not been met in the case by the respondent.

iii. Whether the Judge erred in finding that the appellant gave a written undertaking in 1961.

20. It is submitted in this respect that the Judge erred in finding that the appellant had in 1961 given an undertaking to surrender ½ of the parcel of land Gaturi/Nembure/2438; that the appellant had denied giving such an undertaking and had disowned a document produced as exhibit P5.

iv. Whether the Judge erred in finding that land parcel number Gaturi/Nembure/2438 was jointly bought by Kamuti and M’Chege.

21. It is submitted for the appellant that there was no evidence in support of the allegation that the land had been purchased jointly because the respondent and his witnesses were not present during the transaction; that allowing the respondent’s father to plant coffee trees on the land was not proof that the land was bought jointly; that lodging of a caution over the land by the respondent did not establish an interest in the land. It is further submitted that the arbitral award had been set aside in it’s entirely by the High Court.

v. Whether the Judge erred in finding the defendant was unable to prove that he was given land parcel No. Gaturi/Nembure/2438 by his father M’Chege Kairana.

22. It is submitted that the whole of that parcel of land was given to the appellant by his father and that he had subdivided the same into two portions.
23. The appellant submits that the Judge erred in ordering cancellation of the appellant’s title in respect of the suit land.
24. The respondent took a near similar fashion in written submissions where 4 areas were identified and addressed separately thus:

- i. Legal capacity.

The respondent draws our attention to the statement of defence at page 57 of the record where it is submitted that the appellant admitted the contents of paragraphs 1 and 2 of the amended plaint. It is submitted that the respondent’s capacity to sue was never an issue and was not one of the issues for the trial court to determine; that it was not in the issues for determination drawn and signed by both parties. It is submitted in that respect that the respondent had capacity to sue as he had taken out limited letters of administration and that parties are bound by their pleadings.

- ii. Written undertaking.

It is submitted that there was evidence that the appellant had given a written undertaking dated 25th January, 1961 that he would transfer ½ portion of the land Gaturi/Nembure/2438 to the respondent’s father; that this was after the appellant had been put to task by clan elders why he



had registered the land in his sole name. It is submitted that the appellant had not complained of misuse of his signature and had not reported any case of forgery to the police.

iii. Fraudulent registration.

It is submitted that the appellant used his position as secretary of Iruma Clan to have himself registered as sole owner of the land when he should have registered a joint proprietorship. The respondent submits that removal of caution lodged on the title was evidence of fraudulent activities that had taken place leading to the original parcel being subdivided into two portions; that charging the respondent's portion of land to a bank as collateral for a loan when the respondents were in occupation was further evidence of fraud.

iv. Costs.

It is submitted that costs follow the event and that the Judge was right to award the same to the successful party.

25. We have considered the whole record, submissions made and the law and this is how we determine this appeal.

26. We had summarized grounds of appeal taken by the appellant and it will be seen that the written submissions by both sides address those grounds.

27. Let us begin with the complaint by the appellant who alleges that the respondent lacked capacity to sue the appellant. We have set out what the appellant and the respondent submitted on this issue.

28. As rightly submitted by the respondent in the amended plaint it was averred on this issue:

“1. The plaintiff is an adult male of sound mind working and residing in Nembure Embu County. He this (sic) suit as legal representative of the estate of Kamuti Kamuingu (deceased) who is his father. His...”

29. The appellant in his amended defence responded by stating:

“2. The defendant admits the descriptive contents of paragraphs 1 and 2 of the amended plaint save that his address ...”

30. The appellant was bound by what he stated in the defence.

31. We have seen on record Limited Grant of Letters of Administration Ad Litem issued by the High Court of Kenya at Embu in Probate and Administration Cause No. 153 of 2013 (Ong'udi, J.) on 11th October, 2013 which limited the grant to “... pursuing Embu CMCC No. 151 /83 only.”

32. The record shows that the suit at the subordinate court was transferred and became the ELC Case subject of this appeal. This is how the trial Judge addressed this issue at paragraphs 32 and 33 of the impugned judgment

“32. The 5th issue is whether the Plaintiff has the capacity to lodge a claim for parcel No. 3685. According to the record, the current Plaintiff was joined in the suit as a personal representative of the original Plaintiff, Julius Mugo. A copy of a limited grant ad litem was produced. In my opinion, the current Plaintiff can prosecute the suit on behalf of the original Plaintiff who is deceased. There is no evidence on record to show that the legal capacity of the original Plaintiff was challenged for the 35 years the matter has been pending.



33. The court has also perused the amended plaint and amended defence herein. The Plaintiff has been described as a personal representative of the estate of the late Kamuti in paragraph 1 of the amended plaint. That description is admitted by the Defendant in paragraph 2 of this amended defence. There is nowhere else in the amended defence that the capacity of the Plaintiff to maintain or prosecute the suit has been challenged. The court, therefore, finds that on the Defendant's own pleading, the Plaintiff has legal capacity to prosecute the suit."

33. We agree with these findings. The appellant's complaint that the respondent had no capacity to sue has no basis and is dismissed.

34. There is the issue whether the parcel of land Gaturi/Nembure/2438 (hereafter "the original parcel of land") was jointly purchased or whether it belonged to the appellant solely.

35. As we have seen the history surrounding the disputed land is long and winded and may not be told in the most coherent way due to the passage of time amongst other factors including the fact that the principal parties and witnesses are long dead without capacity to tell their story. The record will assist in resolving some of the questions.

36. There is a letter on record by the District Officer, Manyatta Division dated 6th February, 1990 to the Senior Resident Magistrate, Embu which refers to RMCC No. 151 of 1983 Julius W. Mugo vs. Eugenio Njagi which forwards an award in respect of that case. What was forwarded to the magistrate reads as follows:

"Ruling and Award by the panel.

The Panel of elders deliberated over the issue and after recalling history of the piece of land in dispute which was known to some of (sic) (-it appears part of the page has been cut off) were quite unanimous that the parcel of land in dispute was jointly purchased by the fathers of the parties to this dispute. Their award is that since the plaint (sic) concerns 9.00 acres each party is awarded 4.5 acres. It is noted that the defendant has sold (unclear) acres of the parcel and what now remains is 5.8 acres which is Gaturi/Nembure/3685, of this remainder they award 4.5 acres to the plaintiff and the remainder 1.3 acres awarded to the defendant."

37. This, as we have seen, was the award which was adopted as a judgment of the court by the magistrates court but the same was set aside on appeal by Ong'udi, J. who found the same to be irregular on the technical point that although it had been signed by all the elders the chairman, who was the District Officer, had not signed it.

38. We do not agree with the appellant's submission that since the award was set aside it could not be taken as evidence in the case. The award, as we have seen, was set aside on the technical point that it had not been signed by the Chairman of the panel. That did not reduce or alter its probative value that elders had converged to discuss the issue of ownership of a disputed parcel of land; those elders had first-hand information on how the parcel of land had been acquired; they had reached a unanimous verdict that the parcel of land had been jointly acquired by 2 individuals known to them; they even knew that the respondent's father and the appellant's father had each paid as consideration for purchase of the land cows and goats which they contributed in equal shares. The Judge who had the advantage of seeing and



hearing the witnesses as they testified believed the version by the respondent and stated at paragraph 25 of the judgment:

“25. The court is satisfied on a balance of probabilities that parcel No. 2438 was bought jointly by Kamuti and M’chege for several reasons. First, if it were not so, Kamuti could not have planted coffee stems on part of the property. It is a matter of judicial notice that coffee is a long-term cash crop. Secondly, the elders could not have intervened in 1961 to have the Defendant make a written commitment to give Kamuti his share in the said property. Third, there is evidence on record that the original Plaintiff had lodged a caution against the suit property in 1978 claiming an interest in the property. Fourth, a panel of elders under the chairmanship of the District Officer Manyatta deliberated on the dispute and found that Kamuti’s family had an interest in the land.”

39. We agree with this finding by the Judge.

40. There is the issue whether there was an undertaking by the appellant to transfer ½ of the original parcel of land to the respondents’ family. The appellant vehemently denies signing such an agreement and says that such an agreement, if any, was a forgery.

41. An agreement dated 25th January, 1961 was produced before the Judge where the appellant undertook to subdivide the original parcel of land into two and transfer ½ portion of the original parcel of land to the respondents’ family. It was produced into evidence as exhibit P5.

42. We have gone through the record of appeal which was prepared by the appellant. Documents attached from page 39 - 43 (inclusive) and again pages 51 - 52 are so faded that it is difficult for one to know what they are.

43. In testimony before the Judge the respondent produced into evidence documents numbered P1 - P5 and, of these documents the Judge recorded as follows:

“Ms. Ndorongo

We have agreed by consent that the plaintiffs list be admitted as exhibits.

Ms Muthoni

That is the position. We have also agreed to have the defendants lists similarly produced by consent.”

44. The agreement where the appellant undertook to transfer ½ portion of the original parcel of land to the respondents’ family was produced by consent as plaintiffs’ exhibit P5 and was seen by the trial Judge. Instructively the original parcel of land was subdivided by the appellant into two leading to the parcels Gaturi/Nembure/3684 and Gaturi/Nembure/3685 (the latter is the suit land).

45. If any further evidence is required on whether the appellant undertook in writing to transfer ½ portion of the original parcel of land to the respondent’s family it will be found in the testimony of Linus Njeru Kamuruana (PW2) who told the Judge in cross- examination:

“The land in question was bought before declaration of the state of emergency in 1952. I do not know who the sellers were but I do know the buyers.

I was not present during the said transaction but I was present during land demarcation. I planted coffee on the suit property after being permitted to do so by the plaintiff’s father.



...

I was present when the defendant signed an agreement stating that he would give ½ share to the plaintiff's father.

The agreement was signed at the market place. The other witnesses have since died....”

46. So we are dealing with an unfortunate situation where generations past, in good faith, entered into certain arrangements for mutual benefit for themselves and their families but their followers in bad faith disown the good deeds of those who have gone to be with their maker. Fathers of the appellant and the respondent contributed cows and goats those many years ago and acquired the 9 acre parcel of land which they were to own jointly. They then died and the appellant here confronted by elders who knew the history of the case agreed in writing that he would transfer ½ share of the original parcel of land; he proceeded to subdivide the land into two; he sold parcel number Gaturi/Nembure/3684 and that is when an idea came to his head that he could disown and ignore history and claim ownership of the whole parcel of land.
47. The trial Judge, who saw and heard the witnesses as they testified and saw exhibit P5 had this to say of the issue at paragraphs 25-28 (inclusive) of the judgment:
- “25. The court is satisfied on a balance of probabilities that parcel No. 2438 was bought jointly by Kamuti and M’chege for several reasons. First, if it were not so, Kamuti could not have planted coffee stems on part of the property. It is a matter of judicial notice that coffee is a long-term cash crop. Secondly, the elders could not have intervened in 1961 to have the Defendant make a written commitment to give Kamuti his share in the said property. Third, there is evidence on record that the original Plaintiff had lodged a caution against the suit property in 1978 claiming an interest in the property. Fourth, a panel of elders under the chairmanship of the District Officer Manyatta deliberated on the dispute and found that Kamuti’s family had an interest in the land.
26. The 2nd issue is whether the Defendant gave a written undertaking in 1961 to surrender half share of parcel No. 2438 to Kamuti. The court has considered the evidence on record on this issue. Although the exhibit produced by the Plaintiff to that effect was disowned by the Defendant, the court is reasonably satisfied that the undertaking was made by the Defendant for the reasons appearing in the paragraph hereinafter.
27. The undertaking was made in the English language. There is evidence on record to show that the Defendant was among the few who were schooled. He was a teacher at the material time. Although the Defendant denied having signed the hand-written undertaking at the trial, he did not specifically deny that the handwriting was his. He did not appear outraged that somebody had forged a document purporting to be his. There was no indication that the Defendant reported the matter to the CID to investigate the suspected forgery. The said undertaking was contained in the Plaintiff’s list of documents filed on 22nd April 2015, that is, about three years before the trial.
28. According to Black’s Law Dictionary, (9th Edition) a signature is defined in the following manner;



- a. A person's name or mark written by that person or at the person's direction.
- b. Any name, mark, or writing used with the intention of authenticating a document.

In the Court's view, the undertaking in issue satisfies the elements of the first definition of signature."

We agree with these findings.

- 48. It follows therefore, and a long discussion on this will not be necessary, that after subdividing the original parcel of land into two portions as directed by clan elders the appellant fraudulently registered himself as the owner of the suit land. He had agreed before clan elders and reduced his agreement into a written undertaking that he would transfer half of the original parcel of land to the respondents' family. That half portion was the suit land. It was wrong and irregular for the appellant to retain the suit land which rightly belonged to the respondents' family.
- 49. We find that the Judge analyzed the evidence and reached the correct conclusion on all the main issues that were before him for determination.
- 50. The appellant complains that it was wrong for the Judge to order costs of the suit against him. We have perused the judgment where the Judge considered that although costs are at the discretion of the Court:

... the general rule is that costs follow the event as provided for under section 27 of the *Civil Procedure Act* (Cap 21). A successful litigant is thus entitled to costs of the action unless, for good reason, the court directs otherwise. There is no good reason why the Plaintiff should not be awarded costs of the suit."

- 51. We agree. There is no reason, even now, why the respondent would not be entitled to costs.
- 52. We find no merit in this appeal which we dismiss with costs to the respondent.

DATED AND DELIVERED AT NYERI THIS 11TH DAY OF JULY, 2025.

S. OLE KANTAI

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

