



**Kabaiku v Gataiyu (Civil Appeal 215 of 2018)
[2023] KECA 1660 (KLR) (15 December 2023) (Judgment)**

Neutral citation: [2023] KECA 1660 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 215 OF 2018
DK MUSINGA, HA OMONDI & GWN MACHARIA, JJA
DECEMBER 15, 2023**

BETWEEN

TERESIA WANGUI KABAIKU APPELLANT

AND

KURIA GATAIYU RESPONDENT

*(An Appeal against the Judgment and Decree of the ELC Court at Nairobi
(Gacheru, J.) dated 27th March 2015 in ELC Case No. 255 of 2013)*

JUDGMENT

1. In this appeal, Teresia Wangui Kabaiku (the appellant), has challenged the judgement and decree of the Environment and Land Court (ELC) delivered by Gacheru, J. on 27th March 2015 in ELC Case No. 255 of 2013. The learned judge found no merit in the appellant's suit and dismissed it with costs to Kuria Gataiyu, (the respondent).
2. The appellant commenced her claim vide a plaint dated 18th February 2013. The appellant pleaded that on 6th April 1977, the respondent fraudulently registered himself as the owner of L.R. No. Kiganjo/Mundoro/983 (the suit land). The appellant particularized the alleged fraudulent activities of the respondent among others: registration of the suit land on 6th April 1977 after the death of her husband; chasing the appellant away from the suit land in 1976 so as to acquire the land; taking over the suit land without following the law of succession; and continuing to occupy and utilize the suit land fraudulently at the expense of the appellant's family. It was the appellant's case that the respondent's acquisition of the suit land by the respondent was not only fraudulent, but also illegal, and the title to the suit land ought to be cancelled and registered in the appellant's name.
3. The appellant therefore prayed as follows:



- a. That the registration of the Defendant as the proprietor /owner of L.R. No. Kiganjo/Mundoro/983, since 6th April 1977 be cancelled and the Plaintiff's name be registered thereon the title.
 - b. That Kiambu District Land Registrar be ordered to cancel/delete from the register L.R. title No.Kiganjo/Mundoro/983 and the name Kuria Gataiyu be replaced on the title with the name of Teresia Wangui Kabaiku.
 - c. That the Defendant do pay the costs of this suit.
 - d. Any other and/or further reliefs/orders as the court may deem fit and just to grant.
4. The respondent filed his statement of defence dated 20th March 2013. He averred that he was the lawful registered owner of the suit land, but he denied the particulars of fraud attributed to him. He further denied that the appellant was entitled to petition or commence succession proceedings in the estate of the late Kiarie Mbugua (-the deceased), and that it was indeed not necessary to pursue succession proceedings. The jurisdiction of the trial court was denied, and the respondent contended that the proper forum was the High Court's Family Division, as the dispute revolves around succession. The respondent asked the trial court to dismiss the appellant's case with costs.
 5. The suit proceeded to hearing. A total of 5 witnesses testified in support of the appellant's case, while 4 witnesses testified in support of the respondent's case. In her judgement, the learned judge considered seven (7) issues for determination, which we shall later expound on, and found that the appellant's suit was without merit and dismissed it with costs to the respondent.
 6. Aggrieved by the decision of the trial court, the appellant commenced this appeal and preferred five grounds of appeal which we have condensed as follows:
 - a. That the learned judge erred in law and in fact in that despite having appreciated that parties had filed an agreed statement of issues for trial upon which she ought to have determined the matter, she determined the suit on issues which were neither pleaded nor evidence adduced on, thereby introduced a new cause of action against the appellant.
 - b. That the learned judge trial judge failed to properly consider the evidence before her for whatever reasons and considered other issues not before her, hence finding against the appellant but which judgment/decreed this court should not let to stand.
 - c. That the learned trial judge failed to appreciate that she was hearing the matter as an ELC Court but not as a family/succession cause as a result of which she arrived at the wrong decision of dismissing her case.
 7. To further support her appeal, the appellant filed written submissions and a list of case digest, both dated 22nd October 2018. The appellant condensed grounds numbers 1, 2, 3 and 4 and submitted on them contemporaneously. She submitted that she was the only one who filed a list of issues for determination, which the learned judge appreciated in her judgement. However, she contended that the trial judge went ahead to address an issue which was not before her.
 8. On ground 5 of appeal, it was submitted that the trial court found it had jurisdiction to hear and determine the dispute before it, but erred when it decided on the issue of the marriage between her and the deceased, whilst it is an issue that can only be determined in the succession/family court. She submitted that, by deviating to determine the issue of marriage, the learned judge ended up deciding on a matter which was not before her. To support this submission, the appellant relied on the Court of Appeal case of Kenya Commercial Bank of Kenya Limited vs. Mwanzau Mbaluka & another Civil



Appeal No. 274 of 1997. The appellant urged us to set aside the judgement of the trial court and enter judgement as prayed in the trial court.

9. In opposing the appeal, the respondent filed his written submissions dated 5th November 2018. He submitted that the grounds in the appeal can be condensed to the one issue that the learned trial judge framed. He submitted that the trial judge addressed issues 1 and 4 in the list of issues, and concluded that there was no evidence tendered to prove that the respondent registered the suit land fraudulently. He further submitted that the trial judge also found that the suit land was rightly transmitted to him through succession proceeds.
10. It was submitted that the appellant filed the suit in the year 2012; thirty years after the deceased died, and therefore, the appellant was guilty of indolence and that although the learned trial judge addressed the issue of marriage, it did not distract her from addressing the fundamental issues which were before her. He argued that the trial judge considered all the aspects of the alleged fraud, registration of the title to the suit land, burden of proof, and correctly concluded that the appellant did not prove her case. He thus urged us to find that the learned trial judge did not misdirect her mind, and that we should therefore uphold the decision of the trial court and dismiss the appeal with costs to him.
11. We heard this appeal virtually on the GoTo platform. Learned counsel Mr. Wambugu Kariuki appeared for the appellant while learned counsel Mr. Gatumuta appeared for the respondent.
12. On behalf of the appellant, it was submitted that the core issue in this appeal is that the learned trial judge deviated from the issues that were before her, formulated issues which were outside the jurisdiction of the ELC, which effectively introduced a different cause of action from the one which was before the trial court; and thus only decided on the issue of marriage between the appellant and deceased alone. Counsel submitted that the decision on the issue of marriage was not an issue of the ELC, nor was it one of the issues framed by the appellant. Counsel emphasized that the learned trial judge did not find for the appellant on any of the other issues which were before her. He relied on the case of Kenya Commercial Bank of Kenya Limited (supra), where the Court referred to the decision of *Odd Jobs vs. Mubia (1970) EA 476* for the proposition that, whereas a trial court is entitled to frame its own issues, it is limited to not introducing a different cause of action, as it happened in this case. Counsel reiterated that the trial court's judgement fully relied on the issue of whether the deceased was married to the appellant, and had three children. He urged us to allow the appeal as prayed.
13. Learned counsel Mr. Gatumuta submitted that the learned trial judge considered all the factors and issues raised by the parties; that the learned judge was not restricted to the issues raised by the parties; and that even if there was either a new issue raised or evidence adduced, the trial court could not ignore it.
14. On the issue of marriage, counsel submitted that it arose out of evidence that was adduced by both parties; and that it was premised on the fact that the appellant was claiming land which belonged to her deceased husband. It was the view of counsel that, since the issue of the appellant's marriage was in dispute, more specifically as to her capacity as a wife of the deceased, the learned judge was not wrong in considering that aspect in her judgement.
15. Mr. Gatumuta further submitted that, even after considering the issue of marriage, the learned judge did not deal with the matter as if it was a succession cause. He referred the Court to pages 110 and 111 of the judgement, and submitted that the trial court considered all the issues that had been framed and arrived at the conclusion it did; that the assumption that the learned judge lost sight of the main issues and concentrated on the issue of marriage is not supported by evidence. Counsel agreed with Mr. Wambugu that the learned judge had a right of framing an issue which parties had not framed,



as long as there was evidence adduced during the hearing to back such an action; and that is what the learned judge did. Counsel urged us to uphold the judgement and dismiss the appeal.

16. This being a first appeal, we have the duty to re-evaluate all the evidence on record and arrive at our own decision, and in so doing, we have to bear in mind that we did not have the opportunity and benefit of seeing the witnesses testify, for which we have to give due regard. This Court in *The German School Society & another vs. Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) had this to say on the role of a first appellate court:

“The first appellate court has jurisdiction to reverse or affirm the findings of the trial court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. A first appellate court is the final court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage.”

17. We have accordingly considered the appeal and appreciated the oral and written submissions by both counsel. We are of the view that the principal question for determination is whether the trial court decided on extraneous issues not before it, by making a finding on the issue of the appellant’s marriage to the deceased.
18. It is common ground that the appellant’s case was hinged on the fact that she is entitled to the suit land by virtue of being a widow of the deceased. We shall therefore highlight the relevant testimonies of the witnesses before the trial court on what they had to say about the appellant’s marital relations with the deceased.
19. The appellant testified that she was married to the deceased in the year 1970. It was her testimony that the suit land was originally parcel number 267, but it was later subdivided into land parcel numbers 982 and 983. The appellant told the trial court that land parcel number 983 was registered in the name of the respondent in the year 1977, which registration was allegedly fraudulent, and she sought its cancellation since no succession proceedings had taken place. The appellant confirmed to the court that she had not filed any succession proceedings in regard to the estate of the deceased.
20. Fredrick Chege Karanja (PW2) and Lucia Wairimu Ndung’u (PW3), the sister to the appellant testified that the appellant, was married to the deceased, and they had three children. Jane Wairimu Kibati (PW4), the daughter to the appellant, testified that the deceased was her father, but that he died when she was 7 years old. Peter Ndung’u, (PW5), testified that he accompanied the deceased to pay dowry for the appellant. His testimony was that the respondent never used to stay on the suit land during the lifetime of the deceased, but he only started staying there between 1986 and 1987. PW5 stated that the appellant lived on the suit land for 7 years after the deceased died in 1977.
21. On behalf of the defence case, the respondent testified that the deceased was his uncle. He stated that he had been living on the suit land with his grandmother until her demise. The respondent testified that the deceased died in the year 1975, and he obtained the suit land through succession proceedings. He denied ever knowing the appellant since the deceased was not married. He further told the court that he knew the appellant after she filed the present suit.
22. Jacinta Wanjiku (DW1), testified that she has known to the respondent since he was a child. The respondent used to stay on the suit land with his grandmother and the deceased who was his uncle. She stated that the deceased was buried on the suit land, and that he was never married. It was DW1’s further testimony that the respondent got the suit land through succession.



23. Samuel Kiongo Gichuhi, (DW2), testified that he is the cousin to the respondent. He stated that the deceased was not married to the appellant. The appellant used to work in a certain bar in Gatundu Township. He further stated that the respondent filed succession proceedings wherein he was given the land belonging to the deceased.
24. From the above brief summary of the testimony of the witnesses before the trial court, the issue which came out predominantly was that of the marriage of the appellant to the deceased. The learned judge at page 14 of her judgement, posed some rhetorical questions: why the appellant did not find it necessary to take out a death certificate immediately after her husband died in 1977, but took the death certificate in the year 2005; why the appellant did not file succession proceedings immediately after her husband died; why the appellant did not bury her 8 year old daughter together with the deceased on the suit land; and why after being allegedly chased from the suit land in 1987, she did not report the incident to the police. The trial court found that it was doubtful that the appellant was indeed the wife of the deceased.
25. The issue of the trial court addressing itself to the validity of the marriage between the appellant and the deceased is what counsel for the appellant contends was not one of the issues framed for determination, and that the ELC had no jurisdiction to pronounce itself on that issue. We note that in her judgement, the learned judge framed seven issues for determination set out in the list of the statement of agreed issues dated 12th April 2013 filed by the appellant. The issue of the marriage of the appellant was not one of the issues framed by the appellant to be determined. The trial court addressed it on its own motion.
26. Order 15 rule (1) (2) of the Civil Procedure Rules provides that the issues which may arise are either of facts or of law. Order 15 rule 2 provides that:
- The court may frame the issues from all or any of the following materials—
- a. allegations made on oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;
 - b. allegations made in the pleading or in answers to interrogatories delivered in the suit;
 - c. the contents of documents provided by either party.
27. From the above provisions of the law, a court has the powers to frame its own issues, which it considers pertinent to the determination of the dispute between the parties. Any such issues arise from the pleadings and the evidence adduced at the trial. The East Africa Court of Appeal had this to say on the discretion of the court when framing issues for determination in *Odd Jobs vs. Mubia* (supra): -
- (i) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.
28. This Court in *Middle East Bank Kenya Limited vs. Thalia Katia Maria Castanha* (2016) eKLR held:
- ...it is apparent that the law allows a court ample leeway to determine what the issues in a dispute are. While it may be obliged to determine all the framed issues to the dispute, it also enjoys wide discretion and as such, may also determine additional issues as they emerge, notwithstanding that the same have not been specifically framed by the parties themselves. It all depends on the weight and bearing the issues may have on the dispute at hand and whether the parties have had a fair opportunity to address them.”



29. With the above principles in mind, we find and hold that a court is not always bound to deal with only the issues framed by the parties. The purpose of a list of agreed issues, in our view, is to enable or guide the court to appreciate the matters in controversy between the parties upon which they are obliged to call evidence to prove the matters alleged. Nothing hinders a trial court from addressing issues which are relevant to the dispute before it, and in which evidence was led by both parties. If the court is of the view that addressing the issue(s) will enable it to resolve the controversy between the parties, nothing which stops the court from doing so, as long as evidence was led on the issue(s).
30. While we agree with the submission of learned counsel Mr. Wambugu for the appellant that, ordinarily, determination of the question whether there ever existed a marriage between the deceased and the appellant is one that ought to have been referred to the Family Division of the High Court in Succession proceedings, and not the ELC, the intricacies of how the respondent became the registered owner of the suit land was mainly dependent on the relationship the deceased had with the appellant, and the respondent and their respective claims over the suit land. It was inevitable that the trial court had to address its mind on the issue of the alleged marriage between the appellant and the deceased, since it was on that basis that the suit was before the trial court. The appellant was not claiming that she was entitled to the suit land as the first registered owner, or as a bonafide purchaser for value; she was claiming that she was entitled to the suit land by virtue of her marriage to the deceased.
31. We also find it strange just as did the trial court, that the appellant chose not to commence succession proceedings immediately after the demise of the deceased, or even apply for his death certificate if indeed she was the widow of the deceased. From the evidence on record, the deceased died on 16th October 1975. The appellant alleged that she left for Juja in the year 1977, but came back to claim the suit land ten years later in 1987. The appellant produced the death certificate of the deceased which was issued in the year 2005. This is 30 years after the deceased had died. The suit in the trial court was instituted in the year 2013, 38 years after the deceased died, and 26 years after she was allegedly chased away from the suit land, when she went to claim it in the year 1987.
32. We cannot fathom how a woman claiming to be the genuine widow of a deceased person, will take that long to claim what rightfully belongs to her. Further, we also find it strange that the appellant did not see the need to produce the birth certificates of the children of the deceased to at least prove that the deceased was indeed the father of the issues born out of her alleged union with the deceased.
33. The trial court considered all the proposed seven issues for determination, starting with whether the registration of the respondent as the owner of the suit land was marred with fraud. The learned trial judge found that, as per section 26(1) of the *Land Registration Act*, the person(s) whose name(s) appear(s) on the title is to be taken as the prima facie owner(s), unless the certificate of title was obtained through fraud or misrepresentation. The learned judge held that there was no evidence led to show that the appellant had commenced succession proceedings, nor was there evidence that the respondent obtained any orders from the succession court through fraud. In addition, the learned trial judge held that there was no evidence from the Lands' office that the registration of the suit land in the name of the respondent was effected fraudulently.
34. The next question for determination was whether the respondent obtained the land after following the due process in succession proceedings. The trial court held, and rightly so, that since it was the appellant who alleged a fraudulent process, she ought to have led evidence to show that the due process under succession was not followed, which she did not.
35. The trial court also considered whether it was necessary for the appellant to now file succession proceedings. It held that the appellant had not given any reasons as to why, being the alleged wife of the deceased, she had not commenced succession proceedings when she obtained the death certificate



in the year 2005. The trial court also found that the appellant was indolent, and there would be no plausible reason why succession proceedings should be instituted almost 38 years later. The court further observed that, ever since the appellant was allegedly chased away from the suit land in the year 1987, she never made any complaint or filed a suit to protect her interests, if any.

36. Referring to section 13 (1) of the Environment and *Land Act*, 2011, which provides that the ELC has the original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and any other written law in relation to land, the learned trial judge found that since the dispute touched on the title of the suit land, it had jurisdiction to handle the dispute before it.
37. Having reviewed all the relevant evidence that was adduced before the trial court, we are not persuaded that the learned judge misdirected herself in any matter, or considered any extraneous issue. On the contrary, it is our finding that the trial court considered all relevant facts and applied correct principles of law and fact in the exercise of its discretion.
38. We therefore uphold the judgement and decree of the trial court. We find this appeal devoid of merit, and hereby dismiss it with costs to the respondent.
39. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER 2023.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

G.W. NGENYE- MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

