



**Phares Mutegi Nyaga v Simon Rutere & another (Civil Appeal  
135 of 2018) [2022] KECA 950 (KLR) (22 July 2022) (Judgment)**

Neutral citation: [2022] KECA 950 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 135 OF 2018  
HM OKWENGU, F SICHALE & A MBOGHOLI-MSAGHA, JJA  
JULY 22, 2022**

**BETWEEN**

**PHARES MUTEGI NYAGA ..... APPELLANT**

**AND**

**SIMON RUTERE NYAGA ..... 1<sup>ST</sup> RESPONDENT**

**EMILIO NYAGA NGUU ..... 2<sup>ND</sup> RESPONDENT**

*(An appeal from the judgment of the Environment and Land Court of Kenya at  
Chuka (P.M. Njoroge, J) dated 27th June, 2018 IN ELC CASE NO. 235 OF 2017)*

**JUDGMENT**

1. This is an appeal arising from the judgment of Njoroge, J delivered on 27<sup>th</sup> June, 2018. A brief background to the appeal is that Simon Rutere Nyaga and Emilio Nyaga Nguu, (the respondents herein) filed a plaint dated 19<sup>th</sup> April, 2017. In the plaint, the respondents alleged that Phares Mutegi Nyaga, (the appellant herein) had forcefully evicted them from their parcels of land namely, Karingani/Mugirirwa/3685 and Karingani/Mugirirwa/3687. They averred that the allocation to them of these parcels of land was in pursuant to the orders made in succession Cause No. 550 of 2011 in respect of the estate of Runyenje Mbuchi (the deceased).
2. The appellant (the then defendant) filed a statement of defence and a counter-claim dated 9<sup>th</sup> September, 2021 in which he averred that he has been in occupation of the suit land; that he is in possession of title No. Karingani/Mugirirwa/503 (in the name of the deceased) that gave rise to the



purported subdivisions of Karingani/Mugirirwa/3685 and 3687. In his counter-claim, he prayed for the following orders:

“(a) An order for cancellation of titles do issue cancelling titles No.KARINGANI/MUGIRIRWA/3685, No. KARINGANI/MUGIRIRWA/3686, No. KARINGANI/MUGIRIRWA/3687.

(b) An order for the fresh survey of parcel of land No. KARINGANI/MUGIRIRWA/503 and the re-establishment of the beacons thereof.

(c) A declaration that the plaintiffs are trespassers on parcel of land No. KARINGANI/MUGIRIRWA/503 and that the purported titles no No. KARINGANI/MUGIRIRWA/3685, No. KARINGANI/MUGIRIRWA/3686, No. KARINGANI/MUGIRIRWA/3687 are unlawful, illegal and a nullity ab initio.

(d) An order of permanent injunction barring the plaintiff by themselves, their agents or anyone claiming under them, from in any way trespassing, encroaching or otherwise interfering with the defendant’s quiet enjoyment of the portion of land he currently uses and or occupies measuring 2 Acres.

(e) General damages for trespass.

(f) ny other relief that this Honourable court deems just.”

3. During a trial conducted by Njoroge J, Simon Rutere Nyaga, (the 1<sup>st</sup> respondent herein) testified that Emilio Nyaga Nguu (the 2<sup>nd</sup> respondent herein) filed Succession Cause No. 194 of 2009 in respect of land parcel No. Karingani/Mugirirwa/1503; that following the succession cause, he was awarded 2 acres, the 2<sup>nd</sup> respondent 1 acre and the appellant 2 acres. The 2<sup>nd</sup> respondent on the other hand adopted his witness statement filed on 27<sup>th</sup> April, 2017 reiterating the evidence adduced by the 1<sup>st</sup> respondent.

4. In his evidence, the appellant told the said court that he was in possession of title LR KARINGANI/MUGIRIRA/503 in the name of the deceased; that he was aware of Succession Cause No. 550 of 2011 that sought to subdivide the deceased’s land into 3 portions; that he has lived on the land all his life, developed the same and raised his family therein; that the purported subdivision that gave rise to Karingani/Mugirirwa/3685 and Karingani/Mugirirwa/3687 was done secretly and it failed to take into account the portion of land he had occupied.

5. Having heard the dispute, Njoroge,J rendered himself as follows:

“One thing is not disputed by the parties. It is that on 11<sup>th</sup> April, 2016, the High Court in Meru High Court Succession Cause No. 550 of 2011 issued a Certificate of confirmation of Grant apposite to the estate of RUNYENJE MBUCHI alias RUNYEJE RUCHI which certificate was issued to EMILIO NYAGA NGUU. The written grant of representation was granted on 29<sup>th</sup> October, 2011.

6. The Certificate of Confirmation of Grant had a Schedule stating as follows: SCHEDULE

GRANT IS CONFIRMED

Description of property Shares of Heirs



<i>Phares Mutegi Nyaga</i>	<i>LR. KARINGANI/ MUGIRIRWA/503</i>	<i>2 acres</i>
<i>Emilio Nyaga Nguu</i>	<i>LR. KARINGANI/ MUGIRIRWA/503</i>	<i>1 acre</i>
<i>Simon Rutere</i>	<i>LR. KARINGANI/ MUGIRIRWA/503</i>	<i>2 acres”</i>

7. The judge proceeded to make the following orders:

Judgment is entered for the plaintiffs in the following terms:

1. The defendant’s counter-claim dated 19<sup>th</sup> September, 2017 and filed in court on 20<sup>th</sup> September, is hereby dismissed and costs regarding the counter-claim are awarded to the plaintiffs.
  2. I hereby issue an order of eviction against the defendant from Land Parcel Number KARINGANI/MUGIRIRWA/3685 and Land Parcel No. KARINGANI/MUGIRIRWA/3687.
  3. The defendant is ordered to move out of the suit land within 30 days of delivery of this Judgment and if he does not do so, he will be evicted with the assistance of the Officer Commanding Station, Chuka Police Station, without further reference to this court.
  4. I issue a permanent order of injunction restraining the defendant by himself, his agents, employees, relatives and /or anybody else acting for him or on his behalf from interfering with the plaintiffs’ occupation, possession, use and/or enjoyment of Land Parcel Nos. KARINGANI/MUGIRIRWA/3685 and KARINGANI/MUGIRIRWA/3687.
  5. Costs of the main suit as regards the prayers contained in the plaint are awarded to the plaintiffs.
  6. The defendant will pay interest on costs at court rates with effect from the date of delivery of this judgment.”
8. The appellant was dissatisfied with the said outcome. In the Memorandum of Appeal dated 9<sup>th</sup> August, 2018, he listed 7 grounds of appeal. In his written submissions dated 8<sup>th</sup> November, 2021, he reiterated his version of the history of the dispute and maintained that the titles “secretly” obtained by the respondents were tainted with fraud.
9. In their submissions dated 2<sup>nd</sup> December, 2021, the respondents maintained that the subdivision that gave rise to the two parcels of land was made in pursuant to the orders issued in Meru High Court Succession Cause No. 550 of 2011.



10. We have considered the record, the submissions of the parties as well as the law. This being a first appeal our mandate is as set out in *Selle vs. Associated Motor Boat Co. of Kenya & others* [1968] EA 123 wherein it was stated:

An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (Abdul Hameed Saif –vs- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270.”

11. In our view, the facts of the case giving rise to this appeal are fairly straightforward. The original title, LR No. KARINGANI/MUGIRIRWA/503 was registered in the name of RUNYENJE MBUCHI (deceased). Upon his demise, and following Meru H.C. Succession Case No. 550 of 2011, the land was sub- divided into 3 portions. The appellant and the 1<sup>st</sup> respondent each got 2 acres, whilst the 2<sup>nd</sup> respondent got 1 acre. Suffice to state that the orders made in the Succession Cause were not challenged and they still stand to date. Indeed, given the orders made in the unchallenged succession cause, the appellant had no business filing a suit at the Environment & Land Court (ELC) for purposes of re-litigating the dispute. The ELC does not sit on appeal in respect of Succession Causes and neither can it review or vary the orders of the High Court in the Succession matter. It matters not that the appellant is still in physical custody of the deceased's title. The fact of the matter is that in the ensuing Succession Cause, the court directed that the deceased's property be divided into three portions. The appellant may have been under the mistaken belief that as long as he has physical custody of the deceased's title in respect of the parcel of land, then no orders can be made for sub-division. How misadvised he was! The succession court made orders in respect of the subdivision which have now been put into effect, albeit the appellant having the physical possession of title No Karingani/Mugiririwa/3685. There was nothing wrong with this.
12. The upshot of the above is that we find no merit in this appeal. It is hereby dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**F. SICHALE**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*



DEPUTY REGISTRAR

