



**IN THE COURT OF APPEAL**

**AT NYERI**

**(CORAM: VISRAM, KOOME & MARAGA, J.J.A)**

**CIVIL APPEAL NO. 96 OF 2012**

**BETWEEN**

LAWRENCE NJERU MUNYI.....1<sup>ST</sup> APPELLANT  
SILAS MUCHANGI MUNYI.....2<sup>ND</sup> APPELLANT  
DAVID MURIITHI GACIRIRIA.....3<sup>RD</sup> APPELLANT  
PRISCA KANINI RACHI.....4<sup>TH</sup> APPELLANT  
PIUS NJUKI MUNYI.....5<sup>TH</sup> APPELLANT  
TERESIA MUNYI.....6<sup>TH</sup> APPELLANT  
ESTHER MARIGU.....7<sup>TH</sup> APPELLANT  
SARAH KARIMI..... 8<sup>TH</sup> APPELLANT  
ANISIA WAMBETI.....9<sup>TH</sup> APPELLANT  
MICHAEL KINYUA MUNYI.....10<sup>TH</sup> APPELLANT  
LUCY KIRIGI MUNYI.....11<sup>TH</sup> APPELLANT  
SAMUEL MWANIKI.....12<sup>TH</sup> APPELLANT  
TARATISIO MUGO.....13<sup>TH</sup> APPELLANT  
FERDINARD NJIRU.....14<sup>TH</sup> APPELLANT  
  
**AND**  
  
MUSA NJAU MITHURO..... RESPONDENT

*in*

*H. C. C. C. No. 64 of 2006)*

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**JUDGMENT OF THE COURT**

1. The dispute giving rise to this appeal has had a chequered history. Emilio Munyi Muthiro (Emilio) was the registered proprietor of the piece of land known as Title No. Gaturi/Namburei/1457. He claimed in his plaint filed in Embu Resident Magistrate's Civil Case No. 61 of 1980 on 10<sup>th</sup> September 1980 that after land adjudication and demarcation in the area, out of natural love and affection for his younger brother, Musa Njau Muthiru (Musa) he allowed him (Musa) to reside on the land until he purchased his own. After sometime, instead of being grateful, Musa started demanding ownership of the portion he occupied. Emilio therefore filed the said suit and sought Musa's eviction. In his defence, Musa pleaded that Emilio had no right to evict him as he had by adverse possession acquired title to the portion he occupied.
2. Thereafter the matter was referred to arbitration but it is not clear to who. Whoever the arbitrator was found that the land was owned by both parties and made an award that the land be shared equally between them. That award was on 2<sup>nd</sup> July, 1982 adopted as a decree in the said Embu RMCC No. 61 of 1980.
3. Aggrieved by that decree, Emilio filed appeal No. 62 of 1982 at the High Court at Nyeri. Tunoi J (as he then was) dismissed that appeal on 4<sup>th</sup> December, 1991. Emilio filed another appeal at Embu being HCCA No. 17 of 1997 against an order made in the Resident Magistrate's Court on 24<sup>th</sup> January, 1997. Etyang J struck out that appeal on 4<sup>th</sup> February, 1998 as incompetent for having been filed out of time without leave.
4. Emboldened by the dismissal of the first appeal (Nyeri HCC No. 62 of 1982) Musa had on 19<sup>th</sup> January, 1994 obtained an order directing the Executive Officer of the Resident Magistrate's Court at Embu to execute, apparently on behalf of Emilio, all necessary documents to facilitate the subdivision of the suit land into two portions and the transfer of one portion to him. Musa thereafter subdivided his portion into several portions which he sold to third parties and went and bought himself another piece of land in Meru.
5. On 27<sup>th</sup> May 1994, upon Emilio's application, the Embu Resident Magistrate's Court had set aside its order of 19<sup>th</sup> January 1994 adopting the arbitral award as a court decree. He thereafter evicted the people Musa had sold his portion of the suit land to and caused the entire suit land to be subdivided into 11 or 12 portions which he transferred to his children and grandchildren.
6. On Musa's application dated 27<sup>th</sup> July 1994, on 23<sup>rd</sup> August 1995 the Embu Resident Magistrate's Court set aside its order of 27<sup>th</sup> May 1994 thus reinstating the one of 19<sup>th</sup> January 1994 adopting the award as a court decree.
7. There appears to have been a truce for about 10 years. In the meantime, Emilio died on 12<sup>th</sup> September 1999. By their application dated 20<sup>th</sup> June 2005 the purchasers of Musa's portion applied to be enjoined in Embu HCCA No. 17 of 1997 and to appoint Emilio's widow as his legal representative and substitute her for her late husband as the appellant in that appeal. In dismissing that application on 16<sup>th</sup> November 2005, Khaminwa J observed that as the decree in Embu RMCC No. 61 of 1980 had been reinstated, all that remained was its execution. There was therefore no

point of substituting the late Emilio with his widow in that appeal which had in any case been struck out. Moreover she could not appoint her the legal representative of her late husband's estate in that appeal. That had to be done in a succession cause.

8. Their application to be enjoined in Embu HCCA No. 17 of 1997 having been dismissed, the purchasers of Musa's portion of the suit land must have turned to him for relief. We say so because on 20<sup>th</sup> December 2005 Musa filed an application in Embu RMCC No. 61 of 1980 and sought an injunction to restrain the late Emilio, his legal representatives, agents and or beneficiaries of his estate from disposing of the subdivisions of the suit land; an order directing the OCS Manyatta Police Station to provide security so that the purchasers of his portion of the suit land would go back to their respective pieces of land; a declaration that the subdivision of the suit land by the late Emilio and the resultant title deeds were null and void. They also sought that the application be served upon Emilio's 14 family members to whom Emilio had transferred portions of the suit land after the subdivision he had carried out. Those 14 family members are the ones whose names appear on the title to Embu HCCA No. 64 of 2006 as third parties and in this appeal now as the appellants.
9. After hearing that application, on 1<sup>st</sup> August 2006 the Hon. Lucy W. Gitari, SPM at Embu allowed it as prayed. That provoked Embu HCCA No. 64 of 2006. Although the late Emilio is named as the appellant in that appeal and the 14 members of his family as third parties, the memorandum of appeal in that appeal faults the Hon. Gitari for making orders against a dead person – the same Emilio. The Hon. Gitari is also faulted for making adverse orders against third parties, we suppose the 14 family members of the late Emilio, whom she had not heard. This is the appeal Muchelule J. heard and struck out for being incompetent as a dead person, the late Emilio who had died on 12<sup>th</sup> September, 1999, was incapable of filing the appeal in 2006. This appeal before us is against Muchelule J's said decision.
10. As we have said, the 14 family members of the late Emilio whose titles to portions of the suit land that Emilio had transferred to them Hon. Gitari cancelled were named as third parties in HCCA No. 64 of 2006. The late Emilio was the appellant. In this appeal before us, however, they are the appellants and Emilio is not a party. That has, however, not sorted out the problem of who are or should be appellants in this appeal. This is because the Notice of Appeal on which this appeal is anchored was given on behalf of the late Emilio. It reads:

**“TAKE NOTICE** that the appellant herein **EMILIO MUNYI MITHURO** being dissatisfied with the decision of the Hon. Justice A. O. MUCHELULE delivered on 2<sup>nd</sup> November 2011 intends to appeal in (sic) this Court of Appeal against the whole of the said decision/judgment.”
11. We have given this long historical background to show the litany of blunders made by counsel for the parties in this appeal and more particularly by Mr. Mugo, learned counsel for the “appellants.”
12. In the respondents said application dated 20<sup>th</sup> December 2006 he sought and obtained an order cancelling the Title Deeds of the late Emilio's family members, who were not party to the suit and whom he had only sought to serve with that application. We cannot find any evidence in the record of this appeal that they were ever served with or heard on that application. Nonetheless orders were made cancelling their Title Deeds.
13. At the hearing of this appeal before us, despite repeated reminders to Mr. Mugo that Embu HCC Appeal No. 64 of 2006 filed by Emilio who had died way back on 12<sup>th</sup> September 1999 and the one before us where there is no notice of appeal by the appellant are incompetent, Mr. Mugo ignored those cues and went on to argue the appeal on its merits.
14. The impression we get from the long history of this matter is that the parties themselves including the late Emilio's family members, were either architects or they have also contributed to

the litany of blunders made by their advocates. They made several applications and counter applications as though they were in a hide and seek game. No wonder this matter has been in court since 1980 and still has no end in sight given the orders we are about to make.

15. All this notwithstanding, we have anxiously considered this matter with a view to finding out if we can ignore the blunders as technicalities and end this long and old saga but we cannot. Taking proceedings for or against a wrong party is not a procedural technicality within the purview of **Article 159 (2) (b)** of the **Constitution**. We suppose this is the problem the learned Judge had although he did not say so in so many words.

16. In the upshot, we sadly agree with counsel for the respondent that the appellants having not filed a notice of appeal, the appeal before us has no legs to stand on. We accordingly strike it out as being incompetent. As both parties are to blame for the mess in the handling of this matter, we order that they bear their own costs of this appeal and those of the High Court.

*Dated and delivered at Nyeri this 6<sup>th</sup> day of May, 2014.*

***ALNASHIR VISRAM***

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***JUDGE OF APPEAL***

***MARTHA KOOME***

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***JUDGE OF APPEAL***

***D. K. MARAGA***

.....

***JUDGE OF APPEAL***

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

**DEPUTY REGISTRAR**