



**Namu v Konji (Environment and Land Appeal E013 of 2021)  
[2024] KEELC 5122 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 5122 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT EMBU  
ENVIRONMENT AND LAND APPEAL E013 OF 2021**

**A KANIARU, J**

**JUNE 6, 2024**

**BETWEEN**

**EPHANDRIS NJERU JOSEPH NAMU ..... APPELLANT**

**AND**

**GABRIEL NGAI KONJI ..... RESPONDENT**

**JUDGMENT**

1. The appeal herein arose from the judgement of Honourable W. NGUMI, Principal Magistrate at Siakago in MCL & E No. 58 of 2020, delivered on 11.08.2021. The appellant sets forth the following grounds of appeal:
  1. The learned trial principal magistrate erred in law and fact in dismissing the application dated 19<sup>th</sup> August 2020 for circumstances that the plaintiff herein was indolent and sat on his rights by failing to pursue the issue of the ownership of land through the appropriate bodies established under the land adjudication process.
  2. The learned trial principal magistrate erred in law and fact in accepting the defendant herein to proceed with the case without his original documents or certified copies of the original documents in support of his case as exhibits, list of documents dated 10<sup>th</sup> September 2020 as D. exhibit 2-6 (copies).
  3. The learned trial principal magistrate erred in law and fact in holding that the defendant was authorized by family elders to sub-divide the Mugwambiti land.



4. The learned trial principal magistrate erred in law and fact that he relied on documents filed for the past cases without putting into consideration what is contained in those documents.
5. The learned trial principal magistrate erred in law and fact in the judgment by failing to comment on questions on the maps asked to the defendant and his witnesses by the plaintiff.
6. The learned trial principal magistrate erred in law and fact by failing to note that the plaintiff knew that he was the first registered owner of the land parcel Embu/Gangara 266 on 3<sup>rd</sup> July 2020 when the land adjudication sketch register, certified copy was issued to him and filed his case against the defendant on 19th August 2020.
7. The learned trial principal magistrate erred in law and fact for not commenting in his judgement on High court case Embu ELC 190 of 2015 formally Kerugoya ELC no. 52 of 2013 final ruling. Page 14 and 19 of documents filed by the plaintiff.
8. The learned trial principal magistrate erred in law and fact by holding that the defendant and DW5 share a grandfather.
9. The learned trial principal magistrate erred in law and fact that the defendant was given the land during land adjudication case no. 19/72-73 by his relatives who were panel members in this case and they were not relatives of Kirangi Nyamu.
10. The learned trial principal magistrate erred in law and fact in holding that Kirangi Nyamu did not complain before the land adjudication members while in the plaintiff's supporting documents exhibits no. 8 Gangara Adjudication Section case the complaint is recorded in page 1 and 2.
11. The learned trial principal magistrate erred in law and fact for not commenting on the plaintiff submission dated 8<sup>th</sup> day of June 2021.
12. The learned trial principal magistrate erred in law and fact that the vital information of all plaintiff witnesses is lacking in the judgement.
13. The learned trial magistrate erred in law and fact that he did not comment on the defendant agreement with others on mugwambiti land agreement dated 12th December 1975.

SUBPARA 14.

The learned trial principal magistrate erred in law and fact by ignoring to know who was the genuine owner of mugwambiti land which is ancestral land between the defendant and Kirangi Nyamu as per the Njuki family tree diagram.

15. The learned trial principal magistrate erred in law and fact by allowing the defendant witnesses Dw2, Dw3, Dw4 and Dw5 to use unsigned statements in court.



16. The learned trial principal magistrate erred in law and fact by not recording down many of the plaintiff's information/questions put to the defendant and his witnesses by the plaintiff.
  17. The learned trial principal magistrate erred in law and fact by acting in a biased manner.
2. The appellant prays that:
- a) That the judgment in *siakago MCL & E 58 of 2020* be set aside.
  - b) That the appeal be allowed.
  - c) That the cost of this appeal be awarded to the plaintiff.
3. The appellant was the plaintiff in the lower court whereas the respondent was the defendant. The appellant via his plaint dated 19.08.2020, was seeking the following orders:
1. A permanent injunction restraining the defendant himself, his agents, servants and/or anyone claiming under him from entering, leasing, trespassing, evicting and/or interfering in any manner with the plaintiff's ownership of land parcel no. Embu/Gangara/266.
  2. The title deed for land parcel Embu/Gangara/266 issued to Gabriel Ngai Konji be cancelled and the land parcel be registered in the name of Ephandris Njeru Joseph Namu.
  3. Costs of the suit together with interest at court rates.
  4. Any other relief that the court deems fit to grant.
4. The respondent filed a defence and denied the appellant's entire claim. It was his case that he was the registered owner of the suit land and had a valid title deed, which he was issued with after the land was registered in his name on the 25.11.2009. He prayed that the appellants suit be dismissed as the appellant had no legal right to ask for an injunction over a parcel of land not registered in his name. He also said that the plaint did not disclose any case against him to justify cancelling his title deed.
5. The trial court delivered judgment on 11<sup>th</sup> August 2021 and found that the appellant was indolent as he sat on his rights and failed to pursue the issue of ownership through the appropriate bodies established under the Land Adjudication process. And also that land adjudication having been conducted, the appellant could not get the reliefs he sought from the court. The trial court dismissed the appellant's case with costs to the respondent.
6. It is necessary to have a look at the evidence tendered: During trial, the Appellant, Ephandris Njeru Joseph, adopted his witness statement dated 18.08.2020. He stated that he was the rightful owner of land parcel EMBU/GANGARA/266 (1.9 Ha) which he received from his late grandfather, Daniel Mbungu Kiaigwa, during his childhood at the time of land demarcation in the year 1973. That when his grandfather gave him the land, he appointed his father, Joseph Namu, to be his guardian since he was a minor.
7. That when he was being given the land, his name was written wrongly as Fredrick Njeru Joseph instead of Ephandris Njeru Joseph Namu. That at the time, there was a sketch drawn serving as a register by the land adjudication settlement officers. That his name had been entered and the respondent fraudulently



caused it to be cancelled and the respondent's names recorded instead without involving the appellant's father.

8. He testified further that his late grandfather had bought the land in stages from the late father of a Kirangi Nyamu, starting in 1937 and that before he had bought it, he had been in occupation of the same since the year 1916. He alleged that the respondent had family ties with the land adjudication committee and so their proceedings were biased and all evidence adduced was not considered. That also the respondent invaded the land in 1973 when the land demarcation began in their area and that he caused the appellant's name to be cancelled claiming that the land was clan land, which was not true.
9. On cross examination, he testified that the suit land had been bought by his grandfather who then gave it to him. That he had no relationship with Kirangi with whom the respondent had dispute with and won in several cases. That Kirangi gave him the documents he had used and they had several mistakes. He denied that in 2002 his father had been called by Kirangi as his witness and that the father affirmed that the land belonged to the respondent. He denied that Kirangi won in all the cases and that an eviction order was issued against his grandmother.
10. He produced in evidence a copy of search for land parcel no. Embu/Gangara/266, a copy of sketch drawn in 1973, a copy of the proceedings of land adjudication committee and judgement delivered on 02.01.1974, a copy of a Njuki family tree drawn in 1977, a copy of a Nthiga family tree drawn in the year 2019, a copy of judgement delivered on 18.03.1980 of Gangara adjudication section, a copy of a letter from the chief dated 07.12.2002, objection letter by Kirangi Nyamu dated 07.11.1977 addressed to the assistant L.A.O in relation to Gangara adjudication section case, proceedings in Embu ELC 190 of 2015 formerly Kerugoya High Court ELC No. 52 of 2013, summons in relation to citation case no. succession 62 of 2019 (in the matter of the estate of Ileri Mbogo, Nguri Nthautho and Edward Ileri (deceased)).
11. The appellant called seven witnesses. PW2 was Gidion Kithua Nthinwa who through his statement told the court that his father used tell him that Gacuthe Nthiga had sold land known as Mugwambiti valley to Gangomo Mutheru. That he was not told of any other family that had bought the land apart from the one stated. That the father had been Kirangi's witness in all the cases involving him and also in respect of Mugwambiti valley land which included parcel Embu/Gangara/266 sold by Gacuthe to Gangomo and also later sold to Daniel Mbungu who later transferred to the appellant. That he was aware that the respondent had several cases with Kirangi and all along his father had been Kirangi's witness.
12. He testified further that he did not know the outcome of the cases and whether the respondent won the cases. He also did not know why the appellant took long to challenge the respondent's title.
13. PW3 was Njoka Kirangi, the wife of Kirangi Nyamu, who told the court that she was told by her late father in law, Nyamu Murwaru, that he sold the land to Daniel Mbungu Kiaigwa. That when the father in law died, the husband was appointed as the administrator of the father's estate and he subdivided his father's lands in 1973-1974 and gave them to his people. That it's during that time that the respondent came with his team and grabbed their land including the one sold to Daniel Mbungu.
14. That later her husband started a dispute with the respondent and in 2002 she together with her husband, her son, and all their neighbours took a traditional oath supporting her husband, who won the case. That the case was presided over by the area chief. She denied that the case was ever heard in a court of law. That her husband's family tree is different from that of the respondent and she wondered how the respondent came to their family land.



15. PW4 was Joseph Namu Mbungu, the father to the appellant, and he told the court that he was the son of the late Daniel Mbungu Kiaigwa – the appellant’s grandfather. That when he was born, he found his father and grandfather cultivating on the suit land and the grandfather was buried on the land at the time of his demise in the year 1945. That when he was young, his father used to tell him that they bought the suit land with his father in 1939 from a man known as Murwaru.
16. That the respondent’s father was a witness to the sale. That when his grandfather died, he left the suit land to his father, who finalized the purchase of the land with Murwaru. That in 1973 his father gave his first born son - the appellant - the suit land which was registered in the appellants name but was later cancelled without their knowledge.
17. PW5 was James Mariu Ndereva. He said he used to be told by his father, the late Nyaga Ndereva who was born in 1945, that parcel No. Embu /Gangara/266 belonged to Daniel Mbungu. That the land was bought from Murwaru's family before he was born. That the respondent lost the case to Kirangi during the oath taking in 2002.
18. PW6 was Margaret Gatari Mbungu, the wife to Daniel Mbungu and grandmother to the appellant. She married Daniel Mbungu in 1970. She testified that after marriage the husband showed her, Mugwambiti land Parcel No. Embu/Gangara/266 and told her that he bought it from Murwaru. She settled on the land. After 3 years he told her that he had given the land to the appellant herein. That the husband used to live on the appellants land but after the husband’s burial, the appellant told her to move and settle in the suit land with her children, which they did. That the respondent had never asked her to vacate the land. That the appellants grandfather was buried on parcel No. Embu/Gangara/266.
19. PW7 was Mercy Ikunyi Migwa, the wife to the late Gideon Migwa, who is a brother to Kirangi Nyamu. She testified that when she got married to that family she was informed that the suit land was sold to Daniel Mbungu years ago.
20. PW8 was Samuel Njeru Nyaga, the former chief Karambari location, and he told the court that in 2002, he received a letter from the District Officer, Siakago, requesting him to administer a traditional oath between Kirangi Nyamu and the respondent concerning a land dispute between the two parties. He summoned the two parties and informed them of the direction given. He asked each of them to take witnesses and elders for them to be heard. The oath was administered and parties heard on 7/12/2002. It was held that Kirangi should be awarded the parcels of land. He then compiled his report and handed it over to the District officer's office who read the report to the parties. He did not know whether the case he presided over was nullified. He did not know whether the title deed was cancelled as he did not follow up.
21. The respondent, Gabriel Ngai Konji, called four witnesses. On his part, he adopted his statement filed court on 12/02/2021. He indicated that in 1972, the family elders authorized him to sub-divide their block into five parcels namely, 265, 266, 267, 268 269. That after the sub-division, Kirangi Nyamu registered the parcels in the names of different people against the family wishes. He challenged him in the unit committee tribunal and defeated him and gave the right names for registration. That Kirangi appealed in different forums including to the arbitrator, filed an appeal to the objection, appealed to the Minister, and finally to the High Court which appeals or cases he lost in all instances. That the appellant did not appear in any of the cases. He denied that the appellant was Kirangi's son and/or dependent.
22. He testified that Kirangi was his cousin but he had no relationship with the appellant. That the land he had been disputing over with Kirangi was a block belonging to the family. He asserted that he was the



- owner of the land having been given the same by his family. He denied that the committee members who had first heard the matter were biased, indicating that he was not involved in the selection.
23. That prior to 1972, there was no parcel number 266 as it did not exist. The land existed but there was no number allocated to it. That the court had granted an eviction order against Kirangi and everyone else occupying the land. He denied that the appellant was in occupation of the land, indicating that the appellant's grandmother was the one settled on the land by Kirangi who never occupied parcel number 266.
  24. That Kirangi had sued him in 2002 but the title deed was obtained in 2010, upon winning the case. He indicated that he only knew some of the owners of the adjacent farms. That there was a case relating to parcel number 266 and the boundary was marked. That the land was initially registered in the name of Kirangi who allocated parcels to strangers and when the land unit committee heard the dispute, the respondent allocated the land to the registered owners including Kirangi. That the case was in 1972. That the appellants name was cancelled as he had not been allocated by the genuine owner.
  25. He indicated that he was not aware of how the appellant's grandfather bought the land. That after the hearing in the case number 1972 -1973 whose proceedings he produced as an exhibit in the case, the four titles were cancelled and he was allowed to allocate the land, which he did, to the clan members including Kirangi. He denied influencing the cancellation of the title documents. That he served the eviction order upon the appellant's grandmother as she was the one occupying the land with authority from Kirangi. He produced the documents in the list of documents dated 10<sup>th</sup> September 2020 as P. exhibit 1-6.
  26. DW2 was Francis Njuki Nguru. He adopted his statement, which was undated, but filed in court on 8/10/2020 as his evidence in chief. He told the court that the respondent was his uncle. He testified that parcel number Embu/Gangara/266 belonged to Gabriel Ngai Konji who had been mandated by the clan elders to sub-divide the Mugwambiti land among the family during land adjudication.
  27. He dismissed the family tree as drawn by the appellant as not a true reflection of the ancestors. He testified that since the respondent was the only literate member of the family, he was authorized by the family members to sub-divide and allocate the land. He denied that the land belonged to the appellant and stated that the sub-division and allocation was done during the adjudication process.
  28. DW3, Fredrick Njiru Ireri, told the court that the respondent was also his uncle. He testified that parcel number Embu/Gangara/266 belonged to the respondent and the appellant did not appear in any of the cases involving the land parcel. He told the court that his father was allocated parcel number Embu/Gangara/265.
  29. DW4 was Jacob Njeru Mugo. He said that both the appellant and the respondent were from his clan. That he had been a witness in all the cases against the appellant's side herein and they had won all the cases. He later changed and said that his father was the one who was the respondent's witness in all the cases. That his father had sold the land adjacent to the respondent's land and the respondent was a witness to the said sale.
  30. DW5 was Chrispin Ngari Mbagato and said that the respondent was his uncle. He further said the suit land belonged to Gabriel Ngari Konji and that it borders parcel number Embu/Gangara/268 belonging to his father, Ngari Nthautho. That he shared a grandfather with the respondent. He denied that the respondent and his family grabbed the land. He clarified that there is a parcel of land between the respondent's farm and the father's farm.
  31. At the close of the defence case, the court directed that the parties file their written submissions which they did.



32. For this appeal itself, it was agreed that it would also be disposed of by way of written submissions. The appellant's submissions were filed on 22.01.2024. The submissions were filed by the appellant in person. They are rather incomprehensible but I will try as much as possible to make sense of them. He submitted that 9 out of 15 adjudication committee members were blood relatives of the respondent, as corroborated by the respondent's own witnesses (DW2 and DW3).
33. That DW2 confirmed that he knew Kariuki Gichoni, the adjudication vice chairman, and that his wife was the respondent's sister. That DW3 confirmed that Kaniki Nduthe, adjudication member number 7, was the respondent's uncle. That these relationships likely influenced the adjudication outcome to the appellant's disadvantage. That the respondent denied direct relationships with committee members, but his witnesses contradicted this denial. That the magistrate misdirected herself by ruling that all the witnesses brought to court appeared to be saying that parcel no. Embu/Gangara/266 belonged to Kirangi Nyamu and not the appellant.
34. It is not clear when the respondent filed his submissions. However the same are dated 05.04.2024. He submitted that all the documents annexed by the appellant in this appeal defeated his own case and the appeal itself. That he annexed documents which were all about land adjudication cases which resulted in the Respondent being registered as the owner of Land Parcel Number Embu/Gangara/266. That the magistrate ruled that the appellant was indolent in not pursuing ownership issues through proper land adjudication channels and dismissed the case with costs to the respondent.
35. That the allegations made in Paragraphs 1 to 9 of the appellant's submissions have no basis at all. The court went to every detail and came to the right conclusion which was that this was a matter which was concluded during the land adjudication process. Any complaint or issue ought to have been raised at that stage of the land dispute. That the only point of determination was whether the Respondent obtained the Registration of Land Parcel Number Embu/Gangara/266 lawfully. That the answer to this question was clearly answered in the proceedings, judgment in the lower court suit, and also in this appeal.
36. It was submitted that the respondent went through the adjudication process and the land was declared to be his. That the appellant lost at all stages of the adjudication process. He went to the ELC Court and lost. He – the respondent - was legally and fairly registered as proprietor of Embu/Gangara/266. That all the other matters raised in the appellants submissions were matters of Land Adjudication which had already been dealt with.
37. I have considered the record of appeal and the party's submissions, and I find that the issue for determination is whether the trial court erred in dismissing the appellant's suit and whether the respondent was lawfully registered as the owner of land parcel Embu/Gangara/266.
38. My duty as the first appellate court is to re-evaluate and re-assess the evidence that was before the lower court and make my own conclusions while bearing in mind that the lower court had the advantage of handling the evidence first hand. The decided cases of *Selle Vs Associated Motor Boat Company Limited* [1968] EA 123 and *Mbogo Vs Shah* [1968] EA 93 serve to remind me that I should not rush to interfere with the findings of fact by the lower court unless I am completely convinced that the lower court was wholly wrong in its appreciation of the evidence before it.
39. In the lower court, the appellant was seeking to have the title of land parcel Embu/Gangara/266 registered in favor of the respondent cancelled and the same registered in his favour. At the same time he was seeking a permanent injunction restraining the respondent or his agents from interfering with his alleged ownership of the suit land. His case was that he had acquired the land from his grandfather who after giving him the land, he was registered as the owner of the same.



40. He claimed that the respondent had fraudulently caused his name to be cancelled from the sketch plan of the suit land and had himself registered as the proprietor of the land. The respondent on the other hand claimed that he acquired the land legally after adjudication proceedings in which the appellant did not participate and that he was registered as proprietor after the adjudication proceedings.
41. Upon a keen look at the evidence and submissions, it is clear that the appellant was claiming ancestral ownership of the disputed land. The trial court correctly found that the court was the wrong forum to determine ownership of land based on a family tree and ancestors. It is something that could have been done better by the elders at the time of the land adjudication which the appellant unfortunately did not pursue. The trial court also observed that the appellant alleged fraud in the removal of his name from the sketch plan, but failed to provide particulars of the fraud as required by law. He also failed to utilize the proper channels during the land adjudication process to contest the registration of the land in the respondent's name. It is difficult to fault the trial court regarding these observations.
42. I hold a similar view that the documents and testimonies provided by the appellant did not convincingly demonstrate that the land belonged to him or that there was any fraudulent activity by the respondent. Having failed to successfully prove that he is the owner of the suit land, the appellant cannot claim orders of permanent injunction over land that does not belong to him.
43. I have taken the trouble to set out at length the evidence made available to the lower court. Most of it is steeped in history and would have been useful for the land adjudication forum which is not hampered by the rules of evidence that apply in a court of law. A look at the evidence shows witnesses talking of what they were told mostly by people who are deceased or can no longer be found. Such evidence is largely inadmissible in a court of law as it can not pass the test of the hearsay rule. It is evidence that the land adjudication forum could lawfully use as the rigours associated with the law of evidence are not applicable there. The appellant is wrong to think that he can make available such evidence in a court of law for use in the manner it would have been used for land adjudication purposes.
44. Further, it is clear that the appellant is challenging alleged fraud that took place at the time of land adjudication. He is doing so after the respondent has already become the first registered owner of the disputed land. Infact he is seeking to cancel that first registration. The law applicable at the time the respondent became the registered owner is the now repealed Registered Land Act (cap 300) which clearly outlawed cancelling of title of the first registered owner on the basis of fraud. Section 143 (1) of the said Act provided as follows;
- 143(1)
- Subject to subsection (2), the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than first registration) has been obtained, made, or omitted by fraud or mistake.
- The operative words are – (other than first registration), which means that that kind of registration is exempted from being used as the basis of cancellation of title.
45. It stands to reason therefore that even were the alleged fraud demonstrated, it would not in law be used to cancel the respondent's title. It can therefore be seen that the appellant's case in the lower court was subject to so many legal hurdles and/or imponderables that the lower court had no option but to dismiss it. This court itself is not persuaded that it should interfere with the findings of the lower court. The appeal urged here has no merits at all. For these reasons, I uphold the lower court judgement and dismiss the appeal herein. The respondent shall get the costs of the appeal.



**JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 6<sup>TH</sup> DAY OF JUNE, 2024.**

In presence of the appellant and the respondent in person.

Court Assistant - Leadys

**A. KANIARU**

**JUDGE – ELC, EMBU**

**6.6.2024**

