



**Ngachu v Kirathi & 3 others (Environment and Land Appeal
E004 of 2024) [2025] KEELC 818 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELC 818 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND APPEAL E004 OF 2024**

JM KAMAU, J

FEBRUARY 20, 2025

BETWEEN

JOSEPH KIARIE NGACHU APPELLANT

AND

HANNAH WANJIRU KIRATHI 1ST RESPONDENT

**MIRIAM KIRATHI (LEGAL REPRESENTATIVE OF THE ESTATE OF SAMUEL
KIRATHI KOMU) 2ND RESPONDENT**

ELISA KURIA KIRATHI 3RD RESPONDENT

JOHN NDIRANGU KIRATHI 4TH RESPONDENT

*(Appeal against the Judgment and Decree of Hon. S. Mogute SPM in
Nyabururu CMC ELC No. 228 of 228 of 2018 delivered on 16/1/2024)*

JUDGMENT

1. This is an Appeal from the Judgment of S. Mogute, Senior Principal Magistrate in Nyahururu CMC ELC No 228 of 2018 delivered on 16/1/2024. In the said case, the Plaintiff, Joseph Kiarie Ngachu who is the 1st Respondent herein had sued Samuel Kirathi Komu, Elisa Kuria Kirathi and John Ndirangu Kirathi over the parcel of land LR Nyandarua/Tulaga/7694. She described herself as the wife of the 1st Defendant and the mother of the 2nd and 3rd Defendants respectively. She claimed to have married the 1st Defendant in 1957 and in 1964 the two jointly acquired a parcel of land measuring 35 Acres from the Settlement Funds Trustees through a loan. The 1st Defendant did sell without the Plaintiff's consent several portions of the land leaving them with only 16½ Acres out of parcel No. Nyandarua/Tulaga/7694 against which the Plaintiff registered a caution restraining any further sale. According to her, the 1st Defendant colluded with the District Land Registrar to remove the caution following which the land was subdivided into several portions being LR Nos. Nyandarua/



Tulaga/8353 to 8362 (inclusive) on the 10/6/2012 without spousal consent. On 10/4/2017 the 1st Defendant transferred to the 3rd Defendant Nyandarua/Tulaga/8354 and to the 2nd Defendant Nyandarua/Tulaga/8359 respectively on 10/4/2017. She sought that the two parcels of land be re-transferred to the 1st Defendant. The particulars of illegality were that the property was/is matrimonial which was sold without spousal consent. The Plaintiff prayed for a Declaration that the transfers of 10/4/2017 to the 2nd and 3rd Defendants were marred with illegality and thus null and void, an Order for the cancellation of Nyandarua/Tulaga/8354 and 8359 respectively and rectification in order to revert to the name of the 1st Defendant, costs and any other relief the court may deem fit to grant. One Joseph Kiarie Ngachu entered the duel as an Interested Party and together with the 3rd Defendant, the two filed a statement of Defence on 25/4/2018 in which they averred that the 1st Defendant subdivided Nyandarua/Tulaga/7694 and thereafter transferred Nyandarua/Tulaga/8354 therefrom to the 3rd Defendant as a gift and the Title Deed was issued after which he sold and transferred the land to the Interested Party for valuable consideration. The latter has been in occupation and use of the same awaiting the processing of the Title Deed in his name. They aver that no spousal consent was required since the 1st Defendant was transferring the land to his children and there was still land remaining for the Plaintiff's use. They also raise the issue of jurisdiction. Joseph Kiarie Ngachu joined in the suit as an Interested Party as an alleged purchaser of ½ Acre of the property known as Nyandarua/Tulaga/8354. This was on 14/3/2018. On 11/6/2018, the court entered Interlocutory Judgment against the 1st and 2nd Defendants in favour of the Plaintiff as prayed for in the Plaint. By the 5/9/2018, the 1st Defendant, Samuel Kirathi Komu had passed on. He was substituted with his Daughter, Miriam Njeri.

2. The case commenced for hearing where the Plaintiff testified that her (now late) husband disposed of nine (9) Acres out of 25 Acres leaving 16 Acres in LR No. Nyandarua/Tulaga/7694 which was later subdivided into 8353 to 8362 (inclusive) albeit without her consent. The 1st Defendant allegedly sold the land to the 2nd and 3rd Defendants because the two tricked him into transferring to them 8354 and 8359 respectively. The evidence in CMC ELC No. 361 of 2018 which the Plaintiff also adopted was as follows:

PW1:

“I am called Hannah Wanjiru Kirathi. Samuel Chege was my late husband. 2nd Defendant was a purchaser. I have my witness statement and documents for the case. I didn't consent to my husband to sell the land. I was never at any time to agree to the same. I want land reverted to me.”

3. From the adopted statement by the Plaintiff, she testified that her children had repaid the Settlement Fund Trustees' loan and the land parcel was eventually discharged and a Title was issued in the name of her husband, the 1st Defendant. She further said that the 2nd Defendant took advantage of the 1st Defendant's old age and senility and he acquired a Title Deed for part of the suit land 1½ Acres being LR No. Nyandarua/Tulaga/8357. She was not consulted but she later saw a sale agreement dated 14/6/2012 where her husband purportedly sold 1½ Acres to the 2nd Defendant. The land was matrimonial yet her consent was not given. This was the Plaintiff's evidence. She also produced the following documents:

1. A copy of the official search in respect to LR No. Nyandarua/Tulaga/8357.
2. Plaint and other pleadings in Nakuru High Court ELC Suit No. 282 of 2012.
3. Notice of discontinuance of the suit.



4. The 1st Defendant did not contest the suit. The court concluded that the 2nd and 3rd Defendants and the Interested Party did not file written statements and/or documents nor did they attend court to defend the case.
5. After this evidence was adopted, Ms. Gatei (who the records do not show who she was representing) said she had no questions. As for questions from Ms. Wangechi for the Defendant, she said that she was not aware her husband had subdivided the land. Plot 7694 was divided. John was her son and he was given a plot. Joseph bought the land but he died 2½ years before 22/7/2021. She also denied having gone to the Land Control Board and admitted that she had nothing to show that the Plaintiff was sick. She admitted that Miriam, who substituted her late husband as the 1st Defendant was her daughter. On re-examination the Plaintiff said that he was not involved in the subdivision of the land and that she did not consent to the subdivisions to any of her children nor did she allow any sale of the land. As expected, the 1st Defendant said that she was not defending the suit.
6. The case was closed on 23/9/2021 after an appearance in court on 22/7/2021 where the coram and proceedings were as follows:
 - Before C. Obulutsa C.M.
 - C/A – Nyaga
 - Ms. Wanjiru for the Plaintiff
 - Ms. Gatei for the Defendant
 - M/s. Wangechi for Interested Parties
 - Ms. Wanjiru:
We want to adopt the statement agreed.
 - A Mr.: We agreed to have the hearing proceed. Let the prayers taken in 361 of 2018 be adopted in this case.
 - Ms. Wangechi:
We proceed as in the same case. We adopt evidence in 361 of 2018.
7. No submissions were filed and on a balance of probabilities, the court was satisfied that the Plaintiff had proved her case and Judgment was entered on 19/7/2022 as shown in the Decree dated 19/7/2022:
 - a. A declaration is hereby made that the transfer of LR No. Nyandarua/Tulaga/8359 effected on the 10/4/2017 and LR No. Nyandarua/Tulaga/8354 effected on the 10/4/2017 to the 2nd and 3rd Defendants was marred with illegality and thus null and void.
 - b. An order is hereby issued for cancellation of Tittle Deeds for LR No. Nyandarua/Tulaga/8359 and LR No. Nyandarua/Tulaga/8354 registered to John Ndirangu Kirathi and for the same to be reinstated to Samuel Kirathi Komu.
 - c. That the Plaintiff will have costs of the suit and interests.
8. What followed was an Application dated 4/10/2025:
 1. That the order of 22/7/2021 fixing the matter for mention for final submissions be removed and the 2nd Defendant's case be deemed as being active and open for further proceedings to take place.



2. That the court do not write the proceedings taken after the proceedings of 22/7/2021 including the Judgment delivered on 19/7/2022 and all the consequential and subsequent orders given.
3. Costs.
The same was opposed and consequently dismissed on the grounds that:
 - a. The 1st Defendant's counsel closed the 1st Defendant's case without calling any witness.
 - b. Ms. Wangechi after failing to secure an adjournment on behalf of the Interested Party closed her case.
 - c. The Interested Party indicated that the case was closed by his advocate without his instructions.
9. From the above the Interested Party has filed this Appeal against Hannah Wanjiru Kirathi, Miriam Kirathu, Elisa Kuria Kirathi and John Ndirangu Kirathi as Respondents on the following grounds:
 - a. The learned magistrate erred in law and fact by failing to find that there was an error apparent on the face of record on the proceedings taken on 22/7/2021.
 - b. The learned magistrate erred in law and fact by finding that the Appellant had closed his case on 22/7/2021.
 - c. The learned magistrate erred in law and fact by failing to find that the court record clearly indicated that the Appellant had not closed his case.
 - d. The learned magistrate erred in law and fact by failing to find that the Appellant's case was active, and as such the court lacked the jurisdiction to render final judgment.
 - e. The learned magistrate erred in law and fact to be guided by the court record in making a determination on whether there was an error apparent on the face of the record.
 - f. The learned magistrate erred in law and fact in dismissing the Application dated 4/10/2023 with costs.
10. I have perused the Lower Court file and found that there is nothing on record to show that the Appellant (Interested Party) ever closed his case. This is a case that so clearly shows the collusion between one Miriam Kirathi, daughter to the Plaintiff (herein 2nd Respondent) and the 1st Respondent in this Appeal. She was brought in by the 1st Respondent to take the part of her late father against who the 1st Respondent had brought the case but who apparently did not share the same position as her late father. Her role was definitely to compromise the suit. The court proceedings show that on 22/7/2021 the case never came to a close but it was given a mention date of 23/9/2021 by the Honourable trial magistrate C. Obulutsa who adjourned the matter. By 14/10/2021 the court records show that submissions had not yet been filed. The proceedings ended so unceremoniously. A Judgment then follows which the proceedings do not indicate that a date for the same had been set.
11. The sanctity of the proceedings as typed and as they appear in the Lower Court file is very crucial in the dispensation of justice and there seems to be some disconnect in this case between the last appearance in court on 14/10/2021 and the delivery of the Judgment on 19/7/2021. I called for the file from the lower Court and even from the manuscript in the Lower Court's file one cannot tell when the Hearing was concluded. Incomplete or unreadable record of proceedings or having abridged proceedings gives rise to an error of law. It causes travesty of justice. It is necessary and mandatory for a trial Court or Tribunal to transmit a (clear)copy of record of proceedings to avoid injustice or flaw on Appeal. The



incompleteness in the proceedings or incoherence or lack of important parts of the same would affect a party's rights on Appeal.

12. In the premises, I order that the Judgment delivered herein on 19/7/2021 and all the consequential orders thereto be set aside and this suit be returned to Nyahururu Chief Magistrate's Court to be heard before another Magistrate de novo.

Orders accordingly.

JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 20TH DAY OF FEBRUARY, 2025

In the presence of:

Mr. Komu for the Appellant

Mr. Gakenia Gichumu for the Respondent

C/A – Eric

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MUGO KAMAU

JUDGE

