



**Gichohi & another (As the legal representatives and substituted for Peterson Gichohii - Deceased) v Miano alias Joseph Maina Miano (Environment and Land Appeal 14 of 2015) [2024] KEELC 5697 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5697 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 14 OF 2015**

**JO OLOLA, J  
JULY 26, 2024**

**BETWEEN**

**LEAH WANYARA GICHOHI ..... 1<sup>ST</sup> APPELLANT**

**LEAH WAMBUI GICHOHI ..... 2<sup>ND</sup> APPELLANT**

**AS THE LEGAL REPRESENTATIVES AND SUBSTITUTED FOR PETERSON  
GICHOHII - DECEASED**

**AND**

**MAINA JOHANA MIANO ALIAS JOSEPH MAINA MIANO ..... RESPONDENT**

**JUDGMENT**

**Background.**

1. This is an Appeal arising from the Judgment of the Honourable E.G Mithamo DM1 as delivered on 16<sup>th</sup> December 1972 in Kerugoya District Magistrate Civil Appeal Case No. 2 of 1972.
2. The Appeal arose from the Judgment of the Honourable J. Gacheru DM III as delivered on 10<sup>th</sup> December 1971 in Kerugoya DM Succession Cause NO. 29 of 1970; Land Registrar – vs- Karimi Johana. In the application before the court, the Applicants had urged the court to determine the heirs of the said Karimi Johana who was said to have died on 24<sup>th</sup> November 1959. Having heard the witnesses, the court ordered that the parcel of land known as Mwerua/Mukure/235 be registered under the name of Peterson Gichohi and that the name of the said Karimi Johana be deleted from the record.
3. Aggrieved by the said determination, one Maina S/o JohanA Miano who was then a minor and suing through his next friend -Jotham Ngii lodged Kerugoya DMs Civil Appeal No 21 of 1972 against Peterson Gichohi. It was the Appellant's case that the Learned Magistrate had erred in law and in fact



in entertaining a matters relating to the sale of land while his jurisdiction was limited to matter arising under Section 120 of the Registered [Land Act](#) (Cap 300 of the Laws of Kenya).

4. The Appellant further faulted the Magistrate for sanctioning a sale of land registered in the name of a minor and one which in his view did not comply with the provisions of the [Land Control Act](#), Cap 302 of the Laws of Kenya.
5. In response to the Appeal, the Respondent contended that there was no competent appeal as those who had filed the same were not parties in the matter before the District Magistrate Court Class III. The Respondents asserted that the suit property had been sold under Customary Law immediately after demarcation and asserted that the Appellants had failed to provide any evidence of the relationship between themselves and the deceased and/or the minor. It was further the Respondent/Objector's position that he had been on the suit property for more than 12 years and more so before the said Cap 300 of the Laws of Kenya came into force.
6. In his Judgment delivered on 16<sup>th</sup> December 1972, the Honourable E.G. Mithamo DM I did uphold the Appeal and set aside the Judgment of the Lower Court. In lieu thereof, the Learned Magistrate did determine that the rightful heir of the suit property was Karimi Johana's brother by the name Maina Johana and he proceeded to order that the suit property be registered in the name of the said Maina Johana.
7. Aggrieved and dissatisfied by the said determination, Peterson Gichohi lodged Nyeri HCCA No. 8 of 1973 against the said Maina Johana Miano (alias Joseph Maina Miano) faulting the Court's findings on the grounds listed therein as follows:-
  1. That the District Magistrate erred in fact and in law in holding that a person that was not a party to the proceedings in the third class District Magistrate's Court had a right of appeal at all;
  2. That the District Magistrate misdirected himself in point of fact and law in that he ignored the fact that a Succession Certificate had been issued to the purchaser for value through the rightful heir and that the Minor Respondent had sufficient notice of the Succession Cause No. 29 of 1970;
  3. The District Magistrate erred in fact and in law as he failed to consider the fact that the Appellant went into possession of that parcel of land in 1959 and he did so by virtue of purchase and consequently the [Land Control Act](#) 1967 does not apply to the said transaction;
  4. That the 1<sup>st</sup> Class, District Magistrate erred in taking into consideration that a minor in 1959 would still be a minor in 1972 without evidence at all; and
  5. That the whole decision is against the weight of evidence in that no judicial notice was taken of the fact that the Respondent has fully developed the said parcel of land and that the said Maina Johana appears to have died in 1959 and cannot therefore appeal through the best friend at all.
8. From the material placed before the court, the Original Appellant Peterson Gichohi Hiuhu passed away on 23<sup>rd</sup> September 1998. Following an application made herein dated 22<sup>nd</sup> March 2015, his two widows and Personal Representatives – Leah Wanyora Gichohi and Leah Wambui Gichohi were substituted in his stead as the Appellants herein.
9. This being a second Appeal, this court is alive to its duty as a second appellate court to determine matters of law only unless it is shown the courts below considered matters that they should not have considered or failed to consider matters that they should have considered or looking at the entire decision, it is perverse. {See Stanley N. Muriithi & Another –vs- Benard Munene Ithiga [2016] eKLR}



10. I have accordingly carefully perused and considered the Record of Appeal as well as the Judgment appealed. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
11. This Appeal stems from a letter dated 23<sup>rd</sup> July 1971 by the then District Officer, Ndia Division addressed to the Land Registrar, Kirinyaga District requesting for the transmission of the parcel of land registered in the name of one Karimi Johana and known as Mwerue/Mukure/235 under the African Customary Law. Upon receipt of the request, the Land Registrar referred the matter to court for a certificate of succession to issue to enable him to transmit the land.
12. Upon hearing the parties in Kerugoya District Magistrate's Succession Cause No. 29 of 1970, the Honourable J. Gacheru DM III did determine on 10<sup>th</sup> December 1971 that the rightful heir was the original Appellant herein – Peterson Gichohi Hiuhu.
13. As it turned out, the Appellant was not a member of the family of the registered proprietor Karimi Johana. It was however the Appellant's case that he had purchased the suit property measuring approximately 8 ½ acres in the year 1959 from one Johana Miano who was the father to the registered proprietor of the land.
14. It was common ground that as at the time Karimi Johana was registered as the proprietor of the suit property in the year 1959, he was a young boy aged about 4 years. As fate would have it Karimi Johana passed away shortly thereafter on 24<sup>th</sup> December 1959 and hence the succession proceedings to determine who was the rightful heir of the suit property.
15. Following the decision of the Kerugoya Third Class District Magistrate rendered on 10<sup>th</sup> December 1971, one Jotham Ngii posing as the next friend of one Maina son of Johana Miano (a minor) instituted Civil Appeal No. 2 of 1972 at the Kerugoya 1<sup>st</sup> Class District Magistrates Court seeking to overturn the decision and to instead have the said Maina son of Johana Miano (the Respondent herein) who was said to be a brother of the minor registered proprietor of the suit property as the rightful heir thereof.
16. In his decision rendered on 18<sup>th</sup> December 1972, the Honourable E.G. Mithamo, DM I allowed the Appeal and ordered that the rightful heir to the suit property was Maina son of Johana Miano or Maina Johana Miano as the Respondent is presently known. Aggrieved by the said determination, the Appellant herein instituted this Appeal which has had a chequered history in the corridors of justice since the year 1973.
17. In his Grounds of Appeal, the Appellant contends that the 1<sup>st</sup> Class District Magistrate erred in allowing one who was not a party to the proceedings to institute the Appeal; that the Magistrate engaged in misdirection in law when he failed to find that the certificate of succession was properly issued; that he erred in requiring the retroactive application of the [Land Control Act](#) and that he reached his conclusions against the weight of the evidence that was presented before the court.
18. From a perusal of the proceedings in the said Succession Cause No. 29 of 1970, it was evident that the court heard a number of parties before making a decision as to who the suit property registered in the name of Karimi Johana would be remitted to. Amongst those who testified were Karimi Johana's father Johana Miano and his mother Sophia Ngubia. It was evident that all the witnesses who testified including Jotham Ngii who was the Applicant's witness agreed that the Appellant had been utilizing the parcel of land for a long period of time and that he had grown tea bushes thereon.
19. It was further evident that all the witnesses save for Karimi's mother were agreed that Karimi's father had sold the land in dispute to the Appellant. According to the Applicant's father, he was ready to



refund the sum of Kshs. 2,900/= that had been given to him as the purchase price so that the land could be registered in the name of his younger son, the Respondent herein.

20. At it were, the age of the Respondent was not given to the court. Given that the parents of Karimi were alive and participating in the proceedings and given the objection raised in the first appeal as to the capacity of the said Jotham Ngii to appeal as next friend of Maina, it was my considered view that the 1<sup>st</sup> Class District's Magistrate's Court ought to have interrogated the reasons behind the institution of the Appeal as the next friend of the minor whose age was not given and some 13 years after the land was said to have been sold to the Appellant.
21. From the material placed before the court, there was no dispute that even as he registered the suit property in the name of his 4 year old son on 11<sup>th</sup> December 1959, Johana Miano had long allowed the Appellant to till the land and grow tea thereon. That must be the reason when his son passed away barely 2 weeks, thereafter on 24<sup>th</sup> December 1959, he entered into a formal arrangement with the Appellant to purchase the land. When the full purchase price was eventually paid in 1964, the parties wrote a sale Agreement in which they states as follows:-

“Today, I have been given Kshs. 15/= which had remained to fulfill the container of honey, making Kshs. 80/= which is the cost of the container. This has made it Kshs. 2,580/= together with the ram for the clan. Now the full consideration for the land is fully paid belonging to Karimi Johana Mwirua Mukure 235.

I am Johana Miano Warungu.”

22. On his part the Appellant stated in the Agreement as follows:-

“Today, I have given Johana Miano wa Warungu Kshs. 15/= Fifteen shillings only which had been the remaining balance to fulfill the container of honey to mark Kshs. 80/=. Now the entire consideration for the land is fully paid Shillings 2,580/= and three rams and a container of honey at Kshs. 80/=.

Now there is nothing else remaining.

I the Buyer Peterson Gichohi S/o Hiuhu.”

23. Arising from the foregoing, it was evident to me that the land had been sold by the customs of Karimi and his father and that it was unconscionable to purport some 7 years later that the rightful heir thereof was his younger brother Maina.
24. According to the Respondents, the suit property was registered in the name of Karimi as the first born son to hold in trust for himself and that of his family. In support of that position, the Respondent relied on the authority of Kimani Githanja –vs- Jane Njoki Gitanja {1983} eKLR. In the said matter, the court had put the issue of trust under Kikuyu Customary Law as follows:

“Land inheritance among the Kikuyu is as stated by Jomo Kenyatta in his book Facing Mt. Kenya at Page 32 (1965 Edition) as follows:

“After the death of the father, the land passed on to his sons, the eldest son took his father's place. At this juncture the system of land tenure changed a little, there was no one who would call it “mine”. All would call it “our land”. the eldest son who had assumed the title of Muramati (titular or trustee) had no more rights than his brothers, except the title, he could not sell the land without the agreement of his brothers who had the same full cultivation



rights on the piece of land which they cultivated as well as those which were cultivated by their respective mothers.”

25. While that was indeed the position under Kikuyu Customary Law, it was clear to me that the circumstances cited in that authority were not the same as those in the matter before me. In the matter herein, it was not the father who had died but his son. That father did confirm during the proceedings before the Third Class District Magistrate that he had sold the land to the Appellant and that all his clan members were aware of the sale. The Father’s first witness in the proceedings one Kamina Njui confirmed in the Succession Cause that the Appellant had paid everything for the land including honey.
26. It follows that I did not find any basis as to why the first appellate court did interfere with the findings of the Third Class District Magistrates Court as rendered on 10<sup>th</sup> December 1971.
27. In the premises I allow the Appeal, set aside the Judgement and Findings of the Honourable E.G. Mithamo DM I and hereby reinstate the decision of the Honourable J. Gacheru DM III as rendered on 10<sup>th</sup> December 1971.
28. Given the circumstances of this case, each party shall bear their own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 26<sup>TH</sup> DAY OF JULY, 2024.**

In the presence of:

Mr. P.K. Mjuguna for the Appellant.

Mr. P.M. Kahiga for the Respondent.

Court Assistant: Michael

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**J. O. OLOLA**

**JUDGE**

