



**Hunyu v Thiongo (Environment and Land Appeal 2B of 2023)
[2024] KEELC 5486 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5486 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT AND LAND APPEAL 2B OF 2023**

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

BETWEEN

ZAWERIA WANJIRU HUNYU APPELLANT

AND

JAMES NGURA THIONGO RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable S.N. Mwangi -SRM delivered in Nyahururu CM ELC Case No. 333 of 2018 on 10th November 2022. The matter was initially instituted at the Nyahururu Law Courts as ELCA No. E024 of 2022. It was transferred to this court on 13th July 2023 after the Judge then handling the same recused himself.
2. By his Complaint dated 23rd August 2018 as filed before the Chief Magistrate Court at Nyahururu, Zaweria Wanjiru Hunyu (the Appellant herein) had sought Judgment against the Respondent for:-
 - a). A declaration that the Plaintiff is the absolute registered proprietor of LR. No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku)/702 and the Defendant is a trespasser;
 - b). An order directing the Defendant to vacate from LR. No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku)/702 and to remove all the structures erected therein and in default eviction orders to issue plus damages for trespass;
 - c). Costs of this suit plus interest;
 - d). Any other or further reliefs that this Honourable Court may deem fit and just to grant.
3. Those prayers were the result of the Appellant's contention that she was the absolute registered proprietor of the said LR. No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku)/702 (the suit property) and that she held a title deed issued on 9th May 2018 in proof of ownership. The Appellant accused the



- Respondent of encroaching onto the suit property and proceeding to erect a house thereon without the Appellant's permission or authority.
4. But in his Statement of Defence and Counterclaim filed in court on 5th October 2018, James Ngura Thiong'o (the Respondent herein) denied that he had unlawfully encroached onto the suit property. It was his case that vide a Sale Agreement dated 10th June 2004, he had purchased the suit property from the Appellant's husband the late Peter Mwangi Ngororo who was then the registered proprietor thereof.
 5. The Respondent asserted that upon the said purchase, he had immediately taken possession thereof and he had developed the same. It was further his case that on 23rd December 2010, he was registered as the sole proprietor of the suit property and that the Appellant's subsequent registration and issuance of title was as a result of fraud.
 6. Accordingly and by way of his counterclaim, the Respondent sought for Judgment against the Appellant for:-
 - a). A declaration that the Defendant is the sole and absolute proprietor of LR. No. Nyandarua/Ndaragwa/Uruku Block 2 (Uruku)/702;
 - b). A declaration that the register that led to the registration of the Plaintiff and Daniel Kihara Mwangi as proprietors of the suit property is null and void, and that it should be closed forthwith;
 - c). Costs of the suit; and
 - d). Any other or further relief this Honourable Court might deem fit and just to grant.
 7. Upon hearing the case and in his Judgment delivered on 10th November 2022 aforesaid, the Learned Trial Magistrate did find that the Appellant had not proved her case on a balance of probabilities and proceeded to dismiss the same with costs. On the other hand, the court made a finding that the Respondent had proved his counterclaim to the required standards and proceeded to grant the orders sought in the counterclaim with costs.
 8. Aggrieved by the said determination, the Appellant lodged the Memorandum of Appeal herein dated 17th November 2022 and urging this court to set aside the said Judgment in its entirety on the grounds:-
 1. That the Learned Trial Magistrate erred in law and in fact in finding that the Respondent was properly registered as the absolute proprietor of the suit property as sought in the counterclaim;
 2. That the Learned Trial Magistrate erred in law and in fact in failing to find that the title deed issued on 24/12/2010 after the demise of the previous registered owner Peter Mwangi Ngororo who died on 3/3/2006 and it was thus acquired illegally;
 3. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent was guilty of intermeddling with the real estate of a deceased person and his acts offended Section 45 of the *Law of Succession Act*, Cap 160 Laws of Kenya;
 4. That the Learned Trial Magistrate erred in law and in fact in ordering cancellation of the title deed issued to the Appellant on 9/5/2018 by way of transmission pursuant to Nyeri High Court Succession Cause No. 569 of 2008; In the matter of the Estate of Peter Mwangi Ngororo as per the Grant issued on 28/1/2009 and confirmed on 8/2/2011;



5. That the Learned Trial Magistrate erred in law and in fact in failing to find that the Respondent was a trespasser on the suit property; and
 6. That the Learned Trial Magistrate erred in law and in fact in dismissing the Appellant's suit and in allowing the Respondent's counterclaim contrary to the weight of the evidence on record, documentary evidence, written submissions and the Law.
9. As the first appellate court, my role is to subject the whole of the evidence to a fresh and exhaustive scrutiny before making my own conclusions thereon. As was long stated in *Selle & Another –vs- Associated Motor Boat Company Ltd & Others* (1968) EA 123:
- “.....this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court..... is by way of retrial 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 through it should always bear in mind that it has neither seen nor heard the witnesses 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 evaluate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally...”
10. Taking those principles into account, this court must then turn its attention to the facts and evidence that was placed before the Learned Trial Magistrate in the course of the trial and to consider if the grounds of appeal raise any matter of substance. I have accordingly carefully perused and considered the Record of Appeal filed herein as well as the impugned Judgment. I have similarly perused and considered the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.
 11. By her suit as filed in the Lower Court, the Appellant had sought for a declaration that she was the absolute registered proprietor of the suit property. In addition, she had sought an order directing the Respondent to vacate the suit property and to remove all structures he had erected thereon.
 12. The basis of the Appellant's claim was that she had inherited the suit property following the death of her husband one Peter Mwangi Ngororo who was initially the registered proprietor of the suit property. It was the Appellant's case that she had become the registered proprietor of the suit property on 9th May 2018 following the conclusion of Nyeri High Court Succession Cause No. 569 of 2008 which dealt with the distribution of her husband's estate.
 13. On his part, the Respondent did not deny that the suit property was initially registered in the name of the Appellant's said husband. It was however his case that he had purchased the same from the Appellant's husband and that he had subsequently taken possession and started developing the same during the lifetime of the Appellant's husband. It was further the Respondent's case that the Appellant's husband had prior to his death executed all the documents of transfer and that the Respondent had subsequently been issued with a title deed for the same on 23rd December 2010.
 14. From a perusal of the Record of Appeal herein, it was not in dispute that the trial court was dealing with an issue whereby the suit property had two Green Cards and two title deeds. As the trial court did rightly state, the main issue for determination before that court was who among the two protagonists was the rightful owner of the suit property said to be measuring some 0.6313 Ha.



15. As Munyao J did hold in *Hubert L. Martin & 2 Others –vs- Margaret J. Kamar & 5 Others* [2016], eKLR:

“A court when faced with a case of two or more titles over same land has to make an investigation so that it can be discovered which of the two titles should be upheld. This investigation must start at the root of the title and follow all processes and procedures that brought forth the two titles at hand. It follows that the title that is to be upheld is that which conformed to procedure and can properly trace its root without a break in the chain. The parties to such litigation must always bear in mind that their title is under scrutiny and they need to demonstrate how they got their title starting with its roots. No party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The other party also has a similar document and there is therefore no advantage in hinging one’s case solely on the title document that they hold. Every party must show that their title has a good foundation and passed properly to the current title holder.”

16. In support of her case at the trial, the Appellant who did not herself testify at the trial called two witnesses in support of her case. From a perusal of Page 179 to 181 of the Record of Appeal, it was evident that her first witness Samuel Thirikwa Ngororo (PW1) was not useful to her case. In his testimony in-chief, PW1 while conceding that he knew the Appellant, testified that he had no knowledge that the late Peter Mwangi Ngororo owned any land in the Uruku area where the suit property is located.
17. In cross – examination, PW1, apparently out of old age turned around and told the court he had no recollection of the Appellant’s husband who was his brother. He further told the court that his memory had faded and that he had no idea about the land in Uruku and that he had never gone there.
18. That being the case, the Appellant’s case was only supported by that of her son and the 2nd Defendant in the counterclaim- David Kihara Mwangi (PW2). According to PW2, his mother obtained the suit property by way of transmission after the family filed Nyeri High Court Succession Cause No. 569 of 2008 in which he was appointed as the Administrator of the estate of his father- Peter Mwangi Ngororo.
19. From the material placed before the trial court, it was evident that when the Appellant’s family tried to register the confirmed grant on the title, they were unable to do so and on 8th May 2018, the then Land Registrar Nyandarua, one Mr. Gichuki proceeded to reconstruct a new Green Card for the suit property.
20. That second Green Card (Page 283 of the Record) aptly named by the trial court as the Gichuki Green Card was as controversial as the circumstances in which it had been issued. While PW2 had purported in his testimony before the court that he had not applied for a reconstruction of the Green Card as he was unaware that it was missing, he did concede in cross examination upon being shown his own affidavit that he had applied for the reconstruction of the same.
21. It was also telling that PW2 conceded that the Gichuki Green Card issued in spite of the existence of the Original Green Card which was opened on 1st August 1997, is the card which led to the issuance of a title deed in the name of his mother (the Appellant herein). The opening of this second card as pointed out by the Land Registrar Charles Ayienda (DW3) did not follow due process. Obviously prepared in a rush and with little attention to detail, it was not in any way useful to the Appellants as it did not even get the entries correct.



22. According to the Appellant's pleadings and the testimony of PW2, the late Peter Mwangi Ngororo was registered as the proprietor of the suit property on 28th February 2003. That fact is corroborated by the Original Green Card (referred to as the Ayienda Card) which captures that date correctly as well as a photocopy of the Title Deed produced by the Appellant in the name of her husband. The Gichuki Green Card however purports that the Appellant's husband was issued with a title deed on 14th September 2001 before it was registered in the name of their son (PW2) on 8th May 2018.
23. That being the case, it was apparent to me that the second title in the name of the Appellant was not issued in conformity with procedure and cannot stand scrutiny. It was telling that while PW2 testified that they realized the original title was missing after his father died in March 2006, he did not make any report of the loss until some 6 years later on 5th June 2012 when he purported to report the loss to Othaya Police Station. There was no explanation offered as to why no action taken by the Appellant and/or her son (PW2) to stop the Respondent from taking over the land and erecting stone buildings thereon.
24. In my considered view, the only plausible explanation for the Appellant's omission to take action against the Respondent for the many years they concede he had been on the land was the fact that they were aware that the late Peter Mwangi Ngororo had sold the suit property to the Respondent as per the Agreement dated 10th June 2004 as produced by the Respondent at the trial.
25. While the Appellant purports that the title was issued to the Respondent some 4 years after the death of her husband and that the same amounted to intermeddling, I was not persuaded that that was the case. It was not always the case that one can be issued with a title deed on the same date he/she purchases the land as that is always a process that takes time.
26. From the totality of the foregoing, I was not persuaded that the Learned Trial Magistrate had misdirected himself or erred in the manner portrayed in the Memorandum of Appeal. This Appeal is accordingly baseless and without merit. It is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 26TH DAY OF JULY, 2024.

In the presence of:

Mr. Gakenia for the Appellant.

Mr. Nderitu Komu for the Respondent.

Court Assistant: Michael

J. O. OLOLA

JUDGE

