



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kamenju v Kamenju (Environment and Land Appeal 2 of 2022)  
[2024] KEELC 5409 (KLR) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5409 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 2 OF 2022**

**JO OLOLA, J  
JULY 19, 2024**

**BETWEEN**

**CHRYSOSTOM GACHUHI KAMENJU ..... APPELLANT**

**AND**

**DAVID MATHENGE KAMENJU ..... RESPONDENT**

**JUDGMENT**

**Background**

1. This is an Appeal arising from the Judgment of Honourable J. Macharia, SPM, as delivered on 30<sup>th</sup> November 2021 in Nyeri MCL & E Case No 6 of 2018.
2. By a Plaint dated and filed in the Lower Court on 17<sup>th</sup> January 2018, Chrysostom Gachuhi Kamenju (the Appellant herein) had sought for:-
  - a). An order of permanent injunction restraining the Defendant, his servants and/or agents from entering, being upon, utilizing or dealing with all that land known and described as Title Number Gakawa/Githima/Block 6/Waichakehiri/217;
  - b). An order of eviction of the Defendant from Title Number Gakawa/Githima/Block 6/Waichakehiri/217;
  - c). An order of accounts or mesne profits in respect of the benefits drawn by the Defendant from Title Number Gakawa/Githima/ Block 6/Waichakehiri/217 for the period of his occupancy until surrender thereof to the Plaintiff.
  - d). Any other and further orders as this Honourable Court may deem just in the circumstances; and
  - e). Costs of the suit.



3. Those prayers were the result of the Appellant's contention that he is the registered proprietor of the said parcel of land described as Gakawa/Githima/Block 6/Waichakehiri/217 situated within Nyeri County (the suit property). It was the Appellant's case that he obtained ownership of the suit property upon being bequeathed shares in Mahiga Investments Company Ltd as a result of the confirmation of Grant issued in Nyeri High Court Succession Cause No 273 of 2005 on 23<sup>rd</sup> January 2014.
4. The Appellant accuses the Defendant who is his brother of failing to grant him vacant possession of the suit property and of continuing to cultivate the same and to collect rents therefrom as he had been instructed to do prior to the succession proceedings and thereby causing the Appellant to suffer substantial and irreversible loss.
5. In his Statement of Defence dated 1<sup>st</sup> February 2018 as amended on 6<sup>th</sup> July 2018, David Mathenge Kamenju (the Respondent herein) denied the Appellant's case that the succession proceedings expressly bequeathed unto himself all shares in Waichakehiri Farmers Ltd which shares included the suit property.
6. Upon hearing the parties and in his Judgment rendered on 30<sup>th</sup> November 2021, the Learned Trial Magistrate did not find any merit in the Appellant's claim and proceeded to dismiss the same with costs.
7. Aggrieved by the said Judgment, the Appellant moved to this court and filed a Memorandum of Appeal dated 17<sup>th</sup> January 2022 urging this court to set aside the said Judgment on the grounds:-
  1. That the Learned Trial Magistrate erred in law and fact by misapprehending the evidence as presented by the parties by failing to make a finding as to whether Title Number Gakawa/Githima/Block 6/Waichakehiri/217 was as a result of the shares held at Waichakehiri Farmers Company Ltd, thereby occasioning a gross miscarriage of Justice;
  2. That the Learned Trial Magistrate erred in law and fact by failing to address his mind on the evidence as presented by the parties as to how Title No Gakawa/Githima/Block 6/Waichakehiri/217 was acquired by the Appellant thereby occasioning a gross miscarriage of Justice;
  3. That the Learned Trial Magistrate erred in law and fact by applying the wrong principles of law while making an order for the cancellation of Title No Gakawa/Githima/Block 6/Waichakehiri/217 while the Respondent had not proved the existence of fraud to the required standards thereby occasioning a gross miscarriage of Justice;
  4. That the Learned Trial Magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at an erroneous finding in the Judgment thereby occasioning a miscarriage of Justice; and
  5. That the Learned Trial Magistrate failed to address his mind to the pleadings on record, the documentary evidence by the parties, the Appellant's submissions and the law, thereby occasioning a miscarriage of Justice.
8. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on the facts and the law and to arrive at its own conclusion bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand (See *Selle & another v Associated Motor Boat Co. Ltd and others* [1968] EA 123).
9. I have accordingly carefully perused and considered the Record of Appeal as well as the submissions and authorities placed before the court by the Learned Advocates representing the parties herein.



10. By the Five (5) grounds raised in his Memorandum of Appeal, the Appellant herein faults the Learned Trial Magistrate for misapprehending the evidence placed before the trial court and thereby arriving at the wrong conclusion that the Appellant had failed to prove his claim against the Respondent.
11. In the suit filed in the Lower Court, the Appellant had sought an order of a permanent injunction to restrain the Respondent from entering or in any manner dealing with the parcel of land described as Gakawa/Githima/Block 6/Waichakehiri/217 (the suit property). In addition, the Appellant sought for an order of eviction to issue against the Respondent as well as an order of account or mesne profits in respect of the suit property for the period that the Respondent had been in occupation.
12. It was the Appellant's case that their father the later Danson Kamenju Kogi had bequeathed to him shares in Mahiga Investments Company Ltd as per the certificate of confirmation of grant issued on 23<sup>rd</sup> January 2014 in Nyeri High Court Succession Cause No 273 of 2005; In the matter of the Estate of Danson Kamenju Kogi. It was further the Appellant's case that when he approached the directors of the said company for the said shares, they had advised him that the shares were used to acquire the suit property from another company known as Waichakehiri Farmers Company Ltd and hence his claim thereto.
13. Having considered the material placed before him at the trial, the Learned Trial Magistrate concluded as follows at Page 3 of the Judgment:

“.....From the will it is clear that the Defendant was allocated the shares at Waichakehiri. I note that the will has not been revoked.

Further confirmation was done in the court and the share of the beneficiary confirmed. The executor of the will also confirmed this in her testimony. It follows that any other method that was followed to acquire any property except as per the contents of the will and also as per the certificate of confirmation is irregular and invalid.”
14. As it were, it was the Appellant's case that following the advise by the Mahiga Investment Company Ltd they had proceeded to issue him with a letter that he had used to process the title for the suit property in his name. The handwritten letter on the Letterhead of Mahiga Investment Company Ltd addressed to Waichakehiri Farmers Co. Ltd dated 9<sup>th</sup> May 2014 is at Page 19 of the record and it reads as follows:-

“Re: Danson Kamenju Kogi –DCD

The above named person was a shareholder of Mahiga Investment Co. Ltd and was transferred to your company for allocation of shares which your company did.

The purpose of our letter is to confirm that the said Shareholder has already passed on and before the demise death, he had transferred the five shares to one of his sons, Chrisostom Gachuhi Kamenju ID..... through a court process as attached.

Please do assist the inheritor to acquire a title deed...”
15. As it turned out, that letter was rather misleading. A proper reading of the court process referred to therein could not lead to the conclusion that the shares held by the deceased with the said Wachakehiri Farmers Company Ltd would go to the Appellant. A perusal of the certificate of confirmed Grant issued in the said Nyeri High Court Succession Cause No 273 of 2005 (Page 40 of the record) reveals at schedule (i) that the shares held in Waichakehiri Farmers Company Ltd were willed by the deceased to the Respondent while the Appellant was to get the shares held in Mahiga Investment Co. Ltd.



16. It was clear from the material presented before the Trial Court including the evidence of the executor of the will Mercy Wanjiku Maina (DW2) that the suit property was part of the shares that were held by the deceased in Wachakehiri Farmers Company Ltd and that the Appellant had concealed material facts by misrepresenting himself to the two companies as the heir of the said shares.
17. It follows that I was not persuaded that the trial court had misdirected itself in arriving at the conclusion that the Appellant's case had no merit. This Appeal therefore equally lacks merit and I hereby dismiss the same with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 19<sup>TH</sup> DAY OF JULY, 2024.**

In the presence of:

Mr. Magua for the Appellant.

Ms. Maina holding brief for Warutere for the Respondent.

Court Assistant: Michael.

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**J. O. OLOLA**

**JUDGE**

