



Karanja v Gichuhi (Suing as the Personal Representative of the Estate of Godfrey Njogu Gichuhi) (Appeal E046 of 2023) [2024] KEELC 5832 (KLR) (12 August 2024) (Judgment)

Neutral citation: [2024] KEELC 5832 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
APPEAL E046 OF 2023
BM EBOSO, J
AUGUST 12, 2024**

BETWEEN

STANLEY MBURU KARANJA APPELLANT

AND

SERAH WANJIKU GICHUHI RESPONDENT

**SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF
GODFREY NJOGU GICHUHI**

*((Being an Appeal against the Judgment of Hon J. A ORWA, Senior
Principal Magistrate, delivered on 25/4/2023 in Kikuyu Senior
Principal Magistrate Court MCE & L Case No. E046 of 2023))*

JUDGMENT

Background

1. This appeal challenges the Judgment rendered on 25/4/2023 by the Kikuyu Senior Principal Magistrate Court [Hon J A Orwa, Senior Principal Magistrate] in Kikuyu SPMC Civil Case No 143 of 2015. Serah Wanjiku Gichuhi [the respondent in this appeal] was the plaintiff in the said suit. Stanley Mburu Karanja [the appellant in this appeal] was the defendant in the suit. A perusal of the pleadings and the record of the trial court does not disclose joinder of the estate of the late John Karanja Mathaga as a party to the suit in the trial court.
2. The respondent sought the following reliefs against the appellant in the suit in the trial court:
 - (i) an order decreeing the appellant to give vacant possession of land parcel number Muguga/Kahuho/T.37 [hereinafter referred to as “the suit land” or “the suit property”] and in default he be forcibly evicted;



- (ii) a permanent injunction restraining the appellant against entering on, cultivating, constructing on or interfering with the suit land; and
 - (iii) costs of the suit.
3. The dispute in the trial court revolved around the question of ownership of and the legality of the appellant's occupation of the suit land. The respondent's case was that the appellant was a trespasser on the suit land which belonged to her deceased son, Godfrey Njogu Gichuhi also known as Raini Gichuhi. She mounted the claim on behalf of the estate of her deceased son. On his part, the appellant's case was that the respondent [Serah Wanjiku Gichuhi and Waweru Waraini who were guardians of the late Godfrey Njogu Gichuhi sold the suit land to his late father, John Karanja Mathaga, in July 1970. He contended that his late father took possession of the suit land in 1970, erected structures on the land and remained in possession of the land up to 1979 when he died. The appellant further contended that in 1974, his late father, John Karanja Mathaga, sued Godfrey Njogu Gichuhi in Nairobi High Court Civil Case No 2006 of 1974 and obtained "adverse orders" against him relating to the to the land. He added that the respondent's suit was bad in law.
4. Upon conclusion of trial, and upon receiving submissions from the parties, the trial court found that the respondent had proved her case against the appellant on the balance of probabilities. The trial court faulted the appellant for failing to tender, as evidence, the decree(s) relating to the preceding proceedings in which the late John Karanja Mathaga was awarded the suit land. Consequently, the trial court issued the following orders:
 - (i) an order decreeing the appellant to vacate the suit land within 60 days and in default he be evicted;
 - (ii) an order restraining the appellant against re-entering, cultivating, constructing on or interfering with the suit land;
 - (iii) an order directing the OCPD - Kabete Sub-County to provide security during execution of the decree; and
 - (iv) an order decreeing the appellant to pay costs of the suit.

Appeal

5. Aggrieved by the trial court's decision, the appellant brought this appeal, advancing the following 10 verbatim grounds of appeal:
 - i. The learned trial magistrate erred in law and fact in failing to appreciate that the respondent's suit was time-barred under the *Limitation of Actions Act*, for having been brought to recover land after forty-five (45) years from when the appellant took possession.
 - ii. That the learned trial magistrate erred in fact and law in failing to appreciate the fact that the respondent sold the parcel of land known as L.R No. Muguga/Kahuho/T.37 to the appellant on 5/7/1970 and possession granted on the same day.
 - iii. The learned trial magistrate erred in law and in fact in failing to recognize that the sale to the appellant was sanctioned by the District Magistrate Kikuyu which was the practice at the time when the sale was touching on minors.
 - iv. That the learned trial magistrate erred in law and in fact in failing to consider that the appellant had been in possession of suit land since the year 1970 and he had enjoyed quiet and uninterrupted possession of the suit property for more than forty-five (45) years.



- v. The learned trial magistrate erred in law and in fact by failing to recognize and acknowledge that CMCC 143 of 2015 is re-judicata as the appellant had filed a case at the High Court of Nairobi in Civil Case 2006 of 1974 and Land Dispute No.110 of 1938 filed at the District Officer's Office at Kikuyu, which cases substantially and directly touched on the same subject matter and was between the same parties.
 - vi. The learned trial magistrate erred in law and in fact when she failed to appreciate that granting orders sought by the respondent would have the effect of reversing the substance of another judgment issued by a court of competent jurisdiction before the then Land Disputes Tribunal.
 - vii. The learned trial magistrate erred in effectively quashing an earlier order issued by the then Land Disputes Tribunal which found that the parcel of land known as LR. No. Muguga/Kahuho/T.37 had been sold to the appellant and the Tribunal proceeded to order the respondent to transfer the said property to them.
 - viii. That the learned trial magistrate erred in law and fact by not considering all the evidence tabled by the appellants and totally failed or refused to scrutinize the list of documents filed by the appellant before court to prove his case.
 - ix. The learned magistrate erred in allowing the respondent's claim against the weight of the evidence.
 - x. The learned magistrate erred in law and in fact in failing to properly analyze the evidence and submissions presented by the appellant.
6. Through the memorandum of appeal dated 18/5/2023, the appellant urged this court to allow the appeal by dismissing the respondent's case and award him costs of this appeal.

Appellant's Submissions

7. The appeal was canvassed through written submissions dated 15/9/2023, filed by M/s C N Kinyanjui & Company Advocates. Counsel for the appellant identified the following as the three issues that fell for determination in the appeal:
- (i) Whether there was a sale agreement between the appellant and the respondent over parcel Muguga/Kahuho/T.37;
 - (ii) Whether the respondent's suit was time-barred; and
 - (iii) Whether the respondent's suit was res judicata.
8. On whether there was a sale agreement between the appellant and the respondent over the suit land, counsel for the appellant relied on the decision in the case of Alton Homes Limited & Another vs Davis Nathan Chelogoi & 2 others [2018] eKLR and submitted that it was not in dispute that a valid sale agreement existed between the parties. Counsel contended that the appellant produced a duly signed copy of the sale agreement dated 5/7/1970 between Wanjiku Gihuhi, Waweru Raini and Karanja Mathaga, written in Kikuyu dialect. Counsel argued that the suit land belonged to Raini Gichuhi who was a minor and who was supposed to transfer the suit land to the purchaser, Karanja Mathaga once he turned eighteen years old. Counsel contended that the respondent admitted during trial that she was also known as Wanjiku Gichuhi, and that Raini Gichuhi was also known as Godfrey Njogu Gichuhi.
9. Counsel faulted the respondent for disputing the sale agreement through mere denial and failing to provide any evidence in support of her position. Counsel submitted that the respondent had the burden of proving that the sale agreement was invalid, which she failed to do. Counsel further



submitted that the respondent swore an affidavit on 20/10/1969 confirming the sale and presented the affidavit to the Kikuyu District Magistrate. Counsel added that the Land Registrar wrote to the District Magistrate at Kikuyu confirming that the respondent together with Mr. Waweru had appeared before him and were desirous of selling the suit land hence, the magistrate should issue them with the consent. Counsel faulted the learned trial magistrate for failing to take into account the fact that there was a sale agreement over the suit land which led to the appellant taking possession of the suit land. Counsel argued that Section 56 of the Trustees Act, Chapter 167, Laws of Kenya, gave the court the power to authorize dealings in trust land.

10. On whether the respondent's suit was time-barred, counsel submitted that the respondent and John Karanja Mathaga (deceased) entered into the sale agreement over the suit land on 5/7/1970. Counsel further submitted that John Karanja Mathaga (deceased) thereafter took possession of the suit land, adding that his family had been in open, continuous and uninterrupted possession of the land for over forty-five (45) years. Counsel contended that the suit was time-barred because it was brought to recover land after forty-five years from when the appellant took possession. Counsel further contended that Godfrey Njogu Gichuhi, on whose behalf the suit was instituted, did not take any step to remove the appellant from the suit land. Counsel added that during trial, PW1 and PW2 testified that Godfrey Njogu Gichuhi (deceased) was buried in a public cemetery. Counsel argued that if it was indeed true that the parcel of land belonged to Godfrey Njogu Gichuhi (deceased), he would have been buried on the land. Counsel urged the Court to strike out the respondent's suit for being an abuse of the Court process.
11. On whether the respondent's suit was res judicata, counsel submitted that during the hearing of the case in the trial court, the appellant produced proceedings and a an award rendered by the defunct Kikuyu District Land Tribunal in Land Dispute No. 110 of 1983. Counsel further submitted that the Tribunal held that the suit Land should be transferred to the appellant. Counsel added that the dispute was between Karanja Mathaga [the appellant's father] and Raini Gichuhi. Counsel relied on Section 7 of the [Civil Procedure Act](#) and the decision in the case of John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015]eKLR.
12. Counsel contended that the issues relating to the suit land were ventilated in another forum of competent jurisdiction and that the judgment was never appealed against. Counsel further contended that the appellant's father had moved the High Court and the Land Disputes Board to determine the ownership of the suit land and that judgment was duly rendered. Counsel argued that the learned trial magistrate erred when she failed to appreciate that granting the orders sought by the respondent would have the effect of reversing the substance of the judgment rendered by the Land Disputes Tribunal. Counsel urged the Court to allow the appeal.

Respondent's Submissions

13. The respondent filed submissions dated 6/11/2023 through M/s R.W Muhuhu & Company Advocates. On grounds 1 and 4, counsel submitted that the learned trial magistrate addressed the issue of whether the suit was time-barred in her judgment. Counsel faulted the appellant for failing to lead evidence to support the allegation that he had been in occupation of the suit land since 1970 after his father, John Karanja Mathaga who died in 1979, gave it to him. Counsel questioned why the appellant did not register a caution against the suit land prior to 2011. Counsel added that the learned trial magistrate correctly held that the appellant had not raised a claim for adverse possession, thus he was a trespassor on the suit land. Counsel submitted that the appellant was in continuous trespass given that his house remained on the suit land and he continued to till the land. Counsel further submitted that the respondent's late son, Godfrey Njogu Gichuhi, lived on the suit land before his demise and



that when the appellant invaded the suit land in 2011, she unsuccessfully asked him to vacate and that he lodged a caution at that point.

14. On grounds 5, 6 and 7, counsel submitted that the issue of whether or not the suit was *res judicata* was ably addressed by the learned trial magistrate in the impugned Judgment. Counsel added that the trial court held that the correspondence relating to HCCC No. 2006 of 1974 produced by the appellant were not sufficient proof that a decision had been made on the subject matter of the suit at the trial court. Counsel submitted that the trial court found that no order relating to adoption of the decision of the Land Disputes Tribunal was produced by the appellant as evidence. Counsel argued that the learned trial magistrate could not be faulted for holding that no decree nor order was placed before the trial court to enable it determine whether the suit was indeed *res judicata*. Counsel relied on the decision in the case of *Isaac Ben Mulwa vs Jonathan Mutunga Mueke* [2016] eKLR.
15. Counsel further submitted that *vide* a ruling dated 25/1/2022, the trial court held that the suit was neither time-barred nor *res judicata*. Counsel argued that the appellant never challenged the said ruling by way of appeal. Counsel added that the issue of the suit being *res-judicata*, raised in the grounds of appeal, ought to fail.
16. On grounds 2 and 3, counsel submitted that no evidence was adduced to prove the allegation by the appellant that sale of the suit land by the respondent in 1970 was sanctioned by a magistrate. Counsel added that the respondent presented evidence in form of a death certificate showing that at the time of his death in 1993, Godfrey Njogu Gichuhi was 45 years old. Counsel argued that Godfrey Njogu Gichuhi was therefore born in 1948, meaning that he was 22 years old in 1970 and not a minor as alleged by the appellant. Counsel further argued that the provisions of the Law of Trust were not applicable to the dispute. Counsel urged the Court to disregard the appellant’s arguments and dismiss the appeal.

Analysis and Determination

17. The court has read and considered the original record of the trial court alongside the record filed in his appeal; the grounds of appeal; and the parties’ respective submissions in the appeal. The court has also considered the legal frameworks and the jurisprudence relevant to the key issues that fall for determination in the appeal. The three key issues that fall for determination in the appeal are:
 - (i) Whether the respondent’s claim was *res-judicata*;
 - (ii) Whether the respondent’s claim was time-barred/statute barred;
 - (iii) Who is the legitimate owner of land parcel number Muguga/Kahuho/T.37. Before I dispose the issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction.
18. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



19. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

20. The court has read the pleadings that formed the basis of the trial in the lower court. The court has also gone through the evidence that was tendered before the trial court. It does emerge from the pleadings and from the evidence that was tendered before the trial court that the suit giving rise to this appeal was preceded by Nairobi High Court Civil Case No 2006 of 1974; *Karanja Mathaga vs Raini Gichuhi* in which the issue of ownership of land parcel number Muguga Kahuho/ T. 37 [the suit land] was the key subject of adjudication. It was contended in the trial court that the High Court referred the dispute to the panel of elders and there was an award and ultimately a decree in favour of Karanja Mathaga against Raini Gichuhi. It was further contended that Raini Gichuhi is the same person as Godfrey Njogu Gichuhi on whose behalf the respondent initiated the suit that gave rise to this appeal. Further, it does emerge that Karanja Mathaga is the same person as John Karanja Mathaga who is the deceased father of the appellant.

21. In spite of the above information, the trial court was invited to make a pronouncement and proceeded to pronounce itself on the question of ownership of the suit land without joining the estate of the late Karanja Mathaga as a distinct party to the case. In my view, taking into account the pleadings and the materials that were before the trial court, the issue of ownership of the suit land could not be effectually and conclusively adjudicated and settled without joining the estate of the late Karanja Mathaga [also known as John Karanja Mathaga] as a party to the suit.

22. The appellant was sued in the lower court as a trespasser. He was not sued on behalf of the estate of the late Karanja Mathaga. This means that up to the point of rendering the impugned Judgment, the estate of the late Karanja Mathaga had not been joined, yet it was alleged that the late Karanja Mathaga and his estate had been in possession of the suit land since 1970 and had a decree in their favour. That is not all.

23. A perusal of the official search extracted from the land register and exhibited before the trial court reveals that there subsists a restriction registered against the title on 17/5/1989 pursuant to an order issued in Civil Case No 1202 of 1985. There also subsists a charge [encumbrance] registered on 31/1/1984 in favour of Kenya Floor Mills (1975) Limited to secure a loan of Kshs 20,000. Clearly, the parties who occasioned registration of the above restriction and encumbrance were necessary parties to the dispute that revolved around the question of ownership of the suit land.

24. For the above reasons, this court takes the view that there was need for joinder of all the relevant parties under Order 1 rule 10(2) of the Civil Procedure Rules. Consequently, this appeal will be allowed without the court making merit pronouncements on the above three key issues. Merit pronouncements may prejudice the parties. An order for joinder of the estate is hereby made. Once the pleadings are amended and served, the estate will be expected to participate in fresh trial and place before the trial court all relevant materials, including the alleged preceding Decree/Judgment. Suffice it to state that the trial court has a legal duty to interrogate the question of the alleged Decree/Judgment and satisfy itself that the proceedings and judgment of the trial court do not place the parties in a situation where there will be two contradictory Decrees/Judgments on the same issue and on the same subject matter.



25. This unfortunate eventuality would have been avoided if the concerned parties and their advocates cared to address the question of the absence of the alleged decree-holder.
26. On costs, the need for joinder escaped the attention of the trial court. For this reason, parties will bear their respective costs.
27. In the end, this appeal succeeds in the following terms:
 - a. The Judgment of the trial court in Kikuyu SPMC Civil Case No 143 o 2015 be and is hereby set aside in its entirety.
 - b. The plaint in the said suit shall be amended to join the personal representative of the estate of the late John Karanja Mathaga [also known as Karanja Mathaga], as a defendant in the suit.
 - c. The party who occasioned the restriction registered on 17/5/1989 shall be joined as a defendant in the suit.
 - d. The chargee in respect of the charge registered on 31/1/1984 shall be joined as an interested party.
 - e. Fresh trial shall be conducted before a different magistrate.
 - f. Parties shall bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF AUGUST 2024

B M EBOSO

JUDGE

In the Presence of: -

Mrs Kihika for the Appellant

Court Assistant: Elvis Hinga

