



**Gikera v Solomon (Environment and Land Appeal E044 of 2023)
[2024] KEELC 6316 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E044 OF 2023
BM EBOSO, J
SEPTEMBER 20, 2024**

BETWEEN

AHMED CHEGE GIKERA APPELLANT

AND

LUCY WANJIRU SOLOMON RESPONDENT

(Being an Appeal against the Judgment of Hon M W Kurumbu, Principal Magistrate, delivered on 20/4/2023 in Thika Chief Magistrate Court MCL & E Case No 18 of 2014)

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered on 20/4/2023 by Hon M W Kurumbu (Mrs) PM in Thika CMC E & L Case No. 18 of 2014. The key issue that fell for determination in the case was the question of ownership of land parcel number Ruiru/Kiu Block 2/4793 [referred to in this Judgment as “the suit property” or “the suit land”]. Lucy Wanjiru Solomon, the respondent in this appeal, was the plaintiff in the trial court. Ahmed Chege Gikera, the appellant in this appeal, was the defendant in the trial court. The trial court made a finding to the effect that the suit property belonged to the respondent and decreed the appellant to remove all his structures from the suit land within 90 days. In default, he was to be evicted from the land. Aggrieved by the Judgment, the appellant brought this appeal. The same question of ownership of the suit land is the key issue that this court, as a first appellate court, is required to determine. Before I analyse and dispose the issue, I will outline the following: (i) a brief background to the appeal; and (ii) parties’ respective submissions on the appeal.

Background

2. The suit in the trial court was initiated by the respondent through a plaint dated 14/4/2014. She sought the following reliefs against the appellant: (i) a declaration that the suit land belonged to her;



- (ii) a permanent injunction restraining the appellant against occupying or erecting structures on the suit land or interfering with the suit land in any manner; (iii) an eviction order; (iv) a declaration that the appellant and those claiming title through him were trespassers on the suit land; (v) damages for trespass; and (vi) costs of the suit.
3. The respondent's case was that she was the registered proprietor of the suit property, having inherited it from her deceased mother, one Elizabeth Mingina Njoroge alias Anna E.N.M Njoroge [hereinafter referred to as her "the deceased"]. The respondent contended that the deceased was a shareholder in Githunguri Constituency Ranching Company Ltd [hereinafter referred to as "the company"] before her death on 9/7/1992, adding that the estate of the deceased was allocated the suit property by the company. The respondent added that she and her siblings went through the process of succession after the death of their mother and a confirmed grant was issued to them on 7/4/1994. It was the respondent's case that her deceased mother's assets were shared amongst the beneficiaries of the estate and it was decided that the suit property be registered in her name. Consequently, upon deliberations by the board of directors, the company issued her with Ballot No. N-131 which initially belonged to one John Gichuki Thairu but had been surrendered to the company in exchange for Plot No. G.145. The respondent contended that she paid the requisite clearance fees of Kshs 4,500 on 19/1/2002. She was subsequently issued with a title deed on 26/11/2004. She later noticed the title deed contained errors which were amended and she was issued with a new title deed on 17/5/2012.
 4. The respondent contended that she was in quiet possession of the suit property until 2013 when the appellant trespassed onto the land and began constructing on it. She reported the trespass to the Area Chief who summoned the appellant and wrote to the company. The company confirmed to the Chief that the suit property belonged to the respondent. However, the appellant continued with construction on the suit property, prompting her to file Kiambu Chief Magistrate Civil Case Number 4 of 2014 against the appellant. The respondent opted to withdraw the suit from the Kiambu Chief Magistrate Court after the appellant raised the issue of geographical jurisdiction. The respondent thereafter filed a fresh suit at the Thika Chief Magistrate Court, to wit, Thika Chief Magistrate Court E & L Case No 18 of 2014 which culminated in the present appeal.
 5. The appellant entered appearance and subsequently filed a defence dated 19/5/2014 in the suit. He denied the respondent's contention that she was the owner of the suit land, adding that the suit land was never one of the assets of the deceased. He urged the court to dismiss the respondent's suit. He did not, however, bring any counterclaim to impeach the title held by the respondent.
 6. Upon conclusion of trial, and upon receipt of submissions, the trial court rendered the impugned Judgment in which it found that the respondent had proved her case against the appellant on the balance of probabilities. The trial court granted the respondent the reliefs sought in the plaint, including costs of the suit. The trial court assessed and awarded the respondent general damages for trespass in the sum of Kshs 100,000.

Appeal

7. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following five (5) verbatim grounds:
 1. The learned magistrate herein having not conducted the dispute between the appellant and the respondent herein completely misunderstood the dispute hence arrived at an erroneous judgment. [sic]
 2. That the learned magistrate failed to appreciate that both parties herein claimed to have bought the suit property from a one Samuel Chuchu, but that the said Samuel Chuchu appeared



before the honourable court and confirmed that he sold the suit property to the appellant herein.

3. That the learned magistrate failed to understand that the suit property was never subject to succession proceedings and that the land that was subject to succession proceedings was different from the land the Samuel Chuchu sold to the appellant herein [sic].
 4. That the learned magistrate herein failed to appreciate that Githunguri Constituency Ranching Company Limited allocated to the respondent herein property that belonged to Samuel Chuchu which property the said Chuchu had already sold to the appellant herein.
 5. That the learned magistrate failed in law and fact when she relied on irrelevant documents of ownership from the respondent, in particular the learned magistrate failed in law and fact in not finding that parties in the succession dispute including a one Hon. Cecilia Githua, sister of the respondent herein were never called as witnesses to confirm the issues of the land dispute.
8. The appellant prayed for the following reliefs from this court: (i) an order allowing the appeal; (ii) an order overturning the Judgment of the trial court; (iii) a declaration that the appellant is the bonafide registered owner of the suit land; (iv) an order dismissing the respondent's suit in the trial court; (v) an order condemning the respondent to bear costs of the appeal.

Appellant's Submissions

9. The appeal was canvassed through written submissions dated 13/10/2023, filed by M/s Prof. Kiama Wangai & Company Advocates. Counsel for the appellant contended that the respondent was never the owner of the suit property. Counsel further contended that the suit property was never part of the estate of the respondent's deceased mother. Counsel submitted that the respondent's witness, one John Maina Mburu, testified that John Gichuki Thairu bought the suit property from Samuel Chuchu Njoroge on 8/11/2002 and that he was later compensated with Plot No. G145 upon surrendering it to the company for it to be allocated to the respondent's deceased mother. Counsel further submitted that Samuel Chuchu Njoroge testified as the appellant's witness and stated that he sold his land to the appellant. Counsel argued that on the basis of the aforementioned testimony, the respondent's claim ought to have failed. Counsel added that the respondent together with her witnesses were not truthful.
10. Counsel faulted the extracts of the register of the company tendered by the respondent as evidence during trial. Counsel contended that the extracts of the register did not indicate that the respondent's deceased mother owned Plots No. N131, 132 and/or 133. Counsel further contended that the respondent's deceased mother's name did not appear in the extracts of the register tendered. Counsel faulted the respondent for not calling John Gichuki Thairu as a witness, adding that the evidence of Samuel Chuchu Njoroge remained unchallenged.
11. Counsel for the appellant referred to affidavits dated 23/1/2014 and 27/2/2014 filed by the respondent in Kiambu Chief Magistrate Court Civil Suit No. 4 of 2014 where the respondent averred that she bought the suit property from the company. Counsel argued that the respondent lied, adding that she initially stated that she bought the suit property but later contended that she inherited the suit property from her deceased mother.
12. Counsel for the appellant submitted that it was not in dispute that the suit property initially belonged to Samuel Chuchu Njoroge. Counsel added that the fact in dispute was the question as to whom Samuel Chuchu Njoroge transferred the suit property. Counsel added that the respondent's case was that the suit property was transferred to John Gichuki Thairu while the appellant's case was that the suit property was transferred to him. Counsel argued that Samuel Chuchu Njoroge confirmed through



his testimony during trial that he sold the suit property to the appellant. Counsel further argued that none of the documents tendered by the company contained the name of the respondent's deceased mother, adding that the respondent did not lead evidence to demonstrate that her deceased mother ever owned land in the scheme. Counsel added that the basis of the claim by the respondent was fraudulent.

13. In conclusion, counsel submitted that having demonstrated that the respondent's deceased mother did not own land from the company, it followed that the title deed the respondent possessed was obtained through fraud. Counsel further submitted that the appellant clearly demonstrated that he bought the suit property from Samuel Chuchu Njoroge who was recognized as the initial owner of the suit land. Counsel faulted the trial court for failing to interrogate the roots of the title that the respondent claimed to have. Counsel urged the Court to grant the appellant the orders sought in the appeal.

Respondent's Submissions

14. The respondent opposed the appeal through written submissions dated 20/11/2023, filed by C W Ngala & Company Advocates. On the appellant's contention that the trial magistrate completely misunderstood the dispute and arrived at an erroneous Judgment, counsel for the respondent submitted that there was no law that barred a competent magistrate with jurisdiction against writing a judgment in a matter where he or she did not conduct the trial, adding that the learned magistrate got seized of the case because the previous magistrate was transferred. Counsel further submitted that the appellant, through his notice of motion application dated 21/8/2019, objected to the judgment being written by the previous magistrate (Hon. C. A Omondi (SPM)). Counsel submitted that the appellant's claim that Hon. M. W Kurumbu (PM), who wrote the impugned Judgment, misunderstood the dispute was baseless, adding that all the trial records, including typed proceedings, were available.
15. On the contention that the learned magistrate failed to appreciate that both parties claimed to have bought the suit land from Samuel Chuchu Njoroge, counsel submitted that the respondent never stated that she bought the suit property from Samuel Chuchu Njoroge. Counsel further submitted that the appellant completely misunderstood the respondent's evidence. Counsel added that the respondent stated that she acquired the suit property from the company as a result of the shares her deceased mother held, which entitled the deceased to 1 ¼ acres plus 1/8 acre plot. Counsel contended that the lower court clearly understood the respondent's case and summarized it in its Judgment, adding that the respondent led evidence on how she acquired the suit land. Counsel further submitted that the respondent's evidence was supported by PW3, John Maina Mburu, the chairman of the company that owned the subdivision scheme, who explained that Samuel Chuchu Njoroge sold the suit property to John Gichuki Thairu who later surrendered it to the company and the company subsequently re-allocated the land to the beneficiary of the estate of the late Elizabeth Mingina Njoroge. Counsel submitted that Samuel Chuchu Njoroge had no capacity to resell Plot No. N131 on 10/03/2003 because he had already sold it to John Thairu Gichuki on 8/10/2002 in the presence of an advocate. Counsel further submitted that the subsequent sale vide the sale agreement dated 10/03/2003 was fraudulent, adding that the agreement was not witnessed by an advocate nor dated.
16. On the contention that the learned magistrate failed to appreciate that the suit property was never the subject of succession proceedings, counsel submitted that what was before the High Court in the Succession proceedings were the shares held in the company by the respondent's deceased mother, which entitled her to 1 ¼ acres plus 1/8 acre plot. Counsel added that the records produced in court by PW3, John Maina Mburu [the chairman of the company], clearly showed that it was the deceased's shares and Ballot No. N-131 which translated to Ruiru/Kiu Block 2/4793. Counsel faulted the appellant for relying on the affidavit sworn by the respondent in Kiambu Chief Magistrate Civil



Case Number 4 of 2014. Counsel argued that the appellant objected to the said suit on the ground of geographical jurisdiction, adding that as a result, the respondent withdrew the suit and filed a fresh suit at the Thika Chief Magistrate Court. Counsel argued that the idea of plucking affidavits made in different proceedings was an abuse of the process of court. Counsel added that the issues in the lower court were framed based on the pleadings before it.

17. On the contention that the learned magistrate failed to appreciate that the company allocated to the respondent property that belonged to Samuel Chuchu Njoroge and which Samuel Chuchu Njoroge had sold to the appellant, counsel submitted that Samuel Chuchu Njoroge could not have legitimately sold the suit property to the appellant in 2003 given that Samuel Chuchu Njoroge had already sold the suit property to John Thairu Gichuki in 2002. Counsel further submitted that PW3, John Maina Mburu, the chairman of the company produced the relevant register during trial and conclusively testified on the origin of Ballot No. N131.
18. On the allegation that the learned magistrate relied on irrelevant documents of ownership from the respondent, counsel submitted that the allegation had no legal basis and was pegged on malice. Counsel further submitted that the respondent was a title holder prior to the invasion of the suit property by the appellant. Counsel added that there was no dispute between the respondent's siblings over the distribution of their deceased mother's estate to warrant their appearance in court to testify. Counsel argued that nothing prevented the appellant from taking out witness summons to summon any party to testify. Counsel further argued that the evidence led by the respondent in the lower court was satisfactory.
19. Counsel added that the appellant neither challenged the respondent's title which he was aware of since 2004 nor filed a counterclaim against the respondent. In conclusion, counsel urged the Court to uphold the decision of the lower court and award the costs of the appeal to the respondent.

Analysis and Determination

20. I have read and considered the original record of the trial court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The key issue to be determined in this appeal is the question as to who is the legitimate owner of land parcel number Ruiru/Kiu Block 2/4793. Before I analyse and dispose the issue, I will outline the principle that guides this court when exercising appellate jurisdiction.
21. This is a first appeal. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar 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.”

22. 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.”



23. Who is the legitimate owner of land parcel number Ruiru/Kiu Block 2/4793? There was common ground that the suit land is located in a subdivision scheme that belongs to Githunguri Constituency Ranching Company Ltd [referred to in this Judgment as “the company”]. The company subdivided the block of land and was responsible for conveying the subdivisions to its eligible shareholders.
24. The respondent went to the trial court waving a registered title conveyed to her by the company. The title was issued to her on 26/11/2004 and re-issued on 17/5/2012. The re-issuance was effected to correct a typographical error relating to her ID card number. She led evidence that her mother who died in 1992 was an eligible shareholder of the company. She inherited the portion of her mother’s shares that translated to the suit land while her other siblings inherited the portions that translated to other lands that her deceased mother was entitled to within the scheme. It was her evidence that subsequent to the death of her mother, they carried out succession and she was given the suit land. Together with her sister, they subsequently approached the company for their deceased mother’s land. They were asked to pay the requisite sums which she paid. With the consent of her sister, the company cleared her and caused a title to be processed, registered and issued to her in 2004. She was in quiet possession of the suit land until 2013 when the appellant emerged and placed building stones on the land. This prompted her to challenge the appellant’s actions through court proceedings.
25. The respondent led evidence from, among other witnesses, the Chairman of Githunguri Constituency Ranching Company Ltd, Mr. John Maina Mburu, who testified as PW3. His evidence was that the company allocated the suit land to the respondent who was the entitled beneficiary of the estate of the late Elizabeth Mingina Njoroge. He also confirmed that the company cleared the respondent and facilitated the processing of the title held by the respondent. It was the evidence of the Chairman that the records held by the company showed that the suit land had initially been assigned to one Samuel Chuchu Njoroge who subsequently sold his corresponding shares to John Gichuki Thairu. When the company realized there was duplication of the corresponding ballot, it allocated John Gichuki Thairu a different parcel of land and retained the respondent as the proprietor of the land. It proceeded to clear the respondent and facilitated the processing of the respondent’s title.
26. The Chairman (PW 3) tendered as evidence, an affidavit sworn by Samuel Chuchu Njoroge on 21/10/2015, in which the deponent confirmed on oath that he had sold his interest to John Gichuki Thairu. For the avoidance of doubt, the affidavit by Samuel Chuchu Njoroge reads as follows:-

“I Samuel Chuchu Njoroge do hereby make oath and states as follows:-

1. That I am a male adult of sound mind hence capable and competent to swear this affidavit.
2. That I am a Kenyan citizen and the legal holder of Identity Card Number xxxxx.
3. That on or about 8th October 2002 I sold plot No.Ruiru/kiu Block 2/4793 contained in share certificate No. 8184 and held by ballot No N131 in the undertaking company commonly known as Githunguri Constituency Ranching Company Ltd to John Githuki Thairu ID No xxxxx.
4. That I surrendered the original share certificate, Ballot and all other documents to the said John Githuki Thairu hence I surrendered all interest over the said plot to him.
5. That I swear this affidavit to affirm that I sold the said plot to John Githuki Thairu.
6. That I am ready to indemnify Githunguri Constituency Ranching Company Ltd and the Government of Kenya if the same is found to be false or for any loss arising there from.



7. That I swear this affidavit in accordance with the oath and statutory declaration believing the same is true to the best of my knowledge, information and belief.”
27. The above affidavit was produced as Plaintiff Exhibit No. 24. At the time Samuel Chuchu Njoroge testified as DW2, the above affidavit had been tendered by PW3. Samuel Chuchu Njoroge elected to say nothing by way of evidence on the above affidavit. Consequently, the depositions in the above affidavit tendered by the Chairman of the company remained uncontroverted.
28. What case and evidence did the appellant present to the trial court? First, the appellant presented a defence dated 19/5/2014 in which he denied the respondent’s contention that she was the registered owner of the suit land. He urged the trial court to dismiss the respondent’s suit. He stopped at that. He did not bother to impeach the respondent’s title through a counterclaim. Secondly, despite being made aware that the suit land had been allotted to the beneficiary of the estate of Elizabeth Mingina Njoroge by the company that owned the subdivision scheme, he did not bother to join the company as a party to the cause through a counterclaim. Consequently, at the point the dispute fell for determination, the respondent’s registered title had not been impeached by the appellant through a counterclaim. Clearly, without a counterclaim and without proof of the counterclaim, the trial court was bound by the framework in Section 26 of the [Land Registration Act](#) which provides as follows:-
- “26. Certificate of title to be held as conclusive evidence of proprietorship
1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.”
29. In his evidence, the appellant alleged that he purchased the suit land from Samuel Chuchu Njoroge on 10/3/2003. Asked about the exact date when he learnt that the respondent had been issued with a title relating to the suit land, the appellant stated thus:
- “I learnt that the plaintiff had been issued a title /2005/2004 on 2004/2005. I have never filed a case against the plaintiff challenging her title.”
30. The evidence in the preceding paragraph was given by the appellant during cross-examination on 28/1/2019. It is clear from the evidence that despite the appellant knowing that the land-allocating company had cleared the respondent and caused a title relating to the suit land to be issued to the respondent, he elected to do nothing in terms of challenging the respondent’s title. Under Section 7



of the *Limitation of Actions Act*, any cause of action which the appellant had against the respondent's title stood statute-barred upon expiry of 12 years reckoned from 2004/2005.

31. That is not all. Whereas Samuel Chuchu Njoroge testified as DW2, he elected to say nothing about the affidavit dated 21/10/2015 [Plaintiff Exhibit No 24] that was attributed to him, in which he unequivocally confirmed to the company that owned the subdivision scheme that he had sold his shares together with the corresponding land [the suit land] to John Gichuki Thairu. He also elected to say nothing about the sale agreement [Exhibit No. 21] attributed to him, dated 8/10/2002 through which he sold the suit land to John Gichuki Thairu. The Chairman of the company tendered the agreement as proof of Samuel Chuchu Njoroge's disposal of his shares together with the corresponding land [the suit land] to John Gichuki Thairu.
32. From the above evidence, it is clear that the appellant did not impeach the respondent's title by way of pleadings and evidence. It is also clear that the respondent proved the legitimacy of her title on the balance of probabilities.
33. The appellant placed reliance on the use of the word "bought" instead of "inherited" in a preceding affidavit in a suit that was withdrawn by the respondent. A perusal of the original record of the trial court reveals that the respondent addressed this issue in her evidence and explained that there was an inadvertent error on the part of her advocate who drew the previous affidavit. She was categorical that she acquired the suit land through inheritance. Her evidence was corroborated by the Chairman of the land-buying company that owned the subdivision scheme.
34. On his part, the appellant deliberately misled the Court that he was the Chairman of the land-buying company at the time of testifying in 2019. He did not present any signed CR Form or court order to controvert the CR Form and the Court Order that John Mburu Maina [PW 3] had tendered as evidence.
35. Lastly, in his memorandum of appeal, the appellant prayed for a declaration that he is the bonafide registered owner of the parcel of land known as Ruiru/Kiu Block 2/4793. There was no such plea before the trial court. Having failed to plead a counterclaim, it is too late in the day to ask for a relief of this nature from an appellate court.
36. For the above reasons, this court finds that the respondent, Lucy Wanjiru Solomon, properly proved that she was the legitimate registered proprietor of land parcel number Ruiru/Kiu Block 2/4793. Consequently, this court has no proper basis to fault the lower court. The result is that this appeal is dismissed for lack of merit.
37. No proper basis has been laid to warrant a departure from the general rule in Section 27 of the *Civil Procedure Act*. It therefore follows that the appellant will bear costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 20TH DAY OF SEPTEMBER 2024

B M EBOSO

JUDGE

In the Presence of:

Ms C W Ngala for the respondent

Court Assistant: Hinga

