



REPUBLIC OF KENYA



KENYA LAW
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**Kinyamu v Kinyamu & 3 others (Environment and Land Appeal
E004 of 2023) [2024] KEELC 7127 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7127 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E004 OF 2023**

CK YANO, J

OCTOBER 30, 2024

BETWEEN

MORRIS MBABU KINYAMU APPELLANT

AND

JUSTUS NJAGI KINYAMU 1ST RESPONDENT

WALLECE KABURU KINYAMU 2ND RESPONDENT

MBAYA KINYAMU 3RD RESPONDENT

DANIEL NTEERE GITONGA 4TH RESPONDENT

(Appeal from the Ruling of the Chief Magistrate's Court at Chuka (Hon. H. I. Mwendwa, SRM) delivered on 28th September, 2023 in Chuka CMC ELC Case No. 230 of 2015)

JUDGMENT

Introduction

1. The Appellant herein filed a Notice of Motion application dated 24th November, 2022 in the lower court seeking inter alia, the following orders:
 1. Spent
 2. That this Honourable Court be pleased to grant leave for the Law firm of M/S Waklaw Advocates to come on record for the Applicant/Plaintiff and to act alongside the Law firm of M/S Njeru Ithiga & Co. Advocates.
 3. Spent
 4. That pending the hearing and final determination of the instant application and/or until further orders from this Honourable Court, this Honourable Court be pleased to issue



inhibition orders inhibiting all dealings on LR. Mwimbi/Chogoria/7736, 7737, 7738, 7739, 7740 and 7741 (fraudulent subdivision schemes of the original LR. Mwimbi/Chogoria/935).

5. That this Honourable Court be pleased to nullify the subdivision schemes LR. Mwimbi/Chogoria/7736, 7737, 7738, 7739, 7740 and 7741 and which survey process thereof was conducted on the original LR. Mwimbi/Chogoria/935 and in total contravention to this Honourable Court's Judgment delivered on 29/7/2021.
 6. That the District Land Registrar Meru South and Surveyor be directed to cancel the subdivision schemes LR. Mwimbi/Chogoria/7736, 7737, 7738, 7739, 7740 and 7741 and restore the original status of LR. Mwimbi/Chogoria/935 as at 4/6/1998.
 7. That this Honourable court be pleased to empower the Executive Officer to sign and/or execute all the necessary documents to effectuate the implementation of this Honourable Court Judgment delivered on 29/7/2021.
 8. That the District Surveyor Meru South be directed to partition the suit land LR. Mwimbi/Chogoria/935 as per Judgment delivered on 29/7/2021.
 9. That the costs of this application be provided for.
2. The application was based on the grounds therein and supported by the affidavit of the appellant sworn on 24th November, 2022.
 3. The respondents opposed the application through a Replying Affidavit dated 13/6/2023 deposed by Justus Njagi.
 4. After considering the application, the learned trial magistrate dismissed the same with costs to the respondents.
 5. The Appellant was aggrieved by that ruling and filed this appeal on the following grounds:
 1. That the learned Principal Magistrate Mr. H. I. Mwendwa grossly erred both in law and in fact in admitting the 1st respondent's Replying Affidavit dated 13th June, 2023 in the Lower Court and which was filed out of time and without the Leave of the Court.
 2. That the learned Principal Magistrate grossly erred both in law and in fact in holding that the 1st Respondent implemented the Court Judgment delivered on 29/7/2021 as per the spirit of the said judgment and when the Mutation and partition documents in respect of LR. Mwimbi/Chogoria/935 clearly attested that the Appellant's signature appended thereon was forged, and further the resultant subdivision schemes to wit LR. Mwimbi/Chogoria/7736, 7737, 7738, 7739, 7740 and 7741 had varying acreages that did not conform with the letter and spirit of the judgment delivered on 29/7/2021.
 3. That the learned Principal Magistrate grossly erred in law and in fact in holding that the 1st Respondent on application dated 24/11/2022 in the lower court was entitled to a lion's share on LR. Mwimbi/Chogoria/935 and when the judgment dated 29/7/2021 in the Lower Court was clear and raised no ambiguities that all the beneficiaries on LR. Mwimbi/Chogoria/935 was each entitled to 0.90 acers or thereabout on the Suit Land LR. Mwimbi/Chogoria/935.
 4. That the learned Principal Magistrate grossly erred both in law and in fact in holding that the 4th Respondent on the application dated 24/11/2022 in the Lower Court one Daniel Nteere Gitonga and who was not registered on the Original LR. Mwimbi/Chogoria/935 and



further not a party to the Judgment delivered in the Lower Court on 29/7/2021 was entitled to ownership of the deceased 4th Defendant's share on LR. Mwimbi/Chogoria/935.

5. That the learned Principal Magistrate grossly erred both in law and in the fact in failing to appreciate that by not allowing the Appellant's application dated 24/11/2022 in the Lower Court, was tantamount to condoning the 1st Respondent's illegalities and/or fraud in the subdivisions and/or partition of LR. Mwimbi/Chogoria/935.
6. That the Ruling of the learned Principal Magistrate Mr. H. I. Mwendwa dated 28/9/2023 was against the weight of the evidence adduced via the Affidavits and Submissions filed and ought to be vacated for the interest of justice.
6. The appellant prayed for the appeal to be allowed and the ruling of the trial court be vacated and substituted with an order allowing the application dated 24/11/2022 as filed.
7. The appeal was canvassed by way of written submissions. The appellant filed his submissions dated 29th July 2024 through the firm of Waklaw Advocates while the Respondents filed theirs dated 9th September 2024 through the firm of B. Musili Advocates.

Appellant's Submissions

8. The appellant gave a brief introduction and summary of the case. While arguing ground 1, the appellant submitted that the 1st Respondent on his own behalf and on behalf of his co-respondents filed response to the appellant's application dated 24/11/2022 out of time and without leave of the court. That as at 9th June, 2023, the said response had not been filed, but filed it on 14th June, 2023 which was out of time and without the necessary leave of the trial court.
9. While arguing grounds 2, 3 and 4 of the appeal, it is the appellant's submission that the mutation document executed in respect of LR. Mwimbi/Chogoria/935 and which gave rise to LR. Mwimbi/Chogoria/7736, 7737, 7738, 7739, 7740 and 7741 clearly demonstrates that the survey process and subdivision was not conducted as per the letter and spirit of the judgment delivered on 29/7/2021 which had decreed that the suit land be subdivided equally. It is the appellant's contention that the judgment delivered on 29/7/2021 did not confer any beneficiary on the original land LR. Mwimbi/Chogoria/935 any superior share after the subdivision of the said land. The appellant submitted that the holding by the learned trial magistrate that the 1st respondent was entitled to a superior share after subdivision was erroneous and not backed by any law.
10. In addition, the appellant submitted that the 4th respondent in the application dated 22/11/2022 (Daniel Nteere Gitonga) was not a beneficiary in the lower court judgment delivered on 29/7/2021 and faulted the trial court for holding that the said person was entitled to a share. The appellant further submitted that the said Danaiel Nteere Gitonga was not a party to the suit in the lower court and had no letters of administration to administer the 4th respondent's share on the original land. The appellant submitted that the 4th respondent was not entitled to ownership of the deceased 4th defendant's share on the original land and more so, without the necessary letters of administration in respect of the 4th defendant's share.
11. With regard to grounds 5 and 6 of the appeal, the appellant submitted that the learned trial magistrate erred in law and fact in not allowing the appellant's application dated 24/11/2022 which the appellant argued was not opposed by the respondents at the close of pleadings. The appellant submitted that the response that was filed out of time and without leave of the court ought to have been expunged from the court record, and faulted the trial court for admitting it.



12. The appellant urged the court to find that the appeal is meritorious and allow it with costs.

Respondents' Submissions

13. The respondents also gave brief background of the case and submitted that the trial court rightly decreed that LR. Mwimbi/Chogoria/935 be partitioned equally with each beneficiary being registered with a portion of land measuring 0.90 acres or thereabout and that they were to take into account where each person was currently occupying. That as per the order of court, they facilitated and executed all necessary documents to effect the transfer of one portion measuring 0.90 acres or thereabout to the appellant herein who is their brother. That the appellant has been in occupation and making use of his share. The respondents added that the appellant had entered into a sale of land agreement dated 4th July, 2013 in which he had disposed of his share to one Amos Mugendi Ngaruni.
14. The respondents denied participating in any fraudulent registration of mutations in respect to the original land, and stated that they only implemented the decree of court contrary to the assertions by the appellant. The respondents submitted that the appellant never proved the alleged fraud in the trial court. The respondents cited Section 109 of the *Evidence Act*, Cap 90, Laws of Kenya and relied on the case of Christopher Ndaru Kagina Vs. Esther Mbandi Kagina & Another [2016]eKLR, Davy Vs. Garrett [1878] 7 Ch. D. 473 at 489 and Insurance Company of East Africa Vs. Attorney General & 3 Others HCCC No. 135/1998.
15. The respondents submitted that as a family including the appellant, they consented to sell part of the original suit land that belonged to their brother, Micheni Kinyamu (deceased) to settle his hospital bill. They contended that the 4th respondent is an innocent purchaser of land from a third party by the name Kellen Kainyu Munene who they sold the land that belonged to their deceased brother on 16th August, 2007. That the 4th respondent has been in lawful possession and use of the said portion for many years. The respondents pointed out that the larger portion alluded to by the appellant belongs to the 2nd respondent and that the 1st respondent only holds it in trust for him.
16. The respondents argued that the one-day delay in filing their response which was mainly due to negotiations that were ongoing with a view to settle the matter harmoniously as a family was not deliberate. The respondents relied on the Supreme Court of Kenya decision in Fanikiwa Limited Vs. Sirikwa Squatters Group & 20 Others (E038) of 2022 (consolidated) [2023] KESC58 (KLR) which dealt with the issue of filing documents out of time. The respondents contended that the replying affidavit did not in any way prejudice the appellant and neither was it fatal to him and that could explain why the appellant never raised any concerns until he lost the application. The respondents submitted that that omission on their part can be cured through Article 159(d) of *the Constitution*. They also relied on Raila Odinga Vs. The Independent Electoral and Boundaries Commission & 3 Others [2013] eKLR. The respondents argued that they had the right to be heard in the trial court and that the court acted in respect to that right. The respondents relied on the case of Blue Nile E.A Ltd Vs. Lydia Gode Yusuf & Another (citation not given).
17. It is the respondents' submission that the appellant's appeal is an afterthought and a clear abuse of the court process and should be dismissed with costs. The respondents urged the court to find that the learned trial magistrate properly evaluated and analyzed the evidence and materials placed before him and arrived at a considered decision.

Analysis and Determination

18. I have considered the appeal, submissions by counsel and the authorities relied on. This being a first appeal, the court's duty and obligation is to evaluate, re-assess and re-analyze the evidence on record to



determine whether the conclusions reached by the learned trial magistrate were justified on the basis of the evidence presented and the law. This principle is expounded in Section 78 of the *Civil Procedure Act* and has been settled by many decisions of the Court of Appeal.

19. This appeal is against the ruling of the lower court delivered on 28th September, 2023 which dismissed the Appellant's Notice of Motion dated 24th November, 2022. From the grounds in the Memorandum of Appeal filed by the appellant, the issues for determination in this appeal are:
 - i. Whether the trial court was justified in admitting the respondents' replying affidavit which was filed out of time and without leave of the court.
 - ii. Whether the survey and sub-division of the original suit land LR. Mwimbi/Chogoria/935 was in contravention of the lower court's judgment delivered on 29/7/2021.
 - iii. Whether the appeal is merited.
 - iv. Who ought to pay the costs of the appeal.
20. The appellant submitted that the respondents' response to the appellant's application dated 24th November, 2022 was filed out of time and without the necessary leave of the court. On their part, the respondents submitted that the one-day delay was not deliberate and that it was occasioned by attempts to settle the matter amicably so that the parties could live in harmony as a family. The respondents submitted that the impugned replying affidavit did not prejudice the appellant in any way. The respondents added that the appellant did not raise any concerns over that response at the trial court.
21. Article 48 of *the Constitution* of Kenya guarantees every person right to access to justice. In addition, under Article 50 (1) of *the Constitution*, every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The ultimate goal and purpose of the justice system is to hear and determine disputes fully and on merit. It follows that no person who has approached the court seeking an opportunity to ventilate their grievances should be locked out, unless for a good reason. Further, Article 159 (2) (d) of *the Constitution* is instructive that in exercising judicial authority, the courts or tribunal shall administer justice without undue regard to procedural technicalities. It is my considered opinion that the trial court was within its right to admit the respondents' replying affidavit out of time and to have the application determined on merit to ensure the ends of justice are met. Moreover, the appellant has not demonstrated the prejudice that was caused to him by the incorporation of the respondents' response in determining the application before the lower court.
22. The next issue is whether the implementation of the judgment of the trial court delivered on 29/7/2021 was as per the spirit of that judgment. The appellant argued that the suit land was not subdivided as per the letter and spirit of the said judgment.
23. I have perused the pleadings filed in the lower court. In the amended plaint dated 16th July, 2019, the appellant herein sought an order directing the respondents herein who were defendants in the lower court to execute all necessary documents to facilitate the partition or subdivision of LR. Mwimbi/Chogoria/935 into six equal portions of 0.9 acres or thereabout and thereafter transfer one portion measuring 0.9 acres or thereabout to the appellant. In the judgment delivered on 29th July, 2021, the trial court allowed the appellant's suit in its entirety. The trial court ordered and decreed that "the land be allocated equally at 0.9 acres each (1/6th share) as currently occupied by each party, with 1/6 to the deceased brother and titles be issued to each of them."



24. I have perused the material on record, including the documents that were produced as exhibits. The green card for LR. Mwimbi/Chogoria/935 was produced as P. Exhibit 1. The same showed all the parties herein as registered owners in equal shares. The letter of consent and the certificate of official search also indicate that the original land was shared equally. The respondents have shown that the appellant was given his share of 0.9 acres as ordered by the trial court, but he sold it to one Amos Mugendi Ngaruni. In his ruling, the learned trial magistrate held that the distribution of the land generally adhered to the spirit of the judgment of the court. I opine that the trial court was right in dismissing the appellant's Notice of Motion dated 24th November, 2022. In my view, and as rightly found by the trial court, the said application lacked merit since it mainly sought to nullify transactions that were made pursuant to the decree of the trial court and which had adhered to the spirit of the judgment of the court.
25. Although the appellant has alleged fraud in the sub-divisions and/or partition of LR. Mwimbi/Chogoria/935, I note that this was not an issue that was canvassed in the lower court and therefore I will decline the invitation by the appellant to deal with that issue at the appellate stage.
26. Considering the totality of the material in this case, and applying the legal principles outlined in law, I am satisfied that the learned Trial Magistrate was justified in arriving at the decision he made. The findings and holdings of the trial court were well founded and I find no reason to interfere with the same.
27. In the end, I find that this appeal has no merit. Consequently, the appellant's appeal is hereby dismissed.
28. Considering that the parties herein are very close relatives, I order that each party bear their own costs.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 30TH OCTOBER, 2024

In the presence of:

Court Assistant – Kiruja

Ms. Musili for Respondents

Kirimi for Appellant

C.K YANO,

JUDGE

