



REPUBLIC OF KENYA



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**Kimani v Mbae & another (Environment and Land Appeal E060 of 2023)
[2024] KEELC 7368 (KLR) (28 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 7368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E060 OF 2023
BM EBOSO, J
OCTOBER 28, 2024**

BETWEEN

PETER KIMANI APPELLANT

AND

MARY KINYA MBAE 1ST RESPONDENT

MWIHOKO HOUSING COMPANY LTD 2ND RESPONDENT

(Being an Appeal against the Judgment of Hon J A Agonda, Principal Magistrate, delivered on 2/11/2023 in Ruiru Principal Magistrate Court MCL & E Case No E035 of 2023)

JUDGMENT

Introduction

1. This appeal challenges the Judgment rendered by Hon J.A Agonda PM on 2/11/2023 in Ruiru SPMC E & L Case No E035 of 2023. Mary Kinya Mbae [the 1st respondent in this appeal] was the plaintiff in the trial court. Peter Kimani [the appellant in this appeal] was the 1st defendant in the trial court. Mwihoko Housing Company Ltd [the 2nd respondent in this appeal] was the 2nd defendant in the suit.
2. Some of the key issues that emerged from the pleadings and the evidence that was before the trial court were: (i) Whether “Plot No 346 KIU Block 4” which the 1st respondent claimed to own and “Plot No Ruiru/ Kiu block 4/908” which the appellant claimed to be owned by his spouse, Regina Wambui Kariuki, was one and the same piece of land on the ground [the suit land]. (ii) Whether title number Ruiru/Kiu Block 4/908 expressed as issued on 17/12/2021 related to the suit land on the ground; (iii) Who is the legitimate owner of the suit land?; (iv) Whether the appellant was a trespasser on the suit land; (v) Whether the above questions could be settled effectually and completely in the absence of Regina Wambui Kariuki as a substantive party to the suit; and (vi) Whether the trial court was properly



seized of the dispute in the absence of a prior boundary determination by the Land Registrar in terms of Sections 18 and 19 of the [Land Registration Act](#).

3. The trial court did not, however, pick out the above important issues. Invariably, these are the key issues that fall for determination in this appeal. Before I analyse and dispose the above issues, I will briefly outline a brief background to the appeal.

Background

4. The 1st respondent initiated the suit in the trial court through a plaint dated 2/3/2023. She sought: (i) a declaration that she was the legal and beneficial owner of “Plot No. 346 KIU Block 4, located at Mwihoko Housing Company,” having purchased the same from the 2nd respondent on 17/2/1986; (ii) a permanent injunction restraining the appellant from constructing on, erecting on, encroaching on, trespassing on, interfering with, damaging and/or dealing, in any manner whatsoever, with Plot No. 346 KIU Block 4, located at Mwihoko Housing Company; (iii) an order compelling the appellant to remove all illegal structures erected on Plot No. 346 KIU Block 4, and compelling all those parties claiming title under him to immediately vacate the property and hand over vacant possession of the land to the 1st respondent, failure to which the 1st respondent would be at liberty to forcefully evict them from the said property under the supervision of the Officer Commanding Station (OCS); (iv) such further order as the trial court would deem fit and just to grant; and (v) costs of the suit in the trial court.
5. The 1st respondent’s case was that she purchased Plot No. 346 KIU Block 4 [hereinafter referred to as “the suit land”] in 1986 from the 2nd respondent where she was a shareholder. She was issued with a share certificate and a plot certificate as evidence of her purchase of the land. The 1st respondent paid Kshs 30,000 on 19/11/2015 to the 2nd respondent, being payment for processing of title for the suit land. The 1st respondent contended that she was in quiet possession of the land until sometime in 2022 when her agent, one Onesmus Mugambi Kibera, visited the land and found illegal structures erected on the land by the appellant. Upon inquiry from the 2nd respondent on whether the land was fraudulently transferred to the appellant, the 2nd respondent issued a letter dated 28/2/2022 confirming that the land belonged to the 1st respondent as per their records. The 1st respondent contended that despite being served with the aforementioned letter, the appellant violently chased the 1st respondent’s agent, Onesmus Mugambi Kibera, from the land and continued to erect illegal structures thereon, prompting Onesmus Mugambi Kibera to file a complaint with the National Police Service. The complaint was referred to the Land Fraud and Investigations Unit and was still pending at the time of filing the suit at the lower court.
6. The appellant entered appearance and subsequently filed a defence dated 7/7/2023. The appellant’s case was that he resided on Ruiru/Kiu Block 4/908 which was owned by and registered in the name of his wife, Regina Wambui Kariuki. He added that the 1st respondent’s documents related to a different piece of land which he did not know. He emphasized that his wife’s land was Ruiru/Kiu Block 4/908.
7. During trial, the appellant contended that the suit property was allocated to his wife by the 2nd respondent after she had previously been allocated other plots which turned out to be registered in the names of third parties. He added that his wife was allocated the land after the 2nd respondent confirmed that the suit property was not registered in anyone else’s name. The appellant contended that the documents held by the 1st respondent related to a different plot.
8. Upon conducting trial and receiving submissions, the trial court found that the 1st respondent had proved her case on the balance of probabilities and granted her the reliefs sought in the plaint:



Appeal

9. Aggrieved by the Judgment of the trial court, the appellant brought this appeal, advancing the following 6 verbatim grounds:
 1. The learned magistrate erred in law and fact in making a conclusive determination without fairly considering the appellant's case.
 2. That the learned magistrate erred in law and fact in that he did not pay keen regard to the suit land in contention being different plots.
 3. That the learned magistrate erred in law and fact while determining the suit as one the parties in the suit lacked the locus standi in the suit as it was being determined.
 4. That the learned magistrate erred in law and fact in issuing orders adversely against a non-party.
 5. That the learned magistrate erred in law and fact in issuing orders not sought by the 1st respondent.
 6. That the learned magistrate erred in law and fact in granting costs to the 1st respondent.
10. The appellant urged this court to: (i) allow the appeal and set aside the Judgment of the trial court; (ii) dismiss the 1st respondent's suit and award the costs of the suit to the appellant; and (iii) award the appellant costs of this appeal.

Appellant's Submissions

11. The appeal was canvassed through written submissions dated 14/3/2024, filed by M/s Waweru Nyambura & Company Advocates. Counsel for the appellant submitted that the single issue that fell for determination in the appeal was whether the appeal had merit. Counsel for the appellant submitted that the lower court decided against the appellant without keenly considering the appellant's case, adding that the dispute between the parties related to two different properties. Counsel further submitted that the 1st respondent contended that her property was "Plot No. 346 KIU Block 4" whereas the property registered in the name of the appellant's wife was land parcel number "Ruiru/Kiu Block 4/908". Counsel added that the 1st respondent failed to demonstrate to the court any connection between her land and the parcel registered in the name of the appellant's wife. Counsel contended that the lower court failed to keenly look at the evidence of the appellant regarding the sketch ground plan for parcel number Ruiru/ Kiu Block 4/908 which showed the position of parcel number Ruiru/Kiu Block 4/908 with the neighbouring plots bearing numbers starting from 900 and did not show any parcel bearing number 346.
12. Counsel for the appellant faulted the lower court for issuing orders against the appellant in the absence of evidence, adding that the appellant had indicated from the onset that he lacked the locus standi to be included as a party to the suit because land parcel number Ruiru/Kiu Block 4/908 was not registered in his name but in the name of his wife. Counsel relied on the decision in the case of Apex Finance International Limited and another v Kenya Anti-Corruption Commission [2012] eKLR. Counsel added that condemning the appellant to pay costs went against the rules of natural justice, adding that as a person who was non-suited, the appellant should not have been ordered to pay costs of the suit.
13. Counsel contended that the lower court ought to have dismissed the suit against the appellant and directed the 1st respondent to sue the proper party. Counsel urged the Court to be guided by the decisions in the cases of Ephantus Mwangi v Duncan Mwangi Wambugu [1984] and Apex



International Ltd and Anglo Leasing and Finance International Finance Ltd v Kenya Anti-Corruption Commission [2012] eKLR.

14. Counsel submitted that the lower court ought not to have “amended” the pleadings of a litigant and issued orders against the wife of the appellant without her being made a party to the suit. Counsel further submitted that the failure by the 1st respondent to sue the appellant’s wife who was the registered owner of the suit property was malicious and was aimed at defeating justice. In conclusion, counsel urged the Court to allow the appeal and award costs of the appeal to the appellant.

1st Respondents’ Submissions

15. The 1st respondent opposed the appeal through written submissions dated 26/4/2024, filed by Baston Woodland & Company Advocates. The 1st respondent’s counsel identified the following as the two issues that fell for determination in the appeal: (i) Whether the learned magistrate erred in fact and in law in declaring the 1st respondent as the legal and beneficial owner of the suit property; and (ii) Whether the learned magistrate erred in law and in fact in determining the suit yet one of the parties in the suit lacked the requisite locus standi.
16. On whether the learned magistrate erred in fact and in law in declaring the 1st respondent as the legal and beneficial owner of the suit property, counsel for the 1st respondent submitted that the 1st respondent proved that she was the legal and beneficial owner of the suit property. Counsel further submitted that the 1st respondent was able to sufficiently show the root of her title. Counsel relied on the decision in the case of *Munyu Maina v Hiram Gathiha Maina* [2013]eKLR. Counsel added that the 1st respondent demonstrated how she acquired the suit land from the 2nd respondent, adding that the 2nd respondent confirmed the 1st respondent’s ownership of the suitland through its letter dated 22/2/2022.
17. Counsel contended that the appellant and the 1st respondent possessed different land ownership documents but were claiming ownership of the same physical piece of land. Counsel further argued that the 1st respondent was the legitimate owner of Plot No. 346 Kiu Block 4 while the appellant claimed ownership of land parcel number Ruiru Kiu Block 4/908. Counsel added that according to the evidence tendered during trial, the suitland belonged to the 1st respondent. Counsel relied on the decision in the case of *Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others* [2016] eKLR. Counsel faulted the appellant for failing to produce documentary evidence demonstrating that indeed his wife was the legal proprietor of the suit property. Counsel contended that the appellant testified during trial that they had been evicted severally from different parcels of land belonging to different landowners as a result of the 2nd respondent allotting them parcels of land already allocated to other members of the 2nd respondent.
18. Counsel submitted that the only explanation advanced by the appellant to justify its possession of the suit land was that the said parcel was confirmed by the DCI Land Fraud Unit. Counsel argued that the DCI Land Fraud Unit had no statutory power or legal authority to allocate land to an individual, hence the said negotiations were illegal. Counsel added that the 1st respondent proved that she was already the registered proprietor of the suit property as at 30/11/2010, the time the appellant alleged they obtained the certificate of title to the suit property. Counsel argued that if there were two competing titles or double allocation over the land, then the title acquired first in time prevailed. Counsel relied on the decision in the case of *Gitway Investment Ltd v Tajmal Ltd and 3 Others* [2006] eKLR.
19. On whether the learned magistrate erred in law and in fact in entertaining and determining the suit yet one of the parties in the suit lacked the locus standi in the suit, counsel submitted that the appellant’s claim that he was not a proper party to the suit was an afterthought which ought not to be entertained



by this Court. Counsel contended that the appellant did not raise the issue during the hearing in the lower court. Counsel added that the appellant was in possession of the suit property at the time the 1st respondent's agent, Onesmus Mugambi, visited the land. Counsel argued that the claim that a party lacked the locus standi needed to be raised at the earliest opportune time. Counsel added that the appellant's wife who was alleged to be the 'owner' of the suit property filed a witness statement and actively participated in the proceedings by testifying during trial. In conclusion, counsel urged the Court to dismiss the appeal with costs.

Analysis and Determination

20. The court has read and considered the original record of the trial court; the record of appeal filed in this appeal; the grounds of appeal; and the parties' respective submissions. The court has also considered the relevant legal frameworks and the relevant jurisprudence. As observed in the introductory part of this Judgment, taking into account the grounds of appeal and the parties' respective submissions, the following are the six issues that fall for determination in the appeal: (i) Whether "Plot No 346 Kiu Block 4" which the 1st respondent claimed to own and "Plot No Ruiru/ Kiu Block 4/908" which the 1st respondent claimed to be owned by his spouse, Regina Wambui Kariuki was one and the same piece of land on the ground [the suit land]; (ii) Whether title number Ruiru Kiu Block 4/908 expressed as issued on 17/12/2021 relates to the suit land on the ground; (iii) Who is the legitimate owner of the suit land?; (iv) Whether the appellant was a trespasser on the suit land; (v) Whether the above questions could be settled effectually and completely in the absence of Regina Wambui Kariuki as a substantive party to the dispute; and (vi) Whether the trial court was properly seized of the dispute in the absence of a prior boundary determination by the Land Registrar in terms of Sections 18 and 19 of the [Land Registration Act](#).
21. The last two issues raise jurisdictional questions. The court will therefore dispose the two questions before focusing on the merit questions.
22. Could the trial court effectually and completely settle the key questions in the dispute in the absence of Regina Wambui Kariuki as a substantive party to the suit? The 1st respondent's claim was that of trespass to land which she described a "Plot number 346/ Kiu Block 4". She alleged that the appellant had entered the above land and had erected semi-permanent structures on the land. The appellant filed a statement of defence in which he stated that the land which he had developed was parcel number Ruiru / Kiu Block 4/908 which was registered in the name of his wife, Regina Wambui Kariuki. He exhibited a certificate of lease, title number Ruiru/Kiu Block 4/908, expressed as issued to Regina Wambui Kariuki on 17/12/2021. He contended that he was lawfully on his wife's land.
23. Against the above background, the 1st respondent did not bother to apply to join Regina Wambui Kariuki a substantive party to the suit. The trial court too did not bother to exercise its jurisdiction under Order 1 rule 10 (2) of the Civil Procedure Rules to join Regina Wambui Kariuki as a party to the suit. The appellant nonetheless called Regina Wambui Kariuki as a witness. She testified that she was the registered proprietor of land parcel number Ruiru/ Kiu Block 4/908 which they had developed and resided on as a couple.
24. Ultimately, the trial court made the following verbatim finding without joining Regina Wambui Kariuki [the party who held an alleged registered certificate of lease alleged to relate to the suitland] as a substantive party to the suit:

"Considering the evidence before me, I find that since the root of the title held by the 1st defendant's wife DW3 is challenged because she was not a member of the MwiHoko Housing Company Ltd and neither did she avail the clearance letter from the company



before she acquired her title or certificate of lease, there is no proper evidence to prove that DW2 legally acquired the title to the suit land which is registered in her name. I opine that no wonder the 1st defendant and the wife approached DCI, Kiambu who cleared them as the owner of the suit property yet it was the mandate of the land-selling company to issue them with clearance letter and not the DCI. Thus, DW2 was not able to explain how she acquired her land documents from the land-selling company. It is my view that DW2 would have known the proper process to be adhered to when she acquired land from said company as well as documents to be relied on to prove validity of title. I have absolutely no reason to doubt the clearance letter issued to the plaintiff. This is clear evidence coming from the land selling company itself and the evidence cannot be taken lightly as it is overwhelming. It is the company which knows its members and which knows what land it has assigned to its members. If the company refutes that a person was never allocated a specific land as alleged. I believe that the person who assisted the 1st defendant and his wife acquire the suit property used his position to illegally acquire the plaintiff's suit land. The 1st defendant or his wife DW2 did not adduce any evidence of payment made at the land selling company regarding title processing fees or transfer fees so as to be assigned the suit land. All that the 1st defendant and his wife had was certificate of lease/title proof that the suit land was assigned to her. It is against the foregoing that I find that DW2 had no valid title to the suit property."

25. Effectively, the trial court annulled Regina Wambui Kariuki's title without joining her as a defendant in the suit. The trial court annulled her title without any pleadings inviting her to make the above finding and without giving the title holder the opportunity to file a defence in the suit. Were the decree to be executed, she will be evicted without being made a party to the case. Kenya's civil legal system does not countenance this. The appellant having tendered documents showing that there was a title relating to the suit land and the title was registered in the name of Regina Wambui Kariuki, the said Regina Wambui Kariuki became a necessary substantive party to the suit, for the complete and effectual adjudication and settlement of all the issues in the suit. For the above reason, this court agrees with the appellant on ground number 4.
26. Was the trial court properly seized of the dispute in the absence of a prior boundary determination by the Land Registrar in terms of Sections 18 and 19 of the [Land Registration Act](#)? The pleadings and the documentary evidence presented by the 1st respondent related to an unsurveyed and unregistered piece of land which she described as "Plot No. 346 Kiu Block 4". At the point of initiating the suit in the trial court, Sections 18 and 19 of the Land Registration Act could not be invoked because there was no evidence to suggest that the above land was registered. However, subsequent to that, the 1st respondent filed a defence and tendered an alleged registered certificate of lease relating to Ruiru /Kiu Block 4/908, contending that this particular land was different from "Plot No 346 Kiu Block 4". It was clear at that point that the trial court would be expected to pronounce itself on the exact location of "Plot No 346 Kiu Block 4" on the Mwhoko Housing Company subdivision plan/scheme. It also became clear that the trial court would be expected to pronounce itself on the exact boundaries of land parcel number Ruiru/Kiu Block 4/908 which was alleged to have been registered on 17/12/21. Without making pronouncements on proof or lack of proof of the location and the boundaries of the land expressed as comprised in the rival documents, the key issues before the trial court could not be effectually and completely settled.
27. For good reasons, Parliament considered the expertise and the equipment at the disposal of the Land Registrar and decided that the primary institution to determine boundary disputes is the Land Registrar [see Section 18 of the Land Registration Act]. The courts are expressly barred against exercising jurisdiction over boundary disputes until the boundaries have been determined by the Land Registrar.



28. For the avoidance of doubt, Sections 18 and 19 of the [Land Registration Act](#) provide as follows:

“Boundaries.

18.

- (1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.
- (2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.
- (3) Except where, it is noted in the register that the boundaries of a parcel have been fixed, the Registrar may, in any proceedings concerning the parcel, receive such evidence as to its boundaries and situation as may be necessary:

Provided that where all the boundaries are defined under section 19(3), the determination of the position of any uncertain boundary shall be done as stipulated in the [Survey Act](#), Cap. 299. Fixed boundaries.

19.

- (1) If the Registrar considers it desirable to indicate on a filed plan approved by the office or authority responsible for the survey of land, or otherwise to define in the register, the precise position of the boundaries of a parcel or any parts thereof, or if an interested person has made an application to the Registrar, the Registrar shall give notice to the owners and occupiers of the land adjoining the boundaries in question of the intention to ascertain and fix the boundaries.
- (2) The Registrar shall, after giving all persons appearing in the register an opportunity of being heard, cause to be defined by survey, the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the register that the boundaries have been fixed, and the plan shall be deemed to accurately define the boundaries of the parcel.
- (3) Where the dimensions and boundaries of a parcel are defined by reference to a plan verified by the office or authority responsible for the survey of land, a note shall be made in the register, and the parcel shall be deemed to have had its boundaries fixed under this section.”



29. The tenor and import of the above framework is that, given that the title which the appellant waved was expressed as registered and the appellant contended that it related to the suit land; and given it was alleged that land parcel number Ruiru/Kiu Block 4/908 was not the same as “Plot No 346 Kiu Block 4”, it was necessary for the precise boundaries of Ruiru/Kiu Block 4/908 to be determined by the Land Registrar before the trial court would be properly seized of jurisdiction over the dispute. Inevitably, the registered proprietor [Regina Wambui Kariuki] and the owner of the subdivision scheme would be expected to be joined as parties to the proceedings before the Land Registrar.
30. For the above reason, this court finds that the trial court prematurely conducted trial and failed to pronounce itself on the question as to where the land(s) described in the parallel documents was/were located.
31. Consequently, the court takes the view that the Judgment of the trial court ought to be set aside and the parties to this appeal ought to be afforded the opportunity to move the Land Registrar to determine the boundaries of Ruiru /Kiu Block 4/908. In the event that the 1st respondent has now obtained registration and title relating to what she described as “Plot No 346 Kiu Block 4”, she will also be expected to move the Registrar and cause the affected parties to be invited for boundary determination.
32. The court will refrain against making merit pronouncements on the first four issues because doing so may prejudice the parties when they ultimately go for determination of boundary/ boundaries by the Land Registrar or during a subsequent trial before the lower court.
33. On costs, taking into account the circumstances of this appeal, including the fact that it is the trial court that should have downed tools and awaited a boundary determination by the Land Registrar, parties will bear their respective costs of this appeal.
34. For the above reasons, this appeal succeeds in the following terms:
 - a. The Judgment rendered on 2/11/2023 in Ruiru SPMC E & L Case No E035 of 2023 is wholly set aside.
 - b. Regina Wambui Kariuki is hereby joined in the said suit as the 3rd defendant.
 - c. Further proceedings in the said suit shall be suspended pending boundary determination by the Land Registrar in terms of Sections 18, 19 and 20 of the [Land Registration Act](#) in relation to Ruiru/Kiu Block 4/908, if indeed the said title exists.
 - d. In the event that there shall be no boundary determination by the Land Registrar within 12 months, the suit shall stand struck out.
 - e. For avoidance of doubt, the plaintiff in the said suit shall be at liberty to move the Land Registrar for boundary determination and shall ensure all affected parties are duly notified.
 - f. Parties shall bear their respective costs of this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF OCTOBER 2024.

B M EBOSO
JUDGE

In the Presence of: -

Ms Amina for the 1st Respondent



Mr Peter Kimani – Present in the virtual court in person although muted

Court Assistant: Hinga

