



**Nyabera v Nyabera (Environment and Land Appeal E014 of 2023)  
[2024] KEELC 13216 (KLR) (13 November 2024) (Judgment)**

Neutral citation: [2024] KEELC 13216 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT AND LAND APPEAL E014 OF 2023**

**M SILA, J**

**NOVEMBER 13, 2024**

**BETWEEN**

**MILK MORAA NYABERA ..... APPELLANT**

**AND**

**JOYCE NYABERA ..... RESPONDENT**

*(Being an appeal against the judgment of Hon. P.K. Mutai, Principal Magistrate,  
in the case Kisii CMCCEL No. 104 of 2019, delivered on 26 April 2023)*

**JUDGMENT**

1. The appellant is step-mother of the respondent. The respondent is from the 1<sup>st</sup> house of the late Nicholas Maticha Nyabera (deceased) whereas the appellant is the 2<sup>nd</sup> wife of the said Nicholas.
2. Through a plaint filed on 19 July 2019, and which was amended on 14 February 2022, the respondent (as plaintiff) pleaded to be the registered proprietor of the land parcel Nyaribari Chache/B/B/Boburia/13111. She contended that this land was transferred to her name by her late father Nicholas Maticha Nyabera before his demise. She pleaded that the appellant has trespassed into the said land and as a result has dispossessed her. In the suit she asked for a declaration that she is the lawful owner of the suit land; an order of eviction of the appellant; a permanent injunction; costs and interest.
3. The appellant filed a defence which she also subsequently amended. Her position was that the land parcel Nyaribari Chache/B/B/Boburia/13111 is non-existent and she insinuated that the respondent held a forged title which had been cancelled.
4. The case proceeded to hearing on the basis of these pleadings.
5. PW – 1 was the respondent. She relied on a witness statement which she supplemented with oral evidence in court. The statement is brief. It more or less states that the respondent is the registered proprietor of the suit land and that the respondent has trespassed into it without any authority. In



- court she produced a copy of the title deed and a search as exhibits. She also produced the Certificate of Death and eulogy written upon demise of her father, the Registry Index Map, and Mutation Form. Cross-examined, she testified that the land was transferred to her on 26 July 2016 while her father was alive. She did not have a current search for the land and was not aware that the title had been cancelled insisting that it was still in existence. She acknowledged that the land originated from the parcel No. Nyaribari Chache/B/B/Boburia/1650 that was in name of one Babiano Makori Nyabera.
6. PW – 2 was George Mogaka Opanga who was Chief of the area. His evidence was to effect that he was aware that the respondent holds title to the parcel No. 13111 and that the appellant had trespassed into it. Cross-examined he stated that he was not aware of any cancellation of title.
  7. PW – 3 was Calister Moraa Tumbo and PW-4 was Simeon Maobe Makori. Their relationship to the parties was not clear but they both said that the respondent had title to the parcel No. 13111 and that the appellant has trespassed into it.
  8. With that evidence the respondent closed her case.
  9. DW-1 was the appellant. She also adopted a pre-recorded witness statement as her evidence. She stated that the land that the respondent wished to restrain her from is registered in name of Babiano Makori Nyabera who was holding the title to the land parcel Nyaribari Chache/B/B/Boburia/1650 in trust for her and his brother one Sylvester Nyabera. She stated that on the ground the land is demarcated into three portions and she occupies the portion allocated to her. She proceeded to state that the respondent's title together with other unlawful subdivisions were cancelled following a complaint at the Lands office, and that Babiano still has the original title deed to the parcel No. 1650. She stated that the respondent is married to one Nicholas Oganga and that her mother also got married elsewhere after separating with her husband (the deceased).
  10. DW – 2 was Steve Mokaya the Land Registrar, Kisii. His evidence was that the land parcel No. 1650 was first registered on 7 January 1971 in name of Makori Nyabera. On 11 April 1988, he applied for change of name to Babiano Makori Nyabera and was issued with a title on 25 April 1988. On 25 July 2016, an entry was made that the land has been subdivided into the two to produce the parcels No. 13110 and 13111. The parcel No. 13110 was in name of Babiano. He elaborated that this entry was cancelled as the survey done in 2016 did not follow procedure. He did not have the mutation form for the parcel No. 1650 but only the transfer forms. There was however no letter written that the parcels No. 13110 and 13111 had an error. He did not know whether Babiano was alive or dead.
  11. With that evidence the appellant closed her case.
  12. Counsel were invited to file submissions, which was done, culminating in the impugned judgment delivered on 26 April 2024. In his judgment, the trial Magistrate held that the Land Registrar did not provide any documentary evidence in support of the cancellations of the title of the respondent. He did not find cogent evidence showing that the suit land is no longer in existence and held that the process of transfer of the suit land from the original number to the parcel No. 13111 was not impeached. He therefore entered judgment for the respondent and directed the appellant to move out of the land within 60 days or she be evicted.
  13. Aggrieved, the appellant has now presented this appeal. Among the grounds raised is that the trial court erred in completely disregarding the evidence of the Land Registrar; relying on a search issued on 2 January 2019 showing the respondent as registered owner of the suit land and disregarding subsequent searches that showed the land is not so owned by the respondent. The appellant wants orders to have the judgment set aside and the respondent's suit dismissed.



14. I would have thought that given their relationship the parties would try to settle their dispute amicably but I was clearly mistaken. I referred the appeal to mediation but it came to nought. Counsel filed their written submissions which I have taken into account.
15. This being a first appeal, it is the duty of this court to reevaluate the evidence and come up with its own decision, bearing in mind that it never saw or took down the evidence of the witnesses.
16. The case of the respondent is that she is the registered proprietor of the land parcel No.13111 and that the land was transferred to her by her late father while he was still alive. The appellant on the other hand asserts that what she occupies is the land parcel No. 1650 which is in name of one Babiano and that the land has never been properly subdivided to produce the parcels No. 13110 and 13111, the latter being the disputed land.
17. If we pause here, it will be seen that there was an issue regarding whether or not one Babiano held title to the land parcel No. 1650 (if it still exists) or whether that land which was in his name was ever subdivided to produce the parcels No. 13110 in his name and the parcel No. 13111 in the name of the respondent. Unfortunately, Babiano was never joined to the case and was never made a party to the proceedings, even as interested party. I do not see how the case could have proceeded without the participation of Babiano as a party or at the minimum as a witness. This is because whichever way the court swayed, there would be the interest of Babiano at stake. If the court held for the appellant, it would in essence be holding that title is with Babiano yet it could very well be that Babiano subdivided the land and was only keen to hold the title to the parcel No. 13110. If the court held that the plaintiff had good title, it would in essence be affirming that Babiano's interest in the land parcel No. 1650 got extinguished and it would be affirming that Babiano holds title to the land parcel No. 13110, despite the controversy surrounding whether or not his land parcel No. 1650 was ever subdivided.
18. Where one party to a suit asserts that the title that is subject to litigation is held in name of a person who is not party to the proceedings, it is imperative that the said person be joined to the case before trial can commence. In essence, a court cannot litigate and make decision on whether or not a third party who is not a party to the proceedings has title or not without that person being given an opportunity to be heard. The court ought to have seen that the defence of the appellant was that there is a third party with title to the disputed land and should have with the utility of Order 1 Rule 10, ordered the joinder of that person at the very least as interested party, given that none of the parties had listed him as a witness. At the level of the pleadings, the court ought to have been alive to the reality that it could hold either for the appellant or the respondent, and recognized that it could not hold in favour of the appellant without affirming a title of a person who was not a party to the case and who was not being called by either party as a witness. Proceeding with the case before joining Babiano as party to the case, if he was never going to testify, was in my view fatal, and everything that proceeded thereafter was akin to a mistrial. The court could not proceed to pronounce judgment on the basis of the pleadings and evidence, as one necessary party, in name of Babiano was not joined to the case.
19. I am afraid without him being party no court can proceed to pronounce itself as to whether the title of the appellant is valid or it is the title held by the appellant, which is in name of Babiano, that is the genuine title.
20. Given the above I proceed to set aside the judgment dated 26 April 2023. I will order that the case is remitted back to the Magistrates' Court with direction that Babiano Makori Nyabera, be joined as interested party to the case. I will further order that the matter do commence de novo before another Magistrate of competent jurisdiction, other than Hon. P.K. Mutai.
21. I will allow the appeal to the above extent.



22. Owing to the procedural flaw in the proceedings and the fact that the parties are close relatives, there will be no orders as to the costs of this appeal.
23. Judgment accordingly.

**DATED AND DELIVERED THIS 13 DAY OF NOVEMBER 2024**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT KISII**

Delivered in the presence of :

Mr. Ochoki for the appellant

Mr. Ochwangi for the respondent

Court Assistant – David Ochieng’

