



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Landluck Investments Limited v Njuguna (Environment and Land Appeal E075 of 2021) [2023] KEELC 15856 (KLR) (31 January 2023) (Judgment)

Neutral citation: [2023] KEELC 15856 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E075 OF 2021**

BM EBOSO, J

JANUARY 31, 2023

BETWEEN

LANDLUCK INVESTMENTS LIMITED APPELLANT

AND

RUTH WANGUI NJUGUNA RESPONDENT

(Being an Appeal against the Judgment of Hon V. Kachuodho (SRM) delivered in the Chief Magistrate Court at Thika on 30/8/2021 in Thika MCL & E Case No 145 of 2019)

JUDGMENT

Background

1. This appeal challenges the Judgment rendered on 30/8/2021 by Hon V Kachuodho, SRM, in Thika CMC Land & Environment Case No 145 of 2019. The appellant, Landluck Investments Limited, was the plaintiff in the primary claim in the said case. The respondent, Ruth Wangui Njuguna, was the defendant in the primary suit and the plaintiff in the counterclaim. Before I dispose the key issues that fall for determination in the appeal, I will outline a brief background to the appeal.
2. Through a plaint dated 27/8/2019 and amended on 2/10/2019, the appellant sued the respondent, seeking among other reliefs, an order for eviction of the respondent from land parcel numbers Ruiru/Kiu Block 2/15688 and 15689. The two parcels of land were subdivisions out of land parcel number Ruiru/Kiu Block 2 (Githunguri) 4101. At the hearing of the suit, the appellant led evidence by Ahmed Chege Gikera and closed their case. The case of the appellant in the trial court was that they purchased the two subdivisions from Boniface Mbugua Ng'ang'a in June 2010 at Kshs 2,000,000. He contended that Boniface Mbugua Ng'ang'a was a brother to the respondent's late husband, Herman Njuguna Ng'ang'a and therefore a brother-in-law to the respondent. He alleged that the respondent had, without his permission or consent, occupied and remained on the two subdivisions.



3. The respondent responded to the suit through a defence dated 25/10/2019. She subsequently filed an amended defence and counterclaim dated 9/11/2020. At the hearing of the case, she testified as DW2 and led evidence by three other witnesses who testified as DW1, DW3 and DW4. Her case in the trial court was that she was the Ad Litem Administrator of the Estate of her late husband, the late Njuguna Ng'ang'a Njuguna [also known as Herman Njuguna Ng'ang'a] pursuant to an Ad Litem Grant of Letters of Administration issued to her on 16/5/2017 in Thika CMC Succession Cause No 144 of 2017. She contended that the two parcels of land claimed by the appellant were illegal subdivisions out of land parcel number Ruiru/Kiu Block 2 (Githunguri) 4101 which was jointly acquired and co-owned by her late husband and his brother, the late Boniface Mbugua Ng'ang'a. It was her case that, together with her late husband and their children, they had lived on their ½ portion of Ruiru/Kiu Block 2 (Githunguri) 4101 for over 40 years, a fact which the appellant's director, Ahmed Chege Gikera, was fully aware of, because he lived in the same neighbourhood.
4. The respondent further contended that in 2010, the late Boniface Mbugua Nganga lodged a claim at the Githurai Land Disputes Tribunal [hereinafter referred to as the Tribunal] and the Tribunal returned an award in Githurai Land Disputes Tribunal Claim No RUR/LDT/13/2010 to the effect that her late husband was entitled to and was to continue occupying his ½ [sic] portion. She further contended that, dissatisfied with the findings and award of the Tribunal, the late Boniface Mbugua Nganga lodged an appeal at the Central Provincial Land Appeals Committee at Nyeri, to wit, Land Case No 101 of 2010 [sic]. Upon his death, the appeal was abandoned, hence the award of the Tribunal which was adopted by the Chief Magistrate Court as a Judgment of the court in Thika CMC D.O Case No 101 of 2010 remained undisturbed. The respondent termed the appellant's suit as res judicata.
5. By way of counterclaim, she urged the court to, inter alia, grant her an order cancelling all the titles relating to Ruiru/Kiu Block 2 (Githurai) 15688 to 15692.
6. Upon conclusion of the trial, and upon receiving submissions, the trial court rendered the impugned Judgment in which it took judicial notice of the fact that land parcel number Ruiru/Kiu Block 2 (Githunguri)/4101 was the subject matter in Thika Chief Magistrate Court D.O Case No 101 of 2010 where the award of the Tribunal had been adopted and the said Judgment had neither been varied nor set aside. The trial court rendered itself thus:

“The court takes judicial notice there is a valid judgment in respect to land parcel number Ruiru/Kiu/Block 2 Githunguri 4101 the subject matter of this suit vide Thika Chief Magistrate Court D.O Case No 101 of 2010. This judgment has not been varied or set aside and it remains a valid judgment of the court to date, whose contents the parties herein are well aware of. To issue another judgment in respect of the same subject matter would only amount to judicial embarrassment.

In the circumstance of this case and to settle the issue between these parties conclusively, I hereby enter judgement as follows:

1. Judgment is hereby entered as per the judgment in Thika Chief Magistrate Court D. O Case No 101 of 2010.
2. Declaration is hereby issued that the estate of Herman Njuguna Nganga is entitled to the portion as awarded in the Judgment in Thika Chief Magistrate Court D.O Case No. 101 of 2010.



3. An order is hereby issued to Land Registrar Ruiru working with Ruiru Land Surveyor to survey land and subdivide the land as per the Judgment in Thika Chief Magistrate Court D. O Case No. 101 of 2010.
4. I grant eviction to the extent applicable to the Judgment in Thika Chief Magistrate Court D.O Case No. 101 of 2010. Eviction order be effected upon subdivision and issuance of title deed within 90 days.
5. Each party to bear own costs.”

Appeal

7. Aggrieved by the findings and orders of the trial court, the appellant brought this appeal, advancing the following verbatim grounds:-
 1. That the learned magistrate erred in both facts and law, in finding that there is a valid Judgment in respect of land parcel Ruiru/Kiu/Block 2 Githunguri 4101 on behalf of the estate of Herman Njuguna Nganga (deceased).
 2. That the learned magistrate erred in fact and law in declaring that the estate of Herman Njuguna Nganga is entitled to the portion as awarded in the Judgement in Thika Chief Magistrate Court D.O Case No. 101 of 2010.
 3. That the learned magistrate erred in fact and law in issuing an order to the Land Registrar Ruiru working with Ruiru Land Surveyor to survey and subdivide the suit land as per the Judgement in Thika Chief Magistrate Court D.O Case No. 101 of 2010.
 4. That the learned magistrate erred in fact and law in granting an eviction order to the extent applicable to the Judgement in Thika Chief Magistrate Court D.O case No. 101 of 2010 hence eviction order be effected upon subdivision and issuance of title deed within 90 days.
 5. That the learned magistrate failed to appreciate that the appellant was not a party in Thika Chief Magistrate Court D.O Case No. 101 of 2010.
 6. That the learned magistrate failed to appreciate that the appellant had purchased Ruiru/Kiu/Block 2 Githunguri 4101 way before the Judgment in Thika Chief Magistrate Court D.O Case No. 101 of 2010.

Submissions

8. The appeal was canvassed through written submissions dated 25/10/2022, filed by M/s Prof Kiama Wangai & Co Advocates. Counsel for the appellant faulted the trial court for relying on Thika Chief Magistrate Court D.O Case No 101 of 2010 whose proceedings were never produced as evidence by any of the parties. Counsel added that the trial court erroneously indicated that the award of the Land Disputes Tribunal was adopted yet no case file existed at the Thika Chief Magistrate Court relating to adoption proceedings. Counsel made reference to the Memorandum of Appeal filed at the Provincial Land Disputes Appeals Committee by the late Boniface Mbugua Ng'ang'a and contended that it was clear from the Memorandum of Appeal filed at the Appeals Committee that the Tribunal had no jurisdiction to entertain the dispute, hence its award was an illegality. Counsel contended that it was incumbent upon the trial court to hold that the Tribunal had no power “to make recommendations in a matter of title deed”, adding that the award of the Tribunal was contrary to Section 3 of the [Land Disputes Act](#), No 18 of 1990.” Counsel argued that the decision of the Tribunal was null and void and could not be enforced by any court.



9. Counsel for the appellant argued that once the decision of the Tribunal is found to be illegal, then the appellant deserves the orders sought in this appeal. Counsel contended that it was not in doubt that the appellant purchased the suit property from the legal owner, notwithstanding the seller's dispute with other persons who were not privy to the sale. Counsel urged the court to allow the appeal.
10. The respondents opposed the appeal through written submission dated 9/9/2022 filed by M/s Gichuki Karuga & Company Advocates. On the trial magistrate's finding to the effect that there was a valid judgment in Thika Chief Magistrate Court D.O Case No 101 of 2010, counsel for the respondent submitted that the trial court's finding was informed by the memorandum of appeal which the appellant had exhibited, in which Boniface Mbugua Ng'ang'a made reference to the award of the Tribunal that had been adopted by the Thika Chief Magistrate Court in Thika Chief Magistrate Court D.O Case No 101 of 2010. Counsel invited this court to similarly take judicial notice of the existence of the said judgment. Counsel contended that a contrary judgment by the trial court would have caused judicial embarrassment.
11. Counsel added that there was a clear mechanism for challenging the award of the Tribunal and that Boniface Mbugua Ng'ang'a had elected not to pursue that mechanism. Counsel urged the court to dismiss the appeal.

Analysis and Determination

12. I have read and considered the original record of the trial court, the original record relating to Thika Chief Magistrate Court D. O Case Number D.O 101 of 2010 [an Award Adoption Cause] which is at the centre of this appeal. I have also read and considered the record of this appeal. Further, I have considered the parties' respective pleadings, the relevant legal frameworks, and the relevant jurisprudence.
13. The appellant advanced six grounds of appeal. In his subsequent submissions, Prof Kiama Wangai, counsel for the appellant, focused largely on the trial court's reliance on the award of the Land Disputes Tribunal and the adoption proceedings. Counsel faulted the trial court and contended that: (i) none of the parties produced proceedings relating to Thika Chief Magistrate Court D.O Case 101 of 2010; and (ii) the trial court erroneously indicated that the award of the Tribunal had been adopted yet no case file existed at the Thika Chief Magistrate Court relating to the adoption proceedings. Further, counsel contended that the Tribunal had no jurisdiction to deal with the dispute, hence its award was null, void and unenforceable. Consequently, the key issue falling for determination in this appeal is whether the trial court erred in its finding that there was a valid Judgment relating to land parcel Number Ruiru/ Kiu Block 2 Githunguri /4101 in Thika Chief Magistrate Court D.O Case No 101 of 2010 and in disposing the suit on that basis and in the manner it did.
14. Counsel for the appellant faulted the trial court for two reasons: (i) for relying on the record relating to Thika Chief Magistrate Court D.O Case No 101 of 2010 which none of the parties had produced; and (ii) for erroneously proceeding on the basis that there existed a valid Judgment in Thika Chief Magistrate Court D.O Case No 101 of 2010, yet no such case file existed at the said court. In exercise of its appellate jurisdiction, this court called for the original records relating to Thika Chief Magistrate Court Land & Environment Case No 145 of 2019 [the cause in which the impugned Judgment was rendered] and the original record relating to Thika Chief Magistrate Court D. O Case No 101 of 2010 [the cause in which the Award of the Tribunal was placed before the court by the D. O for adoption as a Judgment of the Court]. The original record relating to Thika Chief Magistrate Court D.O Case No 101 of 2010, reveals that on 10/12/2010 the Chairman of Githurai Land Disputes Tribunal, vide a letter dated 7/12/2020, presented to the Thika Chief Magistrate Court an Award of the Tribunal



relating to Land Parcel Number Ruiru/Kiu Block 2/4101. The claimant in the Tribunal Dispute was Njuguna Ng'ang'a Njuguna and the respondent was Boniface Mbugua Ng'ang'a. It further reveals that the Tribunal awarded Njuguna Ng'ang'a Njuguna 1/8 out of land parcel number Ruiru /Kiu Block 2/4101 [the suit property]. A perusal of the said original record further reveals that on 31/1/2011, the Award was read to the parties in open court and the cause was fixed for confirmation of the Award after 30 days. The cause was fixed for mention on 7/3/2011 for confirmation of the award. Come 7/3/2011, the Chief Magistrate Court made the following verbatim order:

“Since an appeal has been filed by the defendant, this matter is stood over generally pending the outcome of the appeal.”

15. Although there were subsequent proceedings in the cause, there is no record of any order adopting the award as a judgment of the court. Indeed, the respondent in this appeal contended that an appeal was filed by Boniface Mbugua Ng'ang'a at the Nyeri Provincial Land Disputes Appeals Committee but Boniface Mbugua Ng'ang'a did not prosecute the appeal. It is therefore clear that as at the time the trial court rendered the impugned Judgment, the award of the Tribunal had not been adopted as a judgment of the Magistrate Court. The award was still pending and is, to date, still pending before the Chief Magistrate Court.
16. In the circumstances, this court agrees with the appellant that the trial court made an error in finding that there existed a valid Judgment of the Chief Magistrate Court in Thika Chief Magistrate D.O Case No 101 of 2010. The correct position is that there exists an Award of the Githurai Land Disputes Tribunal in which the late Njuguna Ng'ang'a Njuguna was awarded 1/8 out of land parcel number Ruiru/Kiu Block 2/4101. Secondly, the above adoption cause exists in the Thika Chief Magistrate Court. Thirdly, the Award is still pending adoption as a Judgment of the Magistrate Court. It was therefore an error for the trial court to purport to grant the respondent Judgment “to the extent of the Judgment in Thika Chief Magistrate Court D.O Case No 101 of 2010” because no such judgment existed at the time. Even now, no such judgment exists. What exists is an award of the Tribunal. It is up to the parties to the award to take necessary steps for the adoption of the award, if they so desire.
17. The appellant faulted the trial court for relying on the record relating to Thika Chief Magistrate Court D.O Case No 101 of 2010 because none of the parties had produced it as evidence. The issue of the award of the Tribunal and the consequential proceedings in the Chief Magistrate Court was raised as part of the evidence of DW1 – Erasmo Ng'ang'a at Page 2 of his witness statement. Given that the defence had contended that there a valid judgment subsisting in relation to the suit property , the trial court was entitled to peruse the relevant file and take judicial notice of any existing judicial determination relating to the suit property and to the dispute at hand. I therefore find no fault in the trial court perusing the court record relating to Thika Chief Magistrate Court D.O Case No 101 of 2010 for the purpose of taking judicial notice of any subsisting judgment or order relating to the suit property.
18. For the above reasons, it is my finding that there was an error on part of the trial court to the extent that the trial magistrate made a finding that the award of the Tribunal had been adopted as a Judgment of the court yet, from the relevant record of the Chief Magistrate Court, the award of the Tribunal was pending adoption and had not been adopted as a Judgment of the court. Indeed to date it has not been adopted. The adoption cause is still pending.

Disposal Order

19. The result is that the Judgment rendered in Thika CMC MCL & E Case No 145 of 2019 is set aside. The case is remitted back to the trial court for disposal by a different magistrate. Because the error



leading to this appeal was committed by the trial magistrate, parties will bear their respective costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 31ST DAY OF JANUARY 2023

B M EBOSO

JUDGE

Mr Gichuki for the Respondent

Court Assistant: Ms Osodo

