



**Weru & 2 others v Ndiritu (Suing as the personal representative of the Estate of Ndiritu Kimindi (Deceased) & 2 others (Environment and Land Appeal 39 of 2021) [2023] KEELC 799 (KLR) (16 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 799 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT AND LAND APPEAL 39 OF 2021  
JO OLOLA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**STEPHEN KAHUTHIA WERU ..... 1<sup>ST</sup> APPELLANT  
MICHAEL MUTURI KARUE ..... 2<sup>ND</sup> APPELLANT  
JOHN MUGO WAWERU ..... 3<sup>RD</sup> APPELLANT**

**AND**

**DENNIS WAHOME NDIRITU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF NDIRITU KIMINDI (DECEASED) ..... 1<sup>ST</sup> RESPONDENT  
RICHARD MUGO KOMU (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF KOMU RITHO (DECEASED) ..... 2<sup>ND</sup> RESPONDENT  
WANGUKU WAMAI (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JAMES WAMAI MURAYA (DECEASED) ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the judgment of the Honourable R. Kefa, Principal Magistrate delivered on September 22, 2021 in Nyeri MCELDC No 143 of 2018.
2. By a plaint dated December 4, 2018, Dennis Wahome Ndiritu, Richard Mugo Komu and Francis Wanguku Wamai suing as personal representatives respectively of the estates of the late Ndiritu Kimindi, the late Komu Ritho and the late James Wamai Muraya (hereinafter “the respondents”) sought orders against the three appellants herein for:



- (a) A declaration that plot No 37 Marua Market is the property of the Estates of the deceased joint owners, i.e Ndiritu Kimindi, Komu Ritho and James Wamai Muraya and the defendants (the appellants) are mere trespassers thereof;
  - (b) A permanent injunction restraining the defendants (appellants) from trespassing into plot No 37 Marua Market, or from in any way interfering with the plaintiffs' use and enjoyment thereof;
  - (c) Mesne profits;
  - (d) Costs of the suit and interest thereon at court rates; and
  - (e) Any other relief that the court deems fit to grant.
3. Those prayers arose from the respondent's contention that the three deceased persons were the joint registered owners in undivided shares of that piece of land known as plot No 37 Marua Market. The respondents asserted that the deceased were allotted the suit property in 1946 before being subsequently registered as proprietors thereof in 1998.
  4. The respondents averred that the deceased joint owners developed the land by erecting thereon a permanent commercial building and that they remained in uninterrupted, peaceful and exclusive use, occupation and ownership thereof until their deaths upon which the respondents jointly took over the management, use and occupation of the building.
  5. It was the respondents case that upon the death of the last surviving registered joint owner in the year 2001, the appellants who are strangers to the ownership started claiming that their deceased fathers were also co-owners of the suit property. In March 2016, the appellants wrongfully entered the suit property with a number of servants and workmen and forcefully evicted the tenants thereon before installing their own tenants to the detriment of the estates of the registered joint owners.
  6. It was further the respondents case that the appellants said actions amount to unlawful trespass and conversion of private property and hence the orders sought in the suit.
  7. But in their joint statement of defence dated February 5, 2018, Stephen Kahuthia Weru, Michael Muturi Karue and John Mugo Waweru (the appellants) aver that they respectively represent the estates of their fathers – Weru Gakuu, Karue Karenya and Joseph Waweru Mugo who according to them were together with others, the owners of the said plot No 37 Marua Market.
  8. It was the appellants case that contrary to the respondents claim, the suit property previously belonged to 10 people, namely; Joseph Waweru, Weru Gakuu, Aloisio Waikwa, Murage Mutegi, Komu Ritho, Washington Wachinga, Charles Kabega, James Wamai, Maina Kabega and Karue Karenga.
  9. The appellants further aver that Ndiritu Kimindi who is represented by the 1<sup>st</sup> respondent herein sold his shares in plot No 37 Marua Market on January 3, 1969 and July 1, 1970 and thereafter ceased to be the owner or beneficiary of the same. It was further their case that sometime in the year 1998, the owners of the suit property discovered that the ownership record at the then County Council of Nyeri had changed with the owners being reflected as Murage Mutegi, James Wamai, Nderitu Kimindi and Komu Ritho.
  10. The appellants contend that following representations made to the county council of Nyeri and upon proof that the said Nderitu Kimindi had sold his shares in 1970, the dispute on ownership was resolved with the removal of his name whereupon the ownership reverted to the 10 present owners. It is the appellants case that in 2016, they lawfully evicted a tenant from the building for non-payment of rent



and that they have since leased the same to a tenant who pays rent which rent is shared among the beneficiaries of the registered owners.

11. The dispute was heard before the Honourable R. Kefa – Principal Magistrate who in a judgment delivered on September 22, 2021 found and determined that the respondents had proved their case on a balance of probabilities and granted them the orders sought in the plaint.
12. Aggrieved and dissatisfied by the said determination, the appellants moved to this court and *vide* their memorandum of appeal dated and filed herein on October 18, 2021, they urge this court to set aside and/or vary the said judgement and decree on some six (6) grounds listed in the memorandum as follows:
  1. That the learned trial magistrate erred and misdirected herself in law by selectively interpreting the law and the facts as presented by the parties thus making an erroneous finding to the effect that the appellants failed to tender any evidence to prove how ten people acquired plot No 37 Marua Market (the suit property) whereas the appellants had provided such evidence thereby occasioning a gross miscarriage of justice;
  2. That the learned trial magistrate erred in law and fact by applying the wrong principles of law thus making an erroneous finding by ordering the rectification of the register to reflect the owners of plot No 37 Marua Market whereas the respondent had not pleaded that the registration of plot No 37 Marua Market had been obtained, made or omitted by fraud or mistake thereby occasioning a gross miscarriage of justice;
  3. That the learned trial magistrate erred in law and fact by applying the wrong principles of law while issuing an order of permanent injunction thereby occasioning a gross miscarriage of justice;
  4. That the learned trial magistrate erred and misdirected herself in law by failing to hold and find that the respondents ought to have applied for judicial review proceedings to quash the decision of the defunct Municipal Council of Nyeri changing the ownership of plot No 37 Marua Market administratively from the original four (4) allottees to ten (10) allottees, thereby occasioning a gross miscarriage of justice;
  5. That the learned trial magistrate erred in law and fact by taking into account extraneous and irrelevant considerations thus arriving at an erroneous finding in the judgment thereby occasioning a miscarriage of justice; and
  6. That the learned trial magistrate failed to address her mind to the pleadings on record, the documentary evidence by the parties, the appellants submissions and the law, thereby occasioning a miscarriage of justice.
13. This being a first appellate court, the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal.
14. The appellants herein have in the main faulted the trial court for making an erroneous finding that they failed to tender any evidence as to how the 10 people acquired the suit property whereas indeed according to them, they had provided such evidence.
15. In their plaint dated December 4, 2018, the respondents had sought a declaration that the plot No 37 Marua Market (the suit property) was their property being the representatives of the four (4) original joint owners – Ndiritu Kimindi, Komu Ritho, James Wamai Muraya and Murage Mutegi. In the same breadth, the respondents sought a declaration that the appellants were trespassers on the land as



well as an order of a permanent injunction restraining the appellants from the trespass or in any way interfering with their use and enjoyment of the suit property. In addition, the respondents sought to be awarded mesne profits as well as the costs of the suit.

16. At the trial before the lower court, the 1<sup>st</sup> respondents testified as PW1. It was his evidence that the said deceased persons were jointly registered as the owners of plot No 37 Marua Market as one undivided share in 1946. In support of that position, PW1 produced as Pexh 12, a letter of allotment dated December 22, 1946 by which the suit properties were allocated to the deceased by the then colonial government.
17. It was the respondents' case that their deceased fathers developed the said plot No 37 by erecting thereon a permanent commercial building comprising several rental units. The respondents told the court the said registered joint owners remained in uninterrupted peaceful and exclusive use, occupation and ownership of the land until their demise whereupon the respondents as the respective legal representatives of their estates took over the management, use and occupation of the plot of land.
18. It was the respondent's case that after the demise of Komu Ritho who was the last surviving registered joint proprietor in the year 2001, the appellants herein started claiming that their fathers who were then equally deceased, were also co-owners of the suit property. The respondents told the court that in March 2016, the appellants made good their threat, entered the suit property and forcefully evicted their tenants thereon before installing their own tenants on the building.
19. In support of their case, the appellants relied largely on the evidence of the 1<sup>st</sup> appellant – Stephen Kahuthia Weru (DW1). It was DW1's case that the names of their fathers were added as the owners of the suit property as a result of a meeting that was held by the Municipal Council of Nyeri on April 19, 2006 for purposes of resolving a dispute relating to the ownership of the suit property.
20. It was DW1's case that although 4 people were initially allocated the suit plot in 1946, other people joined them in the construction of the building standing on the land and therefore became bonafide owners thereof. DW1 told the court that when a dispute arose as to the ownership of the property, the Municipal Council of Nyeri under which Marua Market then fell, resolved that the plot belonged to 10 people, namely; Joseph Waweru, Weru Gakuu, Aloisio Waikwa, Murage Mutegei, Komu Ritho, Washington Wachinga, Charles Kabege, James Wamai, Maina Kabege and Karue Karenga.
21. In support of that position, DW1 produced as Dexh 6, the minutes of the Municipal Council of Nyeri held on April 19, 2016. It was the appellants case that Ndiritu Kimindi who is represented by the 1<sup>st</sup> respondent herein was no longer part of the ownership as he had sold all his shares in 1969 and 1970 to Joseph Waweru and Charles Kabega Mukora respectively.
22. Like the trial court before me, I have looked at the minutes said to be emanating from the Municipal Council of Nyeri dated April 19, 2006 (Dexh6) and said to be confirming the ownership of the appellants as co-owners of the suit property. The same while bearing a stamp and signature certifying the same to be a true copy of the original are neither signed nor dated.
23. A perusal of those minutes appears to suggest that the decision to add more owners to the original list of owners was based on a decision by the area assistant chief whom those attending the meeting decided to believe as the correct position as he knew the people within the locality.
24. From the material placed before me, it was evident that the four original owners of the plot passed away between 1972 and the year 2001. There was absolutely no evidence produced that during their lifetime, any of the appellants and/or their equally now deceased fathers had laid a claim to the land and/or shared the proceeds of the rent emanating from the building.



25. Asked during cross-examination what consideration, if any, their fathers had made to the acquisition and or construction of the building to enable them acquire the shares therein, DW1 who testified on behalf of the appellants could not produce any such evidence. While he claimed that the plot was allocated to their parents between 1998 and 2002, DW1 told the court he had not carried documents showing the allotment to court. He contradicted himself during cross-examination claiming the land was initially registered to the 10 people in 1946 but the records of the County Council of Nyeri disappeared.
26. The suit property had been allotted to the initial four (4) as one undivided share and it was difficult to discern how the parties valued Ndiritu Kimindi's shares to be 30 before he is said to have sold them in 1969/1970.
27. Arising from the foregoing, this court could not fault the trial court for the finding that the appellants had completely failed to demonstrate any interest or right they had on the suit property and how the same was acquired.
28. Having failed to demonstrate such interest or right, it was apparent that their admitted invasion of the suit land in March, 2016 was a clear act of trespass and that the same was actionable in law. Having failed to demonstrate their interest in the suit property, one cannot again fault the trial court for issuing an order of injunction to restore the suit property to its rightful owners for purposes of its preservation and to instill the rule of law and order.
29. Arising from the foregoing, it follows that I did not find any basis whatsoever to disturb the findings of the learned trial magistrate. This appeal is dismissed with costs to the respondents

**JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**IN THE PRESENCE OF:**

**MRS MAGUA HOLDING BRIEF FOR MR. MAGUA FOR THE APPELLANT**

**MS WAMBUI MWAI HOLDING BRIEF FOR WAMAHIU FOR THE RESPONDENT**

**COURT ASSISTANT - KENDI**

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**J. O. OLOLA**

**JUDGE**

