



Justus (Suing as an Administrator of the Estate of Justus Rugwaru alias M'mugwika M'mugaine) v Thurania & 3 others (Civil Appeal 57 of 2020) [2025] KECA 30 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 30 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 57 OF 2020
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
JANUARY 17, 2025**

BETWEEN

JOSES MUGAMBI JUSTUS (SUING AS AN ADMINISTRATOR OF THE ESTATE OF JUSTUS RUGWARU ALIAS M'MUGWIKI M'MUGAINE) APPELLANT

AND

JASON THURANIRA 1ST RESPONDENT

PS MINISTRY OF LANDS AND SETTLEMENT 2ND RESPONDENT

DIRECTOR OF LAND, ADJUDICATION AND SETTLEMENT 3RD RESPONDENT

HON. ATTORNEY GENERAL 4TH RESPONDENT

(Being an appeal from the decision of the Environment and Land Court at Meru (L. Mbugua, J.) delivered on 19th February 2020) in Meru ELC No. 90 of 2007)

JUDGMENT

Background

1. Joses Mugambi Justus (suing as an administrator of the estate of Justus Rugwaru alias M'Mugwika M'Mugaine) (the appellant) was substituted in place of Grace Ngautani M'Mugwika (deceased) who had filed the plaint dated 23rd August, 2007 commencing the suit before the Environment and Land Court (ELC). We note that the Minister for Lands and Settlement was sued as the 4th defendant before the ELC but he is not named as a party to this appeal.
2. The facts as pleaded in the plaint are that Justus Rugwaru alias M'Mugwika M'Mugaine was the alleged lawful owner of L.R. No. Kiirua/Nkando/510 (the suit property) measuring 34.32 acres. It



was pleaded that Jason Thurania (the 1st respondent) fraudulently claimed the suit property through the 2nd, 3rd and 4th respondents' agents, servants or officials.

3. The appellant particularised the elements of fraud as follows: -
 - a. The 1st respondent wrongly claiming the suit property which did not belong to him;
 - b. The 2nd and 3rd respondents accepting an illegal and fraudulent claim and changing the register of land;
 - c. The Minister for Lands and Settlement purporting to hear and determine a matter against a deceased person alleging that he cannot be found whereas the appellant and other dependents were known by the Land Officials;
 - d. Failing to exercise the principles of natural justice;
 - e. Illegally transferring the suit property to the 1st respondent; and
 - f. The 4th respondent failing to advise the parties on the illegality of the process undertaken.
4. The appellant pleaded that he had obtained the required consent from the District Land Adjudication Officer to refer the matter to court and the respondents' actions amounted to fraud and infringement of the deceased's constitutional rights over his lawfully owned land.
5. The appellant prayed for the following orders: -
 - a. An order declaring that her late husband was and is the lawful owner of the suit property and order the requisite Land Register be rectified.
 - b. A permanent injunction against the 1st respondent, his agents or servants from alienating, interfering, encroaching or otherwise tampering or occupying the suit property.
 - c. Costs and interest.
 1. The 1st respondent filed a defence dated 19th October 2007. He denied the allegations raised in the appellant's plaint. He averred that he has been living on the suit property since 1972 together with his family and deriving a livelihood from the suit property. He further stated that the deceased (Justus Rugwaru) had never lived or entered the suit property by the alleged date of his death in 1993 when he (the 1st respondent) was 18 years old and still living on the suit property.
 2. The 1st respondent stated that the prayers for permanent injunctive orders are not available to the appellant as the suit property does not belong to him and the pleadings do not disclose a cause of action against him. He asked the ELC find that the suit is time barred, filed without the leave of the court and it should be dismissed with costs.
 3. The 2nd, 3rd, 4th respondents together with the Minister for Lands and Settlement filed a defence dated 4th July, 2008. They averred that if at all there were issues of fraud being raised, the same amounted to a criminal offence and ought to have been attached to an individual as opposed to an office. It was further averred that the transfer of the suit property to the 1st respondent was done in accordance with the law and it was pursuant to Objection No. 15/93 which was heard on merit. They urged that the suit was statute barred and asked that it to be dismissed with costs.
 4. The suit was heard via viva voce evidence. The appellant testified as PW1.



He adopted his witness statement and documents on record. On cross-examination, he testified that his deceased mother got the land from the Minister of Lands when he was giving out land. He stated that they used the land from 1970's to 1980's before trespassers came and took over the land.

10. The 1st respondent testified in support of his case. He stated that he lives on the suit property and that he had never seen the appellant on the suit property. His testimony was that he got the suit property from the Minister when applications were being made to the Minister. He further testified that he has been on the suit property since 1972. He further testified that he recalls that there was a dispute and an appeal was made to the Minister of Lands and Settlement, which was decided in his favour, and the land grabbers were removed from the suit property. DW1 stated that the persons involved were not from the appellant's family.
11. It was his further testimony that he has sold a portion of the suit property to two persons being Moses Miriti (13 acres) and Joseph Kieya (6 acres) and each parcel of land was given a new number. He stated that out of the 34.32 acres, he sold 15.32 acres of the suit property in 2011 with no objections.
12. Upon considering the evidence on record, the ELC (L. Mbugua J.) considered three issues for determination in dismissing the appellant's suit to wit; who owns the suit property, whether the trial court had jurisdiction to determine the claim; and whether the appellant's claim was time barred.
13. The first two issues were determined concurrently. The ELC held that the suit property came to be through the adjudication process. The ELC observed that there was indeed an appeal made to the Minister being Case No. 15 of 1993. The ELC observed that the applicable statute was the [Land Consolidation Act](#). Further, that under Section 26 thereof the ELC found that the appellant had not proved his claim on a balance of probabilities and dismissed his case with costs to the 1st respondent. The ELC further held that under Section 29 of the [Land Adjudication Act](#), which envisages appeals to the Minister, the said appeal was final and the dispute resolution mechanism came to an end.
14. The trial court held that the outcome of the appeal, which resulted in the cancellation of the adjudication record, was final and the 1st respondent was the lawful owner of the suit property. On that basis, the trial court held that it had no jurisdiction to deal with the matter as the Minister's decision was final.
15. On the issue of limitation of time, the ELC held that the decision by the Minister was made on 18th May, 1995. The suit was filed on 23rd August, 2007 three (3) months had lapsed of the 12 years statutory limit in Section 7 of the [Limitation of Actions Act](#). The appellant never sought leave to file the suit out of time and therefore the institution of his claim was statute barred.
16. Aggrieved by the said decision, the appellant invoked this Court's jurisdiction as stipulated under Rules 77(1) and (2) of the Court of Appeal Rules, 2022 by lodging a notice of appeal. Vide his Memorandum of Appeal, the appellant preferred 18 grounds of appeal which we hereby condense into the following 8 grounds of appeal that the ELC erred in law and fact by: -
 - i. Assuming/presuming that the Minister directed the cancellation of the plaintiff's name from the adjudication record in the determination of an appeal to the objection when it is possible that the said cancellation could have been procured illegally, fraudulently, irregularly, arbitrability by the collusion of the defendants;
 - ii. By failing to make a finding of fact that the plaintiff and his father had been in occupation of the suit property and was in fact the one who planted the trees and erected a fence on the suit property;



- iii. By making a finding of fact that the plaintiff's lack of occupation over the suit property over a certain period of time meant that the plaintiff had no legal interest in the suit property, yet the Adjudication Record had evidenced that the plaintiff's father had gathered rights over the suit property and further that the court had not visited the suit property to establish who was in occupation;
 - iv. By failing to make a finding of fact that the plaintiff and the 1st defendant were strangers to each other and that at no time were there proceedings (either in objection or appeal from the determination of an objection) under the *Land Adjudication Act* or the *Land Consolidation Act* made, heard or determined against the parties;
 - v. By making a finding of fact that there was in fact an appeal to the Minister from the determination of an objection brought under the *Land Adjudication Act* between the plaintiff and the 1st defendant over the said subject matter and that the plaintiff was privy and a party to the alleged appeal to the Minister;
 - vi. By failing to make a finding of fact and finding of law that the plaintiff's name was cancelled from the Adjudication Record by the 2nd - 5th defendants irregularly, arbitrarily and without notice to the plaintiff;
 - vii. By not making a finding of fact that the 1st defendant did not provide evidence to show that he was part of the initial Adjudication or Consolidation process which involved gathering and recording of rights in land but she still found in his favour; and
 - viii. By failing to make a finding that the appellant had sought leave to file suit out of time through an application dated 23rd August 2007 and the same ought to have been dispensed with at the preliminary stage of the case not taking into regard procedural technicality.
17. The appellant urged this Court:-
- a. To allow the appellant's appeal and that the entire judgment of the ELC be set aside and be substituted with a declaration that the plaintiff's late father is the owner of parcel of Land No. L.R. Kiirua/Nkando/510 (the suit property);
 - b. An order to the effect that the Land Register be rectified;
 - c. An order of permanent injunction issue against the 1st defendant, his agents or servants from alienating, interfering, encroaching or otherwise tampering with or occupying the suit property;
 - d. An order that the defendants do bear the costs of the appeal and the trial court costs.

Submissions by Counsel

- 18. At the hearing of the appeal, learned counsel, Mr. Karanja appeared together with Mr. Kithinji for the appellant. There was no appearance for the 1st respondent despite service being effected neither did the 1st respondent file his written submissions. The 2nd - 4th respondents have never been active participants in the ELC.
- 19. Counsel for the appellant relied wholly on his written submissions. In his oral submissions, Mr. Kithinji submitted that the pertinent issues in this appeal were the fact that the trial court declined to have jurisdiction on account of the decision which was rendered on 18th May, 1995. Counsel submitted that the deceased, Justus Rukwaro died on 11th May, 1993.



- Therefore, the decision was rendered when Justus Rugwaru was already deceased. Counsel asserted that the decision and any other proceedings against the deceased after his death were a nullity as against him.
20. In his written submissions, the appellant submitted that his father died on 11th May, 1993 and it was not until 2007 that he discovered that his father's land had been taken over by the 1st respondent. According to the appellant, it was established that the 1st respondent filed an objection against his father in 1992. The Land Adjudication Officer in a decision dated 28th April, 1992 awarded the 1st respondent six (6) acres of the suit property, which was registered in the name of his father. Upon appeal to the Minister, the 1st respondent was awarded the whole of the suit property in a decision dated 18th May, 1995. That after the 1st respondent was awarded 6 acres, the balance thereof was grabbed by the Land Committee Members who subdivided the land amongst themselves.
 21. The appellant contended that his father was never served with the objection nor were his family members served with the appeal to the Minister. It was submitted that service of the objection and the appeal is integral to the right to be heard. To emphasise this point, the appellant relied on the provision of Section 12 of the [Land Adjudication Act](#) and the decision by this Court in *Onyango Oloo vs Attorney General* [1987] eKLR.
 22. The appellant submitted that the service of the objection and the appeal through the Area Chief was not proper service and it is not one of the services recognised under Order 5 of the Civil Procedure Rules. There was no evidence that there was attempted service through registered mail or advertisement made upon the appellant's father. Therefore, the decision of the Adjudication Officer and the Minister were null and void. Further reliance was placed on this Court's decision in *Nyongesa & 4 Others vs Egerton University College* [1990] eKLR in support of the proposition that the right to be heard is sacrosanct. We were urged to find that the appellant's father was condemned unheard.
 23. The appellant faulted the finding that the ELC had no jurisdiction to deal with this matter since the Minister had dealt with it under Section 29 of the [Land Adjudication Act](#). It was submitted that the ELC did not interrogate the facts to establish whether the appellant's father legally and procedurally participated in the proceedings before the Land Adjudication Officer and the Minister.
 24. It was the appellant's further submissions that the ELC fell into error by failing to appreciate that he was granted consent under Section 30 & 8(1) of the [Land Adjudication Act](#). The consent was issued by the District Land Adjudication Officer on 23rd February, 2006. To support this position, the appellant referred us to the decisions of this Court in *Bhaijee & Another vs Nondi & Another Civil Appeal 139 of 2019 (2022) KECA 119* [KLR], *Simani vs Magotswe* [1989] eKLR and *William Onginjo Kanga vs Erick Otieno Mwaira* [2000] eKLR.
 25. Further, the appellant submitted that he pleaded fraud in the ELC against the respondents. Hence, the claim was based on fraud, which was discovered in 2000, and therefore, the ELC was not time barred and it had jurisdiction to hear the matter. The appellant submitted that there are several letters revealing that dealings over the suit property were fraught with corrupt dealings whereby the Members of the Land Committee subdivided the suit property amongst themselves.
 26. In conclusion, the appellant urged us to find that his appeal raises pertinent issues on the hearing of the objection before the District Land Adjudication Officer and before the Minister under Section 29 of the [Land Adjudication Act](#). He reiterated that there was no compliance in notifying the registered owner of the suit property that an objection had been filed against him.



Determination

27. We have given due consideration to the record of appeal before us, the written submissions by counsel for the appellant, the authorities cited and the law. This being a first appeal, we have re-appraised the material before the ELC as we are mandated to under Rule 31(1) of the Court of Appeal Rules, 2022.
28. Our scope as the first appellate court was expounded in *Selle vs Associated Motorboat Company Limited* (1968) EA 123 is to re-consider, re-evaluate the evidence and come up with our own conclusion. We are mindful that unlike the ELC, we did not have the benefit of hearing the first account of the witnesses and as such, we should give allowance for that. We are also aware that this Court will only depart from the findings of the ELC if they were based on no evidence on record, they were based on wrong principles and where discretion was exercised injudiciously – See *Mbogo & Another vs Shah* (1968) EA 93.
29. We discern the following issues for determination in this appeal:
 - a. Whether the appellant’s deceased father was served and well informed of the proceedings before the Land Adjudication Officer and the Minister;
 - b. Whether the 1st respondent proved ownership of the suit property; and
 - c. Whether the trial court had jurisdiction to entertain the dispute.
30. The first two issues are intertwined and we will determine them concurrently. One of the inalienable universal rights guaranteed to every individual is the right to be heard. Under *the Constitution*, the right to a fair hearing which encompasses the right to be heard is spelt out under Article 50(1) and (2) of *the Constitution*. Although the application of the provisions of Article 50 is synonymous to the rights of an accused person in criminal proceedings, the same principles apply to civil or other proceedings before other dispute resolution fora including but not limited to formal and informal tribunals.
31. It is common ground that an objection was filed over the suit property by the 1st respondent. His contention was that some individuals wanted to deprive him of his parcel of land as allocated by the Minister. Perhaps from the discovery that the suit property which he had been in occupation since 1972, was registered in the name of the appellant’s deceased father, the objection was filed against Justus Rugwaru. The 1st respondent’s position is that he has been living in the suit property since 1972. That he has made significant developments and subdivided and sold portions of the suit property to third parties.
32. Indeed, just as the ELC observed, some of the documents produced in evidence are ineligible, but in doing our very best, we shall attempt to decipher them. First, we consider the decision of the Land Adjudication Officer dated 28th April, 1992. The salient observations made were that: -
 - a. The suit property was registered under the name of Justus Rugwaru (the appellant’s deceased father);
 - b. The appellant’s deceased father had been summoned severally since 5th September, 1990 but in vain;
 - c. The committee also used the area Chief to effect the summons but in vain;
 - d. The appellant’s deceased father was not known and could not be traced;
 - e. The 1st respondent had stayed in the suit property for 18 years and made significant developments in an area of approximately 6 Acres; and



- f. The portion of 6 Acres to be registered in the names of the 1st respondent as it was the developed area.
33. Dissatisfied with the decision, the 1st respondent filed an appeal to the Minister which decision was rendered on 18th May 1995. The findings of the appeal were more or less the same as those of the Land Adjudication Officer. The appeal was heard by the District Commissioner who wondered of the whereabouts of the appellant's deceased father. In particular, it was noted that efforts to trace the deceased proved futile using all means possible being through his last known address of service and even through the Area Chief. It was also recorded that even the neighbours around the area did not seem to know or to have heard of the appellant's deceased father for the past 23 years. The letters dated 7th April 1992, 26th April, 1995 and 10th May, 1995 are all a testament of the efforts made to trace the appellant's deceased father. There being no opposition to the appeal, the whole suit property was awarded to the 1st respondent.
34. In a letter dated 20th January, 1997 titled RE: Implementation of Minister's Land Appeal Case No. 15 of 1993 which we suppose that the author of the letter was the Land Adjudication Settlement Officer addressed to the Permanent Secretary, Minister for Lands and Settlement; the author of the letter stated that he carried out investigations and some of his findings were: -
- a. The suit property was originally registered in the name of Justus Rugwaru (the appellant's deceased father);
 - b. Mr. Rugwaru is not known in the area;
 - c. A total 21 Acres of the suit property was registered in the names of the Lands Adjudication Committee members.
35. It is not difficult to see that the findings of the Lands Adjudication Committee reached on 28th April, 1992 that the 1st respondent should only be allocated 6 acres of land was solely for the fact that it was the only developed portion. The decision did not explain what then was to happen to the rest of the portion of the suit property.
36. It emerged later that some unscrupulous officials of the Land Adjudication Committee allocated themselves the said portions which informs the difficulties being raised on the implementation of the Minister's decision of 18th May, 1995.
37. The appellant's main contention is that his deceased father was never informed of the proceedings before the Land Adjudication Tribunal and the appeal to the Minister. However, the observations made from the Land Adjudication Officer and the District Commissioner who handled the appeal is that efforts to trace the appellant's deceased father bore no fruits.
38. It is indeed puzzling that even neighbours surrounding the suit property could not recall or have an ounce of idea of who Justus Rugwaru was. There was simply no trace of Justus Rugwaru. How then were the Lands Officials expected to know of Justus Rugwaru if he was unknown to the neighbours?
39. The appellant submitted that using the Area Chief to effect service was not in accordance with the rules of the service under the Civil Procedure Rules. Necessity being the mother of invention, the fall back to trace the whereabouts of the appellant's deceased father would have been through the area Chief who this Court takes judicial notice that they formed a very powerful and integral part in the society and could easily be used to get information. Be that as it may, both the Lands Adjudication Committee and the Minister noted that service was also effected through the deceased's last known postal address.



40. Therefore, we are not convinced that there were no efforts and all possible means employed to trace Justus Rugwaru to appear before the Lands Adjudication Committee and the District Commissioner handling the appeal on behalf of the Minister. The appellant did not attempt to present any witnesses from the area to attest to the fact that they were known to the area residents before leaving in the 70's and 80's. The late Justus Rugwaru died in 1993. Having known that he left a huge parcel of land, it would have been in his interest to pursue it and even make it known to his family.
41. Furthermore, we do note that the 1st respondent stated that he has been living on the suit property since 1972. This was not objected by the appellant. There was no evidence presented that there was any form of filial relationship between the appellant's deceased father and the 1st respondent to cast doubt as to the possibility that the suit property may have been fraudulently acquired by the 1st respondent to dispossess the deceased.
42. In as much as the appellant's defence was that his deceased father had acquired the suit property in 1969 and that they built a house and even planted trees, no evidence as such was led. The question then becomes if unknown persons destroyed their house, why did they not pursue the claims in 1969 but instead chose to move and even bury the deceased elsewhere in 1993? It certainly would have been prudent if proof of acquisition of the suit property by the appellant's deceased father in 1969 were demonstrated. It cannot also be that the appellant took an interest in the suit property in 2007 after the death of his father if his father chose not to pursue any claim that he may have had on the suit property since 1969.
43. The foregone discussions crystallise our findings that there were genuine efforts made to trace Justus Rugwaru to attend the hearings before the Land Adjudication Board and the appeal before the Minister for Lands and Settlement. We also find that on a balance of probabilities, the 1st respondent proved that he was the rightful owner of the suit property.
44. On the issue of the ELC's jurisdiction, the ELC found that it had no jurisdiction to determine the suit since appeals before the Minister of Lands and Settlement was final under Section 29 of the [Land Adjudication Act](#). The appellant stated that he obtained consent and therefore the ELC was vested with jurisdiction.
45. Section 29(1) (b) of the [Land Adjudication Act](#) provides that an appeal to the Minister shall be final. However, an exception is created under Section 30(1) of the [Land Adjudication Act](#) which provides for appeals to court upon obtaining consent as follows: -
- “Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”
46. In this appeal, we have seen the consent dated 23rd February, 2006 granted to the appellant's deceased mother to institute the civil proceedings. The condition precedent to grant of the consent is that it should be concerning an interest in land against persons who have competing claims on the land under adjudication but not against the decision of the Land Adjudication Officer. An interest in relation to land is defined under Section 2 of the [Land Adjudication Act](#) in the following terms:-
- “absolute ownership of the land and any right or interest in or over the land which is capable of being registered under the Registered [Land Act](#) (Cap. 300).”



47. This Court in *Julia Kaburia vs Kabeera & 5 Others* (2007) eKLR commenting on Section 30 of the *Land Adjudication Act* held as follows:-

“The *Land Adjudication Act* provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By Section 30 (1) (2), the jurisdiction of the court is ousted once the process of land adjudication has started until the adjudication register has been made final...In our respective view, the consent envisaged by Section 30 to institute or continue with civil proceedings is not a consent to file a suit challenging the decision of the Land Adjudication Officer himself on the merits of his decision. Rather the consent is given to a person to file a suit or continue with a suit against persons who have a competing claim on the land under adjudication.”

48. The common theme which came from the proceedings before the trial court and more so in this appeal, is that the appellant is challenging the process employed in reaching the findings of the ownership of the suit property. In particular, that proper service was not effected upon his deceased father or any of his dependants. Section 30 of the *Land Adjudication Act* excludes claims in civil proceedings challenging the process used by the Land Adjudication Officer in reaching his final findings on ownership of land. In our view, the correct suit to have been instituted by the appellant would have been Judicial Review Proceedings. By parity of reasoning, we find that the ELC did not err in finding that it did not have jurisdiction to entertain the suit before it.

49. In the premises, the appellant has not presented to us a meritorious appeal deserving of this Court’s favourable orders. Our finding is that the appeal lacks merit and it is hereby dismissed with costs to the 1st respondent.

50. Orders accordingly.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

