



**Wathingira v Mwathu & another (Sued as the legal representatives of Thendu Wathingira (Deceased)) (Environment and Land Appeal E110 of 2021) [2023] KEELC 17870 (KLR) (17 May 2023) (Judgment)**

Neutral citation: [2023] KEELC 17870 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT AND LAND APPEAL E110 OF 2021**

**BM EBOSO, J**

**MAY 17, 2023**

**BETWEEN**

**PATRICK NDUNGU WATHINGIRA ..... APPELLANT**

**AND**

**WAIRIMU THENDU ..... 1<sup>ST</sup> RESPONDENT**

**PETER MWATHU ..... 2<sup>ND</sup> RESPONDENT**

**SUED AS THE LEGAL REPRESENTATIVES OF THENDU WATHINGIRA  
(DECEASED)**

*(Being an Appeal arising from the Judgment of Hon. G. Omodho (SRM)  
delivered at Kiambu Chief Magistrate Court on 1/12/2021 in Kiambu  
Chief Magistrate Court Land & Environment Case No 4 of 2018)*

**JUDGMENT**

1. This appeal challenges the Judgment rendered on 1/12/2021 by Hon G. Omodho, PM, in Kiambu CMC E & L Case No 4 of 2018. The key issue in the dispute revolved around the question of apportionment of land parcel number Githunguri/Nyaga/284 [the suit property] measuring approximately 3.4 acres between two brothers, Thendu Wathingira [hereinafter referred to as “the deceased”] and Patrick Ndungu Wathingira [the appellant in this appeal]. There was common ground that the deceased was registered as proprietor of the land as a trustee and that the two siblings were the beneficiaries of the land.
2. Thendu Wathingira died in 2007. The two respondents in this appeal are his personal representatives and were sued in the trial court in that capacity. I will outline a brief contextual background to the appeal before I dispose the key issue that falls for determination in the appeal.



3. The deceased was registered as proprietor of the suit property in 1956. The two siblings continued to occupy the suit property during the lifetime of their mother and after the demise of their mother. In 1996, the deceased caused the suit property to be subdivided into two parcels: (i) Githunguri/Nyaga/701, measuring approximately 1.86 acres; and (ii) Githunguri/ Nyaga/702, measuring approximately 1.50 acres. There was common ground that the deceased’s intention was to convey the 1.50 acres to the appellant and thereby terminate the trust.
4. When the appellant learnt about the above unequal apportionment of the suit property, he challenged the apportionment in the Land Disputes Tribunal and the Tribunal awarded him a 50% share of the land. The deceased challenged the award of the Tribunal and the award was set aside by the High Court [Korir J as he then was] in 2014, on the ground that the Tribunal had no jurisdiction to revoke a registered title.
5. The High Court order setting aside the Tribunal’s award alongside the adoption order prompted the appellant to file Nairobi ELC Case No 464 of 2014 seeking, *inter alia*, a declaration that he was entitled to one half of the suit property. He also sought a nullification of the contested subdivisions, contending that the deceased had undertaken apportionment of the trust property unilaterally.
6. The estate of the deceased filed a defence and a counterclaim dated 14/10/2014. At paragraph 3 of the defence, they admitted that the deceased was registered and held the suit property as a trustee. They added that upon subdivision of the suit property in 1996, the appellant failed to process the title deed to his portion, Githunguri/Nyaga/702, and was content with his portion measuring approximately 1.50 acres. They added that the appellant and the deceased were “in mutual agreement about how land parcel number Githunguri/Nyaga/284 was to be subdivided and the respective portions resultant therefrom.”
7. By way of counterclaim, they prayed to the court to grant them an order of permanent injunction restraining the appellant against entering, interfering with, or trespassing on land parcel number Githunguri/Nyaga/701.
8. The suit [Nairobi ELC Case No 464 of 2014] was subsequently transferred to Kiambu Chief Magistrate Court where it was registered as Kiambu CMC Environment & Land Case No 4 of 2018. The case was eventually heard by Hon. G Omodho, PM, at the Kiambu Chief Magistrate Court.
9. During trial, the appellant testified that the deceased held the suit property as a trustee and that he and the deceased were entitled to equal shares of the suit property. The deceased’s widow testified on behalf of the estate of the deceased. She stated that the suit property was family land and that she was not present when it was subdivided. She added that the appellant “refused to go for his title.” It was her evidence that she did not know anything about “title or measurement.”
10. Ultimately, the trial court rendered the impugned Judgment in which it found that the appellant had failed “to explain why he settled for long without making a claim from his brother or challenging the distribution of his father’s estate.” The trial court rendered itself thus:

“The doctrine of acquiescence raises implied consent by the offended party remaining silent over an infringement taking place for a long period of time. In this case I would find that the plaintiff was too quiet too long while the land adjacent to his was being occupied by his family members. He is therefore estopped from starting the dispute with his sister in law yet his own brother was around to square it out with. Considering the circumstances of this case in totality I find that by conduct of the plaintiff he was agreeable to settle in the



smaller portion for years and he is therefore estopped from making the equitable claim for the balance of his land.”

11. The trial court dismissed the appellant’s claim and granted the respondents’ counterclaim.

### **Appeal**

12. Aggrieved by the findings and orders of the trial court, the appellant brought this appeal advancing the following verbatim grounds:
  1. That the learned trial magistrate erred in law and in fact by failing to acknowledge that the land parcel Githunguri/ Nyaga/284 was held in trust for the family and the appellant is entitled to an equal share.
  2. That the learned trial magistrate erred in law and in fact by finding that the appellant was beneficiary and entitled to an equal share of Githunguri/ Nyaga/284. [sic]
  3. The learned trial magistrate erred in law and in fact by finding the respondent’s husband was entitled to a bigger share of land parcel Githunguri/ Nyaga/284 measuring 3.36 acres which resulted to Githunguri/ Nyaga/701 measuring 1.86.
  4. That the learned trial magistrate erred in law and in fact by finding that the appellant was entitled to the share the respondent husband allocated Githunguri/ Nyaga/702 measuring 1.5 acres whereas he does not hold any title to the parcels to which he sits on which are in custody of the respondents.
  5. That the learned trial magistrate erred in law and in fact by failing to acknowledge that the title deed which are resultant of Githunguri/ Nyaga/284 are both in the respondent’s husband’s name and not their father as mentioned in the judgment.
  6. That the learned trial magistrate erred in law and in fact by failing to take note that the appellant only sought for an equal share of Githunguri/ Nyaga/284 and not the entire parcel which was set to be subdivided into two equal shares.
  7. That the learned trial magistrate erred in law and fact by failing to take note that the appellant’s claim that no single entry was made with respect to Githunguri/ Nyaga/702 which the respondent merely denied however the appellant had attached the copy of the green card and search indicating the position stated.
  8. That the learned trial magistrate erred in law and fact by failing to acknowledge that the appellant lodged a complaint upon learning of the mischief by the respondent’s husband and at no time had the appellant been indolent in the matter.
  9. That the learned magistrate erred in law and fact by failing to consider the appellant that there was no dispute that the land in question belonged to the family and hence both parties are entitled to equal shares.
  10. That the learned magistrate erred in law and fact by failing to consider that the appellant does not hold any title deed to the resultant of the Githunguri/ Nyaga/284 which were subdivided unfairly.



11. That the learned magistrate erred in law and in fact by failing to consider that the respondent is in custody of both title deeds yet she is the administrator of the Estate of her husband who is the registered proprietor to both Githunguri/ Nyaga/701 and Githunguri/ Nyaga/702.
  12. That the learned trial magistrate erred in law and fact by failing to consider the issues raised in cross examination by the respondent with regard to the ownership and illegal subdivision of Githunguri/ Nyaga/284.
  13. That the leaned trial magistrate erred in law and fact by failing to consider that the respondent had been given other parcels of land which the appellant's had not sought for a share from.
  14. That the learned trial magistrate erred in law and in fact by failing to consider that the appellant was given a fake title deed to the parcel which he resides whereby he could be rendered homeless by the respondents who are the administrators of the registered proprietors.
  15. That the learned trial magistrate erred in law and in fact by selectively applying evidence and relying on extraneous evidence not before court and hence arriving at an erroneous decision.
13. The appellant urged this court to set aside the judgment of the trial court and enter judgment in his favour as prayed in the plaint.

### **Submissions**

14. The appeal was canvassed through written submissions dated 10/1/2023, filed by M/s Mburu Machua & Co Advocates. The respondent opposed the appeal through written submissions dated 30/1/2023, filed by M/s Karanja Kangiri & Company Advocates. I have read the rival submissions. I will not rehash the submissions. Where necessary, I will make reference to the submissions in my analysis of the key issue in the appeal.

### **Analysis and Determination**

15. I have read and considered the original record of the trial court, the record filed in this appeal, and the parties' respective submissions. I have also considered the relevant legal frameworks and jurisprudence. The key issue to be determined in this appeal is whether the trial court erred in finding that the appellant was not entitled to an equal share of land parcel number Githunguri/Nyaga/284. Before I dispose the issue, I will outline the principle which guides this court when exercising appellate jurisdiction.
16. This is a first appeal. The principle upon which a first appellate court exercises jurisdiction is well settled. The task of the first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Kesbar Shiani* (2013) eKLR as follows:-

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”



17. The above principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”

18. There was common ground that the deceased [the late Thendu Wathingira] and the appellant were brothers. There was also common ground that the deceased held land parcel number Githunguri/ Nyaga/284 [the suit property] as a trustee. Similarly, there was common ground that the two siblings were the only beneficiaries of the land that was held in trust.

19. The case of the appellant in the trial court was that his deceased brother unilaterally apportioned the land in unequal shares without involving him. He contended that he challenged the apportionment through a claim he lodged and successfully prosecuted in the Land Disputes Tribunal. It was his evidence that the award of the Tribunal was subsequently quashed by the High Court on the ground that the Tribunal lacked jurisdiction to cancel a registered title.

20. The case of the administrators of the estate of Thendu Wathingira was that the appellant did not raise any issue with the deceased during his lifetime regarding the unequal apportionment. Indeed, in their submissions before this court, the administrators contended thus:

“The subdivision of the land into Githunguri/ Nyaga/701 and Githunguri/ Nyaga/702 happened in 1996. The appellant did not raise any issue with the deceased during his lifetime on the appellant getting the smaller portion. We will never get the answer on the circumstances that led the deceased to act as such but the appellant was content in occupying the smaller portion and only took issue upon the demise of the deceased. No plausible explanation was given by the appellant on why he took so long in lodging his claim and why he did not do so during the lifetime of the deceased.”

21. The trial court found that the appellant was not entitled to an equal portion of the suit property. The trial court’s finding was informed by the view that the appellant was estopped under the doctrine of acquiescence against making a claim for an equal share.

22. Did the appellant acquiesce to the unequal apportionment? The impugned subdivision titles were generated in 1996. There was no evidence placed before the trial court to suggest that the appellant was privy to the subdivision exercise that led to the generation of the two titles, Githunguri/ Nyaga/701 and 702.

23. It does emerge from the evidence that was placed before the trial court that soon after the deceased procured the impugned sub division titles, the appellant contested the apportionment through claims he lodged with the Area Chief and the Land Dispute Tribunal. The Land Disputes Tribunal adjudicated the claim during the lifetime of the deceased and made an award in favour of the appellant. Through the award, the Tribunal apportioned the land in equal shares between the two siblings.

24. The deceased subsequently challenged the award of the Tribunal in the High Court on the ground that the Tribunal lacked jurisdiction to interfere with a registered title. From the record, the claim in the Tribunal was registered in 2005 and the award of the Tribunal was rendered in 2006. This was before the deceased died in 2007. The High Court judicial review application which culminated in the nullification of the award was initiated in 2006. The High Court rendered its Judgment on the



judicial review application in February 2014. The subsequent suit which culminated in the impugned judgment was initiated in the Environment and Land Court at Nairobi in 2014 soon after the High Court annulled the award of the Tribunal.

25. From the above chronology of events, it is clear that the appellant contested the apportionment from the time he learnt that his sibling had unilaterally apportioned the land unequally. It is therefore clear that the trial court was in error when it made a finding that the appellant had acquiesced to the unequal apportionment. That finding was contrary to the evidence that was before the trial court.
26. During trial, the estate of the deceased did not lead evidence to justify an apportionment that would give the deceased a bigger share than his sibling. In the absence of such evidence, it follows that the two beneficiaries under the trust were and are entitled to equal shares of the suit property [trust property], land parcel number Githunguri/Nyaga/284.
27. On costs, because of the close blood relationship between the appellant and the deceased, parties will bear their respective costs of the appeal and costs of the suit in the trial court.
28. In the end this appeal is allowed in the following terms:
  - i. The Judgment in Kiambu CMC MCE & L Case No 4 of 2018 rendered on 1/12/2021 is set aside wholly and is substituted with an award in favour of the plaintiff in terms of prayers (a), (b), (c), (d) and (e) of the plaint but with no order as to costs.
  - ii. Parties will bear their respective costs in this appeal.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF MAY 2023**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Mr Ndichu for the Appellant

Ms Mugo for the Respondent

Court Assistant: Hinga/Osodo

