



**Njoroge v Gikonyo (Environment & Land Case 341 of 2015)  
[2023] KEELC 19883 (KLR) (20 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 19883 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 341 OF 2015  
FM NJOROGE, J  
JUNE 20, 2023**

**BETWEEN**

**DANIEL KAMAU NJOROGE ..... PLAINTIFF**

**AND**

**BEATRICE WANGECHI GIKONYO ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff in this case married two wives, the first wife in 1951 and the second wife in 1966. It would appear that he settled with his second wife on a piece of land in Molo while the first family was left on a piece of land in Kirima in Nyandarua. There is no dispute that the two parcels are his, and that he desires to subdivide the two portions amongst his family members in the manner outlined in the Originating Summons which he filed on 25/11/2015. The present matter went for mediation having been referred thus by this court but unfortunately the parties were unable to reach settlement and by consent they agreed that the matter be taken back to court for hearing and determination. The Originating Summons specifically seeks the following orders:

1. That an order do issue for a qualified surveyor to visit land parcel no Nyandarua/Kirima/5748 and Mau Summit/molo Block 2/79 (mona) and subdivide it according to the children of the plaintiff as follows:-
  - a. 1 acre at Nyandarua to the defendant Beatrice Wangechi
  - b. 1 acre at Molo to the plaintiff's second wife Waitherero Kamau.
  - c.  $\frac{1}{2}$  an acre at Nyandarua sold to Rufus Macharia
  - d. 1 acre to the plaintiff Daniel Kamau Njoroge to cater for sub-division expenses and issuance of title deeds
  - e. 2 acres at Nyandarua already sold



- f. The remaining land be subdivided equally amongst the plaintiff's children.
  2. That an order that the said surveyor be provided with security through the area OCS during the said subdivision and allocation of beacons
  3. That any other relief the honourable court may deem fit and just to grant
  4. That costs of this Originating Summons be borne by the Defendant.
2. It is evident therefore that the 1<sup>st</sup> and 2<sup>nd</sup> wives would obtain one acre each from the subdivision while the rest would be subdivided equally amongst the children born in both houses after deducting the acreage that has already been sold before the proposed subdivision. The Defendant would after the subdivision continue to stay on the Kirima land while the 2<sup>nd</sup> wife and the plaintiff would continue to stay at the Molo land and the other plot.
  3. The Originating Summons is supported by the affidavit sworn by the Plaintiff herein. He deposes that he acquired the two parcels of land known as Nyandarua/Kirima/5748 (6.18 ha) and Mau Summit/molo Block 2/75 (mona) (1.063 ha) (the suit properties herein) during his marriage to the Defendant but the defendant who is the first wife has objected to the proposed subdivision and that family wrangles are likely to ensue and unless subdivision orders are issued, and his beneficiaries stand to suffer irreparable harm.

### **Response**

4. The Defendant filed her Replying Affidavit dated 30/05/2022 on 6/06/2022. She deposed that the Plaintiff is her husband; they have 9 children; they bought the suit properties together; the plaintiff later married a 2<sup>nd</sup> wife and then left his first family to live with her in Molo; in 1988 there were outstanding school fees issues; the Plaintiff came back and proposed that they sell part of the suit property Nyandarua/Kirima/5748 to enable them get fees for the children; together with her children they opted not to sell the suit property and this agreement was reduced into writing. Despite the said agreement the Plaintiff in 2004 came and wanted to sell 2.5 acres. In 2015 again the Plaintiff summoned her to the chief's office claiming that she was preventing him from subdividing the suit property amongst his family members; that the chief also wrote to the Registrar of Lands to restrict the title until the parties agreed. She stated that the conduct of the Plaintiff has been very unfair and unjust to his first family. The Defendant's son Rufus Macharia Gikonyo also filed a Further Replying Affidavit dated 2/06/2022 wherein he reiterated the contents of the Defendant's Replying Affidavit.

### **Plaintiff's Evidence**

5. PW1, Daniel Kamau Njoroge the Plaintiff herein testified on 15/06/2022. He admitted that the Defendant is his first wife while Waitherero is his second wife; the 1<sup>st</sup> wife has 9 children while his 2<sup>nd</sup> wife has 10 children; he owns the suit properties; the first wife lives in Nyandarua while the second wife lives with him in Molo; seeing that he is growing old, he has decided to distribute the suit properties; he tried to subdivide the land but was unable to do so due to threats from the Defendant; they tried to resolve their issues before elders in vain; he sold a portion of the Nyandarua land in order to purchase land in Wanjohi; that the family agreed that he sells 2 acres whereupon Rufus Macharia his son brought half an acre but he is yet to give him a title; his children have their own properties and that he is only interested in subdivision of the property; that the caution over the Kirima land by the Defendants be removed; he has not made any will.
6. Upon cross-examination, PW1 admitted that Gikonyo is the name by which people know him. He also admitted to having 3 portions of land. Nyandarua Kirima, in Molo and at Kiburuti in Olkalou.



The Kirima land was 17 acres. He added that he was first a squatter and that he did not have land when he married the Defendant; that he was given the land by the company for which he was working for as a gift. He denied the allegation that the defendant contributed to the acquisition of the land. He however stated that he got the land from Settlement Fund Trustees and paid for it; he bought the two properties with his salary; though he married his second wife Waitherero in 1966 he could not recall how many children he had with the Defendant by the time he married his second; that school fees were needed by both houses. He denied that he had said that the 4 acres of the Kirima land be sold for fees. He also denied ever having sat down in a meeting with his first family. He however admitted that notes were written down but added that they were of things different from those discussed. He denied having carried away any cows and stated that his first family sold 20 cows and 6 goats; that 2 acres had been sold before they went to the chief, stated that his sons put up a land sale sign and at the time of sale and as he was receiving the sale monies Rufus his son was present as a witness. He denied ever having discussed sale of the land. He added that his son Rufus never came to him in Molo requesting for school fees as alleged; he stated that his son however threatened him and that was when he sold him a half acre. He stated that the Defendant was to stay on the Kirima land while the 2<sup>nd</sup> wife and himself stay at the Molo land and the other plot.

7. On re-examination, PW1 stated that he used to be a squatter and stated that by the time he got the Nyandarua land he already had two wives; that he separated his wives to avoid quarrels and added that he educated all his children using his salary and the farming income; that there was no evidence that the Defendant educated the children; that he had sold the 2 acres by force and used the proceeds to buy the portion on which he now lives; that he had disagreements with his first family and thus feared for his life; that the idea that the remaining portion was to be theirs was not his. He testified that he is the owner of the land and that he wants to share it as per the number of children he has. Upon cross-examination by the court, PW1 confirmed that he married his first wife in 1951 and the 2<sup>nd</sup> wife in 1966. He further confirmed that he got his first born with the Defendant in 1953 but could not recall when he got his first child with his 2<sup>nd</sup> wife. He added that he got Kirima Land in 1982 and Molo land thereafter.

### **Defendant's Evidence**

8. Beatrice Wangechi the Defendant herein testified as DW1. She testified that she lives at Wanjohi; that the Plaintiff is her husband to whom she got married in December 1951; that they have 8 children since the 9<sup>th</sup> had passed on; they first stayed at Dundori and after the war went to live at Wanjohi where her husband was employed by a white man; they got land on which she is now living; that the Government gave them land and they paid for it; that the land was paid for by her children after the Plaintiff married another wife and left them; that prior to that, they used to pay for the land with the Plaintiff; she had 6 children by the time the Plaintiff married another wife and left with her for Molo; that they had bought the Nyandarua land together; that the Plaintiff was not present during the latter day events that made the land acreage attain 15 acres; that the said land is where she has been farming and bringing up her children; that they had agreed with the Plaintiff that her land was the one at Kirima while the Molo land was Waitherero's (second wife); that in 1988 the Plaintiff took her before the Chief as he had wanted the land subdivided; that before that, the issue of school fees for her children arose since he had abandoned her save for occasional visits. She stated that they would disagree and quarrel; that the Plaintiff had proposed that 5 acres of the land should be sold to pay her children's school fees but the same was not sold as the children objected to the sale; that Kanugi bought 2 acres and her son bought half an acre; that she had refused any sale but after discussing with her children, she agreed to allow the Plaintiff sell 2.5 acres; that the Plaintiff proposed that the Nyandarua land be shared between her and his 2<sup>nd</sup> wife. She further stated that he sold the Molo land and purchased other land in Kiburuti.



She stated that the Plaintiff wanted to split their land by half and one half be given the second wife but she rejected the said proposal; they are not indebted to each other as the Plaintiff got his 2.5 acres and agreed that the remaining land is hers. She further testified that after he got 2.5 acres she directed her sons to subdivide the land among themselves; that the sons gave her and her daughters some portion where they have since planted some trees. She urged the court to dismiss the Plaintiff's case.

9. Upon cross-examination, DW1 stated that after the Plaintiff married his second wife, they stayed together for a while and that she only left when he became violent; that the Plaintiff had been employed at Salient and after the white man left, the late President Kenyatta began giving people land in Salient where they were paying ksh 500/= for the land; that the payments for the land were deducted from the Plaintiff's salary; that the land was 17.5 acres and after 2.5 acres was sold it became 15 acres; that they used to sell potatoes to pay for the land and that by then the Plaintiff had not married his second wife; that she could not agree to the subdivision proposed by the Plaintiff since they had an agreement in place and further, that he failed to educate her children; that they never had cattle by the time the Plaintiff left her; that he left her with her mother-in-law and brother-in-law; that they paid ksh 500/= for the Kirima land and paid ksh 6,000/= for the Molo land. She further stated that she gave him the monies from the potato sales. She backtracked on her earlier assertion and stated that she did not know whether any monies were deducted from the Plaintiff's salary. She admitted that the Plaintiff's name was on both titles and added that if the Plaintiff had brought up his children it would be different; that she does not consent to the Nyandarua land being distributed to the 2<sup>nd</sup> wife's children; that the Plaintiff was the one who drafted the agreement that the Nyandarua land be left to her; that the Molo land ought to be the one shared and not hers.
10. On re-examination, she stated that her mother-in-law was still present when she left after the physical abuse from the Plaintiff. DW1 stated that she had sacrificed much to buy the Kirima and Molo land while the second wife had not been married.
11. Rufus Macharia Gikonyo testified as DW2 and adopted his witness statement dated 2/6/2022 as his evidence-in-chief; He testified that in December 1988, while in Form 1 the Plaintiff came to their home stating that he wanted to sell 4 acres of their Kirima land for school fees; that they discussed the issue and they decided to save 4 acres of the said land as their inheritance. The same was recorded on 11/12/1988 and it was their brother Paul Gitau who wrote the agreement; that Plaintiff had once asked for school fees but the latter told him to sell 4 acres to obtain the said fees; that in 2004 the Plaintiff came back to Kirima wanting to sell some land but there was much disagreement; the case was referred to the chief where he later sold 2.5 acres to one Kanugi and he purchased the half acre remaining at ksh 65,000/= as per the agreement labelled.
12. DW2 testified that in 2015 the Plaintiff sued their house before the chief where the chief directed the Plaintiff to comply with the first agreement. He added that the chief also wrote a letter dated 19/5/2015 restricting any transactions on the land, until the discussions were finalized. It was his testimony that the Plaintiff wanted the land in the two places shared equally between children in the two families which would prejudice them. He also testified that he did not fully understand the subdivision mechanics but confirmed that it would include some of the 2<sup>nd</sup> family members moving into the Kirima land. He stated that neither of his siblings or mother has gone to the Molo or the Kiburuti lands. He urged the court to dismiss the present case and awarded the Defendant costs.
13. On cross-examination, DW2 confirmed that the Plaintiff and Defendant are husband and wife while Waitherero is the Plaintiff's 2<sup>nd</sup> wife. He agreed that the Plaintiff was at liberty to marry Waitherero and bear children and that every child had the right to be educated and to inherit. He admitted that he could not compel the Plaintiff to give him anything but added that the Defendant contributed to the land acquisition and could therefore claim a part and the children get equal share as well. Upon re-



examination, he stated that during the making of the agreements the Plaintiff came alone, without his Molo family. He added that the school fees issue arose when the agreements were being made and that the Plaintiff was ever present. The Defendant's case was then marked as closed.

### Submissions

14. The Plaintiff's submissions dated 14/02/2023 on 16/02/2023 identified 3 issues for determination: (a) whether the Plaintiff has two wives and whether he got the properties while married to them; (b) whether the Plaintiff is the absolute registered owner of all that parcels of land known as Nyandarua/Kirima/5748 and Mau Summit/Molo Block 2/79 (Mona) and whether he has an indefeasible right over the said lands, and (c) whether the Plaintiff has a right to distribute the properties herein amongst his wives and children. On issue (a) it was submitted that it is admitted by both the Plaintiff and Defendant that the Plaintiff has two wives, the Defendant married in 1951 while the 2<sup>nd</sup> wife in the year 1966. He further submitted that the two properties were acquired in the year 1980 and 1982 thereabout meaning it was acquired while he was already married to the two wives. He submitted that the two wives contributed towards the realization of the two properties. On issue (b) it was urged that, relying on Sections 27 and 28 of the *Land Registration Act* and the Court of Appeal case of *Muriuki Marigi and Richard Marigi & another* Nyeri Civil Appeal no 189 of 1996; that he possesses an indefeasible right over the suit properties and has the free will to subdivide his assets. On issue (c), he relied on Section 8 and 14 of the Matrimonial Property Act and stated that the Plaintiff bought the properties after he had married his wives and therefore he has a right to distribute the properties among his wives and children. On the issue of costs, the Plaintiff submitted that he is entitled to the costs of the suit.

### Analysis And Determination

15. It is not in dispute that the Plaintiff has two wives, the Defendant being the 1<sup>st</sup> wife while one Waitherero is the 2<sup>nd</sup> wife who is not a party to these proceedings. The Plaintiff holds the two suit properties Nyandarua/Kirima/5748 and Mau Summit/Molo Block 2/79 (Mona) in his name. He wishes to subdivide his properties amongst his two wives and children but the Defendant herein being the 1<sup>st</sup> wife does not consent to the said subdivision.
16. There is no need in this case to determine whether the suit properties are matrimonial properties. I say so because the plaintiff's marriage to each of the defendants is still in existence and has not been dissolved. This is a case in which the registered landowner is still alive and enjoying all rights under the law with regard to his proprietorship of the suit land. From the facts adduced in this case, it is apparent that the Plaintiff married his first wife in 1951 while the 2<sup>nd</sup> in the year 1966. It was the Plaintiff's testimony that he acquired the Nyandarua Land in 1982 and the Molo land thereafter. The lands were acquired in his name after he contracted both marriages; It is evident that the plaintiff lived on the Nyandarua land with his family before he moved to Molo. In Molo he also acquired the second portion of land and he lives thereon with his second wife.
17. The issue this court ought to determine is whether consent by the Defendant is required before the Plaintiff proceeds to subdivide the suit properties. The Plaintiff in his evidence confirmed that he seeks to subdivide the suit lands and distribute to members of his family so as to avoid squabbles between the two families. The subdivision is not aimed at sale, but will enable those persons who purchased portions of the Nyandarua land earlier on to receive titles for their portions. That disposal is not of consequence to this judgment because the parties have conceded that the sale was by agreement of both sides in this case. Further, the suit land was acquired during the subsistence of their marriage, the



Plaintiff has not sought to evict the Defendant therefrom but to subdivide it between his wives and children.

18. The Defendant contends that the Nyandarua land belongs to her as she had paid for it using the proceeds from the sale of her potatoes. She stated that the Plaintiff was not entitled to subdivide it as there was an agreement in place and further that he had failed to pay fees for his children. Section 12 of the *Matrimonial Property Act* only provides for consent under a monogamous marriage with no provision in a polygamous set up. I have not seen any conclusive evidence that suggests that the defendant was instrumental in the purchase of the Nyandarua land or the Molo Land. The Defendant failed to produce evidence to show the payments she made towards acquiring the suit properties. It is this court's view that though there is a polygamous union in existence both suit properties are owned by the Plaintiff.
19. The plaintiff's rights to his own land are protected jealously by the provisions of Section 25 of the *Land Registration Act* which states as hereunder:

“25.

- (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—
  - (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and
  - (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.
- (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.”

20. From the evidence tendered in court, I note that with the plaintiff confirming that he simply wants to subdivide it and distribute to his two families, then it is only fair that the same be subdivided according to the Plaintiff's wishes. He is only carrying out his duties as a patriarch to the two houses forming his family. It is clear that failure to do so may saddle the families with unnecessary squabbles in the event he passes on intestate, or, as this court may state with a little bit of a self-serving eye, foist more backlog on the shoulders of the judicial system which would not be the case if his prayers were allowed. Further, I am of the view that the courts should be slow in entering into the sphere of making plans for families on how they should live as those are dynamics that should be left to families to sort out. However, if the families cannot sort them out, the court may need to step in and resolve the dispute one way or another. In this case the first wife lives on the Kirima land while the second wife lives on the one in Molo. The Plaintiff acting as head of his two houses in a traditional set up that the family appears to live in, has already settled his wives in different parcels of land and this court has not been provided with any evidence that any of them has suffered such neglect as to warrant intervention. The Plaintiff has a plan on how his family is going to live and how the suit properties are to be allocated to



each house or person, for the duration that he will be alive. It is my view that the Plaintiff has made fair provisions to his families and provided equal share to both his two wives and children.

21. For the above reasons, I see no reason not to uphold the said subdivisions by the Plaintiff and I believe that justice will be served if the subdivision proceeds as he wanted. In ordinary circumstances, I would have ordered the Defendant to pay costs, but given the familial relationship of the parties, and to obviate any no further friction between the parties, I make no orders as to costs.
22. In the upshot, I proceed to make the following final orders: -
  - a. The Plaintiff is at liberty to engage a qualified surveyor to proceed with the subdivision of the suit properties as follows:
    - i. 1 acre at Nyandarua to the defendant Beatrice Wangechi
    - ii. 1 acre at Molo to the plaintiff's second wife Waitherero Kamau.
    - iii. 1/2 an acre at Nyandarua sold to Rufus Macharia
    - iv. 1 acre to the plaintiff Daniel Kamau Njoroge to carter for sub-division expenses and issuance of title deeds
    - v. 2 acres at Nyandarua already sold
    - vi. The remaining land be subdivided equally amongst the plaintiff's children.
  - b. That the said surveyor be provided with security through the area OCS during the said subdivision and allocation of beacons.
  - c. There shall be no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 20<sup>TH</sup> DAY OF JUNE 2023.**

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

