



REPUBLIC OF KENYA



**KENYA LAW**  
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**M'bwiria v Mbwiria (Environment & Land Case 49 of 2018)  
[2023] KEELC 17918 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17918 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE 49 OF 2018**

**CK YANO, J  
JUNE 14, 2023**

**BETWEEN**

**AYUB KIINGE M'MBWIRIA ..... PLAINTIFF**

**AND**

**JENARO NTHURIMA MBWIRIA ..... DEFENDANT**

**JUDGMENT**

1. The applicant moved the court vide the originating summons dated November 29, 2018 seeking determination of the following questions.
  - i. Whether the administrator, Jenaro Nthurima Mbwiria distributed the estate of the deceased, Mbuiiria Nchore alias Mbuiiria M'nchore contrary to the certificate of grant.
  - ii. Whether the applicant, a direct beneficiary of the deceased's estate was illegally and irregularly deprived of his rightful share of the parcel of land No. Abothuguchi/Gaitu/302 measuring 8.33 Ha.
  - iii. Whether the title deeds in relation estate property No. Abothuguchi/Gaitu/302 measuring 8.33 HA ought to be revoked and issued in the terms of the certificate of confirmation of grant dated September 19, 1991.
  - iv. Whether the surveyor should visit the suit land and have it re-subdivided again at all times reinstating the original beacons and mapping out the roads if any supposed to form part of the said suit land as soon as practicable.
  - v. Whether the respondent should pay costs for this summons.
2. The summons is based on the grounds on the face of it and supported by the affidavit of Ayub Kiinge Mbwiiria, the applicant, sworn on November 29, 2018. The applicant avers that he is a direct beneficiary of the estate of the late Mbuiiria Nchore alias Mbuiiria M'nchore and is entitled to one



half of the estate property No. Abothuguchi/Gaitu/302 measuring 8.33 Ha in accordance with the certificate of confirmation of grant but received less than he was entitled during distribution by his co-administrator, the respondent herein. The applicant avers that the respondent is in a spree of selling off the suit property denying the applicant his rightful share and that the applicant has suffered loss of almost 3.5 Ha. that rightfully belongs to him and has such has a valid claim against the respondent who received part or whole the lost portion of the land. The applicant accuses the respondent of benefiting himself at the applicant's expenses. In the affidavit in support of the summons, the applicant has annexed copies of the proceedings and certificate of confirmation of grant in Meru High Court Succession cause No 127 of 1990 and receipt. The applicant avers that he now seeks a new survey and subsequent subdivision to be carried out on the suit property so that each of them gets his share.

3. At the hearing, the applicant testified as P w 1 and adopted his witness statement dated June 23, 2022 as his evidence in chief and produced the confirmation of grant proceedings and order issued on September 19, 1991, certificate of confirmation of grant issued on September 26, 1991, sketch map dated November 1, 1996, receipt dated January 22, 2007, photograph and surveyor's report with attached sketch maps dated December 8, 2021 as P exhibits 1 – 6 respectively.
4. When cross examined by Mr Gichunge, learned counsel for the respondent, the applicant stated that the respondent is his brother and that the suit land belonged to their father. That when subdivision was done, the respondent got more acreage than the applicant, hence this suit. He confirmed that the court directed the county surveyor to visit the land and filed a report produced and marked as P exhibit 6. That the original parcel was No 302 before it was subdivided and according to the sketch map, the applicant's parcel is No 1305 which he has subdivided and shared among his children and sold some. The applicant stated that he does not agree with the mode of distribution sworn in the certificate of confirmation of grant which he produced as P exhibit 2.
5. The respondent filed a replying affidavit sworn on January 25, 2019 in which he depones inter alia, that the succession cause was finalized and the probate court ordered that the deceased's land be shared equally between the applicant and the respondent and that the land was subdivided into parcel No. Abothuguchi/Gaitu/1305 measuring 4.165 Ha. which was registered in the name of the applicant and parcel No Abothuguchi/Gaitu/1306 registered in the respondent's name. The respondent denied depriving the applicant of his share of the suit land and denied the applicant's assertions adding that the applicant has sold most of his parcel of land.
6. The respondent testified as D W 1 and adopted the contents of his replying affidavit as his evidence in chief and produced the certificate of confirmation of grant, green cards for parcels No 1305 and 1306 and mutation form confirming that parcel No 302 was subdivided into two equal parts as defence exhibits. The respondent testified that he still has his parcel No 1306 but that the applicant has sold and transferred his. He saw no reason for this suit as the matter was determined in the succession cause and the District Surveyor. He wants the suit to be dismissed with no order as to costs.
7. Both parties filed written submissions through their respective advocates on record.
8. I have considered the evidence on record and the submissions made. The issue for determination is whether the applicant is entitled to the orders sought. Both the applicant and the respondent are brothers and the suit land originally belonged to their deceased father, Mbuiiria Nchore alias Mbuiiria M'Nchore who died intestate on February 22, 1975.
9. The uncontroverted evidence before me is that there was a petition filed in Meru High Court Succession cause No 127 of 1990 in respect of the estate of the deceased and there was no objection raised to challenge the same. The evidence on record shows that the letters of administration intestate



were issued to the respondent on March 6, 1991 and the said grant was confirmed on September 19, 1991.

10. According to the certificate of confirmation of grant dated September 26, 1991, land parcel No Abothuguchi/Gaitu/302 in the name of the deceased was shared out equally between the applicant and the respondent whereupon each got one half. The evidence on record indicates that the applicant was registered as owner of land parcel No. Abothuguchi/Gaitu/1305 measuring 4.165 Ha while the respondent became the registered owner of parcel No. Abothuguchi/Gaitu/1306 also measuring 4.165 Ha. By consent of the parties, the court ordered the County Surveyor to visit the suit properties and the surveyor made the visit and filed a report which has also been produced herein as an exhibit and the report confirmed that each of the parties got 4.26 Ha out of the original parcel of land. The surveyor's report confirms that it is only the applicant who was infact present during the exercise. The surveyor's report tallied with what the probate court had ordered. The evidence produced herein clearly show that the distribution of the deceased's land was carried out according to the grant that was confirmed by the court. It is a trite principle of law that whoever lays a claim before the court against another has the burden to prove the same. Section 107 and 108 of the Evidence Act provide as follows:-

'107

- 1 whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists.
- 2 When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side."

11. Having analyzed the evidence on record, I am not satisfied that the applicant has proved the allegations made in the originating summons herein. It is therefore my finding that the applicant has failed to prove his case against the respondent on a balance of probabilities and the same is hereby dismissed. Considering that the parties are siblings, I direct that parties bear their own costs of the suit.
12. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 14<sup>TH</sup> DAY OF JUNE 2023**

**In The Presence Of**

**Court assistant - V.Kiragu**

**Ashaba for plaintiff – present**

**Ms Kimotho holding brief for Gichunge for respondent - present**

**C K YANO**

**JUDGE**

