



**Mwangi v Njoroge (Environment & Land Case 5 of 2019)
[2023] KEELC 17998 (KLR) (12 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 17998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 5 OF 2019
BM EBOSO, J
JUNE 12, 2023
(FORMERLY MILIMANI ELC CASE NO 6 OF 2009)**

BETWEEN

TERESIA WANGUI MWANGI PLAINTIFF

AND

MONICA WANJIRU NJOROGE DEFENDANT

JUDGMENT

1. The dispute in this suit revolves around the manner in which land parcel number Lari/Kirenga/752 was partitioned amongst the beneficiaries of the estate of Iraki Njoroge [hereinafter referred to as “the deceased”]. The deceased was father to: (i) Mathewson Mwangi Iraki; (ii) Kimani Iraki; and (iii) Njoroge Iraki. The contested subdivision followed a ruling rendered by the High Court [Githinji J, as he then was] on 16/3/1999, directing that the said land be partitioned and demarcated taking into account the occupation and developments done by each respective beneficiary. The plaintiff contends that the defendant’s stone house sits on a subdivision that does not belong to the defendant. It is the case of the plaintiff that the defendant is a trespasser on the said subdivision. Through the primary suit, the plaintiff seeks an order directing demolition of the defendant’s house and eviction of the defendant from her current site.
2. The defendant filed a defence and a counterclaim in which she impugned the subdivision and contended that the plaintiff’s late husband, the late Mathewson Mwangi Iraki, clandestinely carried out the partition and failed to abide by the High Court order directing that the partition and demarcation should take into account each beneficiary’s occupation and developments on land parcel number Lari/ Kirenga/752. By way of counterclaim, the defendant sought an order annulling the subdivision and directing a fresh subdivision that complies with the order of the High Court.
3. Land Parcel number Lari/ Kirenga/752 measured approximately 5.92 hectares. The High Court ordered in Nairobi High Court Succession Cause No 502 of 1993 that the land be shared as follows:



- i. Mathewson Mwangi Iraki – 1/3 Share
 - ii. Rachel Gaitau Njoroge – 1/3 Share
[widow to Kimani Iraki]
 - iii. Esther Karago Njoroge – 1/3 Share
Mary Wambui Njoroge
Monica Wanjiku Njoroge
[the 1/3 to be shared equally amongst the three widows of Njoroge Iraki – a son to Iraki Njoroge]
4. The impugned partition gave rise to Lari/Kirenga/2040; Lari/Kirenga/2041; and Lari/Kirenga/2042. Some of the key questions to be answered in this Judgment are: (i) Whether the plaintiff's title was procured irregularly; and (ii) Whether the impugned partition should be annulled.

Evidence

5. The plaintiff testified as PW1. Her evidence was that she was a widow of the late Mathewson Mwangi Iraki who died in 2007. Following the death of her husband, she carried out succession relating to the estate of her late husband and she was subsequently registered as proprietor of subdivision parcel number Lari/Kirenga/2040, measuring approximately 1.9 hectares. During cross-examination, she stated that construction of the defendant's stone house and her own husband's [the late Mathewson Mwangi Iraki's] house on land parcel number Lari/Kirenga/752 started in the 1970s. It was her evidence that whereas her late husband stopped further construction during succession proceedings, the defendant continued with her construction. She could not remember the year when the defendant completed the construction of her house on land parcel number Lari/Kirenga/752.
6. The plaintiff further testified during cross-examination that the mutation leading to the impugned partition/subdivision was done by: (i) Mathewson Mwangi [her late husband]; (ii) Esther Karago; and Rachel Gaitau. It was her evidence that the three were the persons who signed the mutation forms giving rise to the impugned subdivisions. She did not, however, tender the relevant mutation forms as exhibits.
7. The defendant testified as DW1 and led evidence by her daughter, Margaret Njeri Njoroge, who testified as DW2. Their evidence was that the defendant was one of the three widows of the late Njoroge Iraki (a deceased son to the late Iraki Njoroge). Her co-widows were Esther Karago Njoroge and Mary Wambui Njoroge. They testified that the defendant built a stone house on the suit property between 1993 and 1996 at a cost of Kshs 800,000.
8. It was the evidence of DW1 and DW2 that through a ruling rendered by the High Court on 16/3/1999, the High Court ordered that partition of land parcel number Lari/ Kirenga/752 should take into account developments that had been done on the land by each beneficiary. They added that the impugned subdivision was done secretly without involving the defendant and without taking into account her developments on the land. It was the defendant's evidence that through the impugned subdivision, her stone house was surveyed as part of subdivision number Lari/Kirenga/2040 which was subsequently registered in the name of the plaintiff. She urged the court to annul the impugned partitions and direct compliance with the order of the High Court.



Plaintiff's Submissions

9. The plaintiff filed written submissions dated 19/7/2022 through M/s Nderitu & Waturu Associates. Counsel submitted that the plaintiff had demonstrated to the court how subdivision of Lari/Kirenga/752 was carried out giving rise to parcel number Lari/Kienga/2040 which is currently registered in the name of the plaintiff. Citing Section 28 [sic] of the *Land Registration Act*, counsel for the plaintiff argued that there was no proper basis for annulling the partition.
10. On the defendant's counterclaim, the plaintiff's advocate contended that this court lacked the jurisdiction to "alter distribution of the estate which was already determined in a succession cause", contending that the defendant's prayer in the counterclaim was "a back door attempt to appeal or challenge Justice Githinji's determination". Counsel argued that the fact that the defendant never challenged the subdivisions through the criminal justice system was testament that she accepted the mutation.

Defendant's Submissions

11. The defendant filed written submissions dated 19/8/2022 through M/s Mwicigi Kinuthia & Co Advocates. Counsel for the defendant submitted that the defendant did not seek a redistribution of the estate of Iraki Njoroge, adding that the defendant sought "a fresh and clean exercise of subdivision that takes into account the occupation and developments that were on land parcel number Lari/Kirenga/752" in tandem with the order of the High Court.
12. Counsel for the defendant added that failure by the plaintiff to produce survey documents relating to the subdivision was a clear indication that the plaintiff and her deceased husband secretly procured the subdivision title which the plaintiff was relying on. Counsel urged the court to reject the plaintiff's case and grant the defendant's counterclaim.

Analysis and Determination

13. I have considered the pleadings; the parties' respective evidence; and the rival submissions tendered in this suit. I have also considered the relevant legal frameworks and jurisprudence. The following are the five issues that fall for determination in this suit: (i) Whether this court has jurisdiction to consider and determine the defendant's defence and counterclaim; (ii) Whether the plaintiff's title was procured irregularly; (iii) Whether the defendant is a trespasser on land parcel number Lari/Kirenga/2040; (iv) Whether the relief sought in the counterclaim is available in the circumstances of this cause; and (v) What order should be made in relation to costs of the primary suit and the counterclaim. I will make brief sequential analysis and disposal of the five issues.
14. The first issue is whether this court has jurisdiction to consider and determine the defendant's defence and counterclaim. The primary suit was initiated by the plaintiff who came to this court waving title number Lari/Kirenga/2040, a subdivision surveyed out of land parcel number Lari Kirenga/752. She contended that the defendant was a trespasser on the said subdivision. She sought an order directing the defendant to remove from the said subdivision what she described as "encroachments that have been prompted thereon by her (defendant)". She also sought a permanent injunction restraining the defendant against entering or using the land comprised in the subdivision title that she waved. Lastly, she sought damages against the defendant.
15. Confronted by the above claim, the defendant tendered a defence and a counterclaim in which she contended that the title which the defendant waved was procured irregularly. It was the case of the defendant that the title which the plaintiff holds was the product of a partition survey exercise that was



carried out clandestinely by the plaintiff's late husband without involving her and in contravention of the High Court Order that required that each beneficiary's occupation and developments on land parcel number Lari/Kirenga/752 be taken into account when partitioning the said title. She sought an order directing fresh mutation that would be in tandem with the High Court Order.

16. The plaintiff contends that this court lacks jurisdiction to consider and determine the defendant's defence and counterclaim. I do not agree with the view held by the plaintiff. The plaintiff is the one who came to this court seeking this court's protection of the title she waved. In essence, she sought an order evicting the defendant from the land comprised in the title she waved. The defendant was entitled to bring a defence to the claim and a counterclaim seeking a nullification of the title.
17. The defendant has correctly pointed out that she does not challenge the succession orders that were issued by the High Court. What she is challenging is the partition survey that culminated in the title which the plaintiff is waving. She contends that the plaintiff's late husband clandestinely carried out the survey in total disregard of the High Court Order which required the existing developments of each beneficiary to be taken into account during the partition. The defendant is questioning the validity of the plaintiff's title on the above ground.
18. In my view, the defendant's defence and counterclaim raise an issue that properly falls within the jurisdiction of this court. The claim raised by the plaintiff and the defence raised by the defendant cannot be determined effectually by this court without this court pronouncing itself on the validity of the survey exercise that gave rise to the title which the plaintiff is waving, and by extension, the validity of the plaintiff's subdivision title. That is what the defendant's counterclaim is about. This is an issue that falls within the jurisdiction of this court as contemplated under Article 162(2)(b) of the Constitution and Section 13 of the Environment & Land Court Act. That is my finding on the first issue.
19. The second and third issues are intertwined. They will be considered simultaneously. The second issue is whether the plaintiff's title was procured irregularly while the third issue is whether the defendant is a trespasser on land parcel number Lari/Kirenga/2040. There is common ground that the title held by the plaintiff is supposed to relate to Mathewson Mwangi Iraki's 1/3 share of land parcel number Lari/Kirenga/752. While issuing vesting orders relating to the estate of the late Iraki Njoroge in Nairobi High Court Succession Cause No 502 of 1993, the High Court [E Githinji J, as then then was] gave the following order in a ruling rendered on 16/3/1999.

“I order that the land be partitioned and demarcated as above taking into account the occupation and developments done by each respective beneficiary.”

20. During cross-examination, the plaintiff testified that the defendant's developments on the suit property started in the 1970s. She could not remember when the defendant completed building the house which, during the partition, was surveyed as part of the title that she (the plaintiff) is waving. On the key question as to the persons who participated in the survey exercise, the plaintiff testified that her late husband together with Esther Karago and Rachael Gaitau signed the mutation forms. These were the three administrators of the estate of the late Iraki Njoroge. There was no evidence suggesting that the defendant was privy to the impugned mutation.
21. Both DW1 and DW2 testified that the defendant's developments were on land parcel number Lari/Kirenga/752 at the time the High Court issued the order of 16/3/1999. What that means is that the Administrators of the estate of Iraki Njoroge were required to take into account the defendant's developments at the time they carried out the partition survey. They did not. To the extent that they disregarded the High Court Order requiring them to take into account the existing developments and proceeded to survey the defendant's house as part of Mathewson Mwangi Irakis's 1/3 share of the land,



the resultant title which is now held in the name of the plaintiff is irregular and cannot be protected by this court. That is my finding on the first limb of the second issue.

22. Given the fact that the defendant's developments remain where they were at the time the High Court issued the Order of 16/3/1999, it is clear that the defendant is not a trespasser on land parcel number Lari/Kirenga/2040. What has emerged from the evidence presented during trial is that the administrators of the estate of Iraki Njoroge created the current dispute by ignoring the High Court order. That is the finding of this court on the third issue.
23. This court has no doubt that the plaintiff and the administrators of the estate of Iraki Njoroge know that disregard of the High Court order is what has created the problem which the plaintiff finds herself in. The solution to the problem is adherence to the order that was made by the High Court. The plaintiff's attempt to uproot the defendant from her house in total disregard of the High Court order cannot be sanctioned by this court.
24. The fourth issue is whether the mutation exercise that culminated in the impugned subdivision titles should be annulled. The mutation was carried out by the Administrators of the estate of the late Iraki Njoroge. They were: (i) the late Mathewson Mwangi Iraki; (ii) Esther Karago Njoroge; and (iii) Rachel Gaitau Kimani. Evidence before this court reveals that Mathewson Mwangi Iraki died in 2007. It is not clear whether the other two administrators are alive. What is clear, however, is that the administrators of the estate of the late Iraki Njoroge were not named as defendants in the counterclaim. Neither were they named as parties to the primary suit. The holder of the other subdivision title was similarly not named as a defendant. For the above reasons, an order annulling the impugned mutation and titles altogether cannot be issued in the absence of those key parties. Parties to this suit will be at liberty to initiate fresh proceedings to nullify the impugned mutation and subdivision titles if the administrators and beneficiaries of the estate of Iraki Njoroge do not move suo motto to resolve the dispute relating to the partition.
25. On costs, the key parties who disregarded the High Court order were not joined as parties to this suit. For the above reason, parties will bear their respective costs of the primary suit and the counterclaim.

Disposal Orders

26. In the end, the plaintiff's primary claim and the defendant's counterclaim are disposed as follows:
 - a. The plaintiff's suit is dismissed for lack of merit.
 - b. The defendant's counterclaim is struck out for failure to join as defendants in the counterclaim the surviving administrators of the estate of Iraki Njoroge and all the holders of the subdivision titles.
 - c. Parties shall bear their respective costs of the primary suit and the counterclaim.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF JUNE 2023

B M EBOSO

JUDGE

In the presence of:

Mr Nyoro for the Plaintiff

Mr Kinyanjui for the Defendant



Court Assistant: Ms Osodo

