



**William v Brouwer (Environment & Land Case 218 of 2016)
[2023] KEELC 21909 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21909 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 218 OF 2016
NA MATHEKA, J
NOVEMBER 29, 2023**

BETWEEN

AGNES NANJALA WILLIAM PLAINTIFF

AND

RENE BROUWER DEFENDANT

JUDGMENT

1. The Plaintiff avers that at all material times she was and is the registered joint proprietor owner of that parcel of land known as CR No. 26148, Subdivision No. 8832/1/MN (Original No. 1269 (1)) situated at Simba Road in Nyali, within Mombasa County measuring approximately 0.2116 Hectares. The Defendant has without any color of right together with his agents unknown to the Plaintiff have since June 2016 unlawfully trespassed on the Plaintiff's suit property and has continually been subjecting the same to wanton destruction and waste without any permission or authority from the Plaintiff. The Plaintiff avers that the Defendant has trespassed on the suit property ostensibly as the donee of a power of attorney from an undisclosed donor (s) after the demise of Jacobus Nicolas Petrus Vander Goes who together with the Plaintiff were a joint proprietor of the suit property. The Plaintiff avers that the Defendant has stationed agents and/or servants on the suit property, which comprises development of a Four (4) bedroomed residential house with strict instructions to bar the Plaintiff from entering into the premises which is secured by a perimeter wall and a lockable gate.
2. The Plaintiff avers that the said activities are also in contravention of a valid Court Order made in Mombasa Court of Appeal, Civil Appeal No. 127 of 2011 which authorized the sale of the suit property and sharing of the proceeds thereof between the Plaintiff and the other joint owner proportionally at 55% in favour of the Plaintiff and 45% in favour of the said now deceased joint owner following divorce proceedings between the Plaintiff and the said deceased. The Plaintiff further avers that following the demise of the said Jacobus Nicolas Pertrus Vander Goes neither the Defendant nor any beneficiary has obtained legal authority to deal with the property of the deceased and therefore the Defendant's activities on the suit property in any event amounts to intermeddling with the deceased



share of his property contrary to Section 45 of the [Law of Succession Act](#) (Cap 160) Laws of Kenya. The Plaintiff prays for judgment against the Defendant for;

- a. A declaration that the Plaintiff being a joint owner of the suit property is exclusively entitled to 55% share of the suit property.
 - b. An Permanent Injunction restraining the Defendant his agents, servants, proxies or any other person claiming through him from trespassing, entering r staying, developing, constructing and/or in any other manner whatsoever interfering or dealing with the property known as Plot No. 8832/1/MN, CR No. 26148 situate at Simba Road, Nyali Mombasa County.
 - c. An order for delivery of vacant possession of the suit property to the Plaintiff unconditionally.
 - d. Costs of this suit with interest.
3. The defendant avers that since the disappearance of Jacobus Petrus Nicolas Van Der Goes, his father - in - law he had been tasked by the family of Jacobus Petrus Nicolas Van Der Goes to liase between the family and the Police and is therefore a Holder of Power of Attorney Number 18202 Registered on the 5/7/2016. The defendant admits that the plaintiff is a co—owner of C.R.No. 26148, Subdivision No. 8832/1/ MN (Original No. 1269 (1) in Nyali together with Jacobus Petrus Nicolas Van Der Goes who has not been confirmed dead to date. The defendant avers and maintains that since 2009 when Jacobus Petrus Nicolas Vander Goes filed HCC Divorce Cause No. 19 of 2004 Mombasa the plaintiff and Jacobus Petrus Nicolas Van Der Goes have not been on speaking terms but Jacobus Petrus Nicolas Van Der Goes has been in physical possession of C. R. No. 26148, Subdivision No. 8832/1/MN Original No. 1269 (1) situate at Simba Road, Nyali on his own from 2004 and has maintained the said property without any assistance from the plaintiff.
4. On or about January, 2016 the said Jacobus Petrus Nicolas Van }Der Goes was pronounced "missing" and the family being concerned visited the Country to make a report to the Police and mount a search for Jacobus Petrus Nicolas Van Der Goes. On the 14/6/2016 a body was discovered at a Septic Tank at C.R. No. 26148, Subdivision No . 8832/1/MN (Original No. 1269 (1) situate at Simba Road, Nyali which body is believed to be of the said Mr. Jacobus Petrus Nicolas Van Der Goes although to date a D.N.A. Test has not confirmed whether the body belongs to the said Jacobus Petrus Nicolas Van Der Goes or not. The property known as C.R. No. 26148 had been declared a Crime Scene by the Criminal Investigation Department after the 14/6/2016 and there were no parties allowed to trample around the place without Police Permission. The defendant avers that since the 14/6/2016 when the body was discovered on C. R. No. 26148 the plaintiff has relentlessly and ruthlessly sought to access the property C.R. No. 26148 which property she never bothered to access since 2004.
5. The defendant avers and maintains that there has always been acrimony and suspicion between the plaintiff and the family of Jacobus Petrus Nicolas Van Der Goes and the plaintiff has never maintained the said property or at all and puts the plaintiff to strict proof.
6. The defendant prays that the plaintiff's suit be dismissed with the costs and judgment be entered for the defendant against the plaintiff as follows;
- a. A permanent injunction be issued as against the plaintiff to restrain herself, her servants, agents, proxies or any other person claiming through her from trespassing , entering, staying, developing, constructing or any other manner whatsoever interfering or dealing with the property known as Plot No. 8832/1/MN C.R. No. 26148 situate at Simba Road Nyali, Mombasa.



- b. An Order that the beneficiaries of Jacobus Petrus Nicolas Van Der Goes are entitled to 45% share in the property known as 8832/1/MN C.R. No. 26148 situate at Simba Road Nyali, Mombasa.
 - c. An order that the property known as 8832/1/MN C.R. No. 26148 situate at Simba Road Nyali, Mombasa be managed by a reputable property company pending the Probate and Sale.
 - d. An order that the plaintiff having a 55% share and the beneficiaries of Jacobus Petrus Nicolas Van Der Goes share, that management costs of the property known as 8832/1/MN C.R. No. 26148 situate at Simba Road Nyali, Mombasa, be shared in the same ratio as the share allocated.
7. Agnes Nanjala William married Jacobus Petrus Vander Goes on 23rd December 1992 and had one issue Demi Ann Van Der Goes on the 6th November 1997. Vander Goes petitioned for their divorce vide Mombasa High Court Divorce Cause No. 19 of 2004. On 9th October 2012, the court allowed Agnes Nanjala's cross-petition and dissolved the marriage on the grounds of cruelty and desertion (DEX-32). On 16th December 2013 the parties were issued with a Decree Nisi absolute (PEX-4).
 8. This court has carefully considered the evidence and the submissions therein. It has been established that during the subsistence of the marriage between Agnes Nanjala and Vander Goes, they purchased and were jointly registered as the proprietors of Plot No. 832/I/MN CR. No. 26148 (PEX-1 and 2), which is the subject of this suit. After the divorce, the parties moved the court for the distribution of matrimonial property and the same was concluded by the Court of Appeal in Mombasa Civil Appeal No. 127 of 2011 between Agnes Nanjala William v Jacob Petrus Nicolas Vander Goes vide a consent order dated 26th September 2013. The court ordered as follows;
 1. That the property known as CR No. 26148 Subdivision No. 8832 (Original No. 1263(1) Section 1 Mainland North Coast shall be sold and the proceeds thereof apportioned at 55% in favour of the appellant and 45% in favour of the respondent.
 2. That the costs of the transaction in No. 1 above including valuation and conveyance shall be shared by the parties equally.
 3. That each party to bear its own cost.
 9. Soon after the appellate court ordered for the suit property to be sold, Agnes Nanjala instructed her advocates Madzayo Mrima & Jadi Advocates while Vander Goes instructed the firm of V.N Okata & Company Advocates to initiate the process of locating a potential buyer of the suit property. There were several letters of correspondence between the two firms between 7th February 2014 and 29th January 2016 which they discussed the sale of the suit property (DEX8-22). The sale negotiations collapsed in January 2016 when Vander Goes went missing and the suit property became a scene of crime after his body was discovered therein. (DEX23-30). After the disappearance of Vander Goes, his children (besides the one he begot with Agnes Nanjala) i.e Johannes Wilhelmus Petrus Van Der Goes, Frank Christian Van Der Goes, Ingrid Anna Margeretha Van Der Goes- Brouwer executed a Power of Attorney on 17th May 2016 in relation to the suit property. The power of attorney donated power to one Rene Petrus Adrianus Brouwer to "represent our family and interest in any matter concerning Mr Jacobus Petrus Van Der Goes and our family to sell to any person our interest comprised in the above named title and in our names to sign all such transfers and other instruments and to do all such acts matters and things as may be necessary... "
 10. At the background of the passing of Vander Goes and the appointment of Rene Brouwer under the power of attorney, Agnes Nanjala filed this suit on 10th August 2016 claiming that Rene Brouwer had trespassed onto the suit property and denied her access to the suit property in contravention of the



orders of the Court of Appeal in CACA 127 of 2011 to sell the suit property and share proceeds of the same between herself and her late ex-husband at a rate of 55% v 45%. Rene Brouwer mounted a defence against the plaintiff's claim maintaining that his presence in the suit property was only to protect the interest of the late Vander Goes and had no intention of ousting her proprietary interest in the suit property. Further to his defence he made a counterclaim against the plaintiff and averred that the plaintiff ought to share the burden of the financial responsibility of maintaining the suit property. He proposed that the plaintiff be compelled by the court to pay a property agent 55% of her share as management fees while the beneficiaries of Vander Goes pay 45% until the suit property is sold as per the orders of the Court of Appeal.

11. Since the institution of this suit, the parties herein have moved the probate court for letters of administration of the estate of Vander Goes. In particular, Rene Brouwer and Ingrid Anna Margaretha Vander Goes have petitioned the court in Mombasa High Court Succession Cause No. 5 of 2017, for letters of administration with a written will annexed, while the plaintiff and her daughter Demi Ann Vander Goes are the objectors (DEX-33). On 31st August 2021, the probate court ordered inter alia that there be an issuance of the grant of probate written to the petitioners jointly and during the pendency of the confirmation of the grant, the objectors may apply for a reasonable provision of the estate. The plaintiff and her daughter (objectors) being dissatisfied with the said orders have since filed a Notice of Appeal to the Court of Appeal dated 13th September 2021 (DEX-34).

12. From an analysis of the genesis of the dispute herein, it is clear to the court that ownership of the suit property was long determined by the Court of Appeal. It has not been disputed by either party that Plot No. CR No. 26148 Subdivision No. 8832/I/MN is jointly owned and registered in the names of Agnes Nanjala and Vander Goes, who litigated upon it on the demise of their marriage and the Court of Appeal in CACA 127 of 2011 ordered the same be sold and the proceeds of the sale be shared 55% for Agnes Nanjala and 45% for Vander Goes. This court takes cognizance of these orders and find that they finalized the issue of ownership of the suit property between Agnes Nanjala and Vander Goes. The Court of Appeal orders were in mandatory terms, the parties were ordered to sell the suit property and divide the proceeds, these orders are still alive and have never been appealed against. In *Ramesh Popatlal Shah & 2 others v National Industrial Credit Bank Limited* (2005) eKLR, it was held that,

“Pausing there for a while, it seems that unless and until a court order is discharged, it ought to be obeyed. A question that immediately arises is this – what happens between the making of the order(s) and the date of the discharge? Simple logic dictates that as long as the orders are not discharged, they are valid. And since they are valid, they should be obeyed, in observance, not in breach. That being the case, it seems to me that the only way in which a litigant can obtain a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the pain of committing a contempt of court.”

13. This court cannot divert from the orders issued by the Court of Appeal, since its bound by the principle of stare decisis, which requires this court to follow earlier judicial decisions when the same points arise again. The Court of Appeal in *Martin Nyaga Wambora v County Assembly of Embu & 37 others* (2015) eKLR, held that;

“Stare decisis is a common law doctrine that has been applicable in Kenya by virtue of the nation's common law heritage. The doctrine now enjoys constitutional protection by dint of Article 163 (7) of the *Constitution*. Although that provision only recognizes the doctrine in regard to the Supreme Court, the doctrine must of necessity be extended to the Court



of Appeal in relation to courts lower in rank to it. This is particularly so since the Court of Appeal is in many cases the court of last resort.”

14. The question before this court therefore is, have the parties herein made any steps towards obeying these orders and what steps do they need to take to dispose of the suit property and share the proceeds as ordered by the Court of Appeal? I answer this question in the negative, the parties herein have not complied with these orders, and they have not taken any legitimate step to dispose of the suit property as directed by the Court of Appeal. This court has no jurisdiction to determine the personal representatives of the Estate of Vander Goes that is a question to be determined by the probate court. It is important for this court to mention that the power of attorney held by the defendant does not qualify him to be the personal representative of the Estate of Vander Goes. The power of attorney was limited to representing the interest of the family of Vander Goes in the suit property, which did not empower him to proceed with the sale of the suit property on behalf of the Estate of Vander Goes without letters of administration. More so, at the time the power of attorney was being registered, Vander Goes had already died and therefore he was incapable of donating any powers to the defendant to act on his behalf.
15. The suit property has to be sold pursuant to the orders of the Court of Appeal dated 26th September 2013. From the pleadings and evidence adduced neither party has opposed or disputed how to share proceeds, the only issue the defendant has is the management of the suit property before the same is sold. However, the defendant did not adduce any evidence e.g. receipts of payment of salaries to a security guard and house caretaker or any receipt of payment towards the maintenance of the suit property since he took physical possession. The Court cannot speculate any expenses incurred by the defendant and as such the same has not been proved on a balance of probabilities and cannot be granted by court.
16. Other than directing the parties to comply with the orders of the Court of Appeal, this court directs that the parties value the suit property by a professional, duly registered Land valuer and the net proceeds be shared as ordered by the Court of Appeal. For the avoidance of doubt, this court proceeds to make the following orders:
 1. The plaintiff and the legal representative(s) of the Estate of Vander Goes proceed with the sale of Plot No. CR 26148 Subdivision No. 8832/I/MN as ordered by the Court of Appeal in Mombasa CACA No. 127 of 2011 on 26th September 2013.
 2. The price of the suit property is to be guided by a valuation conducted by the Mombasa County Land valuer.
 3. Each party to bear its own costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29TH DAY OF NOVEMBER 2023.

N.A. MATHEKA

JUDGE

