



Kagai v Nyaleso & 4 others; Nyaleso & 2 others (Interested Parties) (Environment & Land Case E003 of 2023) [2023] KEELC 21895 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21895 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE E003 OF 2023
DO OHUNGO, J
NOVEMBER 28, 2023**

BETWEEN

NOEL KAGAI PLAINTIFF

AND

AGGREY NYALESO 1ST DEFENDANT

HAGGAI AMUHIMA MANOA 2ND DEFENDANT

CORNELIAS ARAKA LUBOSA 3RD DEFENDANT

WALTER OLUMBE 4TH DEFENDANT

COUNTY LAND REGISTRAR - KAKAMEGA 5TH DEFENDANT

AND

HUMPHREY LISANJILI NYALESO INTERESTED PARTY

JUSTINE MUHIMWA INTERESTED PARTY

LENAH MULUMBA INTERESTED PARTY

RULING

1. The plaintiff moved the court through plaint dated 31st January 2023 in which she averred that the first defendant is her husband and that she brought this case for and on behalf of the estate of Robert Isinjili (deceased) who died on 29th May 1986 and who was the proprietor of the parcel of land known as Kakamega/Shisejeri/930 (the suit property). That the first and second defendants are biological brothers of the deceased and that no succession proceedings were filed in respect of the deceased's estate. That the fourth defendant fraudulently, unprocedurally and illegally caused registration of the suit property in the name of the second defendant. She further averred that the first and second defendant caused title in respect of the suit property to be closed and subdivided into Kakamega/Shisejeri/3930



to Kakamega/Shisejari/3934. The plaintiff also averred that there were no other proceedings in any court between the parties save for Kakamega MCELC Number 65 of 2020 where the third defendant herein had sued her for injunctive orders and eviction.

2. The plaintiff therefore prayed for judgment for the following orders:
 - i. A declaration that the transfer of Land Parcel No. Kakamega/Shisejari/930 from Robert Isinjili (Deceased) by way of transfer into Haggai Amuhima Manoa on the 2nd of February, 2015 was irregular, unprocedural, improper, illegal/unlawful and is null and void and the resultant subdivisions of the following titles comprising of Kakamega/Shisejari/3930, 3931, 3932, 3933 and 3934 in the name of 2nd Defendant and the 3rd and 4th defendant be cancelled forth with.
 - ii. The 5th defendant be directed to cancel entries 2, 3 and 4 on the register in respect of Land Parcel Number Kakamega/Shisejari/930 and revert the suit property into the name of Robert Isinjili (Deceased) for succession to take place.
 - iii. An eviction order do issue against the 3rd Defendant one Cornelias Araka Imbosa from that portion measuring 0.4HA which he has occupied in Land Parcel No. Kakamega/Shisejari/930 and a further order of injunction do issue restraining the 1st, 2nd, 3rd and 4th Defendants from interfering with the Plaintiff's and the Interested Parties occupation, use and development of the beneficial share they occupy in land parcel No. Kakamega/Shisejari/930.
 - iv. Costs of this suit be borne by the Defendants.
 - v. Any other or further orders the Court deems just and fit to grant or issue in the circumstances.
3. Alongside the plaint, the plaintiff filed Notice of Motion dated 31st January 2023, which is the subject of this ruling. The following orders are sought in the application:
 1. [Spent]
 2. [Spent]
 3. [Spent]
 4. That there be an order of prohibition directed at the 5th respondent from making any further entries on Land parcels Nos.
 - a. Kakamega/Shisejari/3930
 - b. Kakamega/Shisejari/3931
 - c. Kakamega/Shisejari/3932
 - d. Kakamega/Shisejari/3933 and
 - e. Kakamega/Shisejari/3934
 5. That there be an order directed at the 3rd respondent to remove the fence erected on the portion occupied by the Applicant and the interested parties and thereafter be restrained from erecting any other fence that inhibits the Applicant's entry or exit from the portion they occupy in Land parcel No. Kakamega/Shisejari/930 - now subdivide into Kakamega/Shisejari/3930 - 3934.
 6. The O.C.S Shisejari Police Station be directed to ensure that the orders issued by this Court are fully complied with.



7. That until the suit filed herein is finally heard and determined, all the orders issued herein in the interim be confirmed and or be extended.
 8. That the costs of this application be borne by the Respondents.
 9. That the Court be at liberty to issue any or further orders it deems just and fit to grant in the circumstances.
4. The application is supported by an affidavit sworn by the plaintiff/applicant. She repeated the averments in the plaint and deposed that she discovered in the year 2019 that her husband sold to the third defendant the portion of the suit property that had been bequeathed to them.
 5. A replying affidavit sworn by Eunice Engoke Nyaleso was filed. She deposed that she was a spouse to the first defendant who was outside the country and who had authorised her to swear the affidavit on his behalf. She further deposed that Robert Isinjili (deceased) was the first defendant's grandfather and added that the plaintiff did not have the legal capacity to sue on behalf the estate of Robert Isinjili (deceased). That Robert Isinjili (deceased) had two sons: Jonathan Isanjili who was the first defendant's father and Manoah Isanjili who both inherited land from Robert Isinjili (deceased). That the first defendant who inherited the suit property from his father later authorized the second defendant who is his cousin to subdivide the suit property out of which he allocated Kakamega/Shisejeri/3933 and 3934 which were the larger portions to his children and their mother who is the plaintiff while Kakamega/Shisejeri/3932 which is the smaller portion was allocated to the other family where Eunice Engoke Nyaleso was the wife.
 6. She further deposed that since the first defendant had separated from the plaintiff, the first defendant sold his family's share to the third defendant and purchased another parcel in Bungoma where he relocated his other family to avoid conflicts between the families. She went on to state that the plaintiff and her children were not satisfied with what they got, and they refused to sign transfer forms which would have enabled transfer of Kakamega/Shisejeri/3933 and 3934 to them. That as a result, the first defendant instructed the second defendant to have the said parcels registered in their names to await transfer to the plaintiff and her children when they are ready. She added that the plaintiff is only actuated by greed in claiming the parcel sold to the third defendant, yet the plaintiff and her children had been allocated the largest share.
 7. The third defendant filed Notice of Preliminary Objection dated 8th May 2023, to the effect that this suit offends Section 6 of the Civil Procedure Act in view of existence of Kakamega MCL & E Number 65 of 2020 concerning the same parties and subject matter.
 8. The fifth defendant filed a replying affidavit sworn by Nelson O Odhiambo, the County Land Registrar, Kakamega County. He deposed that the suit property was registered in the name of Robert Isinjili (deceased) on 21st November 1973 and that it was transferred to the second defendant on 2nd February 2015 and ultimately subdivided on 19th February 2019 to give rise to Kakamega/Shisejeri/3930 to 3934. He added that all the documents that were submitted to his office to facilitate the subdivisions and transfers were properly executed and that his office discharged its duty.
 9. The first defendant filed a further affidavit sworn by Eunice Engoke Nyaleso to which she annexed a copy of a valuation report dated 12th May 2023 and signed by Edwin Oduor of Basemark Realtor Valuers Ltd who put the market value of the suit property inclusive of its subdivisions at KShs 6,152,000.



10. When the application came up for inter parte hearing on 2nd May 2023, counsel for the first defendant urged the court to transfer the suit to the Subordinate Court for hearing and determination arguing that the value of the suit property was within the pecuniary jurisdiction of the said court.
11. I have considered the application, the affidavits, the preliminary objection, and the submissions.
12. Section 6 of the *Civil Procedure Act* provides:

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.
13. There is no dispute that there is another suit, being Kakamega MCELC Number 65 of 2020, which is pending before the Subordinate Court. The plaintiff has herself referred to it in her plaint wherein she averred that in the said suit, the third defendant herein had sued her for injunctive orders and eviction. I note that the third defendant herein filed his list and bundle of documents on 10th May 2023. He included copies of the plaint and defence and counterclaim in the said case among his list and bundle of documents.
14. I have perused the plaint as well as the defence and counterclaim in Kakamega MCELC Number 65 of 2020. I note that in the said case, the third defendant herein asserts proprietorship of Kakamega/Shisejeri/3932 and on that basis seeks a permanent injunction to restrain the plaintiff herein from interfering with his peaceful use and enjoyment of the said parcel. On the other hand, the plaintiff herein has mounted a counterclaim seeking cancellation of the third defendant's title on allegations of fraud. Just like in this case, the plaintiff herein has discussed at length in Kakamega MCELC Number 65 of 2020, validity of subdivision Kakamega/Shisejeri/930 into Kakamega/Shisejeri/3930 to Kakamega/Shisejeri/3934 as well as cancellation of the said titles.
15. Thus, it is manifest that validity of subdivision Kakamega/Shisejeri/930 into Kakamega/Shisejeri/3930 to Kakamega/Shisejeri/3934 as well as validity of the titles which is the issue in this case is also directly and substantially in issue in Kakamega MCELC Number 65 of 2020, a previously instituted suit between the same parties. Consequently, I find that this suit offends Section 6 of the *Civil Procedure Act* and is therefore to be stayed. In those circumstances, I cannot proceed to consider and determine Notice of Motion dated 31st January 2023.
16. At the same time, in view of the valuation report dated 12th May 2023 and signed by Edwin Oduor of Basemark Realtor Valuers Ltd which put the market value of the suit property inclusive of its subdivisions at KShs 6,152,000, I find that this suit can be heard and determined by the Subordinate Court.
17. In the result, I make the following orders:
 - a. This suit is hereby transferred to the Chief Magistrate's Court at Kakamega for hearing and determination.
 - b. This suit is hereby stayed pending hearing and determination of Kakamega MCELC Number 65 of 2020.
 - c. The order in (b) above notwithstanding, the Subordinate Court shall be at liberty to consider consolidation of this suit with Kakamega MCELC Number 65 of 2020 for hearing and



determination or to make such further or other orders herein as will be necessary to facilitate determination of the dispute between the parties.

d. Costs shall be in the cause.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF NOVEMBER 2023.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Ms Luseno holding brief for Mr Chitwa for the Plaintiff and the Interested Parties

Mr Majimbo for the First Defendant

Mr Indimuli for the Second Defendant

The Third Defendant present in person

No appearance for the Fourth and Fifth Defendants

Court Assistant: E. Juma

