



**Ngatia v Mwaniki (Environment & Land Case 2081 of 2007)
[2023] KEELC 22452 (KLR) (22 December 2023) (Judgment)**

Neutral citation: [2023] KEELC 22452 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2081 OF 2007**

**MD MWANGI, J
DECEMBER 22, 2023**

BETWEEN

LINAH NYOKABI NGATIA PLAINTIFF

AND

CHARLES MWANIKI RESPONDENT

JUDGMENT

Background

1. The Plaintiff's suit is grounded on the amended complaint, amended at Nairobi on 29th May, 2009 and filed in Court on 2nd June, 2009.
2. The original Plaintiff Linah Nyokabi Waithera pleaded that she was the wife of the Defendant Charles Mwaniki. The Plaintiff alleged that during the subsistence of their marriage, she and the Defendant bought a developed property known as L.R. No. 12151/2 at a consideration of Kshs 6.0 million (hereinafter referred to as the suit property).
3. It was the original Plaintiff's case that she was the one who was managing the said property and it had been her main source of livelihood, including their daughter. The Defendant however, sometimes in 2006, while in jail in the Republic of Tanzania allegedly instructed one Peter Karingu of Karingu & Co. Advocates, instructing them to take over the management of the suit property from the Plaintiff who according to the Defendant was managing it merely as his agent. The Plaintiff however contended that she was not an agent of the Defendant, rather, was a co-owner of the suit property though it was registered in the name of the Defendant at the time of the purchase.
4. The Plaintiff further pleaded that she and the Defendant bought yet another property known as Ngong/Ngong/24830 which they had been developing jointly.
5. The Plaintiff therefore prayed for the following orders:-



- A. An injunction do issue against the Defendant's agents and or servants from interfering with L.R. No. 12151/2 and L.R. No. Ngong/Ngong/24830 until the final determination of the suit.
 - B. A declaration that L.R. No. 12152/2 and L.R. No. Ngong/Ngong/24830 is owned by the Plaintiff and the Defendant equally.
 - C. That the said L.R./Nos. 12151/2 and Ngong/Ngong/24830 be sold and the proceeds therefrom be shared equally.
 - D. Costs of the suit.
6. The original Plaintiff, Linah Nyokabi passed on, on 2nd October, 2009. The mother to Linah Nyokabi one, Anne Waithira Ngatia took over the case in her capacity as the Administrator of the Estate of Linah Nyokabi. However, as fate would have it, Anne Waithira Ngatia too passed on as well on 9th May, 2014. It was then that Stephen Karanja Ngatia who was a Co-Administrator of the Estate of Linah Nyokabi was substituted with Anne Waithira Ngatia as the Plaintiff.
7. Stephen Karanja could not however prosecute the suit after he got a job in Qatar. Eventually, Nancy Waithira Mwaniki, who was at the time of majority age and had subsequently been issued with letters of Administration in her late mother's estate in Nairobi High Court Succession Cause No. 460B of 2010, was substituted as the Plaintiff in this matter. She is the Plaintiff who eventually concluded this case.

Defence and Counter-Claim by the Defendant

8. The Defendant, Charles Mwaniki filed a statement of Defence and Counter-Claim dated 20th February, 2007. It was filed in Court on 21st February, 2007.
9. In the said statement of Defence and Counter-claim, the Defendant denied that the Plaintiff was his wife and put her to strict proof. The Defendant further asserted that he solely bought the suit property L.R. No. 12151/2 and is therefore the sole proprietor of the same. The Defendant alleged that he merely appointed the Plaintiff as his property manager of the suit property L.R. No. 12151/2 with the mandate to collect rents, pay utility bills and let out vacant spaces.
10. The Defendant admitted that about the year 2006, he terminated the management services of the Plaintiff and through his Lawyers, appointed M/s Paragon Property Consultants Ltd to take over the Management of the suit property but the Plaintiff became hostile to them and illegally continued to hold on to the management of the suit property. The Defendant denied in totality that the Plaintiff was a co-owner of the suit property with him and put her to strict proof.
11. In his counter-claim, the Defendant reiterated that the Plaintiff was his property manager on the suit property L.R. No. 12151/2 from whence she had been collecting rents, from the nine (9) residential flats and three shops on the ground floor. She had however failed and or refused to deliver to the Defendant or his appointed agents all or any rents collected from the property.
12. The Defendant therefore prayed for:
- i. An order of permanent injunction restraining the Plaintiff by herself, her servants or agents from entering, remaining in, collecting rents, managing or in any way dealing with all the property known as L.R. NO. 12151/2, Kahawa Wendani.
 - ii. An order that the Plaintiff to pay to the Defendant all the rents collected from the suit property from December, 2003 to the date of judgment.



- iii. Costs of this suit.
 - iv. Interest on (iii) and (iv) above.
13. On 11th June, 2009, the Defendant filed a statement of Defence to the Plaintiff's amended Plaint dated 8th June, 2009.
 14. In the said defence, the Defendant denied being married to the Plaintiff at all and further averred that the property NO. 12151/2 belonged to him solely and that he was the one who singly paid the purchase price of Kshs 6.0 million without any contribution from the Plaintiff.
 15. The Defendant further denied siring a daughter with the Plaintiff. He reiterated that he was the sole owner of the subject property which was also registered in his name alone. He denied that the Plaintiff was a co-owner.
 16. In regard to the other property referred to as Ngong/Ngong/24830, he asserted that he bought the property on his own and partly developed it without any input from the Plaintiff.
 17. The Defendant prayed for the dismissal of the Plaintiff's suit with costs.

Evidence adduced at the trial

18. This matter proceeded to full hearing, with the Plaintiff testifying as the sole witness in support of her case. The Defendant too testified as a witness in his own case and called two (2) other witnesses.
19. The Plaintiff adopted her witness statement dated 3rd October, 2019 as her evidence in chief. She further produced the documents on the Plaintiff's list of documents as her exhibits.
20. It was the Plaintiff's evidence that Linah Nyokabi was her mother whereas the late Ann Waithera Ngatia was her grandmother. She produced the statement of the late Ann Waithera Ngatia as an exhibit.
21. In Cross-Examination, the Plaintiff stated that she was born on 17th July, 1993. She had no information whatsoever in regard to the transactions for the purchase of the subject properties. She only heard about them. She averred that she knew the Defendant, Charles Mwaniki, as her father, though not a biological father. She had no information about his arrest and incarceration in Tanzania though.
22. The Plaintiff confirmed that she was pursuing the suit on behalf of her late mother, who was married to the Defendant under Kikuyu Customary Law. They used to live together as Wife and husband. Up to the time of her death, her mother and the Defendant were still married.
23. The Plaintiff affirmed that she could not confirm if her late mother and the Defendant bought the properties jointly. The bank statements she had produced as exhibits merely showed withdrawals. There was no evidence of transfer of the money withdrawn into the Defendant's account. There is also no evidence of money paid to the Advocate who represented her mother in the transaction, if at all.
24. Referring to the agreement dated 6th January, 2003 in the Defendant's bundle, the Plaintiff confirmed that it only indicated the Defendant as the purchaser of the suit property and made no mention to Linah Nyokabi. The title to the suit property too was in the single name of the Defendant.
25. The Plaintiff further confirmed, in response to questions from the Defendant's Advocate that her late mother was buried in Limuru in her family home not in the Defendant's home though a wife under Kikuyu customs is buried at her husband's home.



26. There had not been a divorce between the Plaintiff and the Defendant. The Plaintiff affirmed that she was aware that it was not possible to divide matrimonial property between spouses before a divorce or dissolution of the marriage for that matter.
27. The Plaintiff stated that she had heard that the Ngong property had been sold. She had not produced a copy of the title for the Ngong property. She was not aware how the Ngong property had been bought either.
28. The rent from the Kahawa Wendani property is collected by an agent and divided between her and the Defendant.

Evidence adduced on behalf of the Defendant

29. The 1st Defence witness, one Godwin Njoroge Mukirai, was an uncle to the Defendant. He adopted his witness statement dated 6th May, 2013 as his evidence in chief. He confirmed the visit to Linah Nyokabi's home by the Defendant's family members for purposes of introduction of the Defendant's family to Linah Nyokabi's family. During the visit, they left behind Kshs 50,000.00. The Kshs 50,000.00 was not dowry however, it was a form of commencing an engagement. In Kikuyu it is referred to as, 'Kuhanda Ithigi'. It is the very initial process, signifying intention to engage. It was supposed to have been followed up with other rituals for the marriage between the Defendant and Linah Nyokabi to crystallize. Nothing else however happened thereafter. The family of the Defendant never went back to Linah Nyokabi's family to pay dowry and formalize the marriage. Accordingly, no marriage took place.
30. Under Cross-examination, DW1 explained that the ceremony they went through was not a dowry payment ceremony. Therefore, there was no marriage between Linah Nyokabi and the Defendant in this case. DW1 could not confirm if Linah Nyokabi was living with the Defendant.
31. Regarding the Kahawa Wendani property, DW1 stated that he could not confirm whether Linah Nyokabi contributed to the purchase of the property.
32. DW2 was a maternal cousin of the Defendant. She adopted her witness statement dated 31st May, 2013 as her evidence in chief. She too confirmed the introductory visit to Linah Nyokabi's home. Though dowry was not paid, they left behind a token of Kshs 50,000.00. They never went back to pay dowry. According to her, there was no marriage between Linah Nyokabi and the Defendant.
33. Under Cross-examination, DW2 explained that she learnt about the Kahawa Wendani house from the Defendant.
34. The Defendant testified as DW3. He adopted his witness statement dated 31st May, 2023 as his evidence in chief. He produced various documents in support of his case.
35. The Defendant asserted that he had not married Linah Nyokabi. The visit to her home was merely introductory. The sum of Kshs 50,000.00 left behind was to take care of the catering and 'Kuhanda ithigi'.
36. The Defendant reiterated that he solely bought the Kahawa Wendani house. Linah Nyokabi at the time was not even aware of his intention to buy the property.
37. The Defendant stated that he had never lived with Linah Nyokabi as husband and wife. He only used to visit her in her house as a girlfriend. He alleged that he had not known about Linah Nyokabi's daughter until Linah Nyokabi visited him in prison in Tanzania. It was then that Linah Nyokabi told



him about her daughter and her intention to change her name to include him as the father. He was not sure if she actually did.

38. The Defendant explained that he made a sale agreement at the time of purchasing the Kahawa Wendani property which was one of his exhibits. The agreement made no mention of Linah Nyokabi. She never contributed any amount of money whatsoever towards the purchase of the property.
39. It was the Defendant's case that he only told Linah Nyokabi about the Kahawa Wendani property when she visited him in prison in Tanzania. That was the time he explained to her where the property was and authorized her to collect rent on his behalf. He wrote the letter to his Advocate to collect rent after Linah Nyokabi failed to remit to him the rent she had collected.
40. The Defendant was arrested, charged, convicted and sentenced to jail in Tanzania in the year 2003. He only came back to Kenya in the year 2021. Linah Nyokabi filed the case after the Defendant had instructed his Advocate to take over the rent collection on his behalf. Linah Nyokabi did not give him any money out of the rent she had collected from the suit property.
41. The Defendant was categorical that Linah Nyokabi did not contribute any money towards the purchase of the property. In the bank statements produced by the Plaintiff in court, there was no evidence of any transfer of money to him.
42. The Defendant affirmed that he did not consent to his name being included as the father of Nancy Waithera in her birth certificate. The date of registration is indicated as 14th November, 2006. By then, he was in locked up prison in Tanzania.
43. The sale agreement for the Kahawa Wendani property is dated 6th January, 2003. It was prior to the introductory visit to Linah Nyokabi's home which was on 14th January, 2003.
44. The Defendant elaborated that his counter-claim was for a refund of all rents collected from the suit property, that is to say property L.R. No. 12151/2 at Kahawa Wendani. The Defendant explained that though he had owned a property in Ngong, he had sold it way back in 2011. He had purchased he same even before he met Linah Nyokabi.
45. In Cross-examination, the Defendant reiterated that Linah Nyokabi had not told him about her daughter, Nancy Waithera prior to her visit in prison. The Birth Certificate registration happened when he was in prison in Tanzania.
46. The Defendant explained that Linah Nyokabi had been his girlfriend. He had thought she was wife material hence the visit to her home but it turned out otherwise. He had authorized her to collect rent on his behalf from the suit property in good faith.
47. The Defendant admitted that from the year 2009, he has been receiving 40% of the rent from the Kahawa Wendani property in accordance with a court order issued in this matter. He sold the Ngong Property in the year 2010.
48. In re-examination, the Defendant clarified that he was counter-claiming for the rent collected by Linah Nyokabi as well as the 60% paid to Nancy Waithera pursuant to the court order referred to above.

Court's Directions

49. At the close of the hearing, the Court directed the parties to file written submissions. Only the Plaintiff did. The Defendant did not file any submissions. I have had the opportunity to read the submissions filed by the Plaintiff which form part of the record of this court.



Issues for Determination

50. Having carefully analyzed the pleadings in this matter and the evidence adduced, I am of the considered view that the issues for determination in this matter are:
- A. What is the import of the Certificate of Confirmation of Grant issued in Nairobi High Court Succession No. 460 B of 2010 in the Estate of Linah Nyokabi Ngatia distributing the properties L.R. No. 12151/2 and L.R. No. Ngong/Ngong/24830 (the subject matter of this suit)?
 - B. Whether the Plaintiff's suit as framed discloses a cause of action against the Defendant.
 - C. Whether the Plaintiff's case was supported by the evidence adduced.
 - D. Whether the Defendant's counter-claim is merited.
 - E. What orders should issue on costs?

Analysis and determination.

A. What is the import of the Certificate of Confirmation of grant issued in Nairobi High Court Succession Cause No. 460B of 2010, in the matter of the Estate of Linah Nyokabi Ngatia distributing the properties L.R. No. 12151/2 and L.R. No. Ngong/Ngong/124830 – the subject matter of this suit?

51. On two occasions prior to the hearing of this case, the Court invited the parties in this case to consider the implication of the confirmation of grant in the Nairobi High Court Succession Cause No. 460B of 2010. The 1st time was on 10th February, 2022. The 2nd time was on 1st November, 2022.
52. On 1st November, 2022, Ms. Waweru informed the Court that she had looked into the Succession Cause and was of the view that since the suit property had already been distributed, this case had been overtaken by events. Mr. Wesonga who was holding brief for Mr. Kiprop on that day told the court that he was merely holding brief and could not comment on the issue. The Court granted the parties more time to make up their minds on the way forward in view of the confirmation of grant.
53. On 8th December, 2022, both Mr. Kiprop and Ms. Waweru sought more time to consult. The next mention date was on 20th February, 2023. Ms. Shikali, who was holding brief for Mr. Kiprop yet again sought for more time.
54. On 22nd March, 2023, Ms. Shikali categorically stated that her position was that the matter be set down for hearing without any further delay. Ms. Waweru conceded to that position. The Court then set down the case for hearing on 14th June, 2023. It was on that date that the hearing took place.
55. One of the documents produced by the Plaintiff in this case is the Certificate of Confirmation of Grant in the Estate of Linah Nyokabi Ngatia, the original Plaintiff in this Case. The Certificate of Confirmation of Grant was issued by the High Court at Nairobi in Succession Cause No. 460B of 2010 on the 3rd December, 2018 during the subsistence of this suit.
56. This Certificate of Confirmation of Grant is of great significance to this case. I don't think the parties gave it the due consideration it deserved, otherwise, they would have approached this case differently.
57. I say so because, the Certificate distributes the two properties which are the subject matter of this case, that is to say, L.R. No. 12151/2 and L.R. No. Ngong/Ngong/24830; meaning that the two properties



were considered as part of the estate of the late Linah Nyokabi Ngatia. The same are distributed as follows:

Name	Description of the Property	Shares Of Heirs
Ann Waithira Ngatia	L.R. No. 12151/2 in trust for Nancy Waithera Ngatia L.R. No. Ngong/ Ngong/24830 in trust for Nancy Waithera Ngatia	Half Share Absolutely

58. In the case of Wilfred Muriithi Kinyua ELC Misc. Appl. No. E135 of 2023, this Court discussed the legal import of confirmation of grant in the estate of a deceased person.
59. Under the provisions of Section 61 of the [Land Registration Act](#), and Section 50 of the [Land Act](#) (where applicable), a confirmed grant is adequate to effect a transfer by transmission. Section 61(2) of the [Land Registration Act](#) particularly provides that:
- “Upon confirmation of a grant, and on production of the grant, the Registrar may, without requiring the personal representative to be registered, register by transmission –
- a. Any transfer by the personal representative; and
 - b. Any Surrender of a lease of discharge of a charge by personal representative.”
60. In the case of the [Estate of the late Kabuta Kamara Nguuro alias Pharis Njegegu \(deceased\)](#) (2002) eKLR, the Court cited with approval the decision in [Rose Wanjiku Kuria vs. Ng’ang’a Mugwe](#) (2003) eKLR, where the Court held that by virtue of Section 79 of the [Law of Succession Act](#), the administrator (of the estate of the deceased) gets all the property of the deceased vested in him.
61. The [Black’s Law Dictionary](#), 11th Edition, defines the term ‘vest’ to mean, “to confer ownership (of property) on a person.”
62. In the context of this case, half of L.R. No. 12151/2 and the whole of L.R. No. Ngong/Ngong/24830 have been vested in the Administrator of the Estate of the late Linah Nyokabi Ngatia by pursuant to the confirmation of the grant by the High Court at Nairobi in Succession Cause No. 460B of 2010 on the 3rd December, 2018. The Administrator of the Estate of the late Linah Nyokabi Ngatia is therefore at liberty by virtue of the provisions of Section 61(2) of the [Land Registration Act](#) upon production of the grant to the Registrar, to transfer to herself or to any other person by transmission, half of L.R. No. 12151/2 and the whole of L.R. No. Ngong/Ngong/24830. She does not need any further order of this court to achieve her objectives.
63. Upon the confirmation of the grant in the Estate of Linah Nyokabi Ngatia, this suit became superfluous; otiose, as lawyers fondly put it. The Advocate for the Plaintiff, Ms. Waweru was right when she stated that this suit had been overtaken by events. There is nothing more left for this court to determine. I need not say anymore on this issue.
64. I will move to the second issue, in spite of my above finding.



B. Whether the Plaintiff's suit as framed discloses a cause of action against the Defendant.

65. The original Plaintiff, Linah Nyokabi Ngatia, filed this case as she put it in her plaint, as a wife of the Defendant, Charles Mwaniki seeking the subdivision of the subject properties acquired by her and the Defendant during the subsistence of their marriage; in essence matrimonial property. The Plaintiff during her testimony confirmed that up to the time of her death, Linah Nyokabi was still married to the Defendant.
66. Matrimonial property is defined under Section 6 of the [Matrimonial Property Act](#) as;
- a. The matrimonial home or homes;
 - b. Household goods and effects in the matrimonial home or homes; or
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
67. The suit property(s) herein would therefore in view of paragraph (c), above qualify as matrimonial property if indeed the Plaintiff and the Defendant were lawfully married and acquired it jointly during the subsistence of the marriage.
68. However, it is well settled in law that division of matrimonial property cannot take place whilst the marriage is subsisting. Kemei J, in [ENN vs SNK](#) (2021) eKLR, held that a matter regarding division of matrimonial property ought/shall have the following facets;
- i. The fact of a valid legal, regular marriage in law;
 - ii. Dissolution of such marriage by/through an order of court;
 - iii. That earmarked/listed property constitutes matrimonial property acquired and developed during subsistence of the marriage; and
 - iv. Contribution by each party to the acquisition/development.
69. The court in [P.O.M vs M.N.K](#) (2017) eKLR expressed a similar opinion to the effect that;
- “.....such property is to be divided upon divorce or dissolution of the marriage.”
70. The Plaintiff's case as initiated therefore was non-starter ab initio. It did not disclose a cause of action against the Defendant and ought to have been struck out under the provisions of order 2 rule 15(2) of the [Civil Procedure Rules](#). It is unfortunate that this matter had to come this far after being in court for a total of sixteen years.
71. From the foregoing, the Plaintiff's case does not disclose a cause of action against the Defendant.
72. I will proceed to determine the third issue in spite of my above findings, as good practice demands.

C. Whether the Plaintiff's case was supported by the evidence adduced.

73. The Defendant in his evidence testified that the sale agreement for the purchase of the Kahawa Wendani property is dated 6th January, 2003 and was prior to the introductory visit to Linah Nyokabi's home of 14th January, 2003. The said ceremony according to the Plaintiff was the one that formalized the marriage between Linah Nyokabi and Charles Mwaniki.



74. Evidence to counter the Plaintiff's argument on the alleged marriage was adduced by the Defendant and his witnesses. The said ceremony was merely an introductory ceremony and did not formalize the engagement between the two. The family of the Defendant was supposed to have followed up to pay dowry in order to formalize the marriage. This did not happen. Apparently, the Defendant was arrested in 2003 and repatriated to Tanzania where he was charged, convicted and sentenced to a jail sentence. So, the marriage between the Plaintiff and the Defendant was not formalized.
75. Secondly, matrimonial property vests in the spouses according to the contribution of the other spouse towards acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. For the court to grant an order of division of matrimonial property(s), assuming the parties were legally married, evidence of the Plaintiff's contribution has to be demonstrated since the property is in the Defendant's name. No such evidence was provided in this case. The bank statements produced by the Plaintiff as evidence of such contribution were of no use to the court in that respect.
76. There was no evidence advanced to support the assertion that the withdrawals were for purposes of purchase of either of the suit properties. There was also no evidence of 'non-monetary' forms of contribution either. The evidence adduced by the Plaintiff, did not support her claim against the Defendant.
77. Going by the foregoing, the Plaintiff's case must fail in its entirety.

D. Whether the Defendant's counter-claim is merited.

78. The first prayer in the Defendant's counter-claim was for a permanent injunction restraining the Plaintiff by herself, her servants or agents from entering, remaining in, collecting rents, managing or in any way dealing with all the property known as L.R. No. 12151/2, Kahawa Wendani. Whereas the Defendant has established that he is the sole proprietor of the suit property, L.R. No. 12151/2, Kahawa Wendani, the certificate of confirmation of grant issued by the High Court referred to above has already vested half of the suit property in the Administrator of the Estate of the late Linah Nyokabi Ngatia. That is a valid decree of a court of equal status. I am unable to issue the order sought by the Defendant in view of the confirmation of the grant by the High Court at Nairobi in Succession Cause No. 460B of 2010. As it stands now, the Defendant is entitled to only a half of the suit property whereas the Plaintiff is entitled to the other half.
79. The 2nd prayer by the Defendant was for an order that the Plaintiff pays him all the rent collected from the suit property from December 2003 to the date of judgement. This is essentially a prayer for special damages. The Defendant did not however specifically plead the amount of rent claimed in his counter-claim; neither did he prove the figures claimed in his evidence.
80. The law on special damages is well settled. The court of Appeal in *Hahn vs Singh* (185) KLR 716, re-emphasized the position in the following terms:
- “Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of an act complained of and may not be inferred from the act.”
81. That being the position, the 2nd prayer in the Defendant's counter-claim fails too.
82. On the issue of costs, considering that the Plaintiff's case has failed on the one hand and the Defendant case too has failed as well, I find it appropriate to direct that each party bears its own costs.



It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF
DECEMBER 2023**

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Mutunga h/b for Kiprop for the Defendant

Ms. Waweru for the Plaintiff

