



**Mbauni (Suing as the Legal Representative of the Family of Catherine Nyaguthii Mbauni) v District Surveyor Nyeri; Mbauni (Interested Party) (Environment & Land Case 15 of 2017) [2023] KEELC 22321 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22321 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 15 OF 2017  
JO OLOLA, J  
DECEMBER 15, 2023**

**BETWEEN**

**MARGARET NJAMO MBAUNI (SUING AS THE LEGAL REPRESENTATIVE OF THE FAMILY OF CATHERINE NYAGUTHII MBAUNI) ..... PETITIONER**

**AND**

**DISTRICT SURVEYOR NYERI ..... RESPONDENT**

**AND**

**GREGORY MAINA MBAUNI ..... INTERESTED PARTY**

**RULING**

1. By her Petition dated November 7, 2017, Catherine Nyaguthii Mbauni (the Petitioner) prays for judgment against the Respondents for:
  1. A declaration that the survey of the land by the 1<sup>st</sup> respondent is an administrative action within the meaning of article 47 of the *Constitution* and that the 1<sup>st</sup> respondent is obliged to give to an owner of land reasons in writing why and how he intends to sub-divide his land, to explain who has instructed that the survey or division takes place and further to ensure that the sub-division is lawful, reasonable and has been effected in a procedurally fair manner;
  2. A declaration that the intended sub-division of LR No. Nyeri/Gatarakwa Scheme/866 on 9<sup>th</sup> or November 10, 2017, or any other day thereafter will contravene the Petitioner's rights under article 27,35(2), 40 and 47;
  3. A declaration that the intended partition of the suit property shall be arbitrary, illegal, unlawful, unconstitutional and a contravention of the Petitioner's right, under articles 10, 27 35(2), 40, 47, 50 and 73 of the *Constitution* and therefore, null and void;



4. A declaration that the Respondent shall contravene the petitioner's rights under articles 10, 27, 35 (2), 40, 47 (1), 50 and 73 of the *Constitution of Kenya*, 2010;
  5. A permanent injunction to restrain the respondents, their officers, agents or employees or otherwise howsoever undertaking the partition of the suit property, LR. No. Nyeri/Gatarakwa Scheme/866;
  6. An order of mandamus to compel the 1<sup>st</sup> Respondent to supply to the Petitioner the legal basis upon which the intended survey and partition of the suit property and an opportunity to be heard and make representations on the intended partition;
  7. An order of prohibition to prohibit the Respondents, their officers, agent or employees or otherwise howsoever from proceeding with the intended survey and partition of the suit property on 8<sup>th</sup> November 2017, until the Respondents respect the Petitioner's rights and fundamental freedoms under articles 10, 27, 35 (2), 40, 47(1), 50 and 73 of the *Constitution of Kenya* , 2010;
  8. General damages for violation of the rights and fundamental freedoms of the Petitioner;
  9. Costs of this suit; and
  10. Any such other order as this Honourable Court shall deem just.
2. From the material placed before the court, it was apparent that the original Petitioner herein was the second wife and the then surviving spouse of the late Peter Maina Mbauni who died intestate on January 14, 1997. The Interested Party herein- Gregory Maina Mbauni is the son of the late Peter Maina Mbauni with his first wife Wandeto who is also deceased.
  3. It was also apparent to me that following Peter's death, the original Petitioner herein filed Nyeri High Court Succession Cause No. 6 of 1999 seeking to administer the estate to which the Interested Party objected. Having heard the dispute and in a judgment delivered on February 11, 2003, the honourable Justice J.V. Juma concluded as follows:
 

“I am satisfied on the evidence adduced before me that the objector being the only living child of Wandeto, the first wife of the deceased, is entitled to share equally with the Petitioner the estate of his father, Mbauni the deceased. The children of his sister who were dependent on the deceased will share with him his mother's portion and the children of the Petitioner will share the half portion of the petitioner. The upshot is that the estate of the deceased shall be shared equally between the house of Wandeto, mother of objector and the house of Nyaguthi, the Petitioner.”
  4. Being dissatisfied with the judgment, the petitioner appealed the same in Nyeri Civil Appeal No. 34 of 2004. In its decision rendered on July 10, 2009, the Court of Appeal on its part concluded as follows:
 

“In the end, the view we take in the application of section 40 to the estate of the deceased is that the net intestate estate of the deceased should be shared out at the ratio 3:5 which reflects the number of units in the two houses of the deceased. We allow the appeal to that extent only and set aside the decision of the Superior Court and all consequential orders. We substitute an order that the net intestate estate of the deceased be distributed at the ration 3:5...”



5. Arising from the foregoing, it was apparent that the only matter in dispute was the manner of partitioning or sub-dividing the parcel of land known as Nyeri/Gatarakwa Scheme/866. In recognition of that position, when this matter came up for hearing on 15<sup>th</sup> February 2018, the parties herein agreed by consent to appoint 3 surveyors who would each visit the suit land and thereafter prepare a report spelling out the best manner in which the land should be partitioned as among the parties in line with the determination by the Court of Appeal. As fate would have it the Petitioner also passed away and was substituted by her daughter Margaret Njami Mbauni.
6. In that respect, the Petitioner herein appointed Messrs Geocast Agencies Ltd who upon visiting the land filed a Report dated December 17, 2018. On the other hand, the Interested Party appointed Messrs P.K. Registered Land Surveyors who prepared a report dated January 7, 2019 while the District Surveyor prepared a Report dated December 19, 2018 on behalf of the Attorney General's Office. All the three (3) surveyors appeared in court on February 13, 2020, when they produced the reports and were cross-examined thereon.
7. I have looked at the survey reports and the recommendations they each made as to how the suit land should be partitioned. All the reports are united in their conclusion that the houses and the homes belonging to the disputants should be left intact, and that the portion of the land said to be "rocky" should also be shared out to all as per the ration set out by the Court of Appeal.
8. I note however that while the petitioner's surveyor proposes that the land be partitioned vertically, the other two reports propose that the same be partitioned horizontally. Having taken into account the testimonies of the three surveyors in court, I was of the considered view that the land be sub-divided in a horizontal manner as proposed by the surveyors for the Respondents and the Interested Party.
9. A vertical partition of the land would not be possible without the demolitions of some houses. It would also mean that the area described as "rocky" would only go to one party. A horizontal partition would ensure that each party would have a single unit and that each party would have easy access to their portions of land.
10. In the circumstances I hereby order and declare that the suit property be portioned in the manner proposed in the Nyeri District Surveyor's Report dated December 18, 2018. The said partitioning to be done within 45 days from today.
11. In the circumstances herein, the petitioner shall bear the costs of this petition.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 15<sup>TH</sup> DAY OF DECEMBER, 2023.**

In the presence of:

Mr. Kebuka Wachira for the Interested Party.

No appearance for the Petitioner.

Court Assistant: Millicent.

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O. OLOLA

**JUDGE**

