



**Kiboi v David Nguli Mwale & Joseph Ndini Nguli (Sued as the legal representative of the Estate of Daniel Nguli Kyalo Kyalo - Deceased) & another (Environment & Land Case 511 of 2017) [2025] KEELC 3094 (KLR) (3 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3094 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 511 OF 2017**

**LN MBUGUA, J**

**APRIL 3, 2025**

**BETWEEN**

**STEPHEN NJOROGE KIBOI ..... PLAINTIFF**

**AND**

**DAVID NGULI MWALE & JOSEPH NDINI NGULI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF DANIEL NGULI KYALO KYALO - DECEASED) ..... 1<sup>ST</sup> DEFENDANT**

**LABAN NDOVA MASAI & STEPHEN JESINGA MASAI (SUED AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF MASAI ITUMO - DECEASED) ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This case is now 26 years old and counting, having been filed in year 1999. Judgment was eventually delivered on 9.7.2019 where the court gave the following orders;
  - i. The upshot of this case is that the plaintiff has not proved his case on a balance of probability as against the defendants and his suit is herein dismissed.
  - ii. I however find in favour of the 1<sup>st</sup> defendant's defence and counter claim and direct that the plaintiff shall subdivide and transfer to the 1<sup>st</sup> defendant the identifiable portion of land that he occupies at the latter's expense within 60 days from the date hereof, failing which the Deputy Registrar of the Court at Nyahururu shall execute, on behalf of the 1<sup>st</sup> Defendant the necessary transfer documents.
  - iii. Costs to the defendants herein.



2. The finality of litigation that comes along with the delivery of a judgment has not materialized in this matter. Instead, a plethora of applications, accusations and counter accusations have taken centre stage in the post judgment proceedings. As at now, the land (L.R.NO 1950) from which the 1<sup>st</sup> defendant was to get a portion has since been subdivided into parcels Laikipia/Nyahururu 14165 and 14166 of which parcel 14165 has been registered in the name of the 1<sup>st</sup> defendant.
3. The plaintiff has filed an Application dated 25.6.2024 seeking an order of inhibition, stopping all dealings relating to parcel 14165 by the 1<sup>st</sup> defendant, that the title issued to the 1<sup>st</sup> defendant be cancelled for having been issued contrary to the doctrine of lis pendense in contrary to the court order of 6<sup>th</sup> July 2023 which directed the County Physical Planner and Surveyor to visit the suit parcel No. Laikipia/Nyahururu/1950 and to excise and demarcate the identifiable portion occupied by the 1<sup>st</sup> defendant in terms of the judgment of 9.7.2019.
4. The application is premised on ground on the face of the application and the supporting affidavit of the plaintiff dated 25.6.2024. He contends that the execution of the court decree required physical planning and surveying of the 1<sup>st</sup> defendant's portion and as such, the respective parties engaged private physical planners of which the 1<sup>st</sup> defendant's physical planners report indicated that the 1<sup>st</sup> defendant occupied a portion measuring 10.585 hectares (26.15 acres), while plaintiff's planners report indicated that the 1<sup>st</sup> defendant occupied 1.76 hectares which is 4.72 acres. That in that regard, the court gave orders on 6.7.2023 directing the County Physical Planner Laikipia County to visit parcel 1950 and to draw a sub division scheme in terms of the judgment of 9.7.2019 and file a report within 45 days.
5. He contends that the 1<sup>st</sup> defendant failed to participate in the exercise where the county planner was establishing the boundaries. The plaintiff contends that the 1<sup>st</sup> defendant used his physical planners report to process a title deed in his favour.
6. In opposition thereof, the 1<sup>st</sup> defendant filed a replying affidavit dated 3.9.2024 where he contends that a physical planner did go to the ground and prepared a scheme which was approved by the county government adding that the physical planners report is on record. He contends that he was not served with a notice by the County Physical Planner, instead he was only called by the OCS of the area and informed that the following day the exercise was to take place only to appear and to be told by the County physical Planner that his presence was not required.
7. He contends that the court never stopped him from proceeding with the process as he had followed the procedure required, adding that the mutations were drawn during the time the court directed him and his private physical planner to visit the land. He contends that the area map has since been amended to reflect the true position adding that he acquired the title on 3.6.2024 and the Laikipia County Physical Planner's report was filed on 13.10.2023.
8. In his submissions dated 15.10.2024, the plaintiff averred that the process of execution of the decree required physical planning and survey of the portion decreed to belong to the 1<sup>st</sup> defendant. Citing the case of Naftali Ruthi Kinyua v Patrick Thuita Gachure & Another (2015) eKLR, the plaintiff contends that the doctrine of lis pendense applies as the title of the 1<sup>st</sup> defendant was issued before the filing of a conclusive report from the County Physical Planning.
9. The submissions of the 1<sup>st</sup> defendant are dated 28.10.2024 where he contends that the plaintiff blatantly refused to comply with the decree of the court reiterating that he was given the go ahead by the court to carry out the subdivision scheme. He denies that he took excess land and avers that the doctrine of lis pendense is not applicable in this case.



## Determination

10. I have considered all the arguments raised herein. It is quite apparent that after the judgment of year 2019, nothing happened until the defendant filed an application dated 10.3.2021 in his quest to have the judgment implemented. On 24.6.2021, that application was allowed in terms of prayers 4, 5 and 6 as follows;
  - i. That the status quo be maintained till the survey and demarcation of the parcel of land is done pursuant to the decree herein.
  - ii. That a qualified Surveyor/County Surveyor do visit L.R Nos. Laikipia/Nyahururu/1945 and 1950 to subdivide the parcels as per the decree of the court dated 19<sup>th</sup> December, 2019.
  - iii. That the O.C.S Losongwa Police Station do ensure compliance.
11. The defendant was to file another application dated 28.3.2022, and in a ruling delivered on 22.9.2022, the court while dismissing the said application gave directions that;
  - a. The defendants are hereby directed to expeditiously serve the court orders made on 25.6.2021 upon the County Land Surveyor – Laikipia County for implementation.
  - b. The County Land Surveyor – Laikipia shall implement the order on excision of the suit property within 90 days from the date hereof and file a report in court to that effect.
  - c. The matter shall be mentioned on 19.1.2023 to confirm compliance.
12. On 25.1.2023, the district surveyor informed the court that he could not undertake the excision without a consent from the land control board and that an approved subdivision scheme was also needed. The court gave directions as follows

“The defendants are at liberty to engage a physical planner to prepare the subdivision scheme and he shall involve the plaintiff during the site visit”.
13. And on the subsequent date of 15.3.2023, counsel for the defendant informed the court that the physical planner had duly prepared the subdivision scheme which was approved.
14. In response thereof, counsel for the plaintiff averred that the defendant occupies less than an acre of the suit land, thus they were opposing the said plan and they made a request to avail a second report. Thus on 7.6.2023, the court gave the plaintiff a go ahead to avail a report from a physical planner within 14 days.
15. On 6.7.2023, the plaintiff confirmed that their report had been duly filed. The same was objected to on the basis that it did not comply with the decree of the court. The court then gave the following orders;
  - a. The County Physical Planner Laikipia shall visit the suit property title No. Laikipia/Nyahururu/1950 to draw a subdivision scheme in accordance with the terms of the judgment and decree dated 9.7.2019 and file a report to that effect within 45 days from the date hereof.
  - b. The O.C.S Losogwa Police Station to provide security to the County Physical Planner – Laikipia County to undertake the exercise.
  - c. The parties shall be given notice of the visit in advance by the County Physical Planner and they shall be entitled to be present with their planners and advocates during the exercise.
  - d. Mention on 9.10.2023 for further orders.



16. The above orders are the ones which the plaintiff avers that they were violated by the defendant as he went ahead and got a title without the input of the County Physical planner's report. In the circumstances, should the orders sought be granted?
17. I have keenly perused the entire record. Firstly, I find that the orders given in the judgment of 9.7.2019 placed the responsibility of the subdivision exercise upon the plaintiff. He was even given a timeline to that effect that is 60 days. However, there is nothing to indicate that the plaintiff took any steps at all to comply with the court order, for the next 2 or so years. Thus, vide the court orders of 24.6.2021 and 22.9.2022, the defendant was given a go ahead to take over the exercise. And when the defendant did so, the plaintiff was up in arms in opposition of the subdivision exercise. This far, I find that the plaintiff is the author of his own misfortune and it is rather late in the day for him to cry foul.
18. Secondly, I find that the issues of planning and surveying appear to have been muddled up of which some of the technical experts who were expected to shepherd the process smoothly only fuelled spanners in the works, thereby hindering the implementation of the judgment and convoluting the dispute further into the abyss. Take for instance the address made by the district surveyor on 25.1.2023 where all he had to say was that;- "I am prohibited from undertaking any subdivision of land without an approved physical plan .....the defendant should engage a physical planner to prepare a subdivision scheme and present it for approval". As an expert, the said officer ought to have given guidance on the requisite steps which were to be undertaken in the process of excision of defendants' land. The report of the County planner, the one the plaintiff is relying on to have the orders issued is no better but I will come to it later in this ruling.
19. Nevertheless, on the advice given by the district surveyor, the defendant went ahead and engaged a physical planner, but his report is the one which was objected to by the plaintiffs thereafter.
20. It is pertinent to note that the two processes, planning and survey operate under different statutory frameworks but with closely related mandates. As at the time the judgment was delivered, the applicable law on planning was the Physical planning Act Cap 286, while the Survey Act governed matters of survey.
21. Planning is related to land use and development which encompass compliance with laws, by laws and regulations of planning authorities i.e. minimum subdivisions of land as well as impact of developments on land.
22. On the other hand, surveying relates to the actual geographical identification of a thing, say a parcel of land on the ground as well as on paper. It entails the marking out of the boundaries through the beacon system and the drawing of mutation forms.
23. The third schedule of the Physical and land use Planning Act of 2019 deals with development controls, process and procedures which includes; (1) (d) sub-division schemes.
24. Section 7 thereof provides for consideration for subdivision and amalgamation proposals which includes;
  - “(a) The design of the Plan.
  - (b) Provisions of relevant approved physical and land use development Plans.
  - (c) Land reference number, size and shape of land.
  - (d) The location Plan/inset.



(e) Resultant subplots, their access and adequate truncations.....”

25. What resonates from the above provisions of law is that subdivision of land is an integral part of development. What then are the requisite steps to be undertaken in the process of subdivision of land?
26. It is crucial for a preliminary survey to be undertaken by a surveyor for ground picking to establish the layout of the land i.e. if its sloppy or gentle and to identify the features as well as the developments thereon. Thereafter, the scheme plans are prepared by a physical planner which are then submitted to the relevant County’s approving authorities in terms of the development application. The approving agencies including the Director Land Administration, Director Survey and Director Physical Planning (or their county representatives) would then give their comments.
27. If the comments are positive, the scheme plan is approved paving way for the surveyor to step in, where the beacons are placed on the ground to mark out the actual boundaries. The mutations are then drawn and signed for onward transmission to the Land Registrar for creation or amendment of the green card. The title is then issued by the Land Registrar. The land registrar liaises with the director of survey to ensure that the Registry Index map (RIM) is amended accordingly.
28. Having set out the applicable law and the process relating to subdivision of land, I come to the 3<sup>rd</sup> point which is; Was the aforementioned process followed in birthing the title of the defendant?
29. A perusal of the record reveals that a survey report was availed by Rumuruti sub county surveyor dated 3.7.2023 in which excision of the land in question was undertaken where two parcels were produced measuring 9.4 ha. and 0.67 ha, with an access road in between. The said report indicates that one of the documents used was “the approved scheme plan prepared by James Kithinji (Registered Planner) and approved by County Government of Laikipia on 9.3.2023”. To this end, Mutation forms were drawn whereby the two parcels were given new numbers 14165 and 14166 respectively.
30. Thus, as at 6.7.2023 when the order was made for the physical planner to visit the land, the subdivision exercise was already underway. Two critical issues arise from the aforementioned subdivision process. Firstly, there was no stay of execution of the judgment and the process was undertaken courtesy of court orders including those given on 24.6.2021 and 22.9.2022. Secondly, there is no evidence to indicate that the approval procedures were not undertaken by the relevant county approving authorities so as to give rise to the issuance of a title to the defendant.
31. It is noted that the resultant title of the defendant bears the acreage of 9.40 Ha which is in tandem with the surveyor’s report. This far, I find no evidence to disparage the process leading to the issuance of the title to the defendant.
32. Fourthly and finally, I come to the issue of the County Physical planners report which is dated 18.9.2023 and was filed in court on 30.10.2023. This is the report that the plaintiff is basing his claim on, that it had not been availed to the court, yet a title was issued to the defendant. It is crucial to extract the findings there in;
  - a. A notice was issued to all parties through a letter dated 12<sup>th</sup> September 2023, that they should be present during the site visit exercise.
  - b. A joint site visit was conducted by both County Surveyor, County Physical Planner and two security officers to the land Title No. Laikipia/Nyahururu/1950 and Laikipia/Nyahururu/1945 on the 15<sup>th</sup> of September 2023.



- c. It was observed that there were some encroachment with semi-permanent structures and farming activities on the land Laikipia/Nyahururu/1950 as mapped out on the attached scheme plan. In addition, there was no any identifiable boundary in the parcel of land.
  - d. The fact that the 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendant were to guide on the boundary but they failed to participate in the exercise therefore it was not possible to map out the boundary between parcel Laikipia/Nyahururu/1950 and the encroached section.
  - e. Picking was done on the road that is used to access the natural spring and a scheme plan prepared as attached. It is advised that amendment should be done on the Registry Index Map to reflect the changes
33. It is plainly clear that even if this court was to allow the application dated 25.6.2024, for the subdivision process to start afresh, the county planner's report would not in any way facilitate the implementation of the judgement delivered in year 2019. If anything, the report would take the parties back to where they were 6 years ago when the judgment was delivered, as the report did not identify defendant's land.
34. Of great concern is the recommendation given by the county planner that; "It is advised that amendment should be done on the Registry Index Map to reflect the changes". It is rather perplexing as to how the RIM was to be amended when the report had not identified the boundaries! That is why I have stated in this ruling that some of the technical experts were most unhelpful in resolving the post judgment dispute.
35. In the circumstances, this court cannot reverse the subdivision and titling process so as to accommodate the report of the county physical planner.
36. In the end, I find that the Application dated 26.6.2024 is not merited. Each party is to bear their own costs of the application.

**DATED, SIGNED AND DELIVERED AT NYAHURURU THIS 3<sup>RD</sup> DAY OF APRIL 2025 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:

M/S Ndegwa H/B for Gakuhi Chege for the Plaintiff

Oyugi for the defendant

