



Karanja & another v Gatoto & another (Environment & Land Case 539 of 2009 & Environment and Land Case Civil Suit 218 of 2012 (Consolidated)) [2022] KEELC 2612 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELC 2612 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 539 OF 2009 & ENVIRONMENT
AND LAND CASE CIVIL SUIT 218 OF 2012 (CONSOLIDATED)**

LC KOMINGOI, J

JULY 14, 2022

BETWEEN

PETER C. GATOTO KARANJA PLAINTIFF

AND

STEPHEN KARANJA GATOTO DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT AND LAND CASE CIVIL SUIT 218 OF 2012

BETWEEN

JAMES WANYOIKE GATOTO PLAINTIFF

AND

STEPHEN KARANJA GATOTO 1ST DEFENDANT

GODFREY NJOROGE WANYOIKE 2ND DEFENDANT

JUDGMENT

1. On May 21, 2014, this court directed that ELC 218 OF 2012 and this suit should be heard together. To place the matter in context. The two disputes relate to the property known as LR No. Githunguri/ Nyaga/8. It was originally held by Moses Gatoto Karanja (deceased). He was married to two wives, the eldest being Hannah Wanjiku and the youngest Monicah Wanjiru. The two separate households are on either side of these suits.



2. ELC No.539 of 2009 was brought vide the plaint dated October 22, 2009.The Plaintiff prays for judgement against the Defendant for:-
 - a) A permanent injunction restraining the Defendants, their servants and /or agents from trespassing or in any way interfering with the Plaintiff's use of land parcel Githunguri/Nyaga/1429.
 - b) Costs.
3. The Plaintiff averred that he is the registered proprietor of land parcel Githunguri/Nyaga/1429 whose user is agricultural while the Defendant is the registered proprietor of land parcel Githunguri/Nyaga/1430. He further averred that on diverse dates, the Defendant without any color of right and despite notice to desist, has persistently trespassed on the Plaintiff's parcel of land and caused wastage thereon and prevented the plaintiff from undertaking best agricultural practices thereon.

The Defendant's case

4. The Defendant came on record vide the Notice of Appointment of Advocates filed on November 2, 2009 by M/S Odawa, Ombwayo & Ochich Advocates.
5. He filed the statement of defence dated 30th June 2010. He denied allegations contained in the plaint and averred that he has occupied Githunguri/Nyaga/1429 from 1949 when he was born. He contended that he first built his matrimonial home thereon in 1972 as directed by his late father, Moses Gatoto Karanja, which house he later upgraded in 1990 by building a permanent house and continues to live there with his wife, children and grandchildren. He also stated that he buried his son on the land in 1980.
6. He averred that his late father, Moses Gatoto Karanja was married to two wives and that he subdivided his land known as Githunguri/Nyaga /8 equally among his two households taking into consideration the portion occupied by and in the possession of the Defendant herein. He further averred that the Plaintiff caused the mother title to be subdivided into three portions namely Githunguri/Nyaga/1275, 1276 and 1275 and later into nine portions namely Githunguri/Nyaga 1425- 1432. He contended that he was not a party to those sub divisions which disregarded his rights derived from occupation, possession and trust under Kikuyu Custom under which his late father held the ancestral property.
7. In ELC suit 218 of 2012, the Plaintiff averred that he is the registered owner of LR.No.Githunguri/Nyaga/1426.He accused the Defendants of trespassing thereon and burying one Evelyn Wangui Njoroge thereon. He prayed that Judgment be entered against the Defendants for:-
 - a) The Defendants to exhume the body of Evelyn Wangui Njoroge buried on 19th Aril 2012.
 - b) A permanent injunction restraining the Defendants from trespassing on L.R No.Githunguri/Nyaga/1426.
 - c) Costs of this suit.
 - d) Any other relief that this Honourable court may deem fit and just to grant.

The Defendants' case

8. The Defendants filed the statement of defence and counterclaim dated 15th April 2014.They denied the allegations contained in the plaint and averred that title to L.R No.Githunguri/Nyaga/1426 was obtained unlawfully and fraudulently as it is hived from their late father's title, Githunguri/Nyaga 8 which he held in trust for them under customary law. They contended that the said subdivision



was done without the consent of their father Moses Gatoto (deceased) and in dispossession of the proprietary rights of the 1st Defendant that he had rightfully acquired from occupying the property since 1949.

9. They averred that their late father subdivided the suit land over twenty (20) years ago under Kikuyu customary law into two equal portions between his two wives and they crystallized ownership through actual occupation and possession of their respective portions. In their counterclaim they pray for orders of eviction against the Plaintiff as well as orders to cancel all titles derived from Githunguri/Nyaga/8.

The Plaintiff's evidence

10. PW1, Peter Gatoto Karanja, the Plaintiff in this suit testified on 15th November 2021. He told the court that his father had two wives and ten children; nine boys and a girl and that his mother Monica Wanjiru is the younger of the wives. He stated that his father obtained Land Control Board consent from Githunguri Land Control Board and subdivided his land Githunguri/Nyaga/8 into nine (9) plots amongst his sons in 2006.
11. He told the court that the Defendant and others opposed the subdivision and filed a case against his father in the High Court being HCCC 1220 of 2006 and the court granted orders in his father's favour. He stated that for the last five years, the Defendant has not trespassed on his land.
12. When he was cross-examined, he stated that the Defendant is his step brother, born of Hannah Wanjiku. He further stated that he was born in 1964 and he is not aware that his father's land was subdivided into two portions but he is aware that his parents and his step mother were farming on the land.
13. He stated that the original title was Githunguri/Nyaga/8 and it is currently subdivided into nine portions being 1424-1432 and he has his title deed which is 1429 but he is not aware if the others have their titles.
14. He stated that land 1427 belongs to Teresiah Nduta, the wife of his late brother Moses Kariuki Gatoto, 1425 to Gatoto Karanja, 1425-1428 belongs to his brothers 1429 is his, 1430 is in his late father's name, 1431 belongs to his brother Samuel and 1432 is not in his father's name. He stated that all of them went to the Land Control Board though he has no minutes for that date. He further stated that the Defendants ought to have followed up on their title deeds. He also stated that when he was born, the 1st Defendant did not have a house but he built one in the 1980's.
15. When he was referred to a sketch showing that the land was subdivided into two equal portions and depicting the houses thereon, he stated that the sketch is not a true picture of where the houses were since they all lived in the same compound and his father did not have a separate house. He stated that the subdivision into nine (9) portions took into account where everyone had built their houses. He stated that everyone lives in their ½ acre. When referred to the mutation showing plot 1532 allocated to Benson Njoroge measuring 0.15 acres, he stated that he does not know why his father gave him less. When referred to the ruling in HCCC No.1220 of 2006, he stated that he does not know the outcome of the suit.
16. PW2, James Wanyoke Gatoto, the Plaintiff in ELC suit No.218 of 2012 testified on 15th November 2021. His witness statement dated 27th April 2012 was adopted as part of his evidence in chief. He told the court that the Defendants had trespassed on his land but they have since stopped. He stated that at one time, they buried a body of the granddaughter of Stephen Karanja. He requested the court to compel the 1st Defendant to exhume the said remains from his portion. He testified that the 1st Defendant had passed three other portions to bury on his land.



17. When he was cross-examined, he stated that he prays that the body of Evelyn Wangui buried on his portion be exhumed. He told the court that Stephen Karanja is his elder step brother and he has built where he was shown by their father. He stated that there is also another body buried there a long time ago around 1980 when his late father was alive. He further stated that he was born in 1952 but at the time his father was subdividing the land, he was away in Machakos. He stated that the subdivision captured where everyone had built. He further stated that he was not given a graveyard.
18. When he was referred to the sketch of the plot showing subdivision in to two equal portions and showing how the houses were distributed on the mother title, he stated that the sketch is not a true depiction of how the land was since they all lived in the portion of the land where there were houses. He stated that his father brought the surveyor who subdivide the land as it is now while he was away in Kiambu.
19. When he was re-examined, he stated that his father had earlier shown his two wives where to build and plough for food and that it was in three portions.

The Defendant's evidence*

20. DW1, Stephen Karanja Gatoto was the Defendant herein testified on 20th May 2019. His witness statement sworn on 10th February 2012 was adopted as his evidence in chief. He stated that he has lived on the portion now claimed by the Plaintiff being land parcel Githunguri/Nyaga/1429 from 1949 when he was born. He further stated that in 1972, his father allowed him to build his matrimonial home on that portion which he did and has lived thereon and even buried his late son there in 1980.
21. He stated that the Plaintiff now seeks to evict him from there on the basis that he is the registered owner from sometime in December 2007 to another area being Githunguri/Nyaga/1430 purportedly registered to him though he has never participated in the registration process and the Plaintiff he knew that he has lived there since childhood.
22. He stated that in 1983, their father subdivided the mother title parcel Githunguri/Nyaga/8 into two each for his respective wives and their children and that he considered his house and location in that subdivision. He further stated that a dispute had arisen when unlawfully and irregularly, the mother title was subdivided into three portions being land parcel Githunguri /Nyaga/1275, 1276 and 1277 being Githunguri SRMCC No.69 of 2006 which is still pending in court. He added that the Plaintiff and his brothers purported to have the said three parcels divided into nine portions being Land Parcel Githunguri/Nyaga/1424-1432 and filed Civil Suit No.23 of 2007 at the Principal Magistrates' court in Githunguri which was struck out.
23. When he was cross –examined, he stated that his late father subdivided the suit land in 1983 in the presence of elders. He further stated that his mother took his late father to court vide HCCC No.1220 of 2006 since he was influenced by the second house to subdivide the land again but the injunction sought were not granted. He further stated that they appealed the court's ruling. He further stated that he could not direct his father as the registered owner on how to subdivide his land.
24. When he was re-examined, he stated that his late father subdivided his land in 1983 willingly in the presence of elders into two equal portions. He further stated that after 1983, the land could not have been subdivided again. He added that he was not involved in the second subdivision. When he was referred to HCCC 1220 OF 2006, he stated that he does not know the outcome. All they have is a ruling on their application for an injunction which was dismissed.
25. DW2 one Joseph Ngaruiya Ng'ang'a testified on May 20, 2019. His witness statement dated 15th July 2010 was adopted as part of his evidence in chief. He stated that over twenty (20) years ago, Moses



- Gatoto Karanja himself subdivided his family land Githunguri/Nyaga/8 into two equal parts to two of his wives. He stated that to his first wife Hannah Wanjiku, he allocated the eastern side of the land and to his second wife Monica Wanjiru he allocated the western side of the land on behalf of their sons who have built houses on their respective portions. He further stated that after the subdivision, a goat was slaughtered and “tatha”, the soft dung from the goat’s intestines was used to seal the boundary, by smearing on the boundary, which is a Kikuyu custom showing that he had completely bound himself to the subdivision. He added that he witnessed the subdivision and participated in the ceremony.
26. When he was cross-examined, he stated that Moses Gatoto Karanja was a friend and that he was present when he subdivided his land into two equal portions between his two wives. He further stated that the boundary was fenced and each wife subdivided land to their children who built on their own portions.
 27. DW3, Dominic Njoroge Karanja testified on May 20, 2019. His witness statement dated 15th July 2010 and the evidence he gave in 2019 were adopted as part of his evidence in chief. His testimony is that he participated in the ceremony twenty (20) years ago when Moses Gatoto Karanja subdivided his land being Githunguri/Nyaga/8 into two equal portions to his two wives to be used by their respective sons.
 28. When he was cross-examined, he stated that the deceased Moses Gatoto Karanja was his uncle and that he is aware of the dispute before court. He further stated that he was present when the deceased subdivided his land into two equal portions and gave the elder wife a portion near the road while the second wife was given her portion on the inside. He stated that he does not know whether Stephen Karanja and Benson Njoroge followed up on the subdivision but it was their responsibility to pursue titles. He stated that Moses Gatoto (deceased) was alive when he subdivided the land and he did it voluntarily. He also stated that he called five elders to witness the subdivision and slaughtered a goat and bought beer and sodas to mark the occasion.
 29. When he was reexamined, he reiterated that the land was subdivided into two portions and that the dung from goat’s intestines was used to mark the beacons/boundaries which was a common practice among the Gikuyu people. He also stated that he was present during the occasion.
 30. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff’s submissions

31. They are dated March 16, 2022. Counsel for the Plaintiff submitted that the Plaintiffs are title holders of the suit property thus protected under Section 26 of the *Land Registration Act*, 2012. He further submitted that they obtained their titles from a subdivision of Githunguri/Nyaga/8 was done by their father during his lifetime and not out of a succession cause. He relied on the case of *James Karogo Njau Muchunu & 6 others* [2022] eKLR.

The Defendants’ submissions

32. The Defendants relied on the submissions dated July 5, 2019. Counsel for the Defendants submitted that the nine (9) titles obtained from the subdivision of the mother title ,Githunguri/Nyaga/8 originally held by Moses Gatoto (deceased) was held by him in trust for his family members. He reiterated that the deceased subdivided the land into two equal portions thus the Defendants used and occupied their respective portions as per the deceased’s directions in the 1980’s. He submitted that subdivision of the said land into nine portions was engineered by the second house with an intention of re-arranging the land without considering that the Defendants had occupied it a long time ago. He also submitted that the nine titles arising from the said mother title were issued to the children of the second house and the late patriarch while the first wife and her children were left out as shown by the searches produced. He relied on the case of *Mbui Mukanga v Gerald Mutwiri Mbui* [2004] eKLR.



33. I have considered the pleadings and the evidence on record. I have also considered the written submissions and the authorities cited. The parties did not agree on the issues. In my view the following issues are for determination: -
- (i) Whether Githunguri/Nyaga/8 was divided into two equal portions by Moses Gatoto Karanja (deceased).
 - (ii) Was Githunguri/Nyaga/8 subdivided into nine portions lawfully?
 - (iii) Whether there exists a customary trust entitling the Defendants to the suit land.
 - (iv) Whether the Plaintiffs have established ownership of Githunguri/Nyaga/ 1429 and Githunguri/Nyaga/1426 and whether the Defendants are trespassers thereon.
 - (v) Whether the Defendant in ELC 218 of 2012 should exhume the body of Evelyn Wangui Njoroge from Githunguri/Nyaga/1426.
 - (vi) Whether the Defendants have made a case for grant of orders sought in their counterclaim?
 - (vii) Who should bear costs of the suit?
34. The land in dispute was originally known as Land Parcel Number Githunguri/Nyaga/8 registered in the name of Moses Gatoto Karanja (now deceased). He was the father of the parties herein. The portions in dispute are Land Parcel No Githunguri/Nyaga/1426 and 1429 which are subdivisions of original parcel. The said Moses Gatoto Karanja had two wives, Hannah Wanjiku who had three sons and Monica Wanjiru who has six sons.
35. It appears, the said Moses Gatoto Karanja subdivided the land into three parcels on 8th July 2002. The resultant titles were Githunguri/Nyaga 1275, 1276 and 1277 respectively. At this point the original title ceased to exist.
36. It is the Plaintiff's case that in the year 2006, the said Moses Gatoto further subdivided the land into nine (9) portions. The resultant titles were Githunguri/Nyaga 1424 to 1432 respectively. There is consent from the Land Control Board Githunguri confirming the said sub-division.
37. It is the evidence of DW1 and DW2 that the land was first divided into two portions between the two houses in 1983. This has not been controverted by the Plaintiffs. In my view this was done by the said Moses Gatoto to ensure that both houses could cultivate the land equally. It is on this basis that the sons including the Defendants put up their houses.
38. The Defendant's case is that the subsequent subdivision of the land into nine portions was done without their consent and or their knowledge. This cannot be true because by a suit filed in the High Court being HCCC 1220 of 2006, in which the 1st Defendant and his mother sued Moses Gatoto Karanja (his father). In that suit they sought orders to restrain their father from subdividing the land into nine portions which application was dismissed. As stated earlier Moses Gatoto Karanja sought consent from the Land Control Board Githunguri to subdivide the land into nine (9) portions which consent was granted. I find that the said Moses Gatoto Karanja being the registered owner of the land lawfully sought the subdivision into nine (9) portions.
39. It is the Defendant's case that his late father did this subdivision owing to undue influence from the second house. This is a matter of fact which ought to have been proved. The Defendant tendered no such evidence that his late father did not undertake the subdivisions willingly. Besides he did not tell the court the outcome of the HCCC 1220 of 2006.



40. I find that the issue of trust under Gikuyu Customary Law would only have arisen if the 1st Defendant had gone ahead to prosecute HCCC 1220 of 2006 to conclusion. I doubt if this court has jurisdiction to deal with the issue now that the registered owner Moses Gatoto Karanja is deceased.
41. It is on record that the Plaintiffs are the registered owners of parcel number Githunguri 1426 and 1429 respectively. It is however on record that the 1st Defendant and the other sons had established their matrimonial homes on some portions of the suit land way before it was subdivided it into nine (9) portions. I therefore decline to declare the Defendants as trespassers on the suit portion.
42. Those who had established their homes way before the second subdivision should not be driven away from their portions, provided that their portions are equal in size with the rest. It is only three sons of the first wife who seem aggrieved. They should be considered in the interest of justice to avoid rearranging them. They may not have a registrable interest on the portions they occupy but they have rights that have crystallized due to their long occupation.
43. In my view the Plaintiffs and the Defendants can come to an arrangement where it would not be necessary for the 1st Defendant to move from the portion where he is occupying.
44. For the above reasons, I also decline to order the exhumation of the body of Evelyn Wangui Njoroge for Land Parcel Number Githunguri/Nyaga/1426 as the body was interred before the subdivision into the nine (9) portions.
45. The Defendant in his counterclaim seeks that the resultant titles be cancelled and the title revert to the original Githunguri/Nyanga/8. As stated earlier, there is nothing to show that the said Moses Gatoto Karanja did the subdivisions under undue influence. This court cannot step in and substitute the wishes of the registered owner Moses Gatoto Karanja. In the case of *James Karogo Njau vs Walter Njau Muchunu & 6 Others* [2021] eKLR the court quoted the Court of Appeal in Nyeri in *Kagina vs Kagina & 2 Others* [2021] KECA 242 (KLR) appreciated the sentiments of the learned J when it adopted the reasoning of Tanui J in *Gitau & 2 Others vs Wandai & 5 Others* [1 JKR 231, where the trial judge analysed the impetus of section 45 of Law of Succession:-

“...if a deceased person has during his life time sold, transferred, disposed or in manner given out his properties either in exchange of consideration or as gifts vivos, such gifts or properties whether transfer had been registered or not do not form part of the deceased’s estate. In fact, the law of succession in my view protects preserves transactions made by the deceased during his life time”.

46. In conclusion, the Plaintiff’s suit against the Defendants fails. The Defendants’ counterclaim also fails. As parties herein are step brothers, I order each party to bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 14TH DAY OF JULY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

No appearance for the Plaintiffs

Mr. Otieno for Mr. Ombwayo for the Defendants



