



Mbithi (Suing on her behalf and as a Legal Representative of the Estate of Charles Mbithi Muli (Deceased)) v Mutuku & 5 others (Environment & Land Case E003 of 2021) [2022] KEELC 12732 (KLR) (28 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12732 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E003 OF 2021
TW MURIGI, J
SEPTEMBER 28, 2022**

BETWEEN

FLORENCE MUTHEU MBITHI (SUING ON HER BEHALF AND AS A LEGAL REPRESENTATIVE OF THE ESTATE OF CHARLES MBITHI MULI (DECEASED)) PLAINTIFF

AND

KATUNGULULU MWANGANGI MUTUKU 1ST DEFENDANT

ROSE NZASUA MWANGANGI (SUED AS THE LEGAL REPRESENTATIVE OF JOSPH MWANGANGI MUTUKU CHARLSE MBITHI MULI(DECEASED)) 2ND DEFENDANT

MUTHAMA MUKEKU MBIVYA 3RD DEFENDANT

JOSEPH MUTUA MUKEKU (SUED AS THE APPOINTED LEGAL REPRESENTATIVE OF MUKEKU MBINYA MWENE(DECEASED)) 4TH DEFENDANT

THE LAND REGISTRAR MAKUENI 5TH DEFENDANT

THE DIRECTOR OF SURVEYS 6TH DEFENDANT

JUDGMENT

1. By a plaint dated December 21, 2020, the plaintiff herein seeks for the following orders: -
 1. An order directing that a survey be carried out and fresh mutations prepared in respect of the earlier sub-division undertaken on land parcel number Nzai/Nzai/383, strictly in accordance with the boundaries established through the sub-division carried out earlier



on land parcel No Nzai/Nzai/383 into Nzai/Nzai/389, Nzai/Nzai/840 and Nzai/Nzai/841.

2. The 5th defendant does receive the mutations prepared pursuant hereby in replacement to the missing mutations in respect of the sub-divisions carried out earlier on land parcel number Nzai/Nzai/383 into Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841 and effect such entries as are necessary for regularising the register.
 3. The 6th defendant does receive the mutations prepared pursuant hereto in replacement of the mutations missing in respect of the sub-divisions carried out earlier on land parcel number Nzai/Nzai/383 into Nzai/Nzai/839, Nzai/Nzai/840, and Nzai/Nzai/841 and amend the registry index map accordingly.
 4. Costs of the suit to be borne by the 1st, 2nd, 3rd and 4th defendants.
 5. Any other or further relief that the honourable court deems fit.
2. The 1st - 4th defendants were duly served with summons to enter appearance but failed to enter appearance or file a defence. Interlocutory judgment was entered against the 1st - 4th defendants on July 7, 2021.
 3. The 5th and 6th defendants filed a joint statement of defence dated July 28, 2021 and denied the plaintiff's claim.
 4. The 5th and 6th defendants alleged that the plaintiff's suit offends the mandatory provisions of section 13 of the Government Proceedings Act as a notice of intention to sue the government was never issued.
 5. This matter proceeded for hearing on June 19, 2022 in the absence of the 1st - 4th defendants.

The plaintiff's case

6. The plaintiff adopted her statement dated December 21, 2021 as her evidence in chief. She produced the documents in her list of documents as exhibit 1 to 8 respectively.
7. It was her testimony that she was the registered owner of land parcel No Nzai/Nzai/839 and held the same in trust for her siblings. She stated that she was informed that the sub-division of title No Nzai/Nzai/839 could not be carried out since the sub division of the original parcel No Nzai/Nzai/383 had not been amended in the map to reflect the current title deeds that they held. She urged the court to allow the surveyor to conduct a fresh survey and amend the map so that she could have an independent parcel.
8. In cross examination by Ms Kerubo for the 5th and 6th defendants, she testified that the land was originally number Nzai/Nzai/383 which upon sub-division gave rise to land parcels No Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841. She stated that she held parcel number Nzai/Nzai/839 while her deceased uncles jointly held land parcel number Nzai/Nzai/840 and Nzai/Nzai/841. She went on to state that they did not have any boundary dispute and requested for the survey to amend the registry index map so as to reflect the three parcels of land.
9. The plaintiff closed her case and did not call any other witness.

The 5th and 6th defendants case

10. The 5th and 6th defendants closed their case without calling any witnesses.
11. At the end of the trial the parties proposed to tender written submissions.



The plaintiff's submissions

12. The plaintiff's submissions were filed on July 1, 2022.
13. Counsel for the plaintiff identified the following issues for the court's determination:-
 - i. Whether the plaintiff is entitled to the reliefs sought.
 - ii. Whether the instant suit offends the mandatory provisions of section 13A of the [Government Proceedings Act](#).
14. With regards to the issue whether the plaintiff is entitled to the orders sought, counsel submitted that the plaintiff was the registered owner of land parcel number Nzai/Nzai/839 by virtue of the certificate of confirmation of grant issued with respect to the Estate of Charles Mbithi Muli(deceased). Counsel submitted that upon application for consent to sub-divide land parcel number Nzai/Nzai/839, the plaintiff discovered that the registry index map had never been amended to reflect the initial sub-division of the original land parcel number Nzai/Nzai/383 which had given rise to land parcels numbers Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841. She stated that although the mutation forms had been prepared during the original survey and sub-division of land parcel number Nzai/Nzai/383 which gave rise to land parcel numbers Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841, the same had gone missing without a trace. Counsel maintains that land parcel number Nzai/Nzai/383 should be resurveyed and fresh mutations issued as it has become impossible for the plaintiff to sub-divide Nzai/Nzai/389 amongst her siblings.
15. With regards to the issue whether the present suit offends the provisions of section 13A of the [Government Proceedings Act](#), counsel submitted that the section had been declared as unconstitutional as it offends the provisions of article 48 of the [Constitution](#). To buttress this point, counsel placed reliance on the case of [David Njenga vs Attorney General \(2016\) eKLR](#).
16. Counsel submitted that the plaintiff had in the absence of any evidence to the contrary proved her case on a balance of probabilities and urged the court to grant the orders as prayed.

The 5th and 6th defendants' submissions

17. The 5th and 6th defendants written submissions were filed on July 15, 2022.
18. The Hon Attorney General for the 5th and 6th defendants raised the following issues for the court's determination: -
 - i. Whether the registry index map (RIM) should be amended.
 - ii. Whether the plaintiff is entitled to costs against the 5th and 6th defendants.
19. With regards to the issue whether the registry index map should be amended, the Attorney General submitted that it was not in dispute that the plaintiff was the registered owner of land parcel number Nzai/Nzai/389. The Attorney General submitted that it is within the law to amend the registry index map so as to reflect the resultant sub-divisions arising from land parcel number Nzai/Nzai/383.
20. With regards to the issue whether the plaintiff is entitled to costs against the 5th and 6th defendants, counsel submitted that the plaintiff is not entitled to costs against the 5th and 6th defendants as the same were not pleaded. To support the submissions on this point, reliance was placed on the case of [IEBC & Another vs Stephen Mutinda Mule & 3 Others \(2014\) eKLR](#).



Analysis and determination.

21. I have considered the evidence on record, the pleadings, the documents produced by the plaintiff and the rival submissions and find that the following issues arise for determination;
 - i. Whether the plaintiff is the registered owner of the suit land.
 - ii. Whether the plaintiff is entitled to the orders sought in the plaint.
22. Although the suit was undefended by the 1st - 4th defendants, the plaintiff has a duty to formally prove her case on a balance of probabilities as is required by the law.
23. In the case of *Kirugi and Another vs Kabiya & 3 Others (1987) KLR 347* the Court of Appeal held that;

' The burden was always on the plaintiff to prove his case on a balance of probabilities even if the case was heard as formal proof. likewise, failure by the defendant to contest the case does not absolve a plaintiff of the duty to prove the case to the required standard.'
24. Similarly, in the case of *Gichinga Kibutha vs Caroline Nduku (2018) eKLR* the court held that;

' It is not automatic that instances where the evidence is not controverted the claimants shall have his way in court. He must discharge the burden of proof. He must proof his case however much the opponent has not made a presence in the contest.'
25. The plaintiff stated that Mutuku Mwene (deceased) her great grandfather was the original owner of land parcel number Nzai/Nzai/383. That subsequently the land was sub-divided into parcels numbers Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841. That land parcel number Nzai/Nzai/839 was then registered in the name of her father Charles Mbithi Muli (deceased). That pursuant to his death, she was on June 17, 2020 issued with a grant of letters of administration in Machakos Succession Cause No 120 of 1999 and that vide the certificate of confirmation of grant, land parcel number Nzai/Nzai/839 was registered in her name. It was her testimony that she held land parcel number Nzai/Nzai/839 in trust for her siblings. In that regard, she produced the limited grant of letters of administration ad litem, grant of letters of administration and the certificate of confirmation of grant as exhibit 1 to 3 respectively. From the documentary evidence vide the copy of the certificate of confirmation of grant produced as exhibit 3 and the copy of the certificate of title for land parcel number Nzai/Nzai/839, it is crystal clear that the plaintiff is the registered proprietor of land parcel number Nzai/Nzai/839.
26. Having established that the plaintiff is the registered owner of land parcel number Nzai/Nzai/839, the next issue for determination is whether the plaintiff is entitled to the orders sought.
27. The plaintiff sought for an order directing that a resurvey be carried out strictly in accordance with the boundaries established on land parcel number Nzai/Nzai/383 and fresh mutations be prepared in respect of the earlier sub-division.
28. In her statement, the plaintiff stated that upon applying for sub- division of parcel No Nzai/Nzai/839, she discovered that the registry index map was never amended to reflect the original sub-division of the original parcel number Nzai/Nzai/383 into land parcels numbers Nzai/Nzai/839. Nzai/Nzai/840 and Nzai/Nzai/841. She went on to state that although mutation forms had been prepared during the survey/sub-division of land parcel number Nzai/Nzai/383, the registry index map had not been amended to reflect the sub-divisions since the same had gone missing without a trace. It was her testimony that a re-survey should be done and fresh mutation prepared in respect of



the resultant sub-divisions arising from land parcel no Nzai/Nzai/383. It was her testimony that the map was not amended to reflect the title that they were holding the plaintiff sought to have the registry index map amended to reflect the resultant sub-divisions arising from land parcel number Nzai/Nzai/383. The plaintiff stated that after the sub-division and issuance of certificate of titles arising from land parcel number Nzai/Nzai/383, the sub divisions were not reflected in the map.

29. It is evident from the green card (exhibit 8) that pursuant to the sub-division of land parcel No Nzai/Nzai/383, Joseph Mwangangi Mutuku and Mukeku Mbinya Mwene were registered as proprietors on September 4, 1985 while Charles Mbithi Muli was registered on June 30, 1986.
30. The 5th and 6th defendants submitted that it is within the law to amend the registry index map to reflect the sub-divisions arising out of land parcel number Nzai/Nzai/383. In a nutshell the 5th and 6th defendants conceded to the plaintiff's claim to have the registry index map amended. The 5th and 6th defendants did not call any evidence to rebut that of the plaintiff. The 1st - 4th defendants did not file any appearance nor a statement of defence. The defendants did not adduce any evidence to rebut the plaintiff's evidence. The evidence of the plaintiff has not been controverted.
31. With regards to the issue whether the plaintiff's suit offends the provisions of section 13A of the *Government Proceedings Act*, the 5th and 6th defendants alleged in their joint statement of defence that the suit offends the mandatory provisions of section 13A of the *Government Proceedings Act* as a notice of intention to the government was never served. Section 13A of the *Government Proceedings Act* provides as follows;

No proceedings against the government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the government in relation to those proceedings.
32. The plaintiff on the other hand submitted section 13A of the *Government Proceedings Act* has been declared unconstitutional as it offends the provisions of article 48 of the *Constitution*. The plaintiff referred the court to the case of *Kenya Bus Service Ltd & Another vs Minister for Transport & 2 Others (2012) eKLR*. Arising from the said authority, the court declared section 13A of the *Government Proceedings Act* as unconstitutional as it violates article 48 of the *Constitution*. Following that decision, I find that the plaintiff was not obliged to adhere or comply with the provisions of the said section.
33. In the end, I find that the plaintiff has proved her case on a balance of probabilities. Consequently, judgment is entered for the plaintiff against the defendants in the following terms: -
 1. An order be and is hereby issued directing a resurvey to be carried out and fresh mutations prepared in respect of the earlier sub-division undertaken on land parcel number Nzai/Nzai/383 strictly in accordance with the boundaries established through the sub-divisions carried out earlier on land parcel No Nzai/Nzai/383 into Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841.
 2. The 5th defendant be and is hereby directed to receive the mutations prepared pursuant hereto in replacement to the missing mutations in respect of the sub-divisions carried out earlier on land parcel No Nzai/Nzai/383 into Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841.
 3. The 6th defendant be and is hereby directed to receive the mutations prepared pursuant hereto in replacement of the mutations missing in respect of the sub-divisions carried out earlier on land parcel No Nzai/Nzai/383 into Nzai/Nzai/839, Nzai/Nzai/840 and Nzai/Nzai/841.



4. Each party to bear its own costs.

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HON. T. MURIGI

JUDGE

JUDGMENT DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 28TH DAY OF SEPTEMBER, 2022.

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi

Ms Kellen Muthuku for the Plaintiff

