



**Kariuki & another v Githii & another (Environment & Land Case  
361 of 2017) [2022] KEELC 15296 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15296 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 361 OF 2017  
LA OMOLLO, J  
DECEMBER 8, 2022**

**BETWEEN**

**STANLEY NGURURI KARIUKI ..... 1<sup>ST</sup> APPLICANT**

**STANLEY NGURURI KARIUKI ..... 2<sup>ND</sup> APPLICANT**

**AND**

**GEOFFREY MURAYA GITHII ..... 1<sup>ST</sup> RESPONDENT**

**GEOFFREY MURAYA GITHII ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Applicant filed Originating Summons dated September 26, 2017.
2. The summons are expressed to be brought pursuant to the provisions of Section 94 and 96 of the Land Registration Act No 3 of 2012 and Order 19 & 37 of the Civil Procedure Rules.
3. The applicant seeks the following orders: -
  - a. That the tenancy in common in respect of title No Nakuru Municipality Block 7/197 be terminated.
  - b. That Title No Nakuru Municipality Block 7/197 be sold and the sale proceeds be shared equally among the Applicant and the Respondent.
  - c. In the alternative, the Applicant be allowed to acquire the interest of the Respondent and be solely entitled to Parcel No Nakuru Municipality Block 7/197.
  - d. That the deputy registrar be empowered to sign any documents that the Respondent may refuse to sign.



- e. That the court be pleased to grant such further or other relief as may be just in the circumstances.
  - f. That the Respondent be condemned to pay the costs of this application.
4. The Respondent filed his Replying Affidavit and Further Replying Affidavit in response to the summons. He admits that together with the Applicant, they hold a tenancy in common in respect of Land Parcel Nakuru Municipality Block 7/197 the suit property herein.
  5. He denies all the other allegations.

**Applicant's Evidence.**

6. At the hearing, Stanley Ngururi Kariuki testified as PW1. He prayed that his witness statement filed on September 28, 2017 and his supplementary statement filed on December 7, 2021 be admitted as part of his evidence. The court granted this prayer and the two statements were admitted as part of his evidence in this suit.
7. He also produced the documents in the list of documents dated December 6, 2021. The documents were produced as follows:
  1. Certificate of Lease Exhibit P1
  2. Transfer forms Exhibit P2
  3. Copy of Official Search Exhibit P3
  4. Agency Agreement Exhibit P4
  5. Rent Tribunal Order Exhibit P5
  6. Bundle of Water Bills Exhibit P6 (a)-(d)
  7. Demand Letter for Kshs 845,000 Exhibit P7(a)
  8. Demand Letter for Kshs 1,165,223 Exhibit P7(b)
  9. Land Rent Exhibit P8
  10. Letter dated May 17, 2017 Exhibit P9
  11. Certificate of Confirmation of grant Exhibit P10
  12. Letter dated July 26, 2017 Exhibit P11(a)
  13. Reply from director physical planning Exhibit P11(b)
  14. Mediation Notice Exhibit P12
  15. Letter dated July 26, 2017 Exhibit P13(a)
  16. Reply letter dated September 11, 2018 Exhibit P13(b)
  17. Letter dated September 14, 2018 Exhibit P13(c)
  18. Letter dated September 21, 2018 Exhibit P13(d)
  19. Court Order dated April 12, 2018 Exhibit P14
  20. Valuation Report dated May 14, 2018 Exhibit P15(a)



21. Valuation Report Exhibit P15(b)
  22. Valuation Cheque Exhibit P16(a)
  23. Valuation receipt Exhibit P16(b)
  24. Banking Slip for Kshs 1,500,000 Exhibit P17
  25. Copy of OB extract Exhibit P18
8. PW1 in his testimony stated that he is a farmer and the Respondent is his elder brother. He went on to testify that they bought the suit property together and were issued with a title in their names.
  9. He further testified that his brother currently lives on the suit property, which they own in equal shares. He added that he does not live on the suit property because the Respondent chased him from it. It was his testimony that there are 20 houses on the property adding that the Respondent collects rents through an agent.
  10. It was his further testimony that the Respondent had been sued by the tenants vide Rent Tribunal Case No 100 of 2012 for increasing rent. It was also his evidence that the Respondent being the one on the suit property is responsible for payment of water bills, land rates and rents.
  11. He testified that the Respondent suggested that they share payment for land rates but he refused because the Respondent had been responsible for collecting the rent. He further testified that before he filed this case in court, they attempted an out of court settlement.
  12. He further testified that there is a parcel of land measuring one and a half acres known as 849 Gachargeini. he explained that this parcel was owned by their father and he requested the Respondent to surrender it to him in exchange for the suit property but the Respondent refused.
  13. It is his testimony that when the Respondent refused his proposal for exchange. The Respondent subsequently got a buyer to purchase his portion in the land described as 849 Gachargeini. It is his further testimony that he also proposed that a valuation be done for the suit property to enable the Respondent buy him out.
  14. PW1 testified that he sought advice from the County Government seeking information on whether the suit property could be sub-divided but he was advised that the suit property was too small. He went on to testify that this court also referred the matter to mediation but the Respondent never attended the mediation sessions.
  15. He further testified that apart from the court annexed mediation, he had requested the Respondent to purchase the suit property and the court directed that valuation of the property be done.
  16. It was his evidence that he conducted valuation through ADN Advisory Valuers whose report estimated the value of the suit property at Kshs 2,775,000 while the Respondent used Apple Cross Surveyors whose report estimated its value as Kshs 3,200,000.
  17. He testified that that he proposed to the Respondent that he (the respondent) give him his money or he (the applicant) buys him out. The condition was on payment of costs of the suit, water and rates and rent for the suit property.
  18. PW1 further testified that the Respondent did not agree to his proposal despite the Applicant having given his advocate Kshs 1,500,000 for the said buy out. It was his testimony that he could not sell his portion of the suit land to a third party because potential third parties did not want to associate with the Respondent's hostility. He explained that potential buyers experienced the Respondent's hostility



- whenever he took them to the suit property. The respondent would come out wielding a panga and threatening them. He stated that he, on one occasion, reported the incident to the police and was issued with an Occurrence Book number.
19. He urged the court to evict the Respondent from the suit land as he is able to buy him out. He added that the Respondent has been collecting rent over the years. It was his testimony that the rent money should be deducted from the value of the suit property and that he be allowed to pay the Respondent the balance.
  20. In his written statement, PW1 states that since 1984 the Respondent has frustrated all efforts to develop the suit land adding that the land is partially developed and in a haphazard manner.
  21. The Applicant in his statement states that the Respondent exhibited lack of cooperation and hostility hence his inability to pay the rates and rent. He further states that his fear is that he is on the verge of losing his share in the suit parcel because since the County Government had threatened to auction it in order to recover land rates areas.
  22. He states that he had engaged the Respondent to take into account the suit property during distribution of their father's estate in Nakuru High Succession No 281 of 2009 to allow smooth termination of the tenancy in common but that the Respondent refused.
  23. He further states that the suit land is incapable of being partitioned as it would adversely affect its use. He also states that the tenancy- in- common can only be terminated by selling the suit property and sharing the proceeds equally.
  24. The Applicant in his statement states that prior to being referred to the court annexed mediation process, they had both agreed to sell the suit land and share the proceeds equally and in the alternative both the Applicant and Respondent were at liberty to buy each others' share.
  25. He also states that the Respondent changed his mind and resorted to verbal abuse and threats. He further states that the said action by the Respondent is only meant to delay and frustrate the court process.
  26. In conclusion he urges the court to grant him the prayers as sought and costs of the suit.
  27. On cross examination, he confirmed that the suit land had been bought from Josephat Gichia and that Gichia and defendant bought it from Gilani estate.
  28. He confirmed that as between Josephat Gichia, the Respondent and Gilani, there had been an agreement but admitted that he was not present or party to that agreement.
  29. He confirmed that the Respondent informed him that there was a developed plot he had bought with Josephat Gichia and that Josephat Gichia was selling his interest in it. He further confirmed that he was not coerced into purchasing the suit property.
  30. PW1 confirmed that stated that he bought half of the suit property which was Josephat Gichia's portion. He could not remember the purchase price. He further testified that the initial plan was that they build rooms and sub-divide the suit parcel but he was informed that the said plot could not be sub-divided.
  31. He further confirmed that the suit land was bought about 40 years ago and that it comprises of semi-permanent houses. He confirmed that the semi- permanent houses comprise of 20 rooms which were rented out and each fetched Kshs 2,500 per month. He also confirmed that the respondent lives on the suit property.



32. PW1 explained that before 1990, he collected rent but in the year 2000 he left the Respondent on the suit property. He confirmed that he had been receiving rent for the 10 rooms while the Respondent received from the other 10 rooms. He stated that since it was impossible to sub-divide the land he could not make further developments.
33. He also explained that that both him and the respondent did not have money to build all the semi-permanent houses at one go and denied that the Respondent had built 12 rooms while he had built 8 rooms.
34. He also stated that the rent tribunal case was evidence that the Respondent was the one collecting rent as he was not a party to the proceedings. It was his testimony that the Respondent did not allow him to collect rent and that rent for the suit property is collected by an agent.
35. PW1 explained that initially, they used to collect rent and share the rent between themselves but the Respondent denied him access to the suit property. He confirmed that he never reported the fact of the Respondent withholding rent.
36. He confirmed that he could not live with the Respondent and that the suit land can only be sold by either of them. He explained that he lives in Murang'a and that his father left the Muranga suit property for both himself and the Respondent to live together. He testified that their father never wanted them to sell the suit property unless it was for exchange with the Muranga property. (Shamba).
37. PW1 testified that he has been taking care of their parents and denied the allegation that their father advised the Respondent to leave their shamba in Murang'a. He explained that after Josephat Gichia sold him the suit land, he insisted that he keeps the title as he had a loan.
38. He stated that the Respondent has no family and is not sickly. He further stated that the Respondent cannot coerce him to sell his portion of the suit property due to their wrangles. He denied that they each have a definite portion in the suit property.
39. The applicant admitted that he did not have any receipts of payment of rates and confirmed that there is a debt for Kshs 1,300,000. He denied that this court had ordered them to pay land rates. He further denied that he is trying to elbow out the Respondent from the suit property.
40. He confirmed stated that they got the suit land to build houses and rent them out but not to subdivide it. PW1 further confirmed that he did not have receipts for the payment of electricity and also confirmed that the water bills are in the Respondents name.
41. This marked the close of the applicant's case.

### **Responden's Case.**

42. Geoffrey Muraya Githii testified as DW1. He based his testimony on his Replying Affidavit and Further Affidavit filed on November 8, 2017 and February 20, 2020 respectively.
43. He produced his documents in the following order: -
  1. Agreement dated August 12, 1982 Exhibit D1
  2. Letter dated June 8, 1982 Exhibit D2
  3. Rates Demand dated June 28, 2019 Exhibit D3
  4. Receipt Payment dated February 8, 2020 Exhibit D4



44. He testified that he lives in Gilani estate and works as a farmer. It was his testimony that the suit property is Nakuru Municipality Block 7/197 which is owned by himself and the Applicant.
45. It was his testimony that half of the suit land was sold to him by his brother in law Josephat Gichia adding that Joseph Gichia retained the other half. He stated that he could not remember the purchase price.
46. DW1 testified that at the time he had purchased the suit land, it was his had not been developed. He testified that he developed his portion by building a semi-permanent house comprising of 11 single rooms and he rented them out.
47. He further testified that he bought the suit land in 1978 and has since been living on it and occupying two of the rooms. It was his further testimony that Josephat Gichia's portion remained vacant until he sold it to the Applicant. It was his testimony that that he was not aware of the intention to sell adding that he was, however, called to witness the agreement.
48. He testified that he did not objected to the sale and that he appended his signature to the purchase agreement as a witness. It was his testimony that had he known of Gichia's intention to sell, he would have asked him to sell to him. It was his testimony that the Applicant also built a semi-permanent house on his portion and rented out the single room created out of it.
49. DW1 testified that the Applicant does not live on the suit property but often visits and has also made some improvements including putting up a gate. He further testified that title to the suit property is in his name and that of the Applicant.
50. He went on to testify that he has never seen the original title and does not know who effected the transfer. He testified that he is not agreeable to termination of the co-ownership of the suit property. He also testified that he is also not agreeable to the land being sold as it would be difficult to develop another parcel and added that he doesn't have money.
51. DW1 stated that he was not amenable to selling his portion of the suit property to the Applicant because he would not have a place to live.
52. It was his testimony that he has never caused any disturbance or been violent to the Applicant and third parties.
53. DW1 testified that it would not be difficult to subdivide the suit land. He explained that the Applicant came to the land when he had already developed it and the Applicant never questioned the said developments but proceeded to develop his portion.
54. He further testified that when Josephat Gichia sold him the suit property, it had been subdivided it into two portions. He testified that the water in the suit property was disconnected and they are currently buy water within the neighborhood, He added that they put resources to have electricity connected to the suit property but subsequently, each one of them pays his own bill.
55. He testified that they attempted mediation but it failed as the two of them were not in talking terms. He stated that it has been more than 10 years since he spoke with the applicant.
56. It was DW1's testimony that his parents are deceased adding that his father bequeathed 5 acres of a parcel of land in Murang'a for them to share equally as brothers. DW1 further testified that upon his father's request, he sold his share in the Murang'a shamba while his brother, the Applicant, continues to live on his share. It was his testimony that he pays the rates for the suit property and now wants the Applicant to refund half of the amount he has paid in respect of rates.



57. It was DW1's further testimony that they both did a valuation of the suit property and filed their reports in court. He added that the property would fetch a much higher price than the amount stated in the valuation report because many years have since passed.
58. In conclusion, he urged the court to order Josephat Gichia to give him his title.
59. On cross-examination, DW1 stated that apart from the suit land, he also has a parcel of land in Mau adding that his children have since filed a caution against it. He also confirmed that he has filed two affidavits in the present case.
60. The witness was referred to paragraph 8 of his replying affidavit filed on November 8, 2017 and he confirmed that he was not aware that the Applicant bought part of the suit property. He added that he came to know of the said sale much later.
61. DW1 was also referred to paragraph 26 and 34 of his further replying affidavit and he admitted that the Applicant filed the present suit without any reference to him. He stated that he had never seen any letter including Exhibit P9 and Exhibit P13(a)-(d).
62. He testified that he did not have a postal address despite the affidavits which indicated that his postal address was 7208 Nakuru. He confirmed that the suit land had been subdivided into two parts but there is no physical boundary and further that a surveyor had not been involved.
63. He stated that he was not aware that the suit land could not be subdivided. He confirmed that he lives on the suit land and receives rent. He added that the Applicant's house has a caretaker who receives rent on his behalf.
64. He denied the allegation that he chased the Applicant from the suit property. DW1 was referred to Exhibit P15 and denied having been arrested. He further testified that about a month ago he met with the Applicant at his house.
65. DW1 stated that he could not recall tenants going to the Rent Restriction Tribunal. He also testified that he had an agent known as Okwemba who collected rent for all the rooms in the suit property.
66. Upon re-examination, he clarified that he used to collect rent for his houses only and that the Applicant has his own agent. He further stated that the Applicant recently visited him but they had not spoken since the time the land in Murang'a was subdivided.
67. This marked the close of the Defence case.

#### **Submissions.**

68. The Applicant filed his submissions on June 21, 2022. He gave a summary of the case and identified the following issues for determination: -
  - a. Whether the court can sever the tenancy in common in respect of Nakuru Municipality Block 7/197.
  - b. What are the parties' respective shares in the suit property?
  - c. Whether the Applicant is entitled to the reliefs sought.
  - d. Who pays the cost of the suit?
69. On the first issue, the Applicant submits that it is clear that the suit property cannot be partitioned. He relied on the judicial decision in [Samir Choitranjan Vs Official Receiver & Another 2017 eKLR](#)



and urges the court to order that the land held in common be sold by private or public auction and give parties the liberty to buy. He further submits that either of them should be allowed to purchase the suit land or the share of the other as provided under Section 96(3) of the Land Registration Act. He relied on the Supreme Court decision in Getao Vs Mokare & 4 Others Petition 9 of 2020 [2021] and submits that the Respondent's argument that each of them should keep part of the land he has developed is not tenable in law. He submits that it would imply that there would be separate ownership and not co-ownership.

70. On the second issue, the Applicant submits that there is evidence of a Certificate of Lease and official search for the suit land showing that the Applicant and Respondent are registered as proprietors- in-common and hold equal shares.
71. On the third issue, the Applicant relied on Section 107, 108 and 109 of the Evidence Act and submits that from the evidence and applicable laws, he has met the required standard of proof and therefore urges the court to grant him the orders sought. He also cited the Court of Appeal decision in Stanley Maira Kaguongo Vs Isaac Kibiru Kabuthia [2022] eKLR
72. On the final issue, the Applicant relied on the decision in Kiska Ltd Vs Angelis (1969) EA 6 and submits that costs are in the court's discretion and that costs shall follow the event. He urges the court to award costs in favour of the Applicant.
73. The Respondent on the other hand filed his submissions dated July 13, 2022. He gave a summary of the application, the Replying Affidavit and evidence adduced during hearing. He submits that it is not in dispute that he owns the suit land with the Applicant in equal shares. He further submits that he was the first one to purchase his half from Josephat Gichia while the Applicant later purchased the other half.
74. The Respondent submits that the reasons adduced by the Applicant to end the ownership in common is not genuine. He argues that the Applicant knew what ownership- in- common entailed and still proceeded to purchase the suit property.
75. He submits that the Applicant does not reside on the suit land and will thus not be adversely affected by the orders he seeks. He argues that the Applicant cannot force him to sell his share of the property or a portion of it.
76. In conclusion, he submits that the application has no merit and ought to be dismissed with costs. He also urges the court to issue directions that the Applicant refunds the half rates payment in the sum of Kshs 105, 265 within 30 days and parties to share any further rates equally.

#### **Analysis And Determination.**

77. This court has considered the pleadings, evidence adduced and the submissions filed in respect of this case and it is the court's view that the following issues arise for determination:
  - a. Whether the Applicant is entitled to the orders sought.
  - b. Who should bear the costs of the suit.

#### **A. Whether the Applicant is entitled to the orders sought.**

78. The instant application has been brought under Sections 94 and 96 of the Land Registration Act which provides for a severance of a common tenancy by way of partition or sale of the land.
79. As regards partition, the procedure is provided for under section 94 as follows:



- (1) Any of the tenants in common may, with the consent of all the tenants in common, make an application, in the prescribed form, to the Registrar for the partition of land occupied in common and subject to the provisions of this Act and of any other written law applying to or requiring consent to a sub-division of land and of any covenants or conditions in a certificate of a land, the Registrar shall effect the partition of the land in accordance with the agreement of the tenants in common.
  - (2) An application, may be made to the Registrar, in the prescribed form, for an order for the partition of land owned in common by—
    - (a) Any one or more of the tenants in common without the consent of all the tenants in common; or
    - (b) Any person in whose favour an order has been made for the sale of an undivided share in the land in execution of a decree.
80. Section 96 (1) of the Land Registration Act, 2012 deals with sale of co-owned land and provides as follows:
- ' If for any reason the land sought to be partitioned is incapable of being portioned, or the partitions would adversely affect the proper use of the land, and the application for partition or one or more of the other tenants in common require the land to be sold, and the tenants cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may –
- a) Cause a valuation of the land and of the shares of the tenants in common to be undertaken,
  - b) Order the sale of the land or the separation and sale of the share of the tenants in common by public auction or any other means which appears suitable to the court or
  - c) Make any other order to dispose of the application which the court considers fair and reasonable'
81. In the present case, it is not in dispute that the suit property was registered on December 11, 1984 in the Applicant and Respondent's name as tenants in common in equal shares.
82. It is also not in dispute that the suit property measures 0.0428Ha as evidenced from the Certificate of Lease.
83. Evidence adduced points to the fact that the Respondent and Applicant have both built semi-permanent houses on the suit property. The Respondent currently resides on the suit land.
84. The Applicant contends that the Respondent chased him out of the suit property and that the Respondent continues to collect rent from the houses. The Applicant now wants the tenancy in common terminated and the suit land sold and they each get their share.
85. The Respondent on the other hand contends that he never chased the Applicant from the suit land. He argues that the tenancy in common should not be terminated as the Applicant knew what he was getting into while purchasing his portion. He argues they can each continue developing their portion of the suit property and that the Applicant cannot coerce him into selling his portion. It is his contention



that he would be adversely affected by the sale since he lives in the suit land. He further contends that the Applicant should also refund him half rates payment in the sum of Kshs 105, 265 and continue to share any further rates equally.

86. It is evident from the letter produced as Exhibit P13(a) which letter is dated July 26, 2017. The said letter is from the County Director Land and Physical Planning and states the suit land cannot be subdivided as it too narrow and would therefore not be economical to develop. It is also evident that the Respondent and Applicant are not in talking terms and cannot reach a consensus regarding the suit property.
87. The court record shows that parties had been given an opportunity to attempt mediation but the same was not successful.
88. Valuation of the suit property was ordered by this court, was done and reports of the two valuers, representing each party, filed. The reports are part of the court record.
89. It is also evident that neither the applicant nor respondent is willing to sell of their portion of the suit property to the other.
90. Taking into consideration the fact that attempts at an amicable settlement have failed and that it is not possible to partition the suit property, the only available legal alternative available is sale of the suit property.
91. Evidence adduced is that there is extremely bad blood between the Applicant and the Respondent who are brothers. Regrettably, they are unable to peacefully co-exist on the suit property. This played out in court during the hearing and is also evidenced by an extract from the Occurrence Book which has been produced as Exhibit P 18. It shows that the Applicant made a report to the police on July 17, 2020 at 1025 HRS.
92. Section 96(1)(b) of the said Act gives this court the discretion to make such orders for the sale of the land held in common either by public auction or any other means.
93. The decision in *Odongo Fitina Vs Odaba Fitina & 2 others [2022] eKLR ELC Appeal No 33 of 2021* offers useful guidance. The Learned Judge held as follows:

' Section 96 of the same Act, if the land parcel is to be sold, one of the tenants may make an application to the court for an order of sale in a variety of forms. That is how dealing with tenancy in common operates.'

#### **B. Who should bear the costs of the suit.**

94. The general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

#### **Disposition.**

95. The upshot of the foregoing is that the application succeeds and I make orders as follows:
  - a. The tenancy in common in respect of title No Nakuru Municipality Block 7/197 is hereby terminated.
  - b. A fresh valuation of Nakuru Municipality Block 7/197 shall be done by the Chief Valuer Nakuru County, at the cost of the Applicant and with participation of the Respondent.



- c. The Applicant be and is hereby authorized to sell Nakuru Municipality Block 7/197 by private treaty for an amount not less than that stated in the valuation report.
- d. The Respondent shall execute the Sale Agreement, the Transfer documents and all other necessary and requisite documents for the successful transfer of Nakuru Municipality Block 7/197, failure to which the Deputy Registrar of the Environment and Land Court shall do so.
- e. In the event that Nakuru Municipality Block 7/197 cannot be sold by private treaty within 6 months from the date hereof, it shall be sold by public auction subject to a minimum value; the value as stated in the valuation report.
- f. The proceeds of the sale shall be shared equally between the Applicant and Respondent.
- g. The Applicant and Respondent shall be at liberty to purchase the suit property either at the auction or by private treaty.
- h. The Applicant shall refund the Respondent the amount of Kshs 105,265 being half of the sum expended towards payment of land rates.
- i. Each party shall bear own costs.

96. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8TH DAY OF DECEMBER, 2022.**

**L. A. OMOLLO**

**JUDGE**

**In the presence of: -**

**Mr. Mbutia for the Plaintiff.**

**Mr. Ochieng Gai for the Defendant.**

**Court Assistant; Ms. Monica Wanjohi.**

