



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 807 OF 2017

NGUGI TICHA KIRITU.....PLAINTIFF

VERSUS

TELESIA WANJIKU MUTHONDU.....1ST DEFENDANT

SIMON NJUGUNA MUTHONDU.....2ND DEFENDANT

KAMAU NJOKI3RD DEFENDANT

KENNETH KIRITU NJOKI.....4TH DEFENDANT

GEORGE NJOROGE TICHA5TH DEFENDANT

KIMANI NJOROGE TICHA.....6TH DEFENDANT

JUDGMENT

By an Amended Plaint dated **27th November 2017**, the Plaintiff has sought for Judgement against the Defendants jointly, and severally for the following Orders:

1. An order for eviction and/or ejection of all the Defendants, jointly and/ or severally and/ or one and all of them from the Plaintiff's suit Land parcel No. Kiambaa/Kihara/7067 and demolition of all the structures semi permanent and / or mabati houses and removal of all the debris from the suit land parcel L.R No. Kiambaa/Kihara/7067, and or any other person and/or persons claiming under them, their agents and/ or servants and family members forthwith from the suit land parcel , together with interest at Court rates.

2. General Damages for trespass to Land and Mesne Profits from 14th July 2016, until the final determination of this Suit together with Interest at Court rates.

3. Costs of this suit together with Interest at Court's rate.

4. Such further and/ or relief or reliefs as this Honourable Court may deem fit and just to grant , in the circumstances of this case.

The Plaintiff averred that he was the registered proprietor of **L.R No. Kiambaa/Kihara/796**, which was the subject matter of **High Court Civil Case No. 1408 of 1976**, which case was heard and determined by the High Court of Kenya Nairobi in which the **Hon. Justice D.K.S Aganyanya J**, in his Judgment of **6th February 2002**, ordered that the said land **L.R 796**, be subdivided into **3 equal** portions;- one portion to belong to the Plaintiff, the **2nd** portion to the House of **Waithera Ticha** and the **3rd** Portion to the House of **Wanjiru Ticha**; That being dissatisfied with the said Judgement, the Plaintiff lodged an Appeal at the Court of Appeal on **26th February 2004**, which Appeal was heard and determined by the Court of Appeal on **18th December 2014**, and was dismissed with costs affirming the decision of the High Court.

That after the Court Appeal's final decision, the Plaintiff applied to the Kiambu District Surveyor to subdivide the land as ordered by the High Court. Further that the Surveyor wrote a letter dated **21st April 2016**, to the Defendants and all other people / persons occupying and or interested in the suit property **LR 796** to appear on **27th May 2017**, so that he could survey and subdivide the Land in execution of the Judgment of the High Court made on **6th February 2002**, and the Court of Appeal on **27th May 2016** .

That when the surveyor was obstructed from carrying out the survey on 27th May 2016, he wrote another letter dated 16th June 2016, informing the parties to be on the Land for the purpose of surveying and sub dividing the land into 3 equal shares failing which he would subdivide the Land. Further that on 14th July 2016, the Land was subdivided and the 1/3rd share of the Land that was registered in the Plaintiff's name on 14th July 2016, being L.R 7067. That the Plaintiff wrote out a demand letter to all the Defendants on 16th December 2016, demanding that they move out of his land. That the defendants are from the family of **Waithera** and **Wanjiru Ticha** and on failing to respond the Plaintiff sent a reminder on 3rd August 2017.

The suit is contested and the 4th & 5th Defendants filed a statement of Defense and Counter Claim. In their Defence they denied all the allegations made in the Plaintiff. They challenged the legality of a title deed purportedly issued to the Plaintiff as the proprietor of L.R 7076. They contended that the title deed was unlawfully obtained and in contempt of a valid court Judgment which only allowed inclusion of the Defendants in **High Court Civil Case No. 1408 of 1976**, as owners in common and not subdivision of **Kiambaa/Kihara/796**. That the Court's Judgment was clear and unambiguous that the Plaintiff was holding L.R 796, in trust for the Defendants in **HCCC No. 1408 of 1976**. Further that the decision to subdivide and process a separate title deed was a unilateral one by the Plaintiff without the participation or involvement of the Defendants as **owners in common** and without inclusion of the Defendants as owners in common of L.R 796. That the subdivision undertaken by the Plaintiff is disruptive of the way the Defendants settled upon L.R 796, and the effect would be to cause demolition of existing structures and deny the Defendants right of way to their property and hence cause unnecessary hardship.

It was their contention that the purported subdivision was unlawful and based on an erroneous and fraudulent interpretation of the Court's Judgment and without involvement of the affected parties. They denied ever being served with the letters by the surveyor and averred that the survey was carried out secretly without consultation or the taking into account the existing structure and areas occupied by the Defendants. Further that the areas purportedly surveyed to create L.R 7076, was deliberately carved out across the land that has for long been occupied by the Defendants and that is where the Defendants have settled and built their houses. That the Plaintiff ought to have first registered the Defendants as owners in common as ordered by the Court and the areas occupied agreed upon and the common owners agreed on the subdivision process. That the Plaintiff has trespassed upon the areas occupied by the Defendants carrying out a subdivision vertically and not horizontally. That the Plaintiff is well aware of the area he occupies within L.R 796 and the unlawful subdivision of the land has led to invasion. Further that the Court has dealt with the issue of eviction of the Defendants in **HCCC 1408 OF 1976**, and it cannot revisit the same.

It was their contention that as beneficiaries of the Estates of the Defendants in **HCCC 1408 of 1976**, they lawfully occupy the said property and the Plaintiff cannot evict them more so upon the Court confirming that the Plaintiff was a trustee. That L.R 7076, being a subdivision unlawfully created from L.R 796, the suit herein is **Res Judicata**

In their Counter Claim the Defendants reiterated the contents of the Defence and averred that the Court Judgment recognized their rights as **owners in common** and therefore for the land to be subdivided, all the affected parties had to be consulted. That in the absence of an agreement amongst the owners in common, the subdivision is unlawful, null and void. They sought for the dismissal of the suit with orders that;

- a) **Cancellation of title deed for a purported subdivision issued unilaterally and known as Kiambaa/ Kihara/7067.**
- b) **The Inclusion of the Defendants as owners in Common to title Known as Kiambaa/Kihara/796 and proper survey of the same to determine the areas occupied and owned by each of the owner in common.**
- c) **The Costs of this suit.**
- d) **Interest on (b) and (c) hereinabove at Court rates.**

The matter proceeded by way of viva voce evidence wherein the Plaintiff gave evidence for himself and called 3 witnesses. The 4th and 5th Defendants too gave evidence and called one more witness. Despite service the 1st, 2nd 3rd and 6th Defendants did not **Enter Appearance** nor file any Defence. On 8th July 2020, the Plaintiff withdrew the suit against the 1st, 2nd, 3rd and 6th Defendants. The suit herein is against the 4th and 5th Defendants only.

PLAINTIFF'S CASE

PW1 Ngugi Ticha Kiritu adopted his witness statement dated 19th October 2017, as his evidence and, also produced his list of documents as Exhibit 1. It was his testimony that the Court gave him the land and which it erroneously held that it should be shared. Further that the Land was subdivided into three portions and his new portion is L.R 767. That many people occupied the land at the time of the survey and he would like them to move out. That other Defendants refused to give their correct names and he removed them from the proceedings. That he was seeking the assistance of the Court to remove the Defendants from the land.

That he had a case with the Defendants in 1976, and the Court made a decision in **February 2002**, stating that L.R 767 was to be registered in the names of the Defendants and each of them was to get 1/3rd of the parcel of land. That he did not obtain the title, but he called the surveyor who showed him his portion and he did not register the other parties in the title deed. That the 4th and 5th Defendants are children of the persons he had sued and that they had no right to live in the said land. That he had filed the case in 1976, as the Defendants had encroached on his land. That he subdivided the land into 3 portions and the Defendants have refused to move out of his portion of land. That the Court had ordered that the land be surveyed and subdivided and he called the Defendants but they have refused to move out.

That the 4th & 5th Defendants were present during the survey and the survey was not objected by anyone. That the title for his portion had affected where they live, and L.R 796 was less than one acre and his portion is approximately **0.07417 ha** and the original was

approximately **0.56 ha**. That he would like to use his portion of land and he denied that the Court had barred him from evicting the Defendants.

PW2 Beatrice Wamotho Ngugi adopted her witness statement dated **15th August 2019**, as her evidence. She further testified that the plaintiff is her husband and **Kiritu Ticha** is his step brother and **Waithera Ticha** is **Kiritu's** mother. That they had sued the children of **Wanjiru** and **Waithera** and that when the land was subdivided the two had not died.

PW3 Patrick Njenga Ngugi adopted his witness statement dated **15th August 2018** as his evidence. He also testified that **Wanjiru Ticha** is deceased and she was his step grandmother. That when subdivision was done, Wanjiru was not alive and that the survey was done while **Wanjiru** and **Waithera** were deceased. That **George Njoroge Ticha** is a son of **Wanjiru Ticha** and the Notice of subdivision was given to **George Njoroge**.

PW4 Michael Githuka Ngugi adopted his witness statement dated **15th August 2019**, as his evidence in Court. He also testified that the Plaintiff is his father and that in **1976** he had not been born and therefore could not comment on a case of **1976**.

DEFENDANTS CASE

DW1 Kenneth Kiritu Njoki testified that the Plaintiff is his uncle and he was **Wanjiru Ticha's** grandson. That he had read the Judgment in the **1976** case, and he lives in **L.R 796** and the land was subdivided by the Plaintiff but they were not involved. That they were born and bred on the said parcel of land and how the Plaintiff has subdivided the land would affect other homesteads. That the land was to be subdivided into three portions and there is a way the said could have been subdivided without affecting their homesteads. He urged the court to cancel the Plaintiff's title deed as the Defendants were not involved in subdivision and also dismiss his case. That **Wanjiru** and **Waithera** are both deceased and by the time the surveyor issued a Notice on **26th June 2016**, **Wanjiru** and **Waithera** were already deceased

That there were two letters given out by the surveyor and the said letter addressed the parties in respect of case no. **1408 of 1976**. He denied seeing the said letters. He further testified that the Defendants did not appear when the subdivision was done as they did not know about the subdivision. He denied accepting the survey plan and he filed a case objecting to the Decree being enforced being case **No. 847 of 2016**, and the same was dismissed on **30th May 2017**. That the subdivision should have been done with their consultation, and they want the land subdivided differently from what had been done. That in **2016**, the Defendants filed a case wanting the enforcement done differently though he did not participate in the said case.

DW2 George Njoroge Ticha adopted his witness statement recorded in **2018** as his evidence. That the Plaintiff subdivided the land unilaterally contrary to how the elders had subdivided the land. That the subdivisions cannot be allowed to stand as it will involve demolishing other homesteads. That the instant suit is different from the one filed earlier. He urged the Court to go by the earlier order and the land be subdivided as per the homesteads.

That the decree issued by **Justice Anganyanya** was to the effect that **Ngugi Tichah** was entitled to $1/3^{\text{rd}}$ of the Land. That the said land was subdivided into three portions and parties herein live as per the elders way of subdivision and the Defendants have objected to the vertical subdivision of the land.

The parties also filed written submissions which the Court has carefully read and considered. The issues for determination are;

- 1. Whether the Plaintiff is entitled to the orders sought***
- 2. Whether the Defendants are entitled to the orders sought***

1. Whether the Plaintiff is entitled to the orders sought

The Plaintiff has sought for the eviction of the Defendants on the suit property and General Damages for Trespass and mesne profits. The Plaintiff has laid claim to the suit property and averred that vide a Judgment delivered on **6th February 2002**, the Court ordered that the suit property be held in Common between him and the Defendants in **HCCC 1408 of 1976**, wherein the decision was affirmed by the Court of Appeal in **CACA No. 40 of 2004**. It was the Plaintiff's further contention that the Court held that the suit property be held in common and in furtherance of the Court order, he sought for a Surveyor who subdivided the land and he got his portion. That he is now claiming his portion which has been occupied by the Defendants. Trespass has been defined by *Clerk and Lindsel on Torts, 18th edition at Pg.23* as;

“any unjustifiable intrusion by one person upon the land in possession.”

For the Court to order for the eviction and grant General Damages on Trespass, the Court should be satisfied that there was unjustifiable intrusion of the Plaintiff's land. It is not in doubt that there exists Judgment in **HCCC No. 1408 of 1976**, that ordered that **L.R 796**, be held in common by the Plaintiffs and the Defendants in that suit. The Defendants in the said suit were **Wanjiru Ticha, Kiritu Ticha** and **Waithera Ticha** and **Wanjiru** were both entitled to $1/3^{\text{rd}}$ portion of the said property. Further, the Court ordered that the said Land be held in Common. The Defendants are children and grandchildren of the said Defendants in the **1976** case and the same being ancestral land, the Court is not in doubt that they have interest over the same.

However, it is not in doubt that the persons whom the Court ordered to be registered as owners in common are **Wanjiru Ticha** and **Waithera Ticha**, who are both deceased. It was acknowledged in evidence that by the time the Plaintiff sought to subdivide the suit

property, the two women were deceased and therefore could not be served with the **Subdivision Notice**. Be that as it may, the provision of **Section 94** of the Land Registration Act provides for partitioning of land held in common in the following words;

“94. Partition (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;

(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.

(3) The Registrar may, after hearing the applicant and any of the other tenants in common who wish to appear and be heard, make an order for the partition of land having regard to—

(a) whether the provisions of this Act, any other written law regulating the subdivision of land and any covenants and conditions in a land have been or will be complied with if the partition is effected;

(b) the nature and location of the land;

(c) the number of tenants in common and the extent of their respective shares particularly, the extent of the share of any tenant in common by whom or on whose behalf the application has been made;

(d) the value of any contribution made by any tenant in common to the cost of improvements to or the maintenance of the land or buildings occupied in common;

(e) where the tenants in common are spouses or the tenants in common who do not agree on the partition are dependants of or related to the tenants in common, whether the interests of those tenants in common who have not agreed to the partition have been or will be adequately provided for as a consequence of or after the partition is effected, and particularly, a spouse or dependants of the tenant in common who is applying for the partition will not be rendered homeless by the partition;

(f)

(g)

(h) the proper development and use of the land and whether it may be adversely affected by the partition applied for; (i) the hardship that would be caused to the applicant or applicants by the refusal to an order in comparison with the hardship that would be caused to any other person by making the order; and (j) any other matters that the Registrar considers relevant.

(4) The Registrar may make the order for partition subject to such limitations and conditions, including conditions relating to the payment of compensation to those tenants in common who have not agreed to the partition, by the tenants in common who have applied for the partition and how the expenses and costs of the partition are to be borne, as the Registrar may consider just and reasonable.

The above provisions of law are thus very clear on how tenants in common can seek to partition the property. Therefore, it follows that it was the duty of the Plaintiff who sought to have the land that was held in common to be partitioned in the said manner.

In this instance, the Plaintiff testified that he wrote to the District Land Surveyor who in turn wrote to the Defendants informing them of the partitioning. The Law is clear that the person tasked with the mandate of determining the Application is the Land Registrar. The Court therefore finds that the District Land Surveyor had no jurisdiction to deal with the matter and any decision and or subdivision done pursuant to his directions are null and void as the proper procedure was not followed.

Further, it is not in doubt that the manner in which the land was subdivided is in contest as the Defendants allege that the side of the property in which they have built was the portion that the Plaintiff sought to acquire for himself. The provisions of Section 94 of the Land Registration Act have put a mechanism in which the Land Registrar is able to determine the said issues. Therefore, the Court finds that the subdivision was improper for having failed to conform with the law. It can not be said that the portion occupied by the Defendants belong to the Plaintiff.

Further the persons sought to acquire the other portions of land are deceased that is Wanjiru Ticha and Waithera Ticha. The provisions of Section 61 of the Land Registration Act provides for the manner in which land in common belonging to a deceased person can be dealt with. There is no indication as to whether the Personal Representatives of the Estates of the two deceased persons were involved in the subdivision since the two were deceased before the partitioning was carried out. The Court finds and holds that the Plaintiff has not proven that the said portion he claims actually belongs to him. Further given that the Court has invalidated the partitioning that took place, and the Defendants having interest over the suit property which is an ancestral land, it further finds and holds that the Plaintiff has not proved his claim for trespass and therefore he is not entitled to the orders sought.

2. Whether the Defendants are entitled to the orders sought.

In their Counter claim the Defendants have sought for the cancellation of the subdivision and their inclusion as owners in common over the suit property. As already held above, the Court has found that the process of partitioning of L.R 796 was flawed. Therefore, it follows that the subdivisions are null and void and the Court finds that the said prayer is merited.

The Defendants have also sought for orders of their inclusion as **owners in Common. On 6th February 2002, the Court made an order that Waithera Ticha and Wanjiru Ticha were the persons that were to be included as owners of common. As per the provision of Section 61 of the Land Registration Act which provides for the transmission upon the death of owners in Common, the Court finds that the Defendants ought to follow the said due process that they can be registered as owners in common.**

Consequently, the Court finds that the 4th and 5th Defendant's prayers are not merited as the land can only transmit as per the Estate of the two deceased persons.

The upshot of the foregoing is that having carefully considered the available evidence, the written Submissions and the relevant provisions of law, the Court finds that the Plaintiff has not proved his case on the required standard of balance of probabilities against the Defendants herein. Consequently, the Plaintiff's claim against the Defendants jointly and severally is dismissed entirely.

In regard to the 4th and 5th Defendants Counter-claim, the Court finds that they have succeeded only in respect to prayer No. (a) of the said Counter-claim dated 16th January, 2017 and the same is allowed.

However, the Court dismisses the other prayers of the Counter-claim as the same have not been proved on the required standard.

On the issue of costs, the Court has discretion to grant the same as provided by section 27 of Civil Procedure Act. Taking into account the circumstances of the case, the Court directs each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 11TH DAY OF MARCH 2021

L. GACHERU

JUDGE

11/3/2021

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgement** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Gaturu for the Plaintiff

No appearance for the Defendants.

L. GACHERU

JUDGE

11/3/2021