



**Thumbi v Kanyuru (Environment & Land Case 218 of 2015)
[2024] KEELC 4068 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 4068 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 218 OF 2015**

JO OLOLA, J

MAY 9, 2024

**IN THE MATTER OF ADMINISTRATION OF THE
ESTATE OF RAHAB NYIHA THUMBI – (DECEASED)**

AND

IN THE MATTER OF PARCEL OF LAND NYERI/NAROMORU/62

AND

IN THE MATTER OF DECLARATION AND DETERMINATION OF TRUST

BETWEEN

PETER WANJOHI THUMBI APPLICANT

AND

NJOKI KANYURU RESPONDENT

JUDGMENT

Background

1. By the Originating Summons dated 4th August 2015, Peter Wanjohi Thumbi (the Applicant) prays for:
 1. A declaration that the administration of the estate of Rahab Nyiha Thumbi (deceased) vide Nyeri High Court Succession Cause No. 109 of 2010 in respect of the parcel of land LR No. Nyeri/Naromoru/82 was subject to a trust;
 2. Determination of the pleaded trust by subdivision and transfer of the suit property into two shares as follows:
 - (a) Njoki Kanyuru – 1 acre to hold in trust for her children Nyawira Kanyuru, Wairimu Kanyuru and Thumbi Kanyuru; and



- (b) Peter Thumbi Kanyuru – the remainder absolutely.
3. An order for removal of the restriction registered on the suit property by the Respondent;
 4. A perpetual injunction restraining Respondent, her agents and/or servants from interfering with the Applicant’s share of the suit property.
2. The Originating Summons is supported by an Affidavit sworn by the Applicant on 4th August, 2015 wherein he deposes as follows at the relevant Paragraphs 2 to 8 thereof:
- “2. That the parcel of land LR No. Nyeri/Naromoru/82 (the “suit property”) is registered in my name as the absolute owner thereof. Annexed hereto marked (P1) is a copy of the title deed;
 3. That the suit property originally belonged to my sister Rahab Nyiha Thumbi (the deceased) who died on 6th February, 2009;
 4. That during her lifetime, the deceased gifted to me the suit land on condition that I reserve 1 acre thereof for the Respondent to hold the same in trust for her three children namely Nyawira Kanyuru, Wairimu Kanyuru and Thumbi Kanyuru while the remainder would be mine absolutely. Annexed hereto marked ‘P2’ is the deceased’s deed in respect thereof dated 27th September, 2008;
 5. That pursuant to the said gift, I constructed a residence on the suit land as per the photographs annexed hereto marked (“P3 a”) while the Respondent constructed a structure as her son’s residence as per the photograph annexed hereto marked “P3(b)” where she stays with her named children;
 6. That vide Nyeri Succession Cause No. 109 of 2010, I administered the deceased estate (and) had the suit property registered in my name absolutely. Annexed hereto marked “P4” is a copy of the Kenya Gazette in respect thereof;
 7. That the Respondent and her children have since pushed me out of the suit land they are now using the whole of it, including my house thereon claiming entitlement to the same contrary to my ownership thereof which is only subject to their entitlement to 1 acre thereof;
 8. That the Respondent has further caused a restriction to be registered against the title to the suit land.”
3. Njoki Kanyuru (the Respondent) is opposed to the grant of the orders sought. In her Replying Affidavit sworn on 31st August 2015, the Respondent avers that she is a sister-in-law to the Applicant and a beneficiary to the estate of Rahab Nyiha Thumbi in respect to the suit property. The Respondent further avers that the said Rahab Nyiha Thumbi died on 6th February 2009 intestate.
 4. The Respondent avers that the deceased had two brothers, the Applicant herein and one Stephen Kanyuru Thumbi to whom the Respondent was married before his death on 12th December, 2007. The Respondent had three children with her husband.
 5. The Respondent asserts that they did establish their home on the suit property with the full knowledge and consent of the deceased prior to her death. Following Rahab’s death, the Applicant and his wife filed a Succession Cause at the High Court at Nyeri wherein the Applicant was without the knowledge



of the Respondent fraudulently issued with a confirmed Grant of Letters of Administration on 8th April, 2011.

6. The Respondent states that upon learning of the grant, she filed a summons for its revocation and registered a restriction on the suit land. She also filed an application to restrain the Applicant from interfering with the suit land on 21st January, 2015 before the Applicant subsequently filed this suit on 3rd August, 2015.
7. The Respondent denies that the Applicant was gifted the suit property by the late Rahab and asserts that the Applicant has never ever lived on the suit land and was hence never pushed out as alleged.
8. The Originating Summons was disposed of by way of viva voce evidence following directions issued by the Court on 1st February, 2016.
9. Peter Wanjohi Thumbi (the original Applicant) passed away on 6th May, 2017 and was substituted by his daughter Rose Wanjiku Gichohi. As at the time of his death however, the Applicant and his witness had testified and had closed their case.

The Applicant's Case

10. The Applicant called 2 witnesses in support of his case at the trial which commenced before the Honourable Justice Waithaka.
11. PW1 – Peter Wanjohi Thumbi told the Court he is a farmer and a resident of Naromoru. He further told the Court LR No. Nyeri/Naromoru/82 is currently registered in his name and that he was in possession of the title deed.
12. PW1 testified that the suit property was gifted to himself by his sister before she died. He denied being related to the Respondent stating that she had come with his younger brother to the suit property which belonged to PW1's sister. The sister gave PW1's brother and the Respondent a place to stay. PW1 further told the Court his sister had no children of her own and that there was no time that the sister indicated that she would give the Respondent or any other person part of her land.
13. PW1 told the Court the Respondent had 3 children and that before his sister passed away, the sister had indicated that she would give the Respondent and her 3 children 1 acre of land until they grew up. He told the Court he had no problem giving them the 1 acre as per the desires of the sister. He told the Court the Defendant had not built any house on the suit land and that all the houses therein belonged to himself. PW1 further told the Court that the suit property was transferred to himself by his sister during her lifetime and that he was issued with a title deed when the sister was still alive.
14. On cross-examination, PW1 told the Court that the late Rahab Nyiha Thumbi was his sister and that when the Respondent came to the land with his brother, his brother already had a wife. He told the Court his brother was not the husband of the Respondent as the Respondent has another husband.
15. PW1 conceded that the Respondent had a total of 7 children. He told the Court that out of the 7 children, only three – Nyawira, Wairimu and Thumbi were the children of his brother and that they were the ones who were to be given the 1 acre of land.
16. PW1 further told the Court the sister gave him the land and caused the same to be transferred to his name when she started ailing. While conceding that he was aware of Nyeri Succession Cause No. 109 of 2010, he told the Court he was unaware that the Respondent had moved to Court and applied for the revocation of the grant and cancellation of the title registered in his name.



17. PW2 – Jackson Mwangi Ngari is a farmer and a resident of Naromoru. He told the Court that on 18th February 2009, he was called by the late Rahab to record how she wanted to share her land. PW2 told the Court he called the sub-chief as a witness and proceeded to record what Rahab wanted. He recorded that the land would go to Peter Wanjohi Thumbi and that the children of her late brother would share the 1 acre where they were residing. He told the Court he recorded the wishes of Rahab in the presence of the Respondent and that there was no dispute until after Rahab's death.
18. On cross-examination, PW2 conceded that the Respondent was the wife to Kanyuru who had died before Rahab. He further told the Court the Respondent was residing on the suit property. PW2 told the Court he was a village elder and that he was aware of the Succession Cause No. 109 of 2010. He did not however know whether the Applicant had informed the other siblings about the Succession Cause.

The Defence Case

19. Despite filing a Replying Affidavit that was deemed as her Statement of Defence, the Defendant failed to testify at the trial herein as both herself and her Counsel were absent on the date fixed for the defence hearing.

Analysis And Determination

20. I have carefully perused and considered the pleadings filed herein by the Parties, the testimonies of the Applicant and his witness as well as the evidence adduced before the Court. I have similarly perused and considered the submissions placed before me by the Learned Advocate acting for the Applicant. The Respondent neither testified at the trial nor did she file any submissions.
21. By the Originating Summons herein dated 4th August 2015, as amended on 9th December, 2020 Peter Wanjohi Thumbi (the Original Applicant) had sought a declaration that the administration of the estate of Rahab Nyiha Thumbi (deceased) vide Nyeri High Court Succession Cause No. 109 of 2010 in respect of the parcel of land known as Nyeri/Naromoru/82 was subject to a trust.
22. In that respect, the Applicant sought the determination of the pleaded trust by way of sub-division of the suit property into two portions to be shared between himself and the Respondent with the Respondent being given 1 acre of the suit property said to be measuring 10 acres. In addition, the Applicant sought the removal of a restriction registered by the Respondent on the suit property as well as a perpetual injunction restraining the Respondent from interfering with the Applicant's share of the suit property.
23. Those prayers were the result of the Applicant's contention that the suit property which originally belonged to his sister Rahab Nyiha Thumbi had now been registered in his name as the absolute proprietor thereof. It was the Applicant's case that before her death on 6th February 2019, the said Rahab Nyiha Thumbi had gifted to himself the suit land on condition that he would reserve 1 acre thereof to the Respondent to hold in trust for her 3 children.
24. It was further the Applicant's case that pursuant to the said gift, he proceeded to construct his residence on the suit property while the Respondent put up a structure thereon as her son's residence. He accused the Respondent and her children of subsequently pushing him out of the suit land and taking over the same including his house in breach of his ownership thereof.
25. In support of his case, the Applicant told the Court that the suit property originally belonged to his sister Rahab Nyiha Thumbi who died on 6th February, 2009. It was his testimony that the sister had during her lifetime gifted him the suit property on condition that he would reserve 1 acre thereof for



- the Respondent to hold in trust for her 3 children, namely Nyawira Kanyuru, Wairimu Kanyuru and Thumbi Kanyuru.
26. In her Replying Affidavit filed herein on 28th August 2015, the Respondent contested the position taken by the Applicant. It was her case that she was a sister-in-law to the late Rahab Nyiha Thumbi and that the deceased had prior to her death allowed herself and her husband, one Stephen Kanyuru Thumbi to construct their matrimonial home on the suit property. The Respondent asserted that the Applicant had never resided on the suit property and denied pushing him out of the same together with her children.
 27. From the material placed before the Court, it was apparent that the suit property was initially registered in the name of the late Rahab Nyiha Thumbi who was the proprietor thereof. Upon her death on 6th February 2009, her brother Peter Wanjohi Thumbi (the Original Applicant) together with his wife Zipporah Wanjugu Gichohi instituted Nyeri High Court Succession Cause No. 109 of 2010; In the Matter of the Estate of Rahab Nyiha Thumbi. On 8th April 2011, the two obtained a confirmed Grant of Letters of Administration which vested the entire suit property in the name of the Applicant.
 28. At Paragraphs 4 of the Applicant's Supporting Affidavit, he avers that the suit property was gifted to him on condition that he would reserve 1 acre thereof for the Respondent to hold in trust for her 3 children whom he acknowledges were sired by his brother Stephen Kanyuru Thumbi.
 29. That being the case, it was rather interesting that the Applicant chose not to acknowledge the interest of the Respondent on the suit property during the Succession Cause and at the point in time of the confirmation of the Grant on 8th April, 2011. Some four (4) months later on 22nd August 2011, he caused the suit property to be registered in his own name as the absolute proprietor thereof.
 30. Upon learning of the said Succession proceedings, the Respondent moved to the High Court vide an Application dated 28th November, 2011 seeking to have the Grant issued to the Applicant and his wife annulled. Subsequently and by a Notice of Motion Application dated 21st January, 2015 filed in the said Nyeri High Court Succession Cause No. 109 of 2015, the Respondent sought orders of injunction restraining the Applicant from selling, alienating, charging or in any manner whatsoever interfering with the suit property pending the hearing of the summons for revocation and/or annulment of the Grant.
 31. Some seven (7) months later on 9th August 2015, the Applicant instituted this suit seeking a declaration that the Grant he had obtained in the said Nyeri High Court Succession Cause No. 109 of 2010 was the subject of a trust and that the suit property measuring some 10 acres should be divided between himself and the Respondent with the Respondent being given 1 acre thereof. It was however very difficult to understand why the Applicant had not sub-divided the suit property at the time of the issuance of the Grant if indeed there was any such trust.
 32. While the original Applicant denied being related to the Respondent, it was apparent from the evidence of his own witness Jackson Mwangi Ngari (PW2) that the Respondent had been married to the Applicant's brother Stephen Kanyuru Thumbi who passed away in the year 2007. It was further PW2's testimony that the Respondent was residing on the suit property with her children when Rahab Nyiha Thumbi passed away on 6th February, 2009.
 33. As it were, there was absolutely no evidence placed before this Court to suggest that the original Applicant and/or members of his family were residing on the suit property as at the time of Rahab's death and/or that the suit property was gifted to him as purported. There was also no evidence that the Applicant had served the Respondent with Summons in the said Nyeri High Court Succession Cause No. 109 of 2010 prior to the issuance of the Confirmed Grant. Indeed, the issue as to whether or



not the Grant was obtained fraudulently and/or with the knowledge of the Respondent is the subject matter of the Summons for Revocation of the Grant pending before the High Court.

33. From the material placed before me, it was clear that the subject matter herein is the very same one in Nyeri High Court Succession Cause No. 109 of 2010, the same being the issue of the sub-division and/or inheritance of the suit property. In regard to such matters, Section 6 of the [Civil Procedure Act](#), Cap. 21 of the Laws of Kenya provides thus:

“No Court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same Parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceedings is pending in the same Court or any other court having jurisdiction in Kenya to grant the relief claimed.”

35. In the premises herein, I am persuaded that this suit was filed in abuse of the Court process and to evade the process instituted by the Respondent in the said Succession Cause. The same is without merit and is hereby dismissed.

36. Each Party shall bear their own costs.

JUDGMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI THIS 9TH DAY OF MAY, 2024.

J. O. OLOLA

JUDGE

In the presence of:

Mr. C. M. King'ori for the Plaintiff

Ms Kimotho holding brief for Ms Maina for the Defendants

Court assistant - Kendi

