



**Withey v Mwangi & 8 others (Environment & Land Case
181 of 2015) [2024] KEELC 3670 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KEELC 3670 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 181 OF 2015**

JO OLOLA, J

MAY 9, 2024

BETWEEN

ROSS XAVIER WITHEY PLAINTIFF

AND

CHARITY WAMBUI MWANGI 1ST DEFENDANT

PETER MUTHEE 2ND DEFENDANT

JESSE KARIUKI MWANGI 3RD DEFENDANT

FRANCIS WAIRIGUINI MWANGI 4TH DEFENDANT

JOSEPH MWANGI KAROKI 5TH DEFENDANT

SUSAN WANGARI KIMARU 6TH DEFENDANT

JOHN MUHORO WACHIRA 7TH DEFENDANT

CATHERINE K. MUGAMBI 8TH DEFENDANT

REGINA NJERI NJERU 9TH DEFENDANT

JUDGMENT

1. By his Complaint dated 16th June 2015, Ross Xavier Withey (the Plaintiff) prays for the following orders:
 - (a) A declaration that the subdivisions of parcel number Naromoru/Block 1/Ragati/147 into Naromoru/Block 1/ Ragati/1307, 1308, 1309, 1310, 1358, 1359, 1312 and 1313 exceeding the area of the Naromoru/Block 1/Ragati/147 on the ground hence pushing parcels numbers Naromoru/Block 1/Ragati/1307 and 1358 to the road reserve with the knowledge of the Defendants and further knowingly selling and transferring parcels number Naromoru/Block/Ragati/1307 and 1358 to the Plaintiff;



- (b) A resurvey of parcel numbers Naromoru/Block 1/Ragati/147 into Naromoru/Block 1/Ragati/1307, 1308, 1309, 1310, 1358, 1359, 1312 and 1313 in order to contain all of them in their mother parcel number Naromoru/Block 1/Ragati/147 into Naromoru/Block 1/Ragati/1307, 1308, 1309, 1310, 1358, 1359, 1312 and 1313;
 - (c) Alternatively to prayer (b) above the 8th and 9th Defendants be ordered to compensate the Plaintiff as to purchase price, transaction costs and development value proved in the hearing;
 - (d) Costs of the suit and interest at Court rates; and
 - (e) Any other relief that this Honourable Court may deem fit to grant.
2. Those prayers arise from the Plaintiff's contention that he is the registered owner of the parcels of land known as Naromoru/Block 1/Ragati/1307 and 1358 measuring 0.445 Ha and 0.607 Ha. respectively which parcels are the resultant subdivision of Naromoru/Block 1/Ragati/147 measuring 3.76 Ha. as was owned by the 1st Defendant.
 3. It is the Plaintiff's case that the said Parcel No. 147 was sub-divided into 8 portions, the same being Naromoru/Block 1/Ragati/1307, 1308, 1309, 1310, 1358, 1359, 1312, 1313 and a Road access measuring some 0.102 Ha. and that their respective measurements tallied with that of the mother title. It is further his case that Parcel No. 1311 measuring 1.071 Ha. was subsequently transferred to the 5th Defendant who proceeded to sub-divide the same into two portions being:
 - (i) Naromoru/Block 1/Ragati/1358 – 0.607 Ha; and
 - (ii) Naromoru/Block 1/Ragati/1359 – 0.464 Ha.
 4. The Plaintiff further asserts that he later acquired by way of purchase parcel No. 1307 from the 8th Defendant as well as Parcel No. 1358 from the 9th Defendant. It is his case that despite the accurate subdivisions of the properties, he could not develop his properties save for the perimeter fence as when he commenced to do so, he was informed by the Kenya National Highways Authority (KeNHA) that said properties were on a road reserve.
 5. The Plaintiff avers that he then did informally carry out a computation of what used to be Parcel No. 147 with the help of the County Surveyor and it was established that all the other portions were larger than they ought to have been and hence pushing his two properties to the road reserve.
 6. The Plaintiff contends that the 1st to 7th Defendants being family members were aware of that fact and that they used the 7th and 8th Defendants to whom they had previously transferred the parcels of land as conduits for facilitation of the illegality. It is his case that he has approached all the Defendants with a view to having the sub-division exercise redone in order to properly accommodate the parcel numbers 1307 and 1358 into the mother parcel but the Defendants have resisted the same thereby necessitating this suit.
 7. But in their Joint Statement of Defence dated 23rd July 2015, the 1st to 7th Defendants aver that parcel No. Naromoru/Block 1/Ragati/1313 measures 0.4047 Ha. and not 0.445 Ha. as indicated by the Plaintiff. It is further their case that the resultant parcels after sub-division aggregate to 3.7221 Ha in size and not 3.76 Ha. as stated by the Plaintiff.
 8. The 1st to 7th Defendants vehemently deny that their parcels of land are larger than they ought to be and assert that they acquired their parcels in their current sizes and as per the boundaries shown by the respective transferors. They assert that the Plaintiff not being in any privity of contract with them has no right to seek any relief from themselves.



9. The 1st to 7th Defendants further assert that the original parcel of land was professionally surveyed and mutated and the resultant parcels were properly registered with no conspiracy to deceive anyone. It is further their case that the question of placing Parcel Nos. 1307 and 1350 into their “rightful” place does not arise as they exist in the positions in which they are situate and hence the claim of extortion on the part of the Defendants does not arise.
10. Catherine K. Mugambi (the 8th Defendant) is equally opposed to the suit. In her Statement of Defence dated 14th July 2015, the 8th Defendant asserts that she has no knowledge and does not therefore admit either that the Parcel No. 1307 falls on a road reserve and/or that the other portions curved out of the original parcel of land were larger and thereby pushed Parcel No. 1307 onto a road reserve.
11. The 8th Defendant however fully admits that the 1st to 7th Defendants may have colluded to make their parcels of land bigger and asserts that the said Defendants should allow the mother title to be resurveyed and subdivided in order to accommodate the Plaintiff’s parcels of land. It is her case that she bought Parcel No. 1307 from the 5th Defendant and later sold the same to the Plaintiff without any knowledge of any encumbrances thereon.
12. Regina Njeri Njeru (the 9th Defendant) is similarly opposed to the suit. In her Statement of Defence dated 16th July 2015, the 9th Defendant avers that the transaction between herself and the Plaintiff was above board and that the Plaintiff was at all times represented by an Advocate who did due diligence before the transaction.
13. The 9th Defendant further avers that prior to purchasing Parcel No. 1358 from herself, the Plaintiff physically inspected the same and carried out all the inspections required. It is however her case that she is not averse to the property being resurveyed but at the expense of the Plaintiff and the other Defendants.

The Plaintiff’s Case

14. At the trial herein which commenced in the year 2016, the Plaintiff called a total of four (4) witnesses in support of his case.
15. PW1 – Ross Xavier Withey is the Plaintiff and a resident of Nanyuki. Adopting his Statement dated 16th June 2015, he told the Court that he is the registered proprietor of the parcels of land known as Naromoru/Block 1/Ragati/1307 and 1358. PW1 told the Court he purchased the two parcels from the 8th and 9th Defendants respectively.
16. PW1 testified that Parcel No. 1358 is a resultant parcel after the sub-division of parcel No. Naromoru/Block 1/Ragati/1311 which was owned by the 5th Defendant. The said Parcel No. 1311 was itself a sub-division of L.R No. Naromoru/Block 1/Ragati/147 which was owned by Charity Wambui Mwangi (the 1st Defendant). The said Parcel No. 1358 was later sold to the 9th Defendant who subsequently sold it to the PW1.
17. PW1 further testified that Parcel No. 1307 was equally a resultant sub-division of the original Parcel No. 147. The same was sold to the 8th Defendant who later sold the same and transferred it to the Plaintiff. PW1 told the Court that upon sub-division of the original Parcel No. 147, the two parcels number 1307 and 1358 fell on a road reserve.
18. PW1 told the Court he was unable to develop his 2 pieces of land after he was informed by the Kenya National Highways Authority that the same were on a road reserve. That position was confirmed by both the County Land Registrar and Surveyor. A recommendation was then made that the original



parcel No. 147 be resurveyed in order for the other boundaries to be re-adjusted but the Defendants had resisted the same.

19. PW2 – Nduati Kariri is a Land Surveyor at the Nyeri County Government. He told the Court he drafted the Report dated 15th April, 2015 after they went to the suit land in the company of the Land Registrar. He told the Court they surveyed the original Parcel No. 147 which had been divided into 8 portions.
20. PW2 testified that parcels Nos 1307 and 1358 had encroached on a road reserve. They proposed a new sub-division to address the issue but the owners of the other parcels became unco-operative and hostile.
21. PW3 – Maryanne Mukami Muigire is a Land Registrar attached to Nyeri County. She told the Court she was familiar with a Report dated 16th April, 2015 that was prepared by her colleague one W. R. Nganyi. PW3 testified that the Report reveals that there was no encroachment on the Applicant's land and that the Applicant could still get his 1 acre after a re-survey of the land.
22. PW4 – Felix Orina is a senior Surveyor based at the Kenya National Highways Authority's Central Region Office. He told the Court they surveyed the area and established that the road reserve was 90 m and not 60 m as had been indicated previously.

The Defence Case

23. On their part, the nine (9) Defendants called three (3) witnesses in support of their case.
24. DW1 – Joseph Mwangi Karoki is the 5th Defendant and a brother-in-law to the 1st Defendant. Relying on a Joint Statement filed by himself the 1st, 2nd, 3rd, 4th, 6th and 7th Defendants DW1 denied that they are all family members. He told the Court the original parcel No. 147 was properly surveyed and mutated into parcels of the respective sizes and that the same were approved by all the relevant Government authorities including the Nyeri Land Registrar and the District Surveyor.
25. DW1 testified that they had acquired their respective parcels in the sizes as indicated in the mutation and their respective certificates of title and they would not brook any amendment which would result in the reduction of the sizes of their respective parcels of land.
26. DW2 – Regina Njeri Njeru is the 9th Defendant and a Banker. Relying on his Statement dated 23rd July 2015, she told the Court that she bought Land Parcel No. 1358 from the 5th Defendant and that at that time she was unaware the land was on a road reserve. She told the Court she was not averse to the parcel of land being re-surveyed save that the costs thereof should be borne by the Plaintiff and the other Defendants.
27. DW3 – Catherine Mugambi is the 8th Defendant and a business woman in Nanyuki. Relying on her Statement dated 14th July, 2015 as filed in Court, DW3 told the Court she sold land Parcel No. 1307 to the Plaintiff on 15th July, 2013. She further told the Court she had bought the land from one of the sons of the 1st Defendant.
28. DW3 testified that the Plaintiff did due diligence and verified the authenticity of her documents before purchasing the land. She however urged the Court to compel the 1st to 7th Defendants to allow a re-survey and sub-division of the mother title so that the Plaintiffs' parcel of land can be accommodated.



Analysis And Determination

29. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced before the Court. I have similarly perused and considered the submissions and authorities placed before the Court.
30. By the suit herein, the Plaintiff prays for a declaration that the sub-division of the parcel of land known as Naromoru/Block 1/Ragati/147 into Naromoru/Block 1/ Ragati/1307, 1308, 1309, 1310, 1358, 1359, 1312 and 1313 exceeded the area of the original piece of land on the ground thereby pushing parcel numbers 1307 and 1358 onto the road reserve. It is the Plaintiff's case that the erroneous sub-divisions were done with the full knowledge of the Defendants who then knowingly proceeded to sell and transfer the two parcels on the road reserve to the Plaintiff.
31. Accordingly, the Plaintiff urges the Court to order a re-survey of all the parcels of land in order to have all of them contained in their mother parcel of land. In the alternative, the Plaintiff has urged the Court to order the 8th and 9th Defendants who sold the two parcels of land to him to compensate him as to the purchase price, transaction cost as well as the development value thereof.
32. It was the plaintiff's case that he is the registered proprietor of the parcels of land known as Naromoru/Block 1/Ragati/1307 and 1358 measuring 0.445 Ha and 0.607 Ha. respectively. The Plaintiff asserts that those two parcels of land are the resultant sub-divisions of the original Parcel No. 147 measuring some 3.76 Ha. and which, according to the Plaintiff, was owned by the 1st Defendant.
33. The Plaintiff asserts that the said original Parcel No 147 was sub-divided into 8 portions the same being Naromoru/Block 1/ Ragati/1307, 1308, 1309, 1310, 1311, 1312 and 1313 as well as a road access measuring some 0.102 Ha and that their respective measurements tallied with that of the original mother title. It is however his case that when he acquired his two parcels of land by way of purchase from the 8th and 9th Defendants respectively, he was unable to develop the same after he was informed by the Kenya National Highways Authority (KeNHA) that the two properties were on a road reserve.
34. The Plaintiff told the Court that upon so being informed he carried out an informal computation of what used to be the original parcel No. 147 with the help of the Nyeri County Surveyor whereupon they did establish that all the other portions arising from the sub-division were larger than they ought to have been and that they had thereby "pushed" the Plaintiff's two properties to the road reserve.
35. It is the Plaintiff's case that the 1st to 7th Defendants who according to him, were the original owners of the land before sub-division were aware of that fact and that the said Defendants used the 8th and 9th Defendants as conduits to sell and transfer the two parcels on the road reserve to himself. It is further his case that he has approached all the Defendants with a view to have the sub-division exercise re-done in order to properly accommodate his two parcels but the Defendants had all rebuffed his efforts.
36. In response to the Plaintiff's claim, the 1st to 7th Defendants have denied that their respective parcels of land are larger than they ought to be. They have instead asserted that they acquired their respective parcels of land in their current measurements and as per the boundaries that exist presently. It is their case that the original parcel of land was professionally surveyed and mutated and that the resultant parcels were thereafter properly registered. The 1st to 7th Defendants deny entering into any conspiracy with the 8th and 9th Defendants to defraud the Plaintiff or anyone else.
37. On their part, the 8th and 9th Defendants admit having purchased their respective parcels of land from the 5th Defendant. It is however their case that they were unaware of the fact that the same fell on the road reserve. Both deny having colluded with the 1st to 7th Defendants to sell and transfer their parcels



of land to the Plaintiff and have no objection to a re-survey of the land in order to accommodate the plaintiff's two parcels of land.

38. In support of his case, the Plaintiff told the Court that he is now the registered proprietor of the two parcels of land known as Naromoru/Block 1/Ragati/1307 and 1358 and that he had bought the two parcels of land from the 8th and 9th Defendants respectively. The Plaintiff told the Court that prior to the sale to himself, the 8th Defendant had herself purchased L.R No. Naromoru/Block 1/Ragati 1307 from the 5th Defendant while the 9th Defendant had similarly bought L.R No. Naromoru/Block 1/Ragati/1358 from the same 5th Defendant.
39. According to the Plaintiff, his intention was to commence development on the two parcels of land only for him to be informed by the Kenya National Highways Authority, the Nyeri County Land Registrar and Surveyor that the two parcels were on a road reserve.
40. From the material placed before the Court, it was evident that the original parcel of land known as Naromoru/Block 1/Ragati/147 and said to be measuring some 3.76 Ha. was registered in the joint names of one Mwangi Karoki and Joseph Mwangi Karoki (the 5th Defendants herein) way back in the year 1987. From the testimony of the 5th Defendant, it was apparent that the said Mwangi Karoki was his brother and that before his death, he was married to Charity Wambui Mwangi who is named herein as the 1st Defendant.
41. It was further evident from the Certificate of Official Search produced by the 1st to 7th Defendants that following the death of Mwangi Karoki, the suit property was on 23rd July, 2009 registered in the names of the 1st and 5th Defendants to own jointly in equal shares. That being the case, the contention by the Plaintiff that the original parcel number Naromoru/Block 1 Ragati/147 belonged solely to the 1st Defendant and that she was the one who subsequently transferred the sub-divisions thereof to the 2nd, 3rd, 4th and 6th Defendants was not entirely correct.
42. It was interesting to note from the pleadings filed before the Court that both the Plaintiff on the one hand and the 8th and 9th Defendants had made an assumption that the 1st Defendant was initially the sole proprietor of the suit property and that she is the one who transferred the same to the 2nd to 7th Defendants. While the 5th Defendant admitted that the 2nd, 3rd, 4th, 6th and 7th Defendants were the children of his elder brother with the 1st Defendant, it was evident that the 5th Defendant was a co-owner of the land which they eventually sub-divided into 8 portions.
43. It was also interesting to note that while both the 8th and 9th Defendants were said to have purchased the parcels of land known as Naromoru/Block 1/Ragati/1307 and 1358 from the 5th Defendant, there was no admission by the 5th Defendant that he had sold any land to the 8th Defendant. In his testimony before the Court, the 5th Defendant admitted having sold his land to the 9th Defendant and produced as Defence Exhibit 3 a Sale Agreement dated 11th August, 2007 indicating that the 8th Defendant was sold a portion of land measuring 1.16 acres by one Stephen Maina Mwangi who is described therein as a beneficiary of Plot No. Naromoru/Block 1/Ragati/147. None of the Parties herein gave any explanation as to whom the said Stephen Maina Mwangi was and/or how he was related to the other Defendants.
44. Be that as it may, it was evident that some six (6) years after they had purchased their respective parcels of land, the 8th and 9th Defendants decided to dispose of the same by way of sale to the Plaintiff herein. Both the Plaintiff on the one hand and the 8th and 9th Defendants on the other admit that prior to the said transactions, the Plaintiff did due diligence and even engaged a private surveyor who gave the transaction a clean bill of health and on that score the Plaintiff went ahead to execute the Sale



Agreements and to have the suit properties transferred into his name on 5th September, 2013 (Parcel No. 1307) and 5th November, 2013 (Parcel No. 1358) respectively.

46. According to the Plaintiff, it was when he desired to develop the properties that he realized that they were on a road reserve upon being cautioned by KeNHA. The Plaintiff testified that on receipt of the caution, he did informally carry out a computation of what used to be Naromoru/Block 1/Ragati/147 with the help of the County Surveyor upon which they did establish that all the other portions were larger than they ought to be and that that is how the two parcels he had bought had been “pushed” to the road reserve.
47. As it turned out, there was absolutely no evidence tabled before this Court to demonstrate that the other resulting sub-divisions of Parcel No. 147 were larger than what they were supposed to be and to what extent. Indeed, while the Plaintiff accused the 1st to 7th Defendants of colluding with the 8th and 9th Defendants to knowingly sell to him the parcels of land situated on a road reserve, no evidence of such collusion was tendered.
48. In actual fact, this Court found it extremely difficult to believe that there would have been such collusion. I say so because from the Sale Agreements exhibited by the Plaintiff as well as the testimonies of the 8th and 9th Defendants, the said Defendants had not only purchased the properties many years back but they had both used them as collateral to secure various loans from two different banks. As at the time of sale the titles for both Parcel Nos 1307 and 1358 were with Messrs K-Rep Bank and Kenya Commercial Bank Limited respectively which banks must have done their own due diligence before accepting the collateral.
49. It was in the circumstances apparent that the confusion herein was brought by the enquiry that was made by the Plaintiff to the Kenya National Highways Authority to be shown the extent of the road reserve. It was clear from the Internal Memo dated 16th December, 2014 written by KeNHA Surveyor to their Regional Manager and produced by the Plaintiff, that as at the time, the Authority was itself unsure of the extent of the reserve. The said Memo reads in the relevant portion thus:

“Reference is made to the undated letter (copy attached) from Ross Withey. Requesting to be shown the extent of the road reserve next to its (sic) parcel of land.

The survey team visited the site on 15th December, 2014 and established the extent of the road reserve at points A and B (see attached copy of the (RIM). The client also agreed to cater for the costs of erecting permanent beacons next to his plots to avoid future encroachment.”

50. It was also evident from the Plaintiffs own documents that prior to the visit by KeNHA staff, the County Land Registrar Nyeri had visited the land on 4th December 2014. A perusal of their letter dated 16th April, 2015 (Pexh 12) reveals that the Land Registrar had until that time a different take on the matter. At Paragraph 2 on the Section marked “Observation”, the Land Registrar, one W. R Ngaanyi reports as follows:

“Measurement was taken for either sides of the road reserve and, initially, the boundary on the ground appeared to be in tandem with the Registry Index Map (RIM). At this point, it would suggest that the KPLC encroached into the Applicants parcel.

After consulting my team, it was agreed that it would be unfair to conclude the case without incorporating the “proprietors” of the road reserve. It was then that a decision was reached that the local office of the Kenya National Highways Authority be involved.



A tripartite agreement involving the KeNHA, Ministry of Lands and the applicant agreed that the survey be done using the KeNHA Roads Map. Since the Airport is few meters from the dispute site and given that it was fixed survey marks, it was agreed that it be used as a reference point to coordinate the desired marks."

51. It was a result of this survey using the KeNHA Road Map that the County Land Registrar purported to come to the conclusion that the Applicants parcels of land were on a road reserve. With respect, that was a most unserious exercise of the responsibility bestowed on the Land Registrar. As it were, the Land Registrar is the custodian of all land records in this country and anyone who relies on their records cannot again be accused of wrongdoing for acting on the position given by themselves.
52. As the Land Registrar Maryanne Mukami Muigire (PW3) conceded during cross-examination, the Records at the Lands Office prevails over those held by any other authority and it was therefore preposterous to ask the parties herein to undergo another survey on the basis of some alleged KeNHA Maps that were not part of the official Land Records.
53. From the testimony of KeNHA's own Senior Surveyor (PW4), the road reserve between Naromoru and Nanyuki ranges between 60 m to 90 m. If those positions are not in tandem with the records held at the Lands Office, anyone whose land is subsequently taken for any purpose can only have a recourse from the Government by way of compensation.
54. In the circumstances herein I was not persuaded that there was any merit in this suit against the Defendants.
55. The same is dismissed with costs.

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

In the presence of:

Ms Kendi Kiruki for the Plaintiffs

Mr. Mwangi Kariuki for the for the 1st to 7th Defendants

Mr. Omariba holding brief for Bwonwong'a for the 8th Defendant

Mr. Muchiri Wa Gathoni for the 9th Defendant

Court assistant - Kendi

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J. O. OLOLA

JUDGE

