



**Nyamiobo v Nyamiobo & 2 others (Petition 8 of 2018)
[2023] KEELC 16186 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16186 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
PETITION 8 OF 2018
M SILA, J
MARCH 15, 2023**

BETWEEN

CHARLES MOTURI NYAMIOBO PETITIONER

AND

NYANDIEKA NYAMIOBO 1ST RESPONDENT

KWAMBOKA KARORI 2ND RESPONDENT

NYAKARA MIREGA 3RD RESPONDENT

JUDGMENT

(Petitioner being brother and brother in law to the respondents; petitioner claiming that when land was adjudicated in the 1960s, it was unfairly distributed amongst the three houses of his late father; petitioner of the view that this is an injustice that needs correction; court of opinion that there must have been good reason in the manner in which the land was adjudicated and distributed; process of adjudication having in-built mechanism for any person aggrieved to object; no objection raised meaning that all persons were comfortable with the process; petitioner cannot now be heard to complain that the process was flawed when the participants and beneficiaries of the process were agreeable; petitioner having been advised in several other forums that his claims are baseless; petitioner trying to unearth a dispute where there has been none and there is none; no violation of the Constitution demonstrated; petition dismissed)

1. This suit was commenced by way of a constitutional petition filed on 12 October 2018. The petitioner avers to be the registered proprietor of the land parcel Majoge/Bombaba/7 measuring 5.5 acres. He states that the respondents cumulatively have 23.75 acres comprised in the titles Majoge/Bombaba/8,9 and 10. The petitioner states that his father died in the year 1947 before the land in dispute was registered and that he left his two wives, Nyareki Nyamiobo and Nyambunde Nyamiobo, in occupation. Nyareki, the 1st wife, did not have sons. The petitioner contends that there was inequality



in distribution of the land as the children of the 2nd house got the parcels No. 8, 9, and 10 measuring in total 23.75 acres. He claims that the first house only got the parcel No. 7 measuring 5.5 acres and part of Majoge/Bombaba/30 measuring 2.0 acres thus a total of 7 acres. He is of opinion that this inequality, in the manner in which the land of his father was distributed, amounts to a violation of his constitutional and fundamental rights. He alleges that his rights under articles 21 (1), 22 (1), 40 (2) and 50, have been infringed upon. In this petition he seeks the following prayers :-

- a. Declaration be issued to the effect that the petitioner is entitled to protection under the Constitution.
 - b. The honourable court to address the historical injustice and the inequality caused by the respondents by cancelling and amalgamating the titles Majoge/Bombaba/7,8,9 and 10 and then subdivide equitably between the two wives (1st wife and 2nd wife) and also issue new titles and each house to get 15.625 acres and that will stop the squabbles.
 - c. Costs of the petition be borne by the respondents jointly and/or severally.
2. The respondents filed a reply to the petition. They pleaded that when the land was demarcated, the petitioner had not been born and that he is not a biological son of Nyamiobo Geteya. They aver that he was sired after his mother deserted the matrimonial home and that he is a son of one Monda Omwenge. They plead that Nyareki (1st wife of Nyamiobo) did not have sons so she got into a woman to woman customary marriage with one Bonareri. They state that the land was distributed among the two wives of Nyamiobo during adjudication in the year 1969 and all parties have had peaceful enjoyment of their parcels of land. They add that the dispute had been to the Land Disputes tribunal and the petitioner lost. They ask that the petition be dismissed.
 3. The evidence of the petitioner was that he was born in the year 1949. He holds a doctorate degree and teaches in the Faculty of Economics in one of the Public Universities. He asserted that he is son to Nyamiobo who died in the year 1947. He explained that Nyamiobo had three wives and that he is son of the third house. The first wife was Nyareki, the second wife Nyambunde, and the 3rd wife Bonareri. He testified that when Mzee Nyamiobo died, his land had yet to be demarcated. Demarcation was done in the year 1969 and the land was distributed to two wives. He stated that his mother (Bonareri) was counted as part of the first house which only had daughters. He explained that she was counted as part of the first house because the dowry paid to a daughter of the first house was used to marry her. He testified that during demarcation, Nyareki, the first wife, gave his mother 7.5 acres of land which got registered in her name. It is the land parcel No.7. The 2nd wife had three sons, James Karori, Nyandieka Nyamiobo, and Mirega Nyagonde. They respectively got registered as proprietors of the parcels Nos. 8, 9 and 10 totalling 23.75 acres. He claimed that the injustice is that the 2nd house got a total of 23.75 acres and the first house got a total of 7.5 acres. He wants the land redistributed. He stated that he is the one holding the title deed to this 7.5 acres in his name. He acknowledged that he had lodged a case at the Land Disputes Tribunal which was dismissed.
 4. PW-2 was Isaac Ongayo. His father and Mzee Nyamiobo were brothers. He is thus first cousin to the parties herein. He never met Mzee Nyamiobo nor his wives and was not there when the land was adjudicated. He only heard the petitioner complain that he was given a small portion. He was about 5 years old when the land was demarcated so he did not witness it being distributed.
 5. PW-3 was James Zakaria Mongeri. He is also a cousin to the parties as his father is brother to the father of the parties. He did not know the size of the land in dispute nor why it was distributed to only two wives. He did not know the land distributed to the two wives only that one is smaller. He was not there



- when the land was distributed. He said that this was done by elders. He does not know how much more land the petitioner wants.
6. With the above evidence, the petitioner closed his case.
 7. The 1st respondent testified on behalf of the other respondents. He elaborated that Mzee Nyamiobo had two wives, Nyareki and Nyambunde. Nyareki only had daughters and they got married. Nyambunde had three sons being Karori, Mirega and himself. His two brothers are deceased and the 2nd and 3rd respondents are their respective wives. Karori died in the 1990s and Mirega in the year 2014. He testified that the petitioner is son of Bonareri and that since Nyareki had no sons, she was brought to sire a son for her. He testified that during demarcation, Bonareri was granted the parcel No. 7, Karori parcel No.8, himself parcel No. 9, and Mirega parcel No. 10. They were the first registered proprietors and no objection was ever raised during adjudication and registration which was done in 1969. The land is still registered in their names. He testified that there was a time the petitioner had complained to the tribunal and the elders came to the land. They however saw no problem. Cross-examined, he testified that the petitioner has an elder brother called Paul who was sired by his father whereas the petitioner was sired by somebody else. Bonareri (their mother) was brought to sire children for Nyareki and therefore the petitioner is considered a son of their father.
 8. I got curious on this evidence touching on Paul and I had the petitioner recalled to testify on this aspect. He affirmed that Paul is his brother and is a retired nurse. Out of the 7.5 acres, his mother sold two acres to Mirega to sent Paul to school so what remained was 5.5 acres. He shared the 5.5 acres with Paul equally. He therefore had the parcel No. 7 subdivided into Machoge/Bombaba/5301 and 5302 both measuring 2.75 acres. Paul does not want anything to do with this case and he told the petitioner that it was up to him if he wanted more land as he is not interested. He in fact told the petitioner that if he wants more land he should go and buy because he has money. Paul has no interest in any extra land. The petitioner does not think that Paul is normal given his stand. He thinks that he is too slow in understanding things.
 9. Both counsel for the petitioner and counsel for the respondents filed submissions which I have taken into account.
 10. The petitioner's case is that there was inequality when the land was being distributed and adjudicated in the year 1969. He thinks that the house of the 2nd defendant got more land than they deserved. According to his formula, the land should have been divided equally to the two houses. He therefore believes that the distribution was unfair and should be redone. The petitioner contends that there was a historical injustice which needs to be corrected. He claims that his constitutional rights were infringed. I am not persuaded.
 11. At the outset, I observe that what is before me has nothing to do with the manner in which the land of the late Mzee Nyamiobo was succeeded upon his death. He had died before the land was adjudicated and no succession process was undertaken as he held no title. The titles, which are subject to the dispute herein, are titles that were issued on first registration upon adjudication. It means that there was an adjudication committee and the process under the *Land Adjudication Act*, cap 284, Laws of Kenya, was followed. The said Act has an inbuilt mechanism for settling disputes. Under section 26, if anyone wished to raise an objection, he/she had 60 days to do so. There is no evidence of any dispute raised towards the adjudication and demarcation of the land. Nobody was aggrieved in the manner in which the land was adjudicated. Bonareri, the mother of the petitioner, never raised any issue when land measuring 7.5 acres was adjudicated to her. She must have been happy and this is where she raised her children. If she had no issue in the manner the land was adjudicated, I wonder what issue the petitioner now wants to unearth.



12. The petitioner is now trying to raise a complaint, and create a dispute, where there was none and where there is none. Maybe the petitioner could succeed if he had demonstrated that the land held by the respondents is land held in trust for him, but there is no demonstration of any such trust. Everybody that was present in the 1960s got land in accordance with the process of adjudication. There is no indication that any party is holding land in trust for the other. There cannot be imported that one house was registered as proprietor and that they were holding part of the land registered in their names on behalf of the other house or some children of the other house.
13. It is not for this court to say that the persons undertaking the process of adjudication ought to have distributed the land differently. This court cannot supplant its wisdom for that of the adjudication personnel. Neither can the petitioner. He cannot now come with his theoretical mathematical formulas to show how land ought to have been distributed. There must have been good reason why the land was adjudicated and distributed in the manner that it was in the 1960s. The mathematical formula of the petitioner was clearly not considered wise to use. It cannot be said that it is now the panacea to employ or was the most creative formula to have been employed in the 1960s.
14. Even if I am to assume that there is some substance in the case of the petitioner, and for the record I find no substance, such suit would be hopelessly time barred by dint of section 7 of the [Limitation of Actions Act](#), cap 22, Laws of Kenya, which provides as follows :-
 7. Actions to recover land
An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.
15. If ever there was a complaint to be raised, it ought to have been raised within 12 years of the registration of the land in the name of the respondents or the registered proprietors named therein. Even if we are to assume that the petitioner was a minor and under disability, and if we take that he was born in 1953 as indicated in his ID card, by the year 1971 he was of age. He had full capacity to file suit before 1981 which would be 12 years from the time the land was registered in the year 1969. No suit was filed.
16. The above aside, the petition cannot succeed as the registered proprietors of two of the parcels of land in issue, that is Majoge/Bombaba/8 and Majoge/Bombaba/10, are deceased. Their land cannot be redistributed without a suit against their legal representatives. The 2nd and 3rd respondents are not the legal representatives of the two deceased proprietors. But even if they were, I would still not have found any substance in this suit.
17. The reality of the matter is that everybody has been comfortable with the manner in which the land was adjudicated in the 1960s. Even the petitioner was comfortable until some preposterous and witless 'stroke of genius' hit him, that he can get more land by contending that the distribution of 1969 was unfair, and by cooking up some sort of mathematical formula for the distribution of the land. I will repeat to the petitioner that those who were present in the 1960s were of opinion that the distribution of the land was very fair. People settled on their land and it is now two generations later. The petitioner is simply trying to stir trouble and disharmony by being greedy. He is jealous and envious that other people around him appear to have more land. One having more land than the other is not by itself an injustice nor an infringement of the [Constitution](#).
18. The petitioner of course contends that some constitutional rights have been violated more so the right to property under article 40 of the [Constitution](#). I see no violation as the properties in issue were titled and distributed in accordance with the law. I have not been shown any breach of law to entitle this court



invoke article 40 of the Constitution and declare a violation of the proprietary rights of the petitioner. The other provisions of the Constitution cited are general provisions concerned with protection of fundamental rights and they do not help the petitioner.

19. It will be seen that I find no substance in the case of the petitioner. In fact, I would categorize it as frivolous. Everybody within the circle of the petitioner has seen the foolhardiness of his claims. His own brother, Paul, does not support him and he has told him to his face that he is fighting a losing cause. Paul is comfortable with what he has. I observe that the petitioner had filed suit before the Land Disputes Tribunal in the year 2011. The elders heard the dispute and informed the petitioner that he has no right to claim any portion of land from his brothers. When this matter was in court, the parties were referred to the County Commissioner for mediation. His report was that the land was properly distributed according to Gusii customary law. The petitioner's brother, Paul, has chided the petitioner to buy land if he wants more of it. It is the same advice that I will give the petitioner. If he wants more land, he should simply go and buy, not eye other people's rightfully obtained parcels of land and cause chaos in an otherwise still and peaceful society.
20. This is a completely unfounded suit that ought not to have seen the light of day. It is hereby dismissed with costs.
21. Judgment accordingly.

DATED AND DELIVERED THIS 15 DAY OF MARCH 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

