



**Omani v Nguuku & another (Environment & Land Case 3 of 2020 & Civil Case 87 of 2010 (Consolidated)) [2023] KEELC 15952 (KLR) (3 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 15952 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 3 OF 2020 & CIVIL CASE 87 OF 2010 (CONSOLIDATED)**

**A OMBWAYO, J**

**MARCH 3, 2023**

**BETWEEN**

**HANNAH WANJIKU OMANI ..... PLAINTIFF**

**AND**

**DOMINIC WARONJA NGUUKU ..... 1<sup>ST</sup> DEFENDANT**

**WALTER NDUNGU MBUGUA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiff has come to court vide the Originating Summons brought under Order xxxVI Rules 3D(1) and (2) respectively dated 15<sup>th</sup> March 2010 seeking orders that that Hannah Wanjiku Omani be declared the owner of the parcel of land previously known as Naivasha/Mwicingiri Block 2/109 measuring approximately six decimal two nine four (6.294) hectares whose title was closed on 17<sup>th</sup> February 2010 resulting in numbers Naivasha/Mwicingiri Block 2/1052 -1150, by adverse possession having occupied, cultivated and tilled Naivasha/Mwicingiri Block 2/1052 -1150, the entire piece of land continuously and uninterrupted for over 41 years since 1969 and that this honourable court do direct that the Naivasha Land District Registrar do rectify the land register accordingly and to register Hannah Wanjiku Omani as the sole proprietor of Naivasha/Mwicingiri Block 2/1052 -1150 measuring approximately six decimal two nine four (6.294) hectares of land whose title appears to be closed for subdivision, and that the plaintiff herein be issued with one title deed for the said land measuring approximately six decimal two nine four (6.294) hectares of land. That the costs of this suit be borne by the defendants.
2. The originating summons is supported by the affidavit sworn by the plaintiff on 15<sup>th</sup> March 2010 where she states that in 1964, she bought 75 shares @ 20/= each from Nyamathi Farmers Co-operative Society Limited and caused the shares to be registered in the name of her elderly father one Mr Mugeni Kahuria (Now deceased) who was issued with a land share certificate in the year 1985.



3. That she had balloted and obtained plot No. 104 in the said society's land where she settled her parents who are now deceased and the plot was now known as Naivasha/Mwichingiri Block 2/109 and continued to pay for the plot after her father had passed away.
4. That her father had two wives and upon his death, her step brother Kahuria Mugeni Kahuria and the step brother's wife Wambui Nguuku Mugeni whose husband had already passed on and who were older than her transferred the suit property to themselves. That they took out letters of administration without involving the other house.
5. That in 1994, the defendants herein as the son and son in law of her step brothers transferred the suit property to themselves without her knowledge or consent. That on 10<sup>th</sup> March 2010, she conducted a search and learnt that the title had been closed for subdivision with new numbers. That even after the suit property was registered in the names of the defendants she has continued to live on the suit property with their knowledge.
6. That in 1990 her son Njogu Omani was sued in Nakuru HCC No. 1744 of 1990 (Kahuru Mugeni and Wambui Nguuku Mugeni vs Njogu Oman) to have him evicted from the said land claiming that he was a trespasser but the said orders were never enforced.
7. That having occupied the suit property since 1969 adversely she is now entitled to the said land. That she has given each of her seven children a portion of the suit property that they are in occupation of.
8. In response to the originating summons, the 2<sup>nd</sup> defendant filed a replying affidavit sworn on 22<sup>nd</sup> April 2010 and filed on 26<sup>th</sup> April 2010.
9. He deposed that on 4<sup>th</sup> January 1994, he and the 1<sup>st</sup> defendant bought land parcel No. Naivasha/Mwichingiri Block 2/109 Nyamathi measuring approximately 6.294 hectares from Kahuria Mugeni and Esther Wambui Nguuku vide a sale agreement dated the same day for a sum of Kshs.450,000/=.
10. He further deposed that the vendors had acquired title to this land via succession cause No. 23 of 1986 at the High Court of Kenya at Nakuru, in which they petitioned for a grant of letters of Administration to the estate of the late Mugeni Kahuria.
11. He also deposed that the plaintiffs were sons of the late Mugeni Kahuria and when Nguku Mugeni passed away his wife Esther Wambui Nguku was enjoined in the grant to represent interests of her late husband. That the late Mugeni Kahuria who is the second owner as per schedule of entries in the land Register bought L. R. NO. Naivasha/Mwichingiri Block 2/109 (Nyamathi) now closed new numbers Naivasha/Mwichingiri Block 2/1052/1150 from the government of Kenya through Nyamathi Farmers' Cooperative Society Ltd where he bought shares and made contributions between the years 1964 and 1971.
12. That the plaintiff has never bought any shares in Nyamathi Farmers Co-operative Society and neither did she make any payments to that society, in respect of L.R. NO. Naivasha/Mwichingiri Block 2/109 (Nyamathi) now closed.
13. That it was not possible for one to pay without having bought shares as only members had the right to contribute and once they paid up, they were allocated their respective portions of land.
14. That if the plaintiff had bought shares, she would have been allocated the land under her names and that even the schedules in the land register of L.R. No. Naivasha/Mwichingiri Block 2/109 (Nyamathi) do not reflect her names.



15. That the plaintiff has never lived on the suit property except for her son Njogu Omani who trespassed onto the suit property sometimes in 1990 and was ordered to vacate the land. That the plaintiff trespassed onto the suit property in the year 2010 and begun constructing a house with her husband Omani who owned a parcel of land adjacent to their land. That the law provides that first registration should not be challenged. That they applied for a consent to subdivide the land and the chairman Naivasha Land Control Board issued the said consent. That they paid Kshs. 24,300/= for the subdivision and the suit property was subdivided into 120 commercial plots and the title closed. That the commercial plots have been earmarked for sale and some plots have been bought and paid for. That the trespass of the plaintiff on the suit property is a violation to his right to property. That the plaintiff's claim that she has acquired the suit property by way of adverse possession is not merited as she has never been in occupation of the suit property.
16. The 2<sup>nd</sup> defendant filed another affidavit sworn on 21<sup>st</sup> November 2016 on the same date where he deposed that when Njogu Omani the son of the plaintiff invaded the suit property in the year 1994, they reported the issue to the area chief who summoned him through the letter dated 8<sup>th</sup> February 1994. That he refused to go and he was again summoned through the letter dated 7<sup>th</sup> December 1994 and later through the letter dated 6<sup>th</sup> May 2002 and both times he refused to go. That following the intervention of the chief, the plaintiff kept off the land until the year 2009 when she forcefully invaded the land and started constructing thereon. That the plaintiff reported the matter to the Land Dispute Tribunal which originally held that that the suit property belonged to her but on appeal, the said decision was set aside.
17. That the decision of the appeals board was adopted as an order of the court on 30<sup>th</sup> September 2010 which decision the plaintiff did not appeal and instead, she filed the present suit. In conclusion, he reiterated that the plaintiff has never been in occupation of the suit property.
18. The 2<sup>nd</sup> defendant also filed a further affidavit sworn on 4<sup>th</sup> October 2017 on 11<sup>th</sup> October 2017. He deposed that the plaintiff filed an application on or about March 1995 to revoke the grant of letters of administration issued to Kahuria Mugeni and Wambui Nguuku Mugeni in Succession Cause No. 23 of 1986 which application was dismissed. The 2<sup>nd</sup> defendant then reiterated the contents of the affidavit filed on 21<sup>st</sup> November 2016 but in more detail.
19. That upon dismissal of her application to revoke the grant, the plaintiff filed land dispute case No. 108 of 2009 at Naivasha Lands Tribunal which upon deliberation of the matter decided that the plaintiff be allocated 4.5 acres of land and Dominic Waronja Nguuku and himself be left with 10.5 acres of land.
20. That they were dissatisfied with the decision of the tribunal and he appealed to the Land Dispute Appeals Committee vide Appeal No. 3 of 2010 which confirmed that land parcel No. Naivasha Mwiciringiri Block 2/109 belonged to Dominic Waronja Nguuku and himself and so the ruling of the Land Disputes Tribunal was set aside. That the award of the Land Dispute Appeals Committee was adopted as the judgement of the Chief Magistrates Court at Naivasha on 5<sup>th</sup> October 2010.
21. That he is advised by his advocates on record that the matter having been adjudicated upon by a competent court, the suit is now res judicata.
22. In HCC No. 87 of 2010 that was consolidated with the present suit on 1<sup>st</sup> December 2021, the defendants herein sued the plaintiff in the present matter and her son Njogu Omani vide the plaint dated 6<sup>th</sup> April 2010 and filed on the same date which was later amended on 15<sup>th</sup> April 2010 and filed on the same date.



23. They averred that the plaintiff herein together with her children trespassed onto LR No. Naivasha/Mwichiringiri Block 2/109 in March 2010 and begun constructing a house thereon.
24. They also averred that the Njogu Omani the son of Hannah Wanjuku Omani had trespassed onto the suit property in the year 1994 claiming the land but was ordered to vacate by the area chief. That they asked the plaintiff to stop the construction but she refused and they therefore sought the following orders against them;
  - a. An order for a temporary injunction restraining the defendants from continuing with their illegal trespass and encroachment on LR No. Naivasha/Mwichiringiri Block 2/109 (Nyamathi) now closed.
  - b. An order of permanent injunction restraining the defendants from continuing with their illegal trespass and encroachment of LR No. Naivasha/Mwichiringiri Block 2/109(Nyamathi) now closed.
  - c. An order of eviction to issue against the defendants from LR No. Naivasha/Mwichiringiri Block 2/109(Nyamathi) now closed.
  - d. Costs of this suit.
  - e. Any other relief that the Honourable court may deem fit to grant.
25. The plaintiff in the present matter and Njogu Omani who were the defendants in Civil Suit No. 87 of 2010 filed their statement of defence dated 11<sup>th</sup> May 2010 on the same date.
26. They denied the contents of the amended plaint and stated that they are the lawful owners of land parcel No. Naivasha/Mwichingiri Block 2/109 (Nyamathi) and sought that the suit be dismissed with costs.

## **Evidence**

27. The suit was heard by way of viva voce evidence. Njogu Omani testified as PW1. It was his evidence that he resides on land parcel No. Naivasha/Mwichingiri Block 2/109. He testified that the land belonged to his mother Hannah Wanjuku Omani who left it to her children. He also testified that his mother had gotten the suit property from her father Mugeni Kahuria (deceased).
28. He further testified that his mother had paid for the land and that his father had a share certificate which he produced as PExh 1. That they paid for the survey of the land in the year 1980 and 1981 before balloting was done which receipts were produced as PExh 2(a) and (b).
29. It was his evidence that his mother balloted for the land and she got plot No. 104 as per the ballot paper which was produced as PExh 3. That on 19<sup>th</sup> July 1985, they paid for the title processing fee at the District Officer's Office which was produced as PExh 4. That his mother was later issued with a title deed for plot No. 104 which was produced as PExh 5.
30. It was his evidence that they had been shown the plot on the ground and later the plot was changed to 109 but his mother was not issued with another title deed so she remained with the one for plot 104.
31. He testified that the land is approximately 15 acres and after it was shown to them in 1980, they constructed a house thereon. That they have been having disputes with Kahuria Mugeni Kahuria and Wambui Nguuku Mugeni. It was his evidence that the defendants are his relatives and that after his grandfather died, they never filed any succession proceedings and prayed that the court awards them the suit property on account of them being adverse possessors and also sought for costs of the suit.



32. On cross examination, he confirmed that his grandfather died in the year 1969 and his mother took over the payment of the land. He further confirmed that his mother died in the year 2012 and that they obtained letters of administration ad litem to enable them proceed with the suit.
33. When he was referred to the witness statement signed by his mother, he confirmed that Kahuria Mugeni Kahuria and Wambui Nguuku Mugeni caused the suit property to be transferred to their names. He further confirmed that his mother reported the matter to the chief and came to court. He admitted that he was not aware if his mother objected to any of the succession proceedings relating to her late father's estate.
34. He confirmed that his mother balloted and got plot No. 104 and that his grandfather had died by the time the titles were issued. He admitted that his mother had filed a case before the Land Disputes Tribunal but that he didn't know the outcome. He stated that he was never served with the letters that were attached to the defendants replying affidavits.
35. On re-examination he stated that it was his grandfather who was registered as the owner and that is why the receipts were issued in his name. He further stated that after the tribunal dismissed their mother's case they filed the present case. He also stated that his father had land within the same area but he had another family who reside on that land.
36. Peter Ndungu Kimwana testified as PW2. He adopted his witness statement dated 9<sup>th</sup> June 2021 and filed on 10<sup>th</sup> June 2021 as part of his evidence.
37. He testified that the land in dispute belonged to Mugeni Kahuria. He further testified that he was the secretary of Nyamathi Co-operative Society and that his work was to keep the register of payments of the shareholders. It was his evidence that a plot measured one acre.
38. He testified that he knew Hannah Wanjiku Omani who was the daughter of Mugeni Kahuria. It was his evidence that the land in dispute was bought from a white man and many people contributed to buy the land. That he left after the subdivision was done and did not know what happened after. He stated that he did not know the defendants Dominic and Walter as he never sold the land to them.
39. On cross examination he confirmed that he was a secretary from the year 1969 to 1977 but did not have any documents to attest the same. He also confirmed that the land belonged to Mugeni Kahuria and not Hannah Wanjiku.
40. On re-examination he stated that the group was wound up after distribution of the land.
41. Ikenye Muiruri testified as PW3. He adopted his witness statement dated 6<sup>th</sup> February 2021 and filed on 3<sup>rd</sup> February 2021 as part of his evidence.
42. He testified that he is giving his evidence because of Njogu Omani who was the son of Hannah Wanjiru Omani who is his neighbour. It was his evidence that his plot is number 101 and that Njogu Omani lives on the suit property where his mother was buried.
43. On cross examination he confirmed that he is neighbours with Njogu and that they are not related and that he did not know how the land was bought and sold. The plaintiff's case was then closed.
44. Walter Ndungu Mbugua testified as DW1. He adopted his affidavits earlier summarised in this judgement sworn on 22<sup>nd</sup> April 2010 and 21<sup>st</sup> November 2016 as his evidence in chief. He made reference to his list of documents dated 23<sup>rd</sup> November 2011 which were marked as DExh 1 to DExh 11.



45. He testified that Hannah Wanjiku Omani was a step sister of his father in law. That the land in dispute was sold to him and Dominic Waro Nguuku by Kahuria Mugeni Kahuria and Esther Wanjohi Nguuku. That Kahuria Mugeni Kahuria had inherited the land from Mugeni Kahuria and that he had done succession. That he had bought the property for Kshs. 450,000/=.
46. It was his evidence that the receipts were in the name of Mugeni Kahuria and that when they entered the property in the year 1994 there was no one in occupation. He testified that Hannah entered the land in the year 2009 and chased them away and were taken to the land disputes tribunal.
47. He further testified that the land was not developed and that they had sold it to several people and that they do not know Hannah's father. He sought for eviction orders against Wanjiku Omani and Njogu Omani.
48. On cross examination he admitted that he did not know Hannah's father but that the receipts were in the name of Mugeni Kahuria which were given to him by Kahuria Mugeni.
49. He also admitted that their agreement had witnesses but that he did call the said witnesses to give their evidence. He confirmed that they went to the Land Control Board and then they did a transfer.
50. He admitted that he did not have the consent to sell the suit property and further that Hannah Wanjiku was buried on the land in 2012 while the case was ongoing. He also confirmed that before the year 2009, there was nothing on the land and that the houses were built after the invasion.
51. He stated that Hannah was living on her husband's land and that the ones who sold the land to him were given a grant which he admitted he did not have in court. He further stated that he was not aware of the outcome of the succession cause.
52. On re-examination he stated that they had sued Njogu and Hannah and that the case begun in the year 2010 while Hannah was still alive and reiterated that she was buried on the property as the case was ongoing.
53. Loice Wanjiku Kahuria testified as DW2. She adopted her witness statement dated 4<sup>th</sup> October 2017 as part of her evidence. She testified that Mugeni Kahuria was her father in law while Wambua Nguuku was the wife to her brother in law. She further testified that Kahuria Mogeni was her husband and that her husband and brother in law had sold the land to Walter.
54. On cross examination she admitted that Mugeni Kahuria was her father in law. She confirmed that when her father in law bought the land, she was already married to her husband. That the said marriage took place in the year 1954. She admitted that she knew Hannah Wanjiku Omani as the wife to Omani and daughter to Mugeni Kahuria. She confirmed that Hannah was staying at Nyanadhi where her husband's land was and after he died, she went back to her father's land. She further confirmed that Mugeni Kahuria bought the land and left Limuru for Nyamadi and that by the time Hannah Wanjiku moved to the land, her father had died. That Mugeni Kahuria had constructed a house on the land which house was later demolished.
55. On re-examination she stated that her father in law had two wives and that he died before the husband of Hannah Wanjiku died. She reiterated that Hannah Wanjiku came to the land after the death of both her father and husband.

## **Submissions**

56. The defendants filed their submissions dated 1<sup>st</sup> February 2023 on 3<sup>rd</sup> February 2023. They set out the evidence of all the parties during the trial and submitted on the following issues:



- a. Whether the plaintiff has proved grounds for adverse possession
  - b. Who is the rightful owner of land parcel No. Naivasha/Mwichiringiri Block 2/109 now subdivided and resulting to Naivasha/Mwichiringiri Block 2/1052 – 1150
  - c. Costs of the suit
57. On the first issue, it was submitted that the plaintiff in support of her summons stated that she had balloted for plot No. 104 which is in possession of Njogu Omani her son while the suit property is plot No. 109 which she moved to in the year 2009. They relied on the cases of Patrick Magu Mwangi Kimunyu versus Joreth Limited [2015] eKLR, Ndatho versus Itumo & 2 Others [2002] 2KLR 637 among others and submitted that unlike the plaintiff, they have demonstrated how they acquired the suit property. The defendants also submitted that since the plaintiff took possession in the year 2009, she has not had peaceful, continuous and uninterrupted possession of the suit property. The defendants relied on among other cases the case of Wambugu vs Njuguna [1983] KLR 172 in support of their arguments.
58. On the second issue, the defendants relied on Section 24 and 26 of the *Land Registration Act* and submitted that they have proved on a balance of probabilities that they are the registered proprietors of the suit property and they are therefore entitled to the orders sought.
59. On the issue of costs they relied on Section 27 of the *Civil Procedure Act* and the case of Supermarine Handling Services Limited versus Kenya Revenue Authority [2010] eKLR and submitted that the award of costs is at the discretion of the court.

### **Analysis and Determination**

60. The plaintiff in ELC Case No. 3 of 2020 was seeking to be declared to have acquired land parcel No. Naivasha/Mwichiringiri Block 2/109 by way of adverse possession. It is not disputed that the said plaintiff Hannah Wanjiku Omani died in the year 2012. From the court record it is not clear whether the legal representatives to her estate were substituted in her place. There is an application on record dated 25<sup>th</sup> July 2013 seeking for the suit to be revived and the legal representatives of Hannah Wanjiku Omani be substituted but the said application was never set down for hearing. Attached to the said application is a Certificate of Death which indicates that she died on 26<sup>th</sup> February 2012.
61. Order 24 Rule 3 provides as follows:
3. (1) Where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff or sole surviving plaintiff dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.
  - (2) Where within one year no application is made under subrule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the court may award to him the costs which he may have incurred in defending the suit to be recovered from the estate of the deceased plaintiff:
62. Provided the court may, for good reason on application, extend the time.
63. Since the Plaintiff had died on 26<sup>th</sup> February 2012, the suit abated by 26<sup>th</sup> February 2013 which forms the basis why the application dated 25<sup>th</sup> July 2013 was filed to revive the suit and to substitute the deceased plaintiff. It is not clear why the said application was never set down for hearing.



64. The Court of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR held as follows:
65. There are three stages according to these provisions. As a general rule the death of a plaintiff does not cause the suit to abate if the cause of action survives. But within one year of the death of the plaintiff or within such time as the court may in its discretion for “*good reason*” determine, an application must be made for the legal representative of the deceased plaintiff to be made a party. The “*good reason*” therefore relates to application for extension of time to join the plaintiff’s legal representative to the suit.
66. Secondly, if no such application is made within one year or within the time extended by leave of the court, the suit shall abate. Where a suit abates no fresh suit can be brought on the same cause of action.
67. Thirdly, the legal representative of the deceased plaintiff may apply for the abated suit to be revived after satisfying the court he was prevented by “*sufficient cause*” from continuing with the suit. The effect of an abated suit is that it ceases to exist in the eye of the law. The abatement takes place on its own force by passage of time, a legal consequence which flows from the omission to take the necessary steps within one year to implead the legal representative of the deceased plaintiff.(Emphasis mine)
68. It is my view therefore that ELC Case No. 3 of 2020 abated one year after the death of the plaintiff Hannah Wanjiku Omani and the suit therefore ceased to exist as was held in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others (supra) cited above.
69. In HCC No. 87 of 2010, Dominic Waronja Nguku and Walter Ndungu Mbugua sued Hannah Wanjiku Omani and Njogu Omani seeking for their eviction from land parcel No. Naivasha/ Mwachiringiri Block 2/109.
70. It is their case that they bought the suit property from Kahuria Mugeni and Esther Wambui Nguku on 4<sup>th</sup> July 1994. They produced the said sale agreement dated 4<sup>th</sup> July 1994 entered into between the plaintiffs and the said Kahuria Mugeni among the various documents they produced in support of their case. They allege that after they bought the suit property, they took possession and at the time there was no one on the land.
71. They produced as PExh 4 a copy of the green card which shows that the suit property was registered to the government of Kenya on 28<sup>th</sup> January 1985. It was thereafter registered in the name of Mugeni Kahuria on 18<sup>th</sup> September 1985 and a title deed issued on the same date.
72. The next entry is on 18<sup>th</sup> September 1985 when the suit property was registered in the names of Kahuria Mugeni Kahuria and Wambui Nguuku Mugeni and a title deed issued on 26<sup>th</sup> January 1994.
73. The subsequent entry was on 19<sup>th</sup> September 1994 when Dominic Waronja Nguuku and Walter Ndungu Mbugua were registered as the owners and the title deed issued. On 17<sup>th</sup> February 2010, the title was closed on subdivision and new title numbers issued.
74. It is their case that Hannah Wanjiku and Njogu Omani trespassed on the suit property in the year 2009. That Hannah Wanjiku later died and was buried on the suit property and since they own the land, they seek for eviction orders against Njogu Omani.
75. Njogu Omani’s case on the other hand is that he resides on the suit property and that it belonged to his late mother Hannah Wanjiku. It was also his case that his mother had balloted for the property and was issued with plot No. 104 as per the ballot paper produced as PExh 3. The said ballot card was issued by Nyamathi Farmers Co-operative Society Limited but it is not indicated in whose favour it was issued.



76. It was further his case that his mother was issued with the title deed for Plot No. 104 as PExh 5. The said title deed is for land parcel No. Naivasha/Mwichiringiri Block 2/104 issued on 18<sup>th</sup> September 1985 to Mugeni Kahuria. It was not issued in the name of Hannah Wanjiku as alleged by Njogu Omani.
77. It was also his case that plot No. 104 later changed to the suit property which is plot No. 109. It is my view that he failed to demonstrate how land parcel No. Naivasha/Mwichiringiri Block 2/104 registered in the name of Mugeni Kahuria could change to land parcel No. Naivasha/Mwichiringiri Block 2/109.
78. It is further my view that the plaintiffs have demonstrated that the suit parcel of land Naivasha/Mwichiringiri Block 2/109 belonged to them as per the green card.
79. As pointed out before, entry No. 8 on the green card for land parcel No. Naivasha/Mwichiringiri Block 2/109 indicates that it was closed on subdivision into new No's 1052- 1150.
80. The plaintiffs produced as exhibit 5 the title deed for land parcel No. Naivasha/Mwichiringiri Block 2/1168 (Nyamathi) which shows that it is registered in the names Dominic Waronja Nguku and Walter Ndungu Mbugua the plaintiffs herein and issued on 17<sup>th</sup> February 2010. This title deed in my view does not relate to the suit property as its resultant subdivisions were given No's 1052 to 1150.
81. The plaintiffs have not demonstrated which portions of the resultant subdivisions the 2<sup>nd</sup> defendant is in occupation of. They have also not demonstrated in whose names the resultant subdivisions are except for Land parcel No. Naivasha/Mwichiringiri Block 2/1150 (Nyamathi) produced as exhibit DExh 10 registered in the name of Mary Wambui Njuguna.
82. For the court to grant the orders sought in the Amended Plaintiff dated 15<sup>th</sup> April 2010, the plaintiffs ought to have discharged his legal burden of proof by demonstrating with specificity which portions of the resultant subdivisions the 2<sup>nd</sup> defendant is allegedly in occupation of.
83. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:
107. Whoever desires any court to give judgment as to any legal right or liability dependent on the  
 “(1) existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
84. Reliance is made on the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows with regard to the burden of proof:
- ....As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account provided.....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant.....The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.... In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/= the debt being claimed herein.”



85. Reference is made to The Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14: describes it thus:

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."

- (16) The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence

86. In conclusion therefore, the plaintiffs have failed to prove their case on a balance of probabilities and their suit is hereby dismissed with costs.

**JUDGMENT DATED, SIGNED AND DELIVERED VIA EMAIL AT NAKURU THIS 3<sup>RD</sup> DAY OF MARCH 2023.**

**A O OMBWAYO**

**JUDGE**

