



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 121 OF 2019**

**MM.....1<sup>ST</sup> APPELLANT**

**SABINA MWONJIRU M'ATIA.....2<sup>ND</sup> APPELLANT**

**VERSUS**

**KENNETH KAMICHIA M'IKIRIMA .**

**alias DAVID NDEGWA.....1<sup>ST</sup> RESPONDENT**

**JOHN KIRIMI ARACHI.....2<sup>ND</sup> RESPONDENT**

**CAROLINE KAGWIRIA.....3<sup>RD</sup> RESPONDENT**

**ELIJAH MURUNGA RINGERA.....4<sup>TH</sup> RESPONDENT**

**ABEL KINOTI RINGERA.....5<sup>TH</sup> RESPONDENT**

***(Being an appeal from the judgment of Hon. Stella Abuya SPM-in Meru CM ELC NO. 11 OF 2017 dated 23/09/2019)***

**JUDGMENT**

1. The background to this case is that the parties save the 2<sup>nd</sup> respondent are family members, whereby the 1<sup>st</sup> appellant is the father of the 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents while the 2<sup>nd</sup> appellant and the 3<sup>rd</sup> respondent are daughters in law of the 1<sup>st</sup> appellant. Three sons of the 1<sup>st</sup> appellant are apparently deceased namely Kaai Maitima, husband to the 2<sup>nd</sup> appellant, Silas Mugambi, husband of the 3<sup>rd</sup> respondent and another one identified as Samuel. There appears to be no dispute that the suit land parcel no. NTIMA/IGOKI/xxxx was registered in the name of the 1<sup>st</sup> appellant and that the same was to be subdivided into other portions of land to benefit his children. How and who was to benefit from the said land forms the crux of the matter.

2. The suit was originally filed in the ELC Court as case no.33 of 2016 but was transferred to the Chief Magistrates court at Meru where it was registered as case no. 11 of 2017. The appellants being the plaintiffs in the trial court sued the 1<sup>st</sup>respondent vide a plaint dated 21/04/2016 seeking;

*a declaration that the subdivision of land parcel number NTIMA/IGOKI/xxxx subdivided to parcel land numbers NTIMA/IGOKI/xxxx to NTIMA/IGOKI/xxxx was null and void and the same be transferred to the original title number, plus costs of this suit.*

3. It was the appellants' case that the 1<sup>st</sup> appellant gave the 1<sup>st</sup> respondent the title deed to the suit land for purposes of dividing it between his six sons including his deceased son Kaai M' Maitima. However, the 1<sup>st</sup> respondent failed to subdivide the suit land equally and also failed to give the 2<sup>nd</sup> appellant her portion, allocating her portion to strangers and is threatening to alienate the suit land further by selling it to would be purchasers.

4. The 1<sup>st</sup> respondent filed his statement of defence dated 17/03/2017, amended on 6/12/2018. Finally, a further amended defence was filed on 30.5.2019 where a counter claim was lodged. The counter claim brought on board the 2<sup>nd</sup> to 5<sup>th</sup> respondents. The 1<sup>st</sup> respondent stated that it was the 1<sup>st</sup> appellant who had subdivided the land and he gave it to all his children. As a result of the intentions and actions of the 1<sup>st</sup> appellant, parcel NTIMA/IGOKI/xxxx was given to the 3<sup>rd</sup> respondent who is the wife of the deceased Silas Mugambi, NTIMA/IGOKI/xxxx & xxxx were given to the 4<sup>th</sup> and 5<sup>th</sup> respondents respectively, while parcel NTIMA/IGOKI/xxxx was meant for the 2<sup>nd</sup> appellant but she

refused to sign the necessary documents or meet the costs of transfer, so the same was retained by the 1<sup>st</sup> appellant.

5. That the 2<sup>nd</sup> respondent got parcels NTIMA/IGOKI/xxxx & xxxx after purchasing the same from the 1<sup>st</sup> respondent with the consent of the 1<sup>st</sup> appellant. That parcels no. NTIMA/IGOKI/xxxx -xxxx were never owned by the 1<sup>st</sup> appellant nor are they sub divisions of NTIMA/IGOKI/xxxx.

6. In their counterclaim, the respondents pleaded that they are the absolute owners of their respective parcels of land and are entitled to enjoy their proprietary rights. They contend that the 2<sup>nd</sup> appellant had encroached onto the road access which was established during the surveying of the mainland; The orders sought by the respondents in their counterclaim are;

*That the appellants' suit be dismissed with costs. An order be issued directing the appellants to remove all structures on the road of access and in default the said structures be demolished plus costs of the counter-claim.*

7. Judgment was delivered on 23/09/2019 dismissing both the appellants' suit as well as the counter claim of the respondents. The appellants being aggrieved by the aforementioned decision filed their memorandum of appeal dated 23/10/2019 raising seven (7) grounds as follows:-

*i. That the learned trial magistrate erred in law and fact in failing to find that the suit land is ancestral.*

*ii. That the learned trial magistrate erred in law and fact in failing to find that the 1<sup>st</sup> appellant had offered sufficient evidence for her claim.*

*iii. That the learned trial magistrate erred in law and fact in finding that the 2<sup>nd</sup> appellant did not testify yet she noted in the proceedings that his testimony will be given by the 1<sup>st</sup> appellant on account of his advanced age and proceeding to dismiss the appellants' suit.*

*iv. That the learned trial magistrate erred in law and fact in upholding the respondents' evidence against the appellant despite glaring contradictions in the evidence of the respondents' and that of their witnesses.*

*v. That the learned trial magistrate erred in law and fact in failing to consider that the parties' clan elders acting on complaint by the 1<sup>st</sup> appellant had found that the 1<sup>st</sup> respondent wrongfully sub divided the suit land and refusing to be guided by the decision and wrongfully proceeding to sanitize the same.*

*vi. The judgment was against the weight of the evidence.*

*vii. That the learned trial magistrate considered and was weighed down by extraneous issues in arriving at the decision she did instead of applying substantial justice.*

8. The appeal was canvassed by way of written submissions. The appellant filed submissions dated 19/02/2021 averring that land parcel no. NTIMA /IGOKI/xxxx was ancestral land hence a trust under customary law existed in so far as that land is concerned.

9. It was further submitted at length on the issue of the 1<sup>st</sup> appellant's mental health, where it was argued that the registered owner of the land (who happens to be the 1<sup>st</sup> appellant) was not in his right mind during the process of the subdivision of the land.

10. In support of their case, the appellants relied on the cases of; **Nairobi HCC 113 OF 1999 John Patrick Machira vs. Patrick Kahiaru Muturi (2002) eKLR**, **Wiltshire vs. Cain (1958-60) Barbados L.R.149**, **Peter Gitonga vs Francis Maingi M'Ikiara (2007) eKLR** and **MKN (suing as the next friend of PNK being a person of unsound mind) vs NMN (2019) eKLR**.

11. The Respondent vide submissions dated 03/03/2021 contended that no evidence was adduced to prove that the suit land is ancestral land and neither was the issue pleaded by the appellants. Further, no evidence was adduced to show that the 1<sup>st</sup> respondent illegally, irregularly or unlawfully sub divided the suit land as alleged, hence the appeal should be dismissed with costs. The respondents relied on the case of; **IEBC & Another V Stephen Mutinda Mule & 3 others [2014]eKLR** and **Evans Otieno Nyakwana V Cleophas Bwana Ongaro [2015]eKLR**.

#### **Analysis and determination**

12. As the first appellate court, this court has a duty to to evaluate, assess and analyze the extracts on record and to make its own determination having in mind that it did not have the advantage of hearing witnesses. See: **Selle & Another vs. Associated Motor Board Company Ltd [1968] EA 123**.

13. I discern that the respondents did not file a cross appeal in respect of their dismissed counterclaim, thus the court will be determining the issue as to whether the current appellants proved their case to the required standard before the trial court.

14. **Pw1 Sabina Mwonjiru M'Maitima** the 2<sup>nd</sup> plaintiff testified and gave evidence on behalf of herself and on behalf of the 1<sup>st</sup> plaintiff. She adopted her statement dated 11/02/2019 as her evidence in which she averred that she is the widow of Kaai M'Maitima who was the 1<sup>st</sup> born son of the 1<sup>st</sup> plaintiff. That the 1<sup>st</sup> plaintiff had summoned his children with the intention of sub dividing the suit land xxxx equally amongst his 6 children. The 1<sup>st</sup> defendant was tasked with the procedure as he was working at the Ministry of Lands in Chuka at the time.

15. However, according to pw1, the suit land was not sub divided in accordance with the 1<sup>st</sup> plaintiff's wishes as 2 sons were left out; namely her late husband and one Samwel (also deceased), with some of them getting bigger portions than others. She is also being asked to vacate her home where she has buried her husband, son and grandchild. She did seek assistance from the clan who summoned the 1<sup>st</sup> defendant but he refused to avail himself.

16. In support of her case, pw1 produced as evidence, the documents in her list dated 21.4.2016 (green card for parcel 5041 and a death certificate of her husband). She also produced the documents in her list dated 21.5.2019 which are application for official searches for the land parcels NTIMA/IGOKI/xxxx to xxxx as exhibits.

17. In cross examination she stated that the 1<sup>st</sup> plaintiff wanted to subdivide the 50 acres among all his children but the same was not done as per the wishes of the 1<sup>st</sup> plaintiff. She contends that even though the land was subdivided into 6 portions, her household and that of Samuel Mukunga were left out. She did not have a survey plan in relation to the subdivision. She avers that she was not aware she was to get parcel NTIMA/IGOKI/xxxx but she would still not take it as it is not equal to the other portions.

18. In re-examination she averred that she wants the sub divisions to be cancelled and the parcels to revert back to the original title so that sub division can be done again.

19. **PW2 George Mutea Koome** adopted his statement dated 6.5.2019 as his evidence. He states that he is an immediate neighbor to the 2<sup>nd</sup> plaintiff who utilizes rental houses left behind by her husband to cater for her 3 children. Her husband is buried on the same portion. That in 2016 all the children were given portions where they have all settled. He further stated that the dispute is emanating from bad blood between children of the second family and their step brother from the first wife. Pw2 also stated that the 1<sup>st</sup> defendant sold off his share of the land as well as another portion meant for his late brother but which is utilized by the 2<sup>nd</sup> plaintiff. He contends that the 2<sup>nd</sup> plaintiff ought to get an equal share with the rest of the siblings.

20. In cross examination, he stated that the 2<sup>nd</sup> plaintiff still resides on the land of the 1<sup>st</sup> plaintiff but she does not have any land in her name as the 1<sup>st</sup> defendant took her portion and sold it to the 2<sup>nd</sup> defendant. He does not know as to how the survey was done.

21. In re-exam pw2 stated that the defendants want to evict the 2<sup>nd</sup> plaintiff as they are claiming that she lives on the road and she has never been shown any land. He also stated that 1<sup>st</sup> plaintiff had called the whole clan and said his land be divided equally among his children.

22. **PW3 Isaac Kigorwe** adopted his statement dated 9.4.2019 as his evidence in which he stated that he is the vice chairman of Kithiu United Clan. That in 1985, Kaai M'Maitima had been sent away, but the former chief called the entire clan where it was decided that 2<sup>nd</sup> plaintiff's husband (Kaai M'Maitima) was a son to the 1<sup>st</sup> plaintiff and was entitled to the land in question. That to date, the 2<sup>nd</sup> plaintiff still lives on that land where she has built wooden houses and derives her livelihood from the same.

23. In cross examination, he reiterated that in 1985 the step brothers of Kaai had chased him away and the clan came in to settle the dispute. He was not present during the survey.

24. **DW1, David Ndegwa** stated that his official name is **Kenneth Kamichia**. He adopted his two statements dated 17.3.2017 and 8.3.2019 as his evidence. He states that 1<sup>st</sup> plaintiff is his father, while 2<sup>nd</sup> plaintiff is his sister-in-law. In 2009 the 1<sup>st</sup> plaintiff showed all his children the various portions of his land they were to occupy and the boundaries were fixed. In year 2015, the 1<sup>st</sup> plaintiff brought in surveyors to the suit land which was thereafter subdivided. The 1<sup>st</sup> plaintiff had duly obtained the relevant consent from the land control board. The parcel no xxxx was then divided into 6 parcels xxxx-xxxx. Dw1 avers that he got parcel no. xxxx, that parcel 9199 was meant for the 2<sup>nd</sup> plaintiff, parcel xxxx was given to 3<sup>rd</sup> defendant, 9201 went to 4<sup>th</sup> defendant while 9202 went to 5<sup>th</sup> defendant. He further stated that he sold parcel 9197 to the 2<sup>nd</sup> defendant. Parcel xxxx was also sold to 2<sup>nd</sup> defendant. That the 1<sup>st</sup> plaintiff is the one who executed the agreement as he was still the registered owner of the suit parcels.

25. Dw1 therefore contends that the allegation that he was given the title deed to carry out survey and transfer is false. The 1<sup>st</sup> plaintiff retained NTIMA/IGOKI/xxxx, the share for the 2<sup>nd</sup> plaintiff and she is the one who refused to execute transfer documents so as to get her own title.

26. Dw1 also stated that the land parcels nos xxxx to xxxx were never owned by the 1<sup>st</sup> plaintiff and they were not resultant parcels from LR. xxxx.

27. In support of his case, Dw1 produced the documents in his list dated 17.3.2017 as his exhibits. These are green cards for parcels xxxx-xxxx, official searches for parcels xxxx-xxxx, the sale agreement of parcel xxxx and xxxx to the 2<sup>nd</sup> defendant and mutation forms.

28. In cross examination he averred that his father had not sued him nor did he ever give him work to subdivide the suit land. He admitted to having sold parcels 9197 & 9198 though the same were not in his name. He contends that the 1<sup>st</sup> plaintiff has another parcel no. xxxx Ruiru/Rwarera which he reserved for his daughters and he currently lives in parcel xxxx with his other son. He wants the 2<sup>nd</sup> plaintiff to vacate the road and move to her allocated land.

29. In Re-exam Dw1 again stated that his father is the one who caused the subdivision of the suit land by going to the board and also signing the mutation forms. That the father had ensured that there was a road of access.

30. **DW2 John Kirimi** adopted his statement dated 8.3.2019 as his evidence. He averred that he bought the two parcels of land xxxx and

xxxx from the 1<sup>st</sup> defendant which parcels were still registered in the name of the 1<sup>st</sup> plaintiff, who duly executed the transfers. In cross examination he averred that there was a witness to the agreement Martin who is a broker. He did not know that there was a dispute concerning the land. He also stated that he 1<sup>st</sup> plaintiff was over 90 years old and his health and mind were not so stable. In re-exam, he averred that the land was not occupied and he fenced the portion sold to him. He contends that the 1<sup>st</sup> plaintiff was involved in writing the agreement and the transfer, the 2<sup>nd</sup> plaintiff could not object to the transfer at the board as she was not the owner.

31. **DW3 Jacinta K. Ntarangwi** is an advocate of the High Court. On 30<sup>th</sup> July 2015 she drew a sale agreement between the 1<sup>st</sup> plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants. In cross-examination, she averred that the 1<sup>st</sup> plaintiff was the registered owner who was gifting his son parcel xxxx and the same was being sold to the 2<sup>nd</sup> defendant, the money was to be deposited in the 1<sup>st</sup> defendant's account. She does not know how 1<sup>st</sup> defendant got parcel no. xxxx. In re-exam she averred that the 1<sup>st</sup> plaintiff gifted both parcels to the 1<sup>st</sup> defendant and he appeared in her office to sign the agreement.

32. The appellants have claimed that the trial court failed to appreciate that the suit land was ancestral land. However, and as rightly submitted by the respondents, this issue was not pleaded, nor was evidence adduced to support such a claim.

33. In regard to an issue raised for the first time in an appellate forum, this court in the case of **Abraham Yattani Guyo v Qunche Woge [2020] eKLR**, quoted the case of **Kiplagat Korir v. Dennis Kipngeno Mutai (2006) eKLR**, where it was held that ;

*“In this case, the appellant has raised the issue of jurisdiction so much later in the day. Substantial justice frowns upon a party who invokes provisions of the law unduly and at a later stage of a proceeding to take undue advantage against an opponent. In any event, this court would be placed in an awkward situation were it to uphold the argument of the appellant where it has been called upon to decide on an issue which is raised for the first time on appeal. If this court were to make a determination on the issue of jurisdiction on this appeal as urged by the appellant, this court would not be sitting on appeal, but be acting as a court of first instance. This is because the issue of jurisdiction was not raised before the trial resident magistrate's court. I say no more on that score. I will disallow the grounds of appeal on jurisdiction”.*

34. In **Coast Professional Freighters Limited v Welsa Bange Oganda & 2 others [2019] eKLR** the Supreme Court stated as follows;

*“Granting the orders sought by the Applicants would be prejudicial to the Respondents as it brings before this Court issues not taken on appeal in the Court of Appeal. The additional grounds of appeal are new grounds which neither formed part of the appeal in the Court of Appeal nor were the Respondents able to respond to such substantive grounds of appeal”.*

35. What resonates from the above case law is that the appellants cannot place an issue before this court which was not a subject of contest before the trial court. Thus the appellants claim that the suit land is ancestral land is a non-issue before this court.

36. On whether, the subdivision of the suit land was carried out lawfully, I find that the appellants have advanced a claim that there was unfairness in the subdivision and allocation of the suit land because the registered owner was not in his right mind. To this end, it was submitted that both parties had even noted that the 1<sup>st</sup> plaintiff was incapable of giving evidence. The appellants have cited the provisions of Order 32 rule 15 of the Civil Procedure Rules to buttress this argument. The question is, was the issue of the mental status or incapacitation of the 1<sup>st</sup> plaintiff pleaded? NO! Did the appellants initiate the relevant proceedings relating to a mentally incapacitated person before the trial court? Again NO! There is nothing to indicate that the trial court conducted the inquiries envisaged under Order 32 rule 15 of the Civil Procedure Rules.

37. What the proceedings indicate is that when pw1 was called upon to testify, she stated as follows;

*“I recorded a statement and I want the court to adopt it as my evidence in chief and also 1<sup>st</sup> plaintiff's evidence”.*

38. Thus her testimony was for herself and the 1<sup>st</sup> appellant. But at no time did she step in the shoes of the 1<sup>st</sup> appellant as his legal guardian. It is therefore clear that this case is distinguishable from the case of **MKN (suing as the next friend of PNK being a person of unsound mind) vs NMN ( supra)** since in the latter case, the claimant/plaintiff was already a legal guardian of his father. I therefore find that the trial magistrate arrived at a correct determination when she held that the 1<sup>st</sup> appellant did not testify, hence what was considered was the testimony of the 2<sup>nd</sup> appellant.

39. The provisions of **Section 107 of the Evidence Act** provides that:

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the 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”.*

40. In the case of **Evans Otieno Nyakwana vs Cleophas Bwana Ongaro (2015) (supra)**, cited by the respondents, it was stated as follows:

*“.....As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (1) of the Evidence Act (chapter 80 of the Law of Kenya”.*

Thus he who alleges bears the burden of proving, see - **Jennifer Nyambura Kamau v Humphrey Mbaka Nandi [2013] eKLR**.

41. The only reason advanced by the 2<sup>nd</sup> appellant as to why she was challenging the subdivision and allocation of the land is because it was not done equally, that even one son of 1<sup>st</sup> appellant (Samuel) was not given the land. However, I find no basis for this claim. Without the unequivocal testimony of the 1<sup>st</sup> appellant in court, the word remains that of the 2<sup>nd</sup> appellant vis a vis that of the 1<sup>st</sup> respondent.

42. I note that the 2<sup>nd</sup> appellant is dealing with the dispute as if the property belonged to a deceased person. However, the property in question belongs to someone who is alive. Having established that the claim of ancestry is misplaced, then the 2<sup>nd</sup> appellant cannot purport to assert that the land was supposed to be divided equally amongst the children of the 1<sup>st</sup> appellant.

43. That is why even if this court finds it curious that the 1<sup>st</sup> respondent was able to dispose off an extra share (parcel 9198) which apparently belonged to his late brother, and even if the allocation was not equal, the fact remains that the 1<sup>st</sup> appellant was sharing out his land as a living person. It is not the place of this court to interfere with the wishes of the registered proprietors of the land in respect of gifts *inter vivos*. In the case of **John Ndungu Muriithi vs Gideon Karegwa Ndungu & 6 others (2006) eKLR**, the court had this to say in respect of claims by children in relation to their parent's property;

***“In law a person cannot be compelled to distribute his property amongst his children during his lifetime....”.***

44. I note that the appellants were also claiming land parcels no's Ntima/Igoki/xxxx-xxxx as part of the subdivisions from parcel xxxx. However, the green cards of the aforementioned parcels running from page 16 to 21 in the Record of Appeal indicate that they were subdivisions from other parcels namely xxxx, xxxx, xxxx and xxxx. The appellants did not adduce any evidence to the contrary.

45. A look at the official searches availed by the 1<sup>st</sup> respondent in respect of the resultant parcels of xxxx, it is clear that parcel xxxx is the only one still in the name of the 1<sup>st</sup> appellant. This evidence is in tandem with the testimony of 1<sup>st</sup> respondent that this parcel was meant for the 2<sup>nd</sup> appellant but she declined to avail the relevant documents so as to have the land transferred in her name. Even in her evidence, pw1 stated that she would not accept this parcel xxxx as it is not equal to other portions. The overall impression I get is that the 2<sup>nd</sup> appellant was provided for but she was unhappy with the share she obtained.

46. In conclusion, I am in agreement with the decision of the trial court and I find no reason to disturb the same. Accordingly, this appeal is hereby dismissed. Ordinarily when it comes to family disputes, I desist from condemning parties to pay costs. However this is a matter whereby the 2<sup>nd</sup> appellant who is not a legal guardian of the 1<sup>st</sup> appellant has taken it upon herself to drag family members in court. As such, the 2<sup>nd</sup> appellant is condemned to pay costs of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 14<sup>TH</sup> DAY OF JULY, 2021 IN PRESENCE OF:**

C/A: Kananu

Ms. Otieno for appellant

Mwirigi Kaburu for respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**