



Mutegi v Nyaga (Civil Case 2 of 2015) [2023] KEHC 749 (KLR) (2 February 2023) (Ruling)

Neutral citation: [2023] KEHC 749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL CASE 2 OF 2015
LW GITARI, J
FEBRUARY 2, 2023**

BETWEEN

AMAFILE KARIMI MUTEGI APPLICANT

AND

NICOPUS NJERU NYAGA RESPONDENT

RULING

1. Before this Court is the application dated April 5, 2022 and filed on April 11, 2022. It is expressed to have been brought under the provisions of Section 3(A) of the *Civil Procedure Act*, Order 22, Rule 29, and Order 51, Rule 1 of the *Civil Procedure Rules*. The application seeks for the following orders:
 - i. That the court be pleased to order and direct the respondent to subdivide L.R. Kagaari/Kigaa/5260 into two equal parts of 12.5 acres each and transfer one part thereof measuring 12.5 acres to the applicant Amafile Karimi Mutegi herein and in default the Deputy Registrar be authorized and empowered to execute all the necessary documents required to put into effect the decree of this honourable court made on May 16, 2019 and issued on October 24, 2019.
 - ii. Costs of this application be provided for.
2. The application is based on the grounds on the face of it and it is supported by the affidavit sworn on the same April 5, 2022. She deposes that from the date of the judgment that was rendered in this case and subsequent issuance of a decree on October 24, 2019, the Respondent has shown no indication of satisfying the decree. She contends that unless the orders sought in the present application are granted, she will not enjoy the fruits of her successful litigation. As such, she prayed that the application be allowed as prayed.



3. To put matters into context, the Applicant brought a matrimonial cause against the Respondent and the judgment in the matter was delivered on May 16, 2019 when the court held that the suit succeeded only to the extent That:

- “i. The Plaintiff shall be paid Kshs.1.5 million being the consideration for her monetary and non monetary contribution towards construction and development of the matrimonial home situate on Kagaari/Kigaa/[particulars withheld].
- ii. The Plaintiff is also entitled to 50% share of that property known as Kagaari/Kigaa/[particulars withheld].
- iii. The other claims made by the Plaintiff on the other properties are disallowed as the Plaintiff has failed to proof to the required standard (balance of probabilities) that the properties are:

1. Part of the matrimonial properties and
2. That she made any monetary or non monetary contribution towards their acquisition.

Finally on the question of costs, I direct each party to bear own costs.”

4. The present application is opposed by the Replying Affidavit of the Respondent sworn on October 5, 2022. He deposes that the land parcel no. Kagaari/Kigaa/5260 (the “suit land”) measures approximately 0.10 Ha and not 12.5 acres as indicated in the Applicant’s application. He attached the copy of the title deed of the suit land to substantiate this assertion. The Respondent further deposed that the judgment of this Court was clear on how the suit land should be shared between the parties and that there have been a series of discussions pertaining to the implementation of the court’s judgment which discussions are still ongoing. According to Respondent, he has always been ready to transfer the 50% share out of the suit land to the Applicant as directed by court. It is thus the Respondent’s contention that the Applicant has not been candid with the truth as she allegedly did not approach the Respondent prior to instituting the present application. The Respondent thus contends that the application is a nonstarter, frivolous, lacks merit and that the same should be dismissed with costs.

5. At the hearing of the application, counsel for the Applicant, Mr. Mugo, sought to amend the orders sought in respect of the size of the suit land indicated in the prayers sought. Mr. Mugo stated that the correct acreage of the suit land is as indicated in the affidavit in support of the application, that is 0.25 acres, and not 12.5 acres that was indicated in the prayers sought in the application, which she termed as a typing error.

6. I have considered the application dated April 5, 2022 as well as the respective affidavits by the parties in support and opposition of the application. The only question for this court to determine is whether this applicant has given sufficient grounds to warrant this court to issue the orders sought.

7. Order 22, Rule 29 of the *Civil Procedure Rules* provides as follows:

- “(1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.



- (2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some conspicuous place on the property.
- (3) Where possession of any building or enclosure is to be delivered, and the person in possession being bound by the decree does not afford free access, the court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of her community to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.”

8. In the instant case, there is a decree against the respondent to transfer 50% of the suit land to the applicant. The applicant alleges that the respondent has declined to do the same. The present application thus seeks to give effect to the judgment of this court which orders I have cited herein above. The respondent has merely denied his alleged failure to adhere to the court orders without any proof to substantiate the alleged steps he claims to have taken to fulfill the judgment.
9. In the circumstances I find that the application dated 5/4/2022 has merits. I order that:-
 1. The Respondent to subdivide the Land Parcel No. LR Kagaari/Kigaa/5260 into two equal parts and transfer one portion to the applicant. The Respondent to comply within 14 days.
 2. If the Respondent fails to comply with the order within 14 days, the Deputy Registrar of this court is authorized to execute all the necessary documents required to put into effect the decree of this court made on 16/5/2019 and issued on October 24, 2019.
 3. Costs to the applicant.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 2ND DAY OF FEBRUARY 2023.

L.W. GITARI

JUDGE

