



**Njoroge v Njoroge (Civil Appeal 6 of 2020)  
[2023] KEHC 1942 (KLR) (10 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1942 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL 6 OF 2020  
LN MUGAMBI, J  
MARCH 10, 2023**

**BETWEEN**

**THOMAS KIMANI NJOROGE ..... APPELLANT**

**AND**

**DANIEL CHEGE NJOROGE ..... RESPONDENT**

*(Being an appeal from the Ruling of the Honourable G. Omodho,  
Senior Resident Magistrate, delivered on the 20th of December, 2019  
in Chief Magistrates Court Kiambu Succession Cause No. 104 of 2013)*

**JUDGMENT**

1. This appeal arises from the ruling of the Honourable G. Omodho, Senior Resident Magistrate, delivered on the 20<sup>th</sup> of December, 2019.
2. The grounds listed in the Memorandum of Appeal dated January 20, 2020 and filed on even date are:
  - a. That the Honourable Learned Magistrate erred in law and in fact arriving at the decision it arrived at in regard to the reference before it;
  - b. That the Honourable Learned Magistrate considered extraneous factors not germane to the reference before it thereby arriving at an unfair determination of the reference before it;
  - c. That the learned trial magistrate erred in law and fact when she delivered a ruling and/or issued an order which was against the weight of evidence on record. The learned trial magistrate failed to appreciate the evidence placed before her and to apply the law thereto;



- d. That the Honourable Learned Magistrate erred in law and in facts by misdirecting itself on putting reliance on non-issues;
  - e. That the Honourable Learned Magistrate erred in law and in facts by finding the appellant application dated 28/8/19 mainly sought restraint order;
  - f. That the Honourable Learned Magistrate erred in law and in fact by finding the matter fully determined and no point of law challenged in reference to the appellant's prayers in application dated 28/8/19;
  - g. That the Learned Trial Magistrate failed by not holding as prayed by the applicant for prayers that the suit land be subdivided to merge the appellant's allocated portion to land parcel number Kiambaa/Waguthu/1856 and not land parcel number Kiambaa/Waguthu/1899;
  - h. That the Learned Trial Magistrate failed by not holding that the appellant's application was unchallenged and did not evaluate and consider it in his determination. He did not closely interrogate grounds on the application and the evidence that was put in by the Appellant, but took a lopsided view of what was reported therein;
    - i. That the Honourable Learned Magistrate erred in law and facts by dismissing appellant's application dated 10/5/2019 and 28/8/2019;
    - j. That the learned magistrate orders have occasioned grave injustice.
3. The Appellant urged this Court to find merit in his appeal and overturn the determination of the learned trial magistrate and make orders that:
- a. The Land parcel number Kiambaa/Waguthu/2015 be resurveyed with the aim of merging the appellant's allocated portion to his land parcel number Kiambaa/Waguthu/1856 and not land parcel number Kiambaa/Waguthu/1899;
  - b. The Appellant allocate the merged with his land parcel number Kiambaa/Waguthu/1856 and not land parcel number Kiambaa/Waguthu/1899; and
  - c. That the Respondents do pay costs of this appeal.
4. On the 10<sup>th</sup> of June, 2021, the appeal was admitted for hearing and the Court directed that the Record of Appeal be filed within 14 days and that the appeal be canvassed by way of written submissions. The Record of Appeal was filed on the 27<sup>th</sup> of September, 2021.
5. The Appellant filed his submissions on the 19<sup>th</sup> of September, 2022. As a brief background of the case, the Appellant stated that the present case emanated from Succession Cause Number 104 of 2013 where the grant of letter of administration intestate was issued to David Chege Njoroge and Thomas Kimani Njoroge on the 9/9/2013. That a certificate of confirmation of grant was later issued on the 29<sup>th</sup> of June, 2015 which grant stipulated that land parcel no Kiambaa/Waguthu/2015 be divided and shared equally among all the children of the deceased. That all the beneficiaries agreed that the said parcel be divided equally among the beneficiaries but the issue was how it was to be subdivided. That the Court vide a ruling on the 19<sup>th</sup> of January, 2018 ordered that a survey be done sub-dividing the



land into seven portions so as to aid the Court in settling the issues. That the said survey was done and a report dated February 28, 2018 prepared.

6. The Appellant submitted that he had an issue with the report because he was the owner of land parcel number Kiambaa/Waguthu/1856 whereon he has erected a permanent house. He stated that he wanted his portion of the land from the estate to be merged with his land parcel number 1856 and not land parcel 1899 as suggested in the survey report as he had already sold land parcel 1899 to a third party. The Appellant contends that the proposed merging will leave him without a road of access should the report be implemented as it is.
7. He stated that he did not sign the agreement attached to the report and that his alleged signature on the report was forged. That the Court on the 13<sup>th</sup> of September, 2019 ordered that a resurvey be done and that parties bring a report before it but the resurvey was never done.
8. The Appellant stated that he challenged the mode in which the survey was done and took issue with the fact that although the Court ordered for a resurvey, none was done. That the Court therefore made its ruling without considering the resurvey report and only considered extraneous factors not germane to the reference before it. The Appellant alleges that the Court misdirected itself that the resurvey had been done as it had earlier ordered and failed to read keenly the report dated October 10, 2019 that was before it. The Appellant stated that the surveyor attached a sketch map to his survey report which sketch indicates how easy it is to implement his suggestion.
9. That the prayers in the application were not considered by the trial magistrate save for the restraining order which the Appellant alleges it was not the main prayer. He concluded by submitting that his appeal raises triable issues which ought to be heard and determined and urged this Court to allow the appeal with costs to the Respondents.
10. The Respondent filed his submissions on the 14<sup>th</sup> of June, 2022. He submitted that the only dispute touching on this matter is how the beneficiaries will take up the respective portions out of land reference number Kiambaa/Waguthu/2105 on the ground.
11. He confirmed that the court directed the District Land Survey-Kiambu to visit the land and present a report on how best the land should be subdivided on the ground which report was filed and the Court made its ruling on the 20<sup>th</sup> of December, 2019. That all the beneficiaries vide a letter dated February 19, 2018 confirmed their consent on how the land was to be subdivided.
12. He urged this Court to uphold the lower court's decision and consequently dismiss the appeal with costs.
13. The ruling appealed against was delivered on the 20<sup>th</sup> of December, 2019 with the Court holding thus:

“.... In an attempt to determine the best way to settle the impasse, this Court ordered for a resurvey to assist with another report following the parties' application which elicited the survey office to maintain that the survey was done in the best way possible and subdivision was proposed having given their reason for not going for the seven-equal portion method.

This matter is fully determined and no point of law is challenged. These applications basically seek the intervention of this Court in the subdivision process of the property. Parties cannot just agree on the implementation of the grant.

Whereas this Court appreciates that the parties may wish to have their way in the estate, at time it is a reality that these wishes may be limited by policy and statutory requirements. It is for this sole reason that I adopt the Surveyor's entire report dated 28/2/2018 buttressed by



the explanation dated October 10, 2019 so as to enable parties move on with the distribution of the estate.

I proceed to dismiss both applications dated 10/5/2019 and 28/8/2019 with no orders as to costs."

14. In his application dated August 28, 2019, the Appellant was seeking the following orders:
- a. That the Application certified urgent band be heard *ex parte* in the first instance on account of its urgency;
  - b. That orders be issued restraining the Respondent from trespassing into the Applicant's land or whomsoever is acting on his behalf or dealing with Land Title Number Kiambaa/Waguthu/2015 and particularly from interfering or evicting the alienation, subdivision erecting beacons and/or drawing any map from the illegal subdivision done on the land pending hearing and determination of this application;
  - c. That orders be issue restraining the Respondent from trespassing into the Applicant's land and from interfering with the beacons or erecting beacons, subdividing his house/home, destroying vegetables, crops and/or interfering with the Applicant's possession and quiet enjoyment and use of his land pending hearing and determination of this application;
  - d. That order be issued for the erected beacons to be removed and the surveyor to resurvey the parcel of land Title Number Kiambaa/Waguthu/2015 as ordered on December 19, 2018 which is yet to be executed;
  - e. That the Courts order issued on 24/4/2019 be set aside pending execution of orders issued on the December 19, 2018;
  - f. That the Kiambu District Surveyor do resurvey the parcel of land title number Kiambaa/Waguthu/2015 remove the illegally erected beacons erected thereon, re-subdivide and merge the Applicant's portion to his land parcel number Kiambaa/Waguthu /1856 and not land parcel number Kiambaa/Waguthu/1899;
  - g. That the subdivision and mutation of parcel number Kiambaa/Waguthu/2015 be set aside and Kiambu District Surveyor resurvey the piece of land number Kiambaa/Waguthu/2015 to merge with the Applicant's portion to his land parcel number Kiambaa/Waguthu/1856 and not land parcel Kiambaa/Waguthu/1899; and
  - h. That the OCS Karuri Police station to provide security to the Kiambu District Surveyor while executing his duties on land reference number Kiambaa/Waguthu/2015.
15. From the pleadings and submissions before this Court it is my view that the issues for determination are:
- a. Whether the trial court erred in law while pronouncing itself on the reference that was before it



- b. Whether the trial court based its decision on extraneous matters and non-issues thereby arriving a decision that was against the weight of evidence on record
  - c. In view of a & b above, whether this appeal has merits or not
  - d. Who pays for the costs of this appeal?
16. The parties are the beneficiaries and administrators of the estate of Rachel Wambui Njoroge. From the proceedings before the trial court, the estate is pending distribution of parcel number Kiambaa/Waguthu/2015. The Appellant contends that although the Court was ordered for a survey of the said parcel and the same was done, the survey was not carried out to his satisfaction hence this appeal. The Appellant applied for a resurvey order in the trial court which order the Court granted but the resurvey was never carried out because the surveyor advised the Court that the initial survey was carried out to the best of their ability.
17. The survey was done on the 28<sup>th</sup> of February, 2018. The surveyor stated that he visited the ground and noted as follows:
 

“That the size of the land being sub-divided was 0.048Ha. That the land, is registered in the names of all the beneficiaries. It might not be possible to subdivide due to the following reasons:

  1. The smallest piece of land recommended for registration is 0.046Ha;
  2. It is therefore not possible to get titles for the seven portions after the sub-division of 0.048Ha;
  3. Each sub plot created will have acreage of 0.07Ha and should have access road;
  4. Land Control Board will not approve this partitioning due to their sizes.

It is advisable the Court order the parcel be divided as per the signed agreement (see copy attached)

  1. 0.007Ha (1 subplot) be transferred to Mr Thomas Kimani Njoroge and be amalgamated with his parcel no Kiambaa/Waguthu/1899;
  2. 0.0140Ha (2 subplots) be transferred to Mr Daniel Chege Njoroge to be combined with this parcel no Kiambaa/Waguthu/2106;
  3. 0.0270Ha (4 subplots) be transferred to Salome Wangari Njoroge and be combined with parcel no Kiambaa/Waguthu/1918;
  4. Daniel Chege and Salome Wangari to compensate the other beneficiaries accordingly”
18. On the 19<sup>th</sup> of February, 2018, all the beneficiaries of the said estate including the parties herein executed a letter agreeing to the Surveyor’s proposal for distribution of the estate. The letter is attached to the surveyor’s report.
19. The Appellant states that he is dissatisfied with the proposed subdivision because he wanted his portion of the estate to be combined with his land parcel number Kiambaa/Waguthu/1856 and not with parcel



number 1899 because he had constructed on the former parcel and giving him any other portion would block his access to the land. The Respondent on the other hand contested these allegations and stated that the Appellant still had access to his land and that both portions belong to him. The Trial Court indulged the Appellant on his application for resurvey and issued the order on the 19<sup>th</sup> of December, 2018. The Surveyor, Kiambu District Survey Office on the 10<sup>th</sup> of October, 2019 stated thus about the issue of the resurvey:

“ A resurvey order was issued at Kiambu Magistrate Court on December 19, 2018. Surveyor did report on the same on the 28<sup>th</sup> of February, 2018 on the best mode of sub-division to enable those parcels be combined with existing parcels. Surveyor visited the land on August 5, 2019 and executed the order of December 19, 2018. The land was resurveyed per the attached diagram.

The order issued on the 19<sup>th</sup> Dec, 2018 is similar to the one issued on 8/9/2019. As for our records the survey was carried out and unless the Court directs us to repeat the resurvey on a different specific mode of sub-division, the exercise is over.”

20. This being a Court of first appeal, it had the duty to analyse the evidence adduced during trial before making its decision. The Appellant has stated that his proposal to have the resurvey done was because he had already disposed of land parcel number Kiambaa/Waguthu/1899 to a third party. He however did not provide any evidence to prove that a sale was in progress or that the land had already been transferred to a third party. The said 3<sup>rd</sup> Party did not swear any affidavit to confirm there was sale or he was in fact in possession. No transfers were shown to have been executed or change of title or even a sale agreement to that effect.
21. This survey was done as agreed by all the beneficiaries. He alleged that his signature on the consent by beneficiaries was forged but provided no evidence to substantiate those allegations. He had the evidential burden to discharge in regard to that allegation which he did not. He could not even demonstrate that he had reported the matter for an investigation at the very least.
22. The Appellant did not seek another professional opinion even from a professional registered private surveyor to back his proposal in any way or contradict that of the District surveyor who had given opinion that his proposal was the best option to subdivide the parcels.
23. The appellant, alleged that his house would be cut into two if the proposed sub-division went on, he did not however tender any tangible proof to demonstrate that fact.
24. As clearly pointed by the trial court, I do not find any issues of law in this appeal that the trial court failed to consider. This case was purely decided on facts that were presented and nothing extraneous. The trial court properly analysed those facts and reached its decision hence it did not make a decision that was against the weight of evidence as indicated in the memorandum of appeal and submitted by the Appellant.
25. In light of the foregoing analysis this Court finds no merit in this Appeal and the same is dismissed.
26. On costs, I consider that these are members of the same family hence the order is that each to party to bear its cost of this appeal.

**RULING DATED AND DELIVERED VIRTUALLY THIS 10<sup>TH</sup> DAY OF MARCH, 2023.**

**L.N. MUGAMBI**

**JUDGE**



**In Presence of: =**

**Coram- (ON-LINE)**

Before L.N. Mugambi, Judge

Court Assistant- Brian

Appellant-

Respondent- absent

Appellant Advocate- Mulinge for Appellant - present

Respondent Advocate- absent

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**Court**

Ruling delivered digitally. The same be transmitted by the Deputy Registrar to the Parties Advocates on record through their respective email addresses.

**L.N. MUGAMBI**

**JUDGE**

10.3.2023

Before Hon. Justice L. N. Mugambi

CA – Brian

Interpretation – English/Swahili

Respondent – absent

Mr. Mulinge for Appellant.

I pray for 30 days stay of execution of ruling.

Court – 30 days stay of execution of ruling dated 10.3.2023 is granted.

**L.N. MUGAMBI**

**JUDGE**

**10.3.2023**

