

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYERI

ELC CASE NO. 16 OF 2018

(Formerly NYERI HCCC:137 OF 2002)

GIDEON KANINI KAMACHO 1ST PLAINTIFF/APPLICANT

CYRUS KANINI NDEGE 2ND PLAINTIFF /APPLICANT

VERSUS

KARIUKI KANINI 1ST DEFENDANT/ RESPONDENT

NANCY WANGECI PETER 2ND DEFENDANT /RESPONDENT

TABITHA WAWIRA KARIUKI .. 3RD DEFENDANT/ RESPONDENT

RULING

1. By a Notice of Motion dated 20th August, 2024, Gideon Kanini Kamacho and Cyrus Kanini Ndege (the Plaintiffs) pray for the following:

1) Spent;

2) That the firm of Joe Ng'ang'a & Associates Advocates be allowed to come on record on behalf of the Plaintiffs herein after Judgment in place of Rakoro & Company Advocates;

3) That this Honourable Court be pleased to direct the Deputy Registrar of this Honourable Court to sign the Application for Consent of Land Control Board in place of the 2nd Defendant who has declined to sign the same;

4) That in the alternative and without prejudice to the foregoing, this Honourable Court be pleased to issue an order dispensing with the signature of the 2nd Defendant in the Application for Land Control Board Consent and her attendance all together; and

5) That the costs of this application be in the cause.

2. The Application is supported by an Affidavit dated 20th August 2024, sworn by the 2nd Plaintiff and is premised on grounds that:

(a) That the Judgment was delivered on 14th October 2016 and a decree dated 27th April, 2017 requiring that the suit property (Kabare/Mutige/65) be shared equally between the parties herein;

- (b) That being dissatisfied with the Judgment, the Defendants appealed in Nyeri Court of Appeal Civil Appeal No. 171 of 2017 which was also dismissed on 12th April 2024 with costs to the Plaintiff;**
- (c) That the Plaintiffs are in the process of actualizing the decree issued by this Honourable Court by subdividing the suit land in equal shares;**
- (d) That the parties herein are required by law to apply for the Land Control Board consent which application forms the 2nd Defendant has refused to sign with the motive of delaying the Plaintiffs from enjoying the fruits of the judgment;**
- (e) That unless the application is heard urgently and the orders sought are granted, the Plaintiffs will continue suffering great loss and prejudice; and**
- (f) That the application has been filed without unreasonable delay and after exhausting all other avenues to resolve the issues herein.**

3. Nancy Wangechi Peter (the 2nd Defendant) is opposed to the grant of the orders sought. In her Replying Affidavit sworn on 15th October 2024, the 2nd Defendant avers that the application

is bad in law and an abuse of the court process. The 2nd Defendant avers that land parcel No. Kabare/Mutige/65 is registered in her name and two deceased persons being the 1st and 3rd Defendants herein.

4. The 2nd Defendant avers that no transaction can be carried out while the names of the deceased persons are still in the register and that this court has no jurisdiction to conduct succession proceedings. She further avers that the Land Control Board Consent forwarded to her Advocates office bears the name of the 1st Plaintiff who is also deceased.
5. I have carefully perused and considered the Plaintiff's application as well as the response thereto by the 2nd Defendant. I have also perused and considered the submissions filed on behalf of the Plaintiffs.
6. By this application before the court, the 2nd Plaintiff urges the court to direct the Deputy Registrar of this court to execute the Application for Land Control Board Consent in place of the 2nd Defendant who is said to have declined to sign the same. In the alternative the Plaintiff has urged the court to issue an

order dispensing with the signature of the 2nd Defendant in the Application Form and her attendance all together.

7. From a perusal of the record, it is not in doubt that this court delivered judgment herein on 8th November 2016 and that a decree was subsequently issued on 27th April 2016 in relation to the parcel of land known as Kabare/Mutige/65 directing as follows:

“1. That a declaration is hereby issued that the 1st Defendant held the suit property LR Kabare/Mutige/65 and all the sub-divisions thereto namely LR Kabare/Mutige/468, LR Kabare/Mutige /469 and LR Kabare/Mutige/470 in trust for himself and the 1st Plaintiff and their dependants in equal shares and therefore, the said trust is hereby dissolved and the property to be shared equally between the two families of Gideon Kanini Kamacho/Cyrus Kanini Ndege and Kariuki Kanini.

2. That a declaration is hereby issued that the sub-division and transfer of the suit property is irregular.

3. That an order is hereby issued cancelling the titles to LR Kabare/Mutige/468, LR Kabare/Mutige/469 and LR Kabare/Mutige/470 curved following the aforesaid

irregular subdivision and transfer of LR Kabare/Mutige/65.

4. That an order of injunction is hereby issued restraining the Defendants by themselves or their agents and or servants from evicting, harassing or otherwise interfering with the Plaintiffs' quiet enjoyment of the suit property.

5. Each party to bear own cost, this being a family dispute."

8. Aggrieved by the said decision the Defendants instituted Nyeri Court of Appeal Civil Appeal No. 171 of 2017 which Appeal was subsequently dismissed on 12th April, 2024. In her Affidavit in Reply, the 2nd Defendant avers that she is unable to execute the Land Control Board Consent documents to have the property shared on account that the 1st and 3rd Defendants who were registered alongside herself as the proprietors of the suit property are now deceased. It is her case that she has been advised that the names of the deceased persons have to be removed from the register and that this court does not

have the jurisdiction to conduct succession proceedings over the estate of a deceased person.

9. I was however not persuaded that the enforcement of the court's judgment herein would amount to the court conducting succession proceedings over the estate of any of the deceased Defendants. It was interesting to note that while the 2nd Defendant asserts that the names of the deceased have to be removed from the register before any action can be taken herein, she does not state any steps she has herself taken in order to have the names removed as such.
10. It was clear to me that if the court were to adopt the position taken by the 2nd Defendant, then the execution process would never proceed. It was further clear to me that there was no proper reason why the 2nd Defendant had not executed the documents on her part. While it may as well be true that she has preferred to appeal the decision of the Court of Appeal in the Supreme Court, there was no evidence that she had obtained an order staying execution of the judgment of this court.

11. Such a situation is envisaged by the law and in that respect Section 98 of the Civil Procedure Act provides as follows:

“Where any person neglects or refuses to comply with a decree or order directing him to execute any conveyance, contract or other document, or to endorse any negotiable instrument, the court may, on such terms and conditions, if any, as it may determine, order that the conveyance, contract or other document shall be executed or that the negotiable instrument shall be endorsed by such person as the court may nominate for that purpose, and a conveyance, contract, document or instrument so executed or endorsed shall operate and be for all purposes available as if it had been executed or endorsed by the person originally directed to execute or endorse it.”

12. I am satisfied in the circumstances herein that this is a proper case in which the court should exercise its discretion under Section 98 of the Civil Procedure Act and do hereby nominate the Deputy Registrar of the Court to execute the instrument of transfer in favour of the Applicant to enable him enjoy the fruits of the judgment delivered herein on 8th November 2016.

13. Accordingly, I allow the Motion dated 20th August 2024 in terms of prayer No. 3 thereof.

14. I make no order as to costs.

Ruling dated, signed and delivered in open court and virtually at Mombasa this 13th day of November, 2025

.....
J.O. OLOLA
JUDGE

In the presence of:

- a) Ms. Firdaus Court Assistant.
- b) Mr. Karanja Advocate for the Plaintiffs/Applicants
- c) No appearance for the Defendants/Respondents