

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT**  
**KERUGOYA**  
**ELCA NO. 10 OF 2022**

**MICHAEL MUNENE NJOGU ..... 1<sup>ST</sup>**  
**APPELLANT**

**DAVID MURAGE NJOGU ..... 2<sup>ND</sup>**  
**APPELLANT**

**JOHN IKARANGU NJOGU ..... 3<sup>RD</sup>**  
**APPELLANT**

**VERSUS**

**JULIA MUTHONI MUNENE ..... 1<sup>ST</sup>**  
**RESPONDENT**

(Suing as administrator of the estate of  
Gilbert Munene Kathenge alias Munene Gathenge)

**POLINE WANGARI GAKUYA ..... 2<sup>ND</sup>**  
**RESPONDENT** (Suing as administrator of the estate of  
Njeru Gathenge)

**JOHN NJOKA GITHINJI ..... 3<sup>RD</sup>**  
**RESPONDENT**

(Suing as administrator of the estate of  
Githinji Mutwanjau Alias Bernard Githinji)

**PETER NJOGU ZAKAYO ..... 4<sup>TH</sup>**  
**RESPONDENT** (Suing as administrator of the estate of  
Zakayo Njogu)

*(Being an appeal against the judgment and decree of Hon. A.K Ithuku, CM delivered on 2<sup>nd</sup> December 2021 in Kerugoya MCELC Case No. 86 of 2019)*

## **JUDGMENT**

1. Aggrieved by the judgment delivered by the learned trial magistrate on 2<sup>nd</sup> December 2021 in **Kerugoya MELC Case No. 86 of 2019**, the appellants lodged this appeal vide the memorandum of appeal dated 6th May 2022, raising eight (8) grounds. In substance, they fault the learned trial magistrate for determining the manner of subdivision of **Land Parcel No. Inoi/Kerugoya/250/16** without adherence to **Section 94** of the **Land Registration Act**; for finding that the appellants had not proved that their developments on the suit land were more substantial than those of the respondents, despite evidence to the contrary; and for failing to properly consider the appellants' evidence and testimony, thereby erroneously concluding that the respondents had proved their case.

The appellants further contend that the trial court misunderstood or ignored their case, arrived at an unjust decision against the weight of evidence, and adopted an inequitable mode of partition, instead of giving a larger share in favour of the appellants, or alternatively awarding them compensation for developments. The appellants

urged this Court to allow the appeal, set aside the judgment of the lower court, and award costs to them.

2. The appeal was canvassed by way of written submissions. The learned counsel for the appellants filed their submissions dated 3rd March 2025, and inter alia submitted that the learned trial magistrate erred in law and fact by entertaining the suit despite the existence of a prior determination in **ELC No. 151 of 2013**, which had already issued directions relating to the suit property, and was pending computation of developments.

It was submitted that the suit before the magistrate was filed several years after the judgment in that prior case. That the trial court ought to have downed its tools on the basis of *res judicata*, but instead erroneously dismissed the appellants' preliminary objection, thereby opening the door to conflicting decisions.

Counsel further submitted that the trial court contravened **Section 94 of the Land Registration Act** by determining the manner of partition of land held in common without an application first being made to the Land Registrar. It was argued that under the said **Act**, partition of land held in common is primarily within the mandate of the Registrar, while the court's jurisdiction is invoked in limited circumstances, including where an order for sale is sought.

According to counsel, the respondents neither applied to the Registrar for partition nor sought for an order for sale in their plaint, and the trial court therefore acted without jurisdiction. On these grounds, the appellants urged this Court to allow the appeal with costs.

3. The learned counsel for respondents filed their written submissions dated 20th July 2025, and inter alia submitted that the issue of the suit being res judicata was neither raised before the trial court nor pleaded in the memorandum of appeal. That an appellate court is confined to reviewing matters that were placed before and determined by the court of first instance. Reliance was placed on the case of **West Kenya Sugar Company Limited versus Okendo (2024) eKLR**, where the court emphasized that appellate courts should not entertain new issues on appeal, save in exceptional circumstances. The counsel further submitted that the central question was whether the trial court had jurisdiction to determine the dispute notwithstanding the provision of **Section 94 of the Land Registration Act**. It was argued that while the section outlines a procedure for partition, it is not couched in mandatory terms and does not oust the jurisdiction of the court in disputes relating to co-ownership.

Counsel further contended that under **Section 94(2)**, where co-owners are unable to agree on the mode of partition, any of them may apply to the court for an order of partition, which is what the respondents did. On that basis, it was urged that the trial court properly exercised its jurisdiction and that the appeal lacked merit and should be dismissed with costs.

4. From the record of appeal and submissions, the following issues arise for determinations by the court:

- a. *Whether the trial court had jurisdiction to order the partition of land parcel No. Inoi/Kerugoya/250/16.*
- b. *Whether, in light of the prior proceedings in ELC No. 151 of 2013, the trial court erred in granting orders affecting the entire suit property and all co-proprietors.*
- c. *Whether the Learned trial magistrate erred in the manner of the partition ordered.*

5. I have carefully considered the grounds on the memorandum of appeal, record of appeal, submissions by the learned counsel, superior court decisions cited and come to the following findings:

- a. This appeal arises from the judgment of **Hon. A. K. Ithuku, CM**, delivered on **2<sup>nd</sup> December 2021** in **Kerugoya MELC No. 86 of 2019**. In that judgment, the learned Trial Magistrate ordered the subdivision

of **Land Parcel No. Inoi/Kerugoya/250/16** to excise a portion equivalent to **four-fifths (4/5) shares** measuring **0.02976 hectares**, to be registered jointly in the names of the respondents, and the remaining **one-fifth (1/5) share** measuring **0.0075 hectares** to be registered in the names of the appellants.

The court further ordered for the removal of all cautions and restrictions registered against the suit land and directed that each party to bear their own costs.

- b. The respondents had commenced the suit in the lower court by an amended plaint dated 16th November 2020 seeking, for *inter alia*, an order for the subdivision of **Land Parcel No. Inoi/Kerugoya/250/16** so as to excise a **four-fifths (4/5) share measuring 0.02976 hectares** to be registered jointly in their names, with the remaining **one-fifth (1/5) share measuring 0.0075 hectares** to be registered in the names of the appellants; and an order for the removal of all cautions and restrictions registered against the suit land, together with costs and interest.

Their case was that the suit land was originally registered in the names of Bernard Githinji, Njogu

Chomba, Njeru Gathenge, Munene Gathenge and Zakayo Njogu as tenants in common in equal shares. It was pleaded that the property was developed through equal contributions by all the co-proprietors and that there was an agreement that each tenant in common would, in turn, rent out the property for a period of two years and keep the rent with the treasurer. The respondents averred that Njogu Chomba, the appellants' father, was the first to rent out the property and that thereafter the appellants had continued to occupy and utilize the suit land exclusively, denying the respondents access and enjoyment of their proprietary interests.

- c. The appellants filed their statement of defence dated 1st July 2019, in which they *inter alia* admitted that **Land Parcel No. Inoi/Kerugoya/250/16** was jointly registered in the names of the said five named proprietors. They, however, contended that the contributions towards the acquisition and development of the property were unequal, asserting that their late father contributed approximately sixty per cent. They denied having excluded the respondents from the suit property and maintained that they were the only parties with the financial capacity to develop and run a business on the premises.

According to the appellants, the property had been leased to them by the partners at a rent of **Kshs. 1,100/= per month**. The appellants further alleged that it was the respondents who had interfered with the suit land by transferring **four-fifths (4/5)** of the property to a third party, Lawrence Ngiricha, and that the register reflected the names of the appellants and the said third party. They denied ever restricting the respondents' access to the property and asserted that, having purportedly transferred their interests, the respondents were not entitled to the remedies sought.

In addition, the appellants contended that the suit land was too small to be subdivided economically, arguing that a portion **measuring 0.0075 hectares** would have no economic value, and stated that they were willing to purchase the other partners' shares.

- d. Jurisdiction is the foundation upon which a court's authority rests. A court acting without jurisdiction renders proceedings that are a nullity, regardless of the merits. The classic and binding statement of the law is found in the case of **Owners of the Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd [1989] KLR 1**, where **Nyarangi JA** held:

***“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

It is therefore trite that jurisdiction cannot be conferred by the conduct of parties, acquiescence, or waiver.

- e. On when and how the question of jurisdiction may be raised, the **Court of Appeal** in the case of **Kenya Ports Authority versus Modern Holdings [EA] Limited [2017] eKLR** stated as follows:

***“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on appeal, or even viva voce and indeed, even by the court itself...”***

The relief sought before the trial court concerned land held by tenants in common. The applicable

statutory framework is set out in **Sections 94 and 96 of the Land Registration Act, No. 3 of 2012**. **Section 94** vests in the Land Registrar the power to determine applications for subdivision of land held in common, where such subdivision is intended to separate the proprietary interests of co-owners, and vest distinct titles in them. The section provides a detailed process, including a hearing and consideration of specified statutory factors, before any order for subdivision is made.

The role of the court under **Section 94** is limited to the review of the Registrar's decision. **Section 96**, of the said **Act**, on the other hand, provides for a different procedure where subdivision is impractical, and the parties seek the sale of the land. In such a case, and only upon a specific application for sale, is the court empowered to intervene. The **Act** therefore, establishes a clear statutory sequence, with first call being before the Registrar, with the Court's jurisdiction being only on review or on a properly pleaded application for sale.

- f. The respondents' suit before the trial court was for orders directing that **Land Parcel No. Inoi/Kerugoya/250/16** be subdivided, and the defined portions be registered in the names of the respective parties according to their shares. Although

framed as a prayer for subdivision, the substance of the relief sought was the severance of co-ownership through the allocation of exclusive titles to the co-owners. In law, that relief falls squarely within the scope prescribed under **Section 94 of the Land Registration Act**.

- g. It is not disputed that no prior application was made to the Land Registrar under **Section 94**. There was equally no decision by the Registrar capable of being subjected to review by the the court under **Section 94(5)**, thereof.

Further, the respondents' suit was not for an order for the sale of the suit land, so as to invoke the court's powers under **Section 96 of the Act**. Had sale been proposed as the appropriate remedy, the procedure provided under **Section 96** would have been available, and the court would have been properly seized of jurisdiction on a specific application. That was not the case here.

- h. By assuming original jurisdiction, issuing orders for subdivision and separate registration of the suit land, the trial court bypassed the procedure prescribed by statute, and exercised a power that Parliament has vested in the Land Registrar in the first instance. Although the appellants had raised a preliminary

objection on the doctrine of exhaustion, which was dismissed in a ruling delivered on 13th February 2020, and was not appealed, that ruling could not confer jurisdiction where none existed, as jurisdiction flows from the constitution, statutes and other laws, and not from interlocutory determinations or the acquiescence of parties. This Court is duty-bound, even at the appellate stage, to satisfy itself that the proceedings before the court below were properly before it in law.

- i. Accordingly, this Court finds and holds that; the learned trial magistrate lacked jurisdiction to grant orders directing the subdivision and separate registration of **Land Parcel No. Inoi/Kerugoya/250/16**, the power to determine such subdivision of land held by tenants in common being vested by **Section 94 of the Land Registration Act** to the Land Registrar in the first instance. This finding is sufficient to dispose of the appeal, and there is no further value to be attained in the court pronouncing itself on the other issue. That is because, having found that the trial court lacked jurisdiction to grant the orders sought, it should have downed its tools as it were to enable the parties comply with the statutory procedure under **Section 94 of the Act**. Therefore, all the other findings and orders flowing from the impugned judgment are

vitiated by that jurisdictional defect, and it is the court's conclusion that the appeal has merit.

- j. Under **Section 27 of the Civil Procedure Act, Chapter 21 of Laws of Kenya** costs follow the event unless the court, for good reason, orders otherwise. In the case of **re Estate of Monica Wanjiru Macharia (Deceased) (Family Appeal 15 of 2023) [2024] KEHC 14780 (KLR)** the court held that:

***“Section 27 of the Act is clear that it lies in the discretion of the court to award costs in a suit. This discretion must be exercised judiciously.”***

In the circumstances of this appeal, the court finds no reasons to deviate from the edict in the above legal provision on costs, and will grant the appellants' costs before this court, and the trial court.

6. In view of the determinations set out above in this appeal, the court renders itself as follows:

- a. That the appeal has merit and is hereby allowed.**

- b. The trial court's judgement delivered on 2<sup>nd</sup> December 2021 in Kerugoya MELC No. 86 of 2019 is set aside, and substituted with an order striking out the respondents' suit.**
- c. The appellants are granted costs in the appeal and trial court.**

Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON  
THIS 18<sup>TH</sup> DAY OF FEBRUARY 2026.**

**Kibunja**

**S. M.**

**ELC**

**JUDGE**

**In the presence of:**

Appellants

Respondents

Kinyua - Court Assistant.

**S. M.**

**Kibunja**

**ELC**

**JUDGE**