

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND COURT AT NAIROBI

ELC CASE NO. 558 OF 2007

MICHAEL BORO WARUI

Suing as the personal representative of the estate of
JOSEPH WARUI MWANGI 1ST

PLAINTIFF

LOISE WACHEKE BORO 2ND

PLAINTIFF

JAMES KIMANI BORO 3RD

PLAINTIFF

VERSUS

GRACE NYAMBURA MBUGUA 1ST

DEFENDANT

AMOS NDUNG'U MBUGUA 2ND

DEFENDANT

SIMON KAGIRI MBUGUA 3RD

DEFENDANT

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FELIX KIMANI MBUGUA 4TH

DEFENDANT

RULING

1. Judgment was delivered in this matter on 23rd January 2019. The Court ordered that **Githunguri/Kiaria/2232** be subdivided into two (2) equal portions to be registered in the names of the Plaintiffs on one part and the Defendants on the other part. Subsequently, in a Ruling delivered on 17th November 2021, this Court directed the Government Surveyor to subdivide the said parcel into two equal portions. What is hence before the Court for determination is the Plaintiffs' Notice of Motion application dated 8th May 2024 in which they seek the following Orders:

a) Spent.

b) That an eviction order be granted owing to the fact that the Applicants herein are the rightful, bonafide and current registered owners of that parcel known as Githunguri/Kiaria/3791 all measuring approximately 0.92 Ha.

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c) That the OCS Githunguri Police Station is authorized to provide the services in evicting the Respondents from that parcel known as Githunguri /Kiaria /3791 all measuring approximately 0.92 Ha.

d) That the Applicants have been unable to occupy and/or possess that parcel known as Githunguri /Kiaria /3791 all measuring approximately 0.92 Ha due to the Respondent's refusal to vacate despite the Honourable Court's orders issued on 24th November 2021 granting Applicants the right to do so.

e) That costs of this application be borne by the Applicant.

2. The application is premised on grounds on its face and on the 1st Plaintiff's supporting affidavit. He avers that in compliance with this Court's orders, **Githunguri/Kiaria/2232** measuring 1.86ha was subdivided into two (2) equal portions being **Githunguri /Kiaria /3791** and **3792** respectively. Subsequently, **Githunguri /Kiaria/3791** was registered to

the Plaintiffs but the Defendants' structures have encroached onto it at the boundary between the two parcels. Further, that the Plaintiffs lodged a boundary dispute at Kiambu Land Registry which was determined but they have been unable to occupy their portion.

3. The application is opposed by the Defendants vide the joint replying affidavit sworn by the 3rd and 4th Defendants. They provided a history of litigation surrounding the suit land and maintained that their father held **Githunguri/Kiaria/687** in his own name and not in trust for the sons of his brother, Mwenja Kagiri (deceased) who are the Plaintiffs herein thus judgement in the matter was obtained without full disclosure of facts to the Court.
4. They also pointed out that Githunguri/Kiaria/687 was subdivided into **Githunguri/Kiaria/1969** and **Githunguri/Kiaria/1970**, with **Githunguri/Kiaria/1969** being bequeathed to them but their ownership was challenged by the Plaintiffs before the Land Disputes

Tribunal. Further, that the Award of the Tribunal was quashed by the High Court in Judicial Review proceedings being **Nairobi HC Misc. Civil Application No. 257 of 2000** but in defiance, the Plaintiffs created **Githunguri /Kiaria /2232** and subsequently **Githunguri/Kiaria /3791** and **3792** respectively.

5. They also aver that the application is defective for want of proper parties as the 2nd Plaintiff is deceased and no substitution has been made.
6. Another affidavit was also filed by the 1st and 2nd Defendants who aver that **Githunguri/Kiaria/2232** is a fictitious title created on title **LR Githunguri /Kiaria /1970** as entry No. 5 of 5th October 2001 shows that it was cancelled thus the Court was misled to carry out a futile subdivision exercise to create **Githunguri/Kiaria /3791** and **3792** which are fictitious and a nullity.

7. The application was canvassed by way of written submissions.

Submissions

8. The Plaintiff submits that the Defendants ought to obey this Court's orders and give vacant possession. To buttress their averments, they relied on the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR**.
9. The 3rd and 4th Defendants submit that the Plaintiffs are not entitled to the orders sought as their conduct of failing to disclose the existence of the Judicial Review proceedings amount to material non-disclosure and abuse of Court process. To this end, the case of **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others [1995] eKLR** was relied upon.

10. It is also their submission that the application is res judicata as issues raised herein were conclusively determined in **Nairobi HC Misc. Civil Application No. 257 of 2000**. To this end, reliance was placed on the following decisions: **ET. v Attorney General & another [2012] KEHC 5506 (KLR)** and in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] KECA 472 (KLR)**.

11. They also argue that orders issued in **Nairobi HC Misc. Civil Application No. 257 of 2000** are also valid and that they ought to be obeyed first by the Plaintiffs. The Court was urged to refrain from aiding the Plaintiffs to enforce orders in violation of subsisting judicial determinations.

Analysis and Determination

12. Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the following are the issues for determination:

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a) Whether the Plaintiffs are entitled to an order of eviction against the Defendants.

b) Whether the Plaintiffs' application is barred by the doctrine of res judicata.

13. The Plaintiffs seek to enforce this Court's judgment delivered on 23rd January 2019 and subsequent Ruling of 17th November 2021. They contend that the Defendants are still in occupation of their parcel, **Githunguri/Kiaria/3791** and want the Court to issue an eviction order against them.

14. While the Defendants do not deny occupation, they challenge the validity of the Plaintiffs' title and the process leading to its creation and have heavily dwelt on issues that are mute as a judgement was delivered in the matter. However, they have not disputed the validity of this Court's judgement on the matter.

15. The Defendants' also allege that the application is res judicata judicial review proceedings, being **Nairobi HC Misc. Civil Application No. 257 of 2000** but I note the Plaintiffs do not seek to re-litigate the issues already determined by this Court and have applied for enforcement of the Court's judgement.

16. The Court stated as follows in **Al Yusra Restaurant Limited v Kenya Conference of Catholic Bishops & another [2025] KEHC 7288 (KLR)**;

"A decree holder is entitled to enjoy the fruits of its judgment, and once any stay is lifted or lapses, the decree becomes enforceable.."

17. On whether the application is res-judicata, the Supreme Court stated as follows in **John Florence Maritime Services Limited & another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)**;

“...whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.”

18. On perusal of the Court record, I note the Defendants have not indicated whether they appealed against the impugned judgement sought to be enforced. It is trite that if a valid judgement is not set aside nor appealed from, the Decreeholder is entitled to pursue and enjoy the fruits of his judgement. I reiterate that the instant application simply seeks to enforce the judgement.

19. Since the suit land was subdivided into two equal portions as directed by the Court, I opine that the Plaintiffs are indeed

entitled to their portion. It is my considered view that the arguments presented by the Defendants' are good in an appeal and not for an application to enforce the judgement. I hence find that the instant application is not res judicata as claimed.

20. Based on the facts before me while associating myself with the decisions cited, I find that the Plaintiffs are indeed entitled to their portion of land and the Defendants should hence grant them vacant possession.

21. In the foregoing, I find the instant Notice of Motion application merited and will allow it in the following terms:

- i. That an eviction order be and is hereby granted owing to the fact that the Applicants herein are the rightful, bonafide and current registered owners of that parcel known as Githunguri /Kiaria/3791 all measuring approximately 0.92 Ha.**

- ii. That the OCS Githunguri Police Station is hereby authorized to provide the services in evicting the Respondents from that parcel known as Githunguri /Kiaria /3791 all measuring approximately 0.92 Ha.
- iii. Each party to bear their own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS
17TH DAY OF FEBRUARY, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Ms Mwangi for Ms Nderitu for Respondents

Michael Boro Warui - 1st Plaintiff

James Kimani - 3rd Plaintiff

Court Assistant: Joan

ORIGINAL