



REPUBLIC OF KENYA



Ambani & another v Mwimali & another (Environment & Land Case 191 of 2016) [2024] KEELC 276 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELC 276 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT & LAND CASE 191 OF 2016
DO OHUNGO, J
JANUARY 30, 2024**

BETWEEN

JOHNSON WYCLIFE AMBANI 1ST PLAINTIFF

JOHN OMUYULA M ODINGA 2ND PLAINTIFF

AND

HENRY LUBANGA MWIMALI 1ST DEFENDANT

MICHAEL OTINGA MWIMALI 2ND DEFENDANT

JUDGMENT

1. The plaintiffs moved the court through plaint dated 26th September 2016 in which they averred that the first and second plaintiffs were the registered proprietors of land parcel numbers E. Wanga/Malaha/1165 and E. Wanga/Malaha/1163 respectively, while the first and second defendants were the registered proprietors of land parcel numbers E. Wanga/Malaha/1166 and E. Wanga/Malaha/1162 respectively. That the said parcels were created upon partition of land parcel number E. Wanga/Malaha/167 pursuant to a certificate of confirmation of grant issued in Kakamega High Court Succession Cause Number 413 of 1995 in respect of the estate of Charles Mwimali Otinga (deceased) and that the defendants trespassed into the plaintiffs' aforesaid parcels of land.
2. The plaintiffs therefore prayed for judgment against the defendants jointly and severally for:
 - a. An order of eviction of the 1st Defendant from land parcel LR E. Wanga/Malaha/1165.
 - b. A permanent injunction against the Defendants, their family, Agents, servants of any other person claiming/acting on their behalf, restraining them from trespassing onto and interfering with the plaintiffs use possession of LR E. Wanga/Malaha/1163 and 1165.
 - c. Costs of the suit.



3. The defendants filed amended defence and counterclaim amended on 30th July 2019 in which they denied the allegations of trespass and averred that the plaintiffs secretly subdivided land parcel number E. Wanga/Malaha/167 to create the suit parcels without their participation and without carrying out any survey on the ground. That the beneficiaries of the deceased's estate did not engage the services of a qualified surveyor to prepare an agreeable mutation to subdivide land parcel number E. Wanga/Malaha/167 whose character and had never been changed from time immemorial. They further averred that the defendants fraudulently engaged E W Olweny Surveyors who prepared and registered mutation dated 15th July 1996 without visiting land parcel number E. Wanga/Malaha/167 and without considering the established home of the beneficiaries of the deceased.
4. The defendants further averred that the orders sought by the plaintiffs are incapable of implementation. They therefore prayed that the plaintiffs' suit be dismissed with costs and that judgment be entered in their favour for:
 - a. That this honourable court does order that the Kakamega County Land Registrar and Surveyor do visit the original land parcel No. E wanga/Malaha/167 and survey, draw a new mutation form with the participation of all the parties herein and all the other beneficiaries and mark out boundaries, to ensure compliance with the orders made in Kakamega HC. Succession Cause No. 413 of 1995.
 - b. Costs of this counterclaim and interest.
 - c. Any other or further relief deemed fit and just.
5. The first defendant (Henry Lubanga Mwimali) passed away on 7th August 2019 and was substituted with Christine Auma Lubanga and Ronald Evans Otinga Lubanga, pursuant to an order made by the court on 21st June 2021.
6. At the hearing, Johnson Wycliffe Ambani testified as PW1 and stated that the second plaintiff and the defendants are his brothers. That the second plaintiff is his stepbrother from a different mother while the first defendant is his elder brother from same father and mother and that the second is his stepbrother who shares a mother with the second plaintiff. He adopted his witness statement filed on 4th October 2016 as well as his further witness statement dated 21st December 2021. He also produced copies of the documents listed as numbers 1 to 4 in the plaintiffs' list of documents dated 26th September 2016, copies of the documents listed as numbers 1, 4, 5, 7 and 8 in the plaintiffs' further plaintiff's list of documents dated 21st December 2021, copies of the documents listed as numbers 1 to 3 in the plaintiff's further list of documents dated 22nd April 2022 and copies of the documents listed as numbers 1 to 3 in the plaintiffs' further list of documents dated 27th April 2022.
7. He reiterated the averments in the plaint and added that his parcel and the rest were created following a family meeting and agreement pursuant to which the succession proceedings were filed, and that confirmation of grant was issued after all heirs signed a consent. That a surveyor went to the ground and prepared a mutation based on the position on the ground and that Henry Mwimali, the second plaintiff, Godfrey Odinga, PW1, and the second defendant all signed the agreed subdivision plan save for three heirs who were all minors at the time. That all were then shown their respective portions to which all moved, save for Henry Mwimali who refused to move out of the portion PW1 was allocated. He added that Henry's family is farming both within his (PW1's) parcel and the plot Henry was allocated and that the counterclaim seeking a resurvey of parcel number E. Wanga/Malaha/167 is overtaken by events in view of a ruling delivered in Kakamega High Court Succession Cause Number 413 of 1995 on 11th May 2017.



8. John Omuyula Mwimali Odinga testified next as PW2, adopted his witness statement filed on 4th October 2016 and associated himself with the testimony of PW1. He further stated that the second defendant is using his (PW2's) parcel number E. Wanga/Malaha/1163 by cultivating it.
9. Finally, Godfrey George Otinga (PW3), a brother to the parties herein, adopted his witness statement dated 21st December 2021 and stated that he was the administrator of the parties' father's estate. That the distribution was agreed upon, the grant was confirmed on 19th March 1996 and that a surveyor demarcated the land as agreed and signed by the heirs on the mutation form. He added that the heirs got registered as proprietors following a partition of parcel number E. Wanga/Malaha/167 and that Henry's family should move to their land and the second defendant should stop using the plaintiffs' land.
10. The plaintiffs' case was closed at that point.
11. Christine Auma Lubanga testified as DW1 and adopted her witness statement filed on 4th November 2021. She stated that the plaintiffs are her brothers in law and produced copies of the documents listed as item numbers 1 to 3 in Defendants' list of documents dated 7th February 2020. She also confirmed that land parcel number E. Wanga/Malaha/167 was shared out after confirmation of grant and that as of the date of her testimony she was staying on parcel number E. Wanga/Malaha/1165 where her husband Henry was buried. She urged the court to dismiss the plaintiff's case and to allow her counterclaim.
12. Lastly, Michael Otinga Mwimali testified as DW2 and adopted his witness statement which he filed on 10th February 2020. He stated that he resides on East Wanga/Malaha/167 and that the said parcel was subdivided after succession proceedings. That the subdivision was done secretly and fraudulently on paper without involving parties on the ground and that the plaintiffs engaged surveyors who drew mutation form without going to the ground. That the mutation did not consider already established homes on the ground. He however confirmed that he signed the mutation form and that he attended the succession proceedings and consented to the distribution.
13. Defence case was then closed. Parties then filed and exchanged written submissions. The plaintiffs filed submissions dated 14th April 2023 while the defendants filed submissions dated 20th May 2023. I have considered the parties' pleadings, evidence, and submissions. The sole issue for determination is whether the reliefs sought should issue.
14. There is no dispute that the parties to the suit as originally filed were the children of Charles Mwimali Otinga (deceased) who was the registered proprietor of land parcel number E. Wanga/Malaha/167 and that upon his death, administration of his estate was undertaken through Kakamega High Court Succession Cause Number 413 of 1995. Pursuant to certificate of confirmation of grant issued by on 19th March 1996 in the said succession proceedings, parcel number E. Wanga/Malaha/167 was distributed to eight beneficiaries including the parties herein. Subsequently, parcel number E. Wanga/Malaha/167 was partitioned into eight new parcels being E. Wanga/Malaha/1162 to E. Wanga/Malaha/1169. Out of those new parcels, the first plaintiff became the registered proprietor of land parcel number E. Wanga/Malaha/1165 while the second plaintiff became the registered proprietor of land parcel number E. Wanga/Malaha/1163.
15. In his testimony, the second defendant stated that he signed the mutation form which was used to process the partition, that he attended the succession proceedings and that he consented to the distribution prior to issuance of the certificate of confirmation of grant. I have perused the mutation form and I note that the initial first defendant (Henry Lubanga Mwimali) also signed it signed on 15th July 1996 at 10:00am, together with other heirs. He was first among signatories. I further note that



the mutation form had a list of the subdivision parcel numbers, their sizes and sketches at pages two and three thereof which showed the location of the new parcels. Thus, the defendants' claim that the partition was carried out secretly without their participation and without carrying out any survey on the ground has no leg to stand on. It is instructive to note that the defendants are not seeking any swapping of parcels. Instead, they want a rolling back of the entire partition process. Even as they do so, they have not sought cancellation of the plaintiffs' titles or even the rest of the titles that were issued to all beneficiaries.

16. To the extent that the plaintiffs are the registered proprietors of parcel numbers E. Wanga/Malaha/1165 and E. Wanga/Malaha/1163, they are entitled to the rights, privileges, and benefits under Section 24 of the Land Registration Act. Section 26 of the Act obligates the court to accept their certificates of title as conclusive evidence of proprietorship, unless it is demonstrated under Section 26 (1) (a) or (b) that they were party to fraud or misrepresentation or if it is proven that the titles were acquired illegally, un-procedurally or through a corrupt scheme. The defendants have not sought cancellation of the plaintiffs' titles.
17. The issue of resurvey was raised by the defendants herein in Kakamega High Court Succession Cause Number 413 of 1995. The court (J Njagi, J) rendered itself as follows in the ruling delivered on 11th May 2017:
 8. The Administrator has deponed in his affidavit that it is the 1st objector [Michael Otinga Mwimali] and his sons who chased away the surveyor when the surveyor went to show him his parcel of land. The 1st objector did not contradict this statement. It is clear that it is the objectors [Henry Lubanga Mwimali and Michael Otinga Mwimali] who have made it difficult to implement the grant by refusing to move to their portions of land.

The objectors participated in the process of sub-division and registration of the land. They cannot now turn around and demand fresh sub-division and registration. They should just move to their registered parcels of land. There are no sufficient reasons adduced to warrant revocation and/or annulment of the grant issued on 9th March, 1996. ...
18. It is therefore abundantly clear that the issues raised in the counterclaim have been previously addressed and the orders now sought in the counterclaim cannot issue.
19. Regarding the prayers sought by the plaintiffs, the defendants have not denied that they are occupying or using plaintiffs' plots as alleged. DW1 explicitly testified that as of the date of her testimony she was staying on parcel number E. Wanga/Malaha/1165 where her husband Henry was buried. Further, the second plaintiff testified that the second defendant is using parcel number E. Wanga/Malaha/1163 by cultivating it. The second defendant did not contradict that evidence.
20. Arising from the foregoing discourse, I find no merit in the counterclaim. On the other hand, the plaintiffs have established their case and are entitled to relief.
21. In the result, I make the following orders:
 - a. The defendants' counterclaim is dismissed.
 - b. Christine Auma Lubanga and Ronald Evans Otinga Lubanga and the family, servants, agents, and representatives of Henry Lubanga Mwimali to vacate the parcel of land known as E. Wanga/Malaha/1165 within ninety (90) days from the date of delivery of this judgment. In default, the plaintiffs shall be at liberty to evict them.



- c. A permanent injunction is hereby issued restraining Christine Auma Lubanga and Ronald Evans Otinga Lubanga and the family, servants, agents, and representatives of Henry Lubanga Mwimali and any other person claiming or acting on their behalf from trespassing onto or interfering with the plaintiffs use and possession of the parcels of land known as E. Wanga/Malaha/1163 and E. Wanga/Malaha/1165.**
- d. In view of the family relationship between the parties, I make no order as to costs.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 30TH DAY OF JANUARY 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

No appearance for the Plaintiffs

Mr Balusi holding brief for Mr Akwala for the Defendants

Court Assistant: E. Juma

