



REPUBLIC OF KENYA



Muita & 3 others v Nderitu & 4 others (Environment & Land Case 556 of 2014) [2024] KEELC 149 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 149 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 556 OF 2014**

**JO OLOLA, J
JANUARY 25, 2024**

BETWEEN

**NICHOLAS NDERITU MUITA 1ST PLAINTIFF
MARY NYAMBURA NDERITU 2ND PLAINTIFF
DR. JOSHUA MAINA NDERITU 3RD PLAINTIFF
PETER MWANGI NDERITU 4TH PLAINTIFF**

AND

**JOHNSON GITHAIGA NDERITU 1ST DEFENDANT
EUNICE NEKESA MUITA (AS THE PERSONAL REPRESENTATIVE OF THE
ESTATE OF PETER MUITA NDERITU DECEASED) 2ND DEFENDANT
ESTHER NJOKI MUIGAI 3RD DEFENDANT
FRANCIS MATHENGE NDERITU 4TH DEFENDANT
SAMUEL NDIRANGU NDERITU 5TH DEFENDANT**

JUDGMENT

1. This suit was initially instituted in the High Court at Nyeri as HCCC No. 57 of 2008. It was transferred to this court in the year 2014.
2. By their Plaint dated 6th June 2008 as amended on 12th February 2018, the four (4) Plaintiffs herein pray for the following:-
 - a). An order revoking and reversing land titles Nyeri/Gatarakwa/2412, Nyeri/Gatarakwa/2143, Nyeri/Gatarakwa/2144, Nyeri/Gatarakwa/2145 and Nyeri/Gatarakwa/2146 into Nyeri/Gatarakwa/897 in the name of the 1st Plaintiff (now deceased);



- b). A declaration that the Defendants had no authority or legal right to sub-divide and transfer parcel of land Nyeri/Gatarakwa/897 to themselves or any other person;
 - c). A declaration that the transactions concerning Nyeri/Gatarakwa/2412, Nyeri/Gatarakwa 2143, Nyeri/Gatarakwa/2144, Nyeri/Gatarakwa/2145 and Nyeri/Gatarakwa/2146 and more specifically the registration of the names of Peter Ndumia Gathuma and Rachel Wambui Mathenge whose names were entered in the register in respect of Nyeri/Gatarakwa/2142, Nyeri/Gatarakwa/2145 and Nyeri/Gatarakwa/2146 and any transaction carried out in respect of the said properties pendente lite is null and void and any consequential registration and transactions flowing from the said transaction be revoked, cancelled and/or nullified forthwith;
 - d). Orders for eviction to issue respectively and severally against the Defendants, their agents and or assigns to give vacant possession of the suit premises, and to forthwith give vacant possession of the same;
 - e). An award of general damages;
 - f). A declaration that the Defendants are not entitled to interfere in any manner whatsoever with the 1st Plaintiff's Nyeri/Gatarakwa/897;
 - g). A permanent injunction restraining the Defendants, their agents and or assigns from occupying and/or dealing in any manner with the titles Nyeri/Gatarakwa/2142, Nyeri/Gatarakwa/2143, Nyeri/Gatarakwa/2144, Nyeri/Gatarakwa/2145 and Nyeri/Gatarakwa/2146 until the full and final determination of this suit (sic); and
 - h). Costs of this suit.
3. The prayers arise from the Plaintiff's position that at all times material, the 1st Plaintiff (now deceased) was the owner of all that property known as Nyeri/Gatarakwa/897. In or about the year 2006, the deceased decided to subdivide the said property measuring 130 acres amongst his sons and wives and sought consent to do so from the Land Control Board.
 4. It is the Plaintiff's case that before the process of sub-division and transfer could be finalized, the Defendants on or about May 2008 proceeded without any colour of right to sub-divide the properties among themselves. It is further the Plaintiff's case that despite a consent order of injunction issued by the court, the 1st to 5th Defendants acting either jointly and/or severally caused a change/transfer of the registration of the properties to their names and added the names of Peter Ndumia Gathuma and Rachel Wambui Mathenge in respect of Nyeri/Gatarakwa/2142, 2145 and 2146 without the consent or awareness of the Plaintiffs.
 5. The Plaintiffs aver that the sub-division of LR. No. Nyeri/Gatarakwa/897 was done secretly and without the knowledge of the 1st Plaintiff who was the registered owner. Further, the Plaintiffs assert that the transfer was fraudulent and perpetrated by the use of a power of attorney which the 1st Plaintiff had given to the 5th Defendant in 1994 and was never intended for such use.
 6. But in their joint Statement of Defence dated 24th June 2008, the five (5) Defendants refuted the contents of the Plaintiffs. It is the Defendant's contention that LR NO. Nyeri/Gatarakwa/897 does not belong to the 1st Plaintiff as he had sub-divided and transferred the resultant parcels to the Defendants individually.
 7. The Defendants assert that the 5th Defendant had the requisite authority by dint of the power of attorney donated to him by the 1st Plaintiff to execute the 1st Plaintiff's wishes and that he acted within the powers donated to him in regard to the suit property.



The Plaintiffs' Case

8. At the trial herein, the Plaintiffs called a total of four (4) witnesses in support of their case.
9. PW1- Dr. Joshua Maina Nderitu is the 3rd Plaintiff and a Medical Doctor by profession. He told the court that the 1st Plaintiff was his father while the 2nd Plaintiff was his mother. He further told the court that the 4th Plaintiff is his brother while the Defendants are his step-brothers.
10. PW1 testified that they grew up on land parcel number Nyeri/Gatarakwa/897 together with the family of one of his step mothers and had been there for about 30 years. Around the year 2006, his father who was the 1st Plaintiff decided to sub-divide the said parcel of land between PW1's family and that of the said step-mother. The family went to the Land Control Board and consent was given for the sub-division although there was a disagreement between PW1's father and his step-brothers.
11. PW1 told the court that sometimes in 2008, they realized that the land had been sub-divided and that titles had been issued. They caused a restriction to be registered on the title after which their father and PW1's family filed this suit. PW1 testified that his father had 3 wives and that the first wife was the mother to the Defendants while his own mother was the second. He told the court this sub-division was done using a power of attorney that his father had given to the 5th Defendant to deal with another dispute.
12. PW1 further told the court that his father died on 12th October 2008 and that the original suit property had now been further sub-divided and transferred to third parties despite the existence of an injunction order issued by the court. On the ground however, PW1's mother and his siblings are still using the land. The 2nd and 4th Defendants also have houses on the land.
13. PW2- Stephen Ndirangu Mureithi is a neighbor of the Plaintiffs. He told the court the suit property belonged to the 1st Plaintiff and that he knew how the 1st Plaintiff had sub-divided the same as he was present when it was done.
14. PW3 – Mary Mumbi Ndirangu is also a neighbor of the Plaintiffs. She told the court that the 1st Plaintiff had several wives. The 1st wife lived elsewhere but the 2nd wife lived on the suit property with her children.
15. PW4 – Peter Mwangi Nderitu is the 4th Plaintiff and a brother to PW1. He told the court he was born on the suit property where he had always resided with his mother. PW4 testified that sometime in May to June 2008, when his father was not very well and was in hospital, they heard that the suit property had been sub-divided by his step-brothers. They looked for their father and found him at the 4th Defendant's home in Ol Kalou. He told the court it was not the father who allowed the sub-division. His father had wanted their family to get 40 acres of the land.

The Defence Case.

16. The Defendants called one (1) witness who testified in support of the case at the trial.
17. DW1- Samuel Ndirangu Nderitu is the 5th Defendant and a farmer in Nyahururu. Relying on his Statement dated and filed herein on 7th April 2016, DW1 told the court that his father was the owner of the parcel of land known as Nyeri/Gatarakwa/897 measuring about 130 acres.
18. DW1 testified that in 1994, his father executed in his favour and registered a power of attorney giving DW1 general powers over his father's properties. In 2006, his father decided to sub-divide and share the original suit land amongst some of his children as follows:-



- i). 35 Acres each to Francis Mathenge, Peter Muita and Johson Githaiga
 - ii). 24 acres to Esther Njoki Muigai; and
 - iii). 1 acre to Francis Mathenge, Johnson Hithaiga, Peter Muita, Samuel Ndirangu and Esther Njoki to hold in trust for the family as a common property.
19. DW1 told the court that in order to effectuate his said wishes, his father applied for and obtained Land Control Board Consent for the subdivision of the land. The land was subsequently sub-divided into LR Nos. Nyeri/Gatarakwa/2142, 2143, 2144, 2145 and 2146. DW1 further told the the court that before his father could effectuate the transfers, he started ailing and he instructed DW1 to complete the transfers accordingly through exercise of the power of attorney that he had donated.
20. DW1 testified that he did carry out the desired transfers of the suit properties in the year 2008. He told the court his father had only one lawful wife that is DW1's mother, Lydia Wambui Nderitu who passed away in the year 2003. His father however had other dependants whom he settled in another parcel of land known as Mugunda/Rurii/Block 1/Muthangira/230, 265, 44, 227 and 267.

Analysis and Determination

21. I have carefully perused and considered the pleadings filed herein, the testimonies of the witnesses as well as the evidence adduced at the trial. I have similarly perused the submissions and authorities placed before me by the Learned Advocates representing the Defendants. I was unable to find any submissions on the part of the Plaintiff.
22. This suit has spent a considerable period of time in the court corridors. It was initially instituted by four (4) Plaintiffs on 6th June 2008. Some four months later, Nicholas Nderitu Muita also known as Nderitu Muita Githaiga who was listed therein as the 1st Plaintiff passed away at the ripe age of 90 years. According to the Plaintiffs, the deceased Plaintiff (whom they continued to fondly refer to as the 1st Plaintiff) was the husband of the 2nd Plaintiff together with whom they sired both the 3rd and 4th Plaintiffs.
23. Again, according to the Plaintiffs, the five Defendants were the children of the deceased with his first wife, one Lydia Wambui Nderitu. The Plaintiffs accused the Defendants of proceeding to unilaterally sub-divide the deceased's parcel of land known as Nyeri/Gatarakwa/897 without his consent and/or knowledge and thereafter fraudulently causing the resultant portions to be registered in their own names.
24. On that account, the Plaintiffs have urged the court to revoke and cancel the new sub-divisions and to declare that the Defendants had no legal authority or right to sub-divide the said parcel of land and to transfer the resultant portions unto themselves. The Plaintiffs further urge the court to declare any transactions that may have occurred regarding to the resultant sub-divisions during the pendency of this suit null and void and to order the eviction of the Defendants, their agents and/or servants from the suit premises. They also pray for an award of damages as well as a declaration that the Defendants should not interfere in any manner whatsoever with the parcel of land known as Nyeri/Gatarakwa/897.
25. On their part, the five Defendants categorically refute and deny the Plaintiffs' claim. While they admit that the deceased Plaintiff was indeed their father and the registered owner of the said LR.No. Nyeri/Gatarakwa/897, they deny that the 2nd Plaintiff was the deceased's wife and/or that the 3rd and 4th Plaintiffs were his children.



26. The Defendants assert that the deceased had only one lawful wife, their mother, the said Lydia Wambui Nderitu who is said to have also passed away in the year 2003. The Defendants aver that at the time this suit was instituted, the suit property did not belong to the deceased Plaintiff as he had already sub-divided it and caused the resultant portions to be registered in the names of the Defendants.
27. The Defendants further assert that before his death, the deceased Plaintiff had executed a power of attorney in favour of the 5th Defendant and that pursuant to the authority vested upon him pursuant to the said power of attorney, the 5th Defendant had properly executed the deceased's wish by causing the sub-divisions to be transferred to the Defendants.
28. From the material placed before the court, it was common ground that sometimes in the year 2006, the deceased who was at an advanced age had set out to sub-divide the said LR. No. Nyeri/Gatarakwa/897 said to be measuring some 130 acres and to distribute the resultant parcels to his dependants. Both sides agree that mid that year 2006, the Old Man applied to the Kieni West District Land Control Board to have the said property sub-divided. The parties equally agree that even though consent to sub-divide and transfer was given to the Old Man on 26th September 2006, he fell ill shortly thereafter and was unable to proceed with the transfers.
29. From that point on however, every party herein had their own version of what transpired. According to the Plaintiffs, the deceased disagreed with his first born son – the 5th Defendant at the Land Control Board meeting and the 5th Defendant walked away in protest. It was their case that while they were still waiting for the Old Man to get well and finalize the transfers as he had planned, they came to learn early in the year 2008 that the said property had been sub-divided and the entire parcel of land had been transferred to the Defendants.
30. The Defendants however deny having snubbed the process. According to the 5th Defendant who testified on their behalf, once their father obtained consent for the sub-division, the original parcel of land was sub-divided into LR. Nos. Nyeri/Gatarakwa/2142, 2143, 2144, 2145 and 2146. Thereafter and when his father became ill, the Old Man instructed the 5th Defendant to complete the transfers accordingly through the exercise of the power of attorney he had donated to him. It was his case that he thereafter acted as per the wishes of his father and transferred the resultant portions of land to his siblings.
31. Again, from the material placed before the court, there was no dispute that some 14 years before the transfers were done, the deceased had in 1994 executed a general power of attorney in favour of the 5th defendant. Clause 3 of the said Power of Attorney had given the 5th Defendant power as follows:-
 - “3. To sell all or part of my freehold and leasehold properties whenever situated with the appurtenances either by private contract or by public auction and either together or in separate lots for such price as shall seem reasonable and to give receipts for all or part of the purchase money with like powers to mortgage charge or otherwise deal with my said property or properties as may seem fit as fully as effectively as I could have done.”
32. As it were, while the Defendants have put so much emphasis on the above clause as having given the 5th Defendant power to transfer the deceased Plaintiff's property unto himself and his siblings, I was unable to see anywhere in the above clause where such power was expressly donated to the 5th Defendant. That clause as framed in my view only gave the 5th Defendant power to sell or part with the land in which case he would still be required to account for the proceeds of the sale to the deceased as he was still alive.



33. That clause did not give the donee the power to transfer unto himself the property of the donor. It is trite law that in a situation where the instrument donating the power is ambiguous, the donee who is a mere agent of the donor who is the principal is supposed to act in good faith. In regard to such a situation, Halsbury's Laws of England Vol.1 4th Edition provides the way forward as follows:-

“In the absence of express directions, the agent may exercise his discretion so as to act in the best manner possible for the Principal. An agent whose instructions are in ambiguous terms is justified if he acts in good faith and places reasonable construction on his authority; but where the limits imposed are definite he has no right to exercise his discretion.”

34. In the matter before me, it was apparent that even if clause 3 could be read to be giving power to the 5th Defendant to act as he did, such power had not been exercised in good faith. From the 5th Defendant's own testimony before the court, he was aware that the Plaintiffs had a home and were residing in the suit property, in his own words, from the 1990s. While he was consumed with the idea that his mother, Lydia, was the only “lawful” wife of his father having been married in a church ceremony in 1945, it was apparent that the 2nd Plaintiff resided on the land as the wife of the deceased and that the 3rd and 4th Plaintiffs resided therein as the deceased's children.

35. Indeed while the 5th Defendant denied any relationship with the 2nd to 4th Plaintiffs, the 3rd and 4th Plaintiffs have exhibited their Certificates of Birth which show that they were born in 1975 and 1979 respectively. Those documents also capture the name of their father as Ndiritu Muita Githaiga in the case of the 3rd Plaintiff and Nicholas Ndiritu Muita in the case of the 4th Plaintiff. Those, as we have seen earlier were the names by which the 5th Defendant's father were known.

36. That being the case, I was unable to see how the deceased could have given instructions and/or have wished to bequeath, the entire 130 acres of land only to the household in which the 5th Defendant hailed from, a majority of whom did not even reside on or near the land.

37. Indeed some four (4) months before his death, the 5th Defendant's father had occasion to categorically deny that the 5th Defendant had acted on his instructions and to put matters straight. In an affidavit sworn on 6th June 2008 in support of an application seeking to restrain the Defendants from evicting the Plaintiffs from the land, the late Nicholas Ndiritu Muita swore as follows at Paragraph 11 thereof:-

“That I was further advised by the second Plaintiff that my parcel of land was sub-divided and transferred by way of Power of Attorney. I state categorically that I have not given any Power of Attorney to the Defendants to effect transfer of my said parcel of land. However, I do recall that in 1994 I gave a Power of Attorney to the 5th Defendant Samuel Ndirangu Ndiritu to manage my affairs then. At the time, I had a dispute with my daughter the 3rd Defendant over a parcel of land in Nanyuki. I gave the 5th Defendant the Power of Attorney to enable him sell that parcel of land after the family met and settled the dispute.”

38. In that same Affidavit at Paragraph 3 thereof, the deceased swears that he was a polygamous man with 3 wives and goes ahead to list them all together with their respective children. At Paragraph 3 (b) he lists Mary Nyambura Ndiritu (the 2nd Plaintiff) as his second wife and the 3rd and 4th Plaintiffs as being among his children with his second wife.

39. At Paragraph 5 and 6 of that Affidavit, the deceased further swore as follows:-

“4. That in the year 2006, I decided to distribute my land to my wives and their children. My third wife and her children were staying on my parcel of land



known as Nyandarua Kahuthia Plot 4/92 in Nyahururu. I allocated (her) the said parcel of land as that was the place they were settled. They are living there peacefully and are not involved in this dispute....

5. That my first wife, late Lydia Wambui Nderitu who passed away in the year 2003, was during her lifetime staying at my parcel of land at Ihururu. This is the same place she was buried upon her demise and further this is the parcel of land that I allocated to my son the 5th Defendant herein; and
 6. That my second wife and the 2nd Defendant are staying in all that parcel of land previously known as Nyeri/Gatarakwa/897 measuring about 130 (One hundred and Thirty) acres. In September 2006, I called a family meeting and advised the children of my first and second wives that I wish to sub-divide the said parcel of land to them. I advised them that I wanted the land to be sub-divided into five portions which were to be shared as follows:-
 - a). 1 acre – Myself;
 - b). 35 acres – Francis Manthenge;
 - c). 35 acres Johnson Githaiga;
 - d). 35 acres – Peter Muita; and
 - e). 24 acres- to my 2nd wife and her children.
40. Arising from the foregoing, it was evident that the 5th Defendant was being very economical with the truth. His father had not given him any instructions to effect the transfers and the manner in which he went about it, was certainly not in accord with the deceased's wishes. The transfers done to the Defendants names and the subsequent ones carried out after the commencement of these proceedings were fraudulent and conducted without the authority of the registered proprietor of the land.
41. It follows that I am persuaded that the Plaintiffs have proved their case on a balance of probabilities. Accordingly I hereby enter Judgment for the Plaintiffs as against the Defendants and hereby make the following orders:-
- a). An order is hereby issued revoking and reversing land titles Nyeri/Gatarakwa/2142; 2143; 2144; 2145 and 2146 into Nyeri/Gatarakwa/897 in the name of Nicholas Nderitu Muita;
 - b). A declaration is hereby made that the Defendants had no authority or legal right to sub-divide and transfer the parcel of land known as Nyeri/Gatarakwa/897 to themselves or any other person;
 - c). A declaration is hereby made that the transactions concerning Nyeri/Gatarakwa/2142; 2143; 2144; 2145 and 2146 and more specifically the registration of the names of Peter Ndumia Gathuma and Rachel Wambui Mathenge whose names were entered in the register in respect of Nyeri/Gatarakwa/2142; 2145 and 2146 and any other transactions carried out in respect of the said suit property pendente lite is null and void and any consequential registration and transactions flowing from the said transactions are hereby revoked, cancelled and nullified forthwith.
 - d). An order is hereby made directing the Land Registrar Nyeri to sub-divide the parcel of land known as Nyeri/Gatarakwa/897 in accordance with the wishes of the late Nicholas Nderitu



Muita as contained at Paragraph 39 of this Judgment and to transfer the resulting sub-divisions as follows:-

- i). 1 acre to be registered in the name of the said Nicholas Nderitu Muita;
 - ii). 35 acres in the name of Francis Mathenge;
 - iii). 35 acres in the name of Johnson Githaiga;
 - iv). 35 acres in the name of Peter Muita; and
 - v). 24 acres in the name of the 2nd Plaintiff and her children.
- e). The costs of the sub-divisions in (d) herein above to be borne by the named beneficiaries.
- f). The costs of this suit shall be borne by the Defendants jointly and severally.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT NYERI THIS THURSDAY 25TH DAY OF JANUARY, 2024.

In the presence of:

Mr. Mugambi for the Plaintiffs.

Mr. C.M. King'ori for the Defendants.

COURT ASSISTANT: KENDI

