



Wanjiru & 3 others v Githiyyi & another (Environment & Land Case 575 of 2008) [2024] KEELC 201 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 201 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 575 OF 2008**

**MD MWANGI, J
JANUARY 25, 2024**

BETWEEN

**PETER GITHINYI WANJIRU 1ST PLAINTIFF
JOHN KINYANJUI KINUTHIA 2ND PLAINTIFF
JOSEPH KARARA KINUTHIA 3RD PLAINTIFF
NENE BENSON GITHIYYI 4TH PLAINTIFF**

AND

**KIOI GITHIYYI 1ST DEFENDANT
GEORGE GITHIYYI KIOI 2ND DEFENDANT**

JUDGMENT

Background

1. This is a case that was filed way back in the year 2008. It is a dispute over a parcel of land known as L.R. No. Githunguri/Githiga/T.326 measuring $\frac{1}{4}$ of an acre which was apparently subdivided into 3 portions known as L.R. No. Githunguri/Githiga/T.863, 864 and 865. The Plaintiffs allegedly live on the said parcel of land and have lived there all their lives.
2. The Plaintiffs and the Defendants are family members. The 1st Defendant, who has since passed on was an uncle to the Plaintiffs. The 2nd Defendant is a cousin to the Plaintiffs.

The Plaintiffs' case

3. The Plaintiffs' case is that the suit property was registered sometimes in the year 1959 in the name of the 1st Defendant, Kioi Githiyyi as a trustee for and on behalf of the entire family as he was the eldest son in the family. Subsequently, the suit property was given to the Plaintiffs' mother, one Mary Wanjiru



Githiyyi (now deceased) by the Plaintiffs' grandmother, the late Margaret Wangui Githiyyi, with the concurrence of clan elders, since she was unmarried. It is alleged that the suit property belonged to the late Margaret Wangui Githiyyi.

4. In spite of the fact that the 1st Defendant had been registered as a trustee, the Plaintiffs aver that he refused to transfer it into the name of Mary Wanjiru Githiyyi. He instead, in 1981 transferred the suit property to the 2nd Defendant, who was his son. In 2001, the 2nd Defendant on his part sub-divided the suit property into three (3) portions, namely Githunguri/Githiga/T.863, 864 and 865.
5. The Plaintiffs claim that they have lived on the suit property since their childhood and have established their homes thereon without any protestations or resistance from the Defendants.
6. The Plaintiffs in their amended Plaint, amended on 20th January, 2009 seek various orders, namely:
 - a. An injunction restraining the Defendants jointly and severally from selling, transferring or in any other way disposing off Plot(s) Title Numbers Githunguri/Githiga/T. 863, 864 and 865.
 - b. The cancellation of the transfer of the said plot Title Number Githunguri/Githiga/T 326, from the 1st Defendant to the 2nd Defendant; as well as subsequent subdivision thereof.
 - c. A declaration that Plaintiffs are properly and legally entitled to ownership of the said plot Title Number Githunguri/Githiga/T 326 and/or the subsequent subdivisions thereof, as heirs of the deceased.
 - d. An order directing the Defendants jointly and severally to transfer the said plot Title Number Githunguri/ Githiga/T 326 and or the subsequent subdivisions thereof (plot(s) title Nos. Title Numbers Githunguri / Githiga/T. 863, 864 and 865 respectively), into the names of the Plaintiffs.
 - e. An order that in the event the Defendants fail to effect the transfer in prayer (d) hereinabove, the Land Registrar be authorized to execute all the necessary documents to effect the transfer.
 - f. In the alternative and without prejudice to the foregoing prayers hereinabove, an order that the Plaintiffs have acquired title to the said plot Title Number Githunguri/Githiga/T326 and or the subsequent subdivisions thereof namely, plots title Nos. Title Numbers Githunguri Githiga/T. 863, 864 and 865 respectively and the Defendants' title thereto (if any) is extinguished.
 - g. Costs of this suit with interest thereon.

The Defendants' Amended Defence and Counter-Claim

7. The Defendants denied the Plaintiffs' claim putting them to strict proof. The Defendants further alleged that the Plaintiffs' case was res judicata and an abuse of the process of court.
8. The Defendants contended that the Plaintiffs were illegally and wrongfully in occupation of the suit property. The Defendants therefore Counter-claimed against the Plaintiffs jointly and severally for an order of eviction, mesne profits and costs of the suit and counter-claim.
9. The 1st Defendant passed on during the pendency of this case. The case proceeded against the 2nd Defendant only.



Evidence Adduced.

10. This case had initially proceeded in the absence of the Defendant. The Plaintiffs had presented 3 witnesses who testified before the court affirming their pleadings. Subsequently, the Plaintiffs had filed written submissions and a Judgment date had been given.
11. The 2nd Defendant moved the Court by way of an application dated the 22nd March, 2022 seeking to arrest the judgment and defer its delivery until he was heard to have the matter determined on its merits. The court after due consideration of the 2nd Defendant's application allowed it on the following terms:
 - a. That the case be re-opened for purposes of Cross-examination of the Plaintiffs' witnesses and the hearing of the 2nd Defendant's case.
 - b. That the Plaintiffs be at liberty to call any additional witnesses.
12. That was the basis upon which the case was re-opened.
13. The Plaintiffs presented PW1 and PW2 for Cross-examination on their own application, the testimony of PW3 was expunged from the record as he was said to be unavailable for Cross-examination. The Plaintiffs called two other witnesses who testified as PW3 and PW4 respectively.

Evidence adduced on behalf of the Plaintiffs.

14. PW1, Peter Githiyyi Wanjiru affirmed his testimony of 20th January, 2022.
15. In Cross-examination, PW1 confirmed that he was the son of Mary Wanjiru Githiyyi. The 2nd and 4th Plaintiffs were his brothers. He had other siblings who were not part of this suit. It was PW1's testimony that the 1st Defendant held the suit property in trust for Stanley Kioi Githiyyi, Karara Githiyyi and Mary Wanjiru Githiyyi. His grandmother had directed how the land was to be sub-divided. The letter with those directions was left with the Land Control Board. He had not brought a copy of it to Court.
16. PW1 too confirmed that he had not brought the letter of the alleged meeting of 1977 that had resolved to give the suit property to his mother. He nonetheless agreed that his mother had been given another half-acre of land at a place called Githiga.
17. PW1 elaborated that the 3 subdivisions were already in existence at the time of filing suit whereas two portions were in the name of the 2nd Defendant, whereas the 3rd one was in the name of someone else by the name of Wangari, who was not a party to the suit.
18. PW1 admitted that there was another suit in Kiambu SRMCC No. 505 of 1993 involving the subject matter of this suit that was nevertheless dismissed with costs.
19. In re-examination, PW1 explained that his grandfather had 5 wives. His grandmother, Margaret Wangui Githiyyi was the 2nd wife who had 8 children including his own mother. 3 of those children were to share his grandfather's property namely, Stanley Kioi Githiyyi, Karara Githiyyi and Mary Wanjiru Githiyyi. The suit property was however registered in the name of Stanley Kioi Githiyyi in trust for the said beneficiaries.
20. In response to answers from the Court, PW1 affirmed that all his Co-Plaintiffs were his brothers – sons of Mary Wanjiru Githiyyi. The 1st Defendant was his uncle. PW1 confirmed that he had not attached letters of administration in his mother's estate.
21. PW2 was Benson Nene Githiyyi. He too affirmed his testimony of 19th January, 2022. He is the 4th Plaintiff in this case.



22. In response to questions by the 2nd Defendant's advocate, Ms. Nekesa, PW2 stated that the suit property measures 100x100 square feet (equivalent to 1/4 acre). He averred that he was born and brought up in the suit property. He was however not present when the decision was made to give the suit property to his mother. It was his mother who allegedly told him that the suit property belonged to her. She however, had another piece of land which is about 1 km away from the suit property.
23. In re-examination by his own advocate, Mr. Rukwaro, PW2 stated that as far as he knew there were no documents confirming that the 1st Defendant held the suit property in trust.
24. The 2nd Plaintiff, John Kinyanjui Kinuthia testified as PW3. He adopted his witness statement dated 20th August, 2015 as his evidence in chief. In Cross-examination he confirmed that they have another portion of land – a half acre portion of land, though they live on the suit property.
25. PW4 was Samuel Mburu Karara, who is a cousin to the Plaintiffs. He adopted his witness statement dated 20th August, 2013 as his evidence in chief.

Evidence adduced on behalf of the Defendants.

26. The 2nd Defendant, George Githiyyi Kioi was the 1st witness for the Defence. He confirmed that the 1st Defendant, who was his father passed on in the year 2009.
27. DW1 confirmed the subdivision of the suit property into 3 plots as pleaded by the Plaintiffs. The subdivision was in the year 2001. The 2nd Defendant inherited the suit property from his late father, who had in turn inherited it from his mother, Wangui Githiyyi.
28. It was DW1's evidence that his grandmother Wangui Githiyyi had 6 acres of land – which were in two portions. One portion which was 4 acres was adjacent to river Kamiti and was referred to as the Kamiti Shamba. The other portion of 2 acres was adjacent River Mukuyu and was called the Mukuyu land. Each portion had a plot in Githiga town attached to it.
29. DW1 adopted the testimony in his witness statement as his evidence in chief. He too called one Joseph Kiratu, his own brother as his witness in support of his case. His testimony was an affirmation of the Defendant's case.

Analysis and Determination

30. The evidence by the Plaintiffs raises one critical issue that the court must decide on even before looking into the merits of the case. if at all. The Plaintiffs in their evidence before the Court moreso the 1st witness testified that the parcel of land Githunguri/Githiga/T326 was subdivided into 3 portions known as T.863, 864 and 865. Two of these portions are in the names of the Defendant herein George Githiyyi Kioi, while the 3rd one is in the name of a 3rd party who was known to hem but they did not join her as a Defendant in this matter. The Defendant confirmed the position.
31. PW1 under cross-examination by the Advocate for the Defendant confirmed that the 3 subdivisions were already in existence at the time of filing suit whereas two portions were in the name of the 2nd Defendant, while the 3rd one was in the name of someone else by the name of Wangari, who was not a party to the suit. All through from the time of filing suit this information was known by the Plaintiffs.
32. The one-million-dollar question is how the Plaintiffs could lay a claim on somebody's land yet choose not to join her in the suit as a party. It is not only contrary to the rules of natural justice but also unconstitutional, as it violates Article 47 and 51 of [the Constitution](#). It violates the 'AUDI ALTERAM



PARTEM' rule. The Plaintiffs had the advantage of representation by learned Counsel. I am surprised that such a serious omission escaped the attention of learned counsel.

33. It is a grave omission; actually, fatal to the Plaintiff's suit. Halsbury's Law of England, 5th Edition, vol. 61, P.545 at Paragraph 640 discusses the 'AUDI ALTERAM PARTEM' rule – and points out that those who are likely to be affected by the outcome (of a judicial or quasi-judicial decision) should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted and of the charge or case they will be called upon to meet.
34. In the case of Onyango Oloo –vs- attorney General [1986 – 1989] EA 456, the Court emphasized on the importance of the principle of natural justice. It held that a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right, since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at.
35. The omission as I have already stated is fatal to the Plaintiffs' case. This Court is a guardian of *the Constitution* and the rule of law. In exercising judicial authority, the courts of this country are enjoined to apply the principles enumerated under article 159 (2) (a) (e) of *the Constitution*. Sub-article (2) (e) is of great relevance here. This court is obligated in exercising its judicial authority to ensure that the purpose and principles of *the Constitution* are protected and promoted.
36. The court refuses to be a partaker in the violation of constitutional principles and rule of law. It has no option but to strike out the Plaintiffs' suit, which I hereby do.
37. The Defendant's Counter-Claim too must suffer the same fate. The Defendant has not demonstrated that he has the authority of the unnamed owner of the 3rd portion of land to claim and file suit on her behalf. In his Counter-claim, the Defendant purports to claim all the three portions for himself.
38. It is unfortunate that this matter must end this way without a meritorious resolution of the dispute after almost 16 years in court owing to that grave oversight. The parties are bound by their pleadings.
39. The end result is that the Plaintiffs' suit and the Defendant's Counter-claim are hereby struck out.
40. There shall be no order as to costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JANUARY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Nyabuti holding brief for Dr. Khaminwa for the Defendant

Mr. Rukwaro holding brief for Mr. Kimani for the Plaintiffs

Yvette: Court Assistant.

M.D. MWANGI

JUDGE

