



Waweru (Suing as the Legal Rep. of the Estate of James Waweru Kamau) v Wanjuki (Environment & Land Case 157 of 2019) [2024] KEELC 158 (KLR) (24 January 2024) (Judgment)

Neutral citation: [2024] KEELC 158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 157 OF 2019
AA OMOLLO, J
JANUARY 24, 2024**

BETWEEN

FRANCIS KIARIE WAWERU PETITIONER

SUING AS THE LEGAL REP. OF THE ESTATE OF JAMES WAWERU KAMAU

AND

JOSEPH NDIRANGU WANJUKI DEFENDANT

JUDGMENT

1. Vide a plaint dated 14th May 2019, the plaintiff sued the defendant accusing him of trespassing on their land L.R No. Dagoretti/Riruta/1771, 1774 and Dagoretti/Kangemi/115. The plaintiff stated that these parcels of land were the subject matter in ELC 159 of 2007. It is pleaded that the Defendant has been served with a demand letter to vacate but has failed to comply thus necessitating the filing of this suit.
2. The plaintiff prayed for judgment to be entered against the defendant for:
 - a. An order of permanent injunction do issue restraining the defendant whether by himself and/or through his agents and/or servants from constructing, erecting and/or interfering in any way with all that property known at Title No. Dagoretti/Rirutta/1771 pending the hearing and determination of the suit.
 - b. Eviction from the suit property.
 - c. General damages.
 - d. Costs of the suit.
3. The defendant entered appearance and filed a statement of defence on 10th June 2019. He pleaded that it is discernable from the decree attached to the plaint the orders made on 12th February 2019 were



against the plaintiff. He also denied the averments in the plaint and in particular paragraph 5 where it is pleaded that he has encroached on the suit property.

4. The defendant while denying encroaching on the suit parcels gave the following chronology of events:
 - a. On the 4th January, 2013, the court in Succession Cause No. 1055 of 2012 issued a grant of Letters of Administration Intestate to Teresia Wambui on behalf of the Estate of Priscillah Wamaitha Kamau (Deceased) the 1st Plaintiff in Nairobi ELC Case No. 159 of 2007.
 - b. On 17th April, 2013, the court in Succession Cause No. 1055 of 2012 issued a Certificate of Confirmation of Grant and granted L.R No. Dagoretti/Riruta/1771 to Teresia Wambui, Virginia Wanhiru and Lucy Wamaitha in equal shares.
 - c. On 4th March, 2014, the beneficiary of a share in L.R No. Dagoretti/Riruta/1771 namely Lucy Wamaitha applied to be registered as the proprietor of the same by transmission.
 - d. On 6th October, 2018, the beneficiary of a share in L.R. No. Dagoretti/Riruta/1771 namely Lucy Wamaitha entered into a Lease Agreement for 12 years with the Defendant and the defendant has since taken possession and started construction as per Clause 2 of the Lease Agreement.
5. The hearing of the case started on 12th June 2023 with the plaintiff's testimony who adopted his witness statement dated 20/8/2020. He also produced the documents in the list dated 14/8/2019 and 20/8/2020 as exhibits in support of his case. The witness averred that the suit parcels belonged to his late father James Waweru Kamau – deceased and he has brought the suit on behalf of the estate.
6. According to the plaintiff, the defendant came on the land without permission and built a permanent house on L.R No 1771. PW continued to state that in ELC 159 of 2007 (OS), Virginia Wanjiru and Priscilla had sued him claiming a portion of the land by way of adverse possession. That during the pendency of that suit, Priscilla died while Virginia withdrew claim. It is only Teresia who was given the portion she occupied. He added that Succession Cause 1055 of 2012 was a fake claim because it was taken out claiming Priscilla's share.
7. The plaintiff further averred that the Defendant was claiming his share from Lucy Wamaitha who had had leased the suit portion to the defendant. The Plaintiff asked the court to issue the eviction order. In cross-examination the plaintiff's grandmother (Priscilla) had 4 children and one of them is Njeri Kamau who is the mother to Lucy Wamaitha.
8. He further admitted that Teresia did not withdraw from ELC (OS) 159 of 2007. The Plaintiff also agreed that he was ordered in that case(159) to subdivide the land and give Virginia her title. The witness conceded that he had not brought evidence to ascertain the land occupied by the defendant comprises the share in Virginia's portion or his late father's portion. His further concession is that as at 2011, the suit properties were registered in the names of Priscilla and Virginia.
9. In further cross-examination, the plaintiff confirmed that Lucy Wamaitha was given ¼ acre in L.R 1771 in the certificate of confirmation of grant in Succession Cause 245 of 1996. He also did not deny that the grant in Succession Cause 1055 of 2012 in respect of the state of Priscilla Wamaitha has not been revoked. In that grant, L.R 1771 was given to Teresia, Virginia and Lucy. Consequently, with the grant in place, Lucy Wamaitha had authority to lease the suit portion to the defendant. In re-examination, the plaintiff stated that he filed summons for revocation of grant in cause No 246 of 1996 which application was settled by consent.



10. That the grant which was confirmed in 1998 was issued to Priscilla and Virginia. It was his view that having filed case No 159 of 2007, Virginia and Teresa abandoned their rights in the Succession Cause. That Lucy could not transfer to the Defendant because the land was still in the name of James Waweru – deceased. This marked the close of the plaintiff’s case.
11. The defendant gave his testimony on 17/7/2023 stating that he is a retired teacher. He stated that he met the plaintiff in April 2019 after he visited him at his construction site with two policemen. That the policemen walked away after reading the judgment in OS ELC 159 of 2007. The defendant continued in evidence that the court found for Virginia in respect of L.R No. 1771 and 1774.
12. It is the defence case that he is constructing on a portion 100 x 100 ft leased to him by Lucy Wamaitha. Lucy Wamaitha and the plaintiffs are cousins. The leased portion is comprised in L.R No 1771/Dagoretti/Riruta. He stated that he did not complete the house after he was served with these proceedings. The defendant averred that he was shown a confirmation of grant issued on 25/10/2011 which grant included Lucy’s name to be entitled to ¼ acre in 1771. It was the defendant’s further evidence that Lucy gave him documents showing her efforts to implement the grant. He averred that he is wrongly sued as he has not claimed any ownership rights over the suit property.
13. In cross-examination the defendant answered that paragraph 16 of the judgment (case 159 of 2007) gave a portion of L.R 1771 and 1774 while cause No. 1055 of 2012 gave the three people named therein L.R numbers 1771 and 1774 in equal shares. That what remained to be done was sub-division of the suit property. The defendant did not know if Lucy already received a title to her portion of the suit property.
14. In re-examination, the defendant stated that it is true the judgment in ELC (OS) 159 of 2007 did not give Virginia the whole land. However, he has only leased 100ft x 100ft (¼ of an acre). That in the transfer by transmission (to Lucy) attached a copy of the grant in cause No. 1055 of 2012. According to him, at the time of leasing, Lucy was the legal owner premised on the grant she had. This evidence also marked the close of the defendant’s case.
15. The learned counsels for the parties filed their respective submissions. I have considered the pleadings, evidenced adduced and read the submissions rendered. Consequently, I frame the following questions for determination:
 - a. Whether or not Lucy Wamaitha had capacity to lease the suit portion to the defendant.
 - b. Whether or not there is proof that the leased portion belonged to the estate of James Waweru Kamau.
 - c. Whether or not the court should grant the reliefs sought in the plaint.
16. In defence to the allegations of encroachment, both parties referred this court to three court documents from previous proceedings as follows:
 - i. Judgment rendered in ELC (OS) 159 of 2007 rendered on 24/1/2019.
 - ii. Certificate of Confirmation of grant in Cause No. 246 of 1996.
 - iii. Proceedings in Succession Cause 1055 of 2012.
17. From the evidence, it came out that Lucy’s mother and the plaintiff’s father were siblings sharing Priscilla Wamaitha-deceased as their mother. In the certificate of confirmation of grant in HC Suc Cause No. 246 of 1996, of *James Waweru Kamau – deceased* was first issued to Priscilla & Virginia Wanjiru on 10th August 1998. Virginia is also a daughter to Priscilla (and so aunt to the Plaintiff). In



this grant L.R 1774 was shared equally between Francis, Michael, Paul and Joyce while parcel number 1771 was shared among 7 people. Notable is that the plaintiff is not amongst the seven (7) people while Lucy Wamaitha was given a ¼ acre piece.

18. The plaintiff stated that his application for revocation for grant was settled by consent. According to the court file (in Cause No. 246 of 1996), the consent recorded on 25/10/2011 was in the following terms:
 1. Letters of administration amended on 9/11/2004 are hereby rectified to remove Priscilla Wamaitha Kamau who has since died and Virginia Wanjiru Gachoka and the same be reissued in the names of Francis Kiarie Waweru and Priscilla Wamaitha Waweru.
 2. The properties Dagoretti/Kangemi/115 and Dagoretti/ Riruta/1771 and 1774 currently registered in the names of Priscilla Wamaitha Kamau and Virginia Gachoka be reverted to the deceased.
 3. There be no further dealings in respect of the said properties and the proceeding herein be stayed pending the hearing and determination of HCC ELC No. 159/2007 (OS).
 4. The application for revocation dated 19/10/2009 be and is hereby marked as settled with no order as to costs.
19. Thus, the consent did not vary the distribution of the suit properties as earlier given. Paragraph 4 also stated that the proceedings were stayed pending the outcome of ELC 159 of 2007 which was determined in 2019. At page 16 of Okong'o J found for Virginia Wanjiru (the 2nd plaintiff in ELC 159 of 2007) that she had acquired portions she occupied comprised in L.R Nos Dagoretti/Riruta/1771 and 1774 by way of adverse possession. As at the time of filing this suit, there was no evidence that the plaintiff herein had marked out the portions awarded to Virginia and what remained for the beneficiaries of the estate of James Waweru Kamau – deceased. The plaintiff explained that he had not done so because Virginia did not have funds with the decree in place.
20. As already shown in the extract of the consent above, the assets as distributed on 10th August 1998 have not been set aside. The inference is that there is no court directing that the ¼ acre in 1771 allocated to Lucy Wamaitha was taken away by the change in administration of the estate James Waweru Kamau-deceased. It is my considered view that the plaintiff ought to have moved the Probate Court to vary the final orders in place if any before filing the present suit.
21. This brings me to the question whether Lucy Wamaitha had capacity to lease the suit portion to the defendant. The plaintiff submitted that Lucy Wamaitha was not a beneficiary of Dagoretti/ Riruta/1771 as the property forms part of the estate of Francis Waweru Kamau – deceased and relied on the provisions of section 29 of the *Law of Succession Act*. The said section provides thus;
 - “For the purposes of this Part, “dependant” means-
 - (a) the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - (b) such of the deceased’s parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death”



22. However, section 30 of Cap 160 provides that

“No application under this Part shall be brought after a grant of representation in respect of the estate to which the application refers has been confirmed as provided by section 71”

The provision to section 71 states thus;

“provided that, in cases of intestacy, the grant of letters of administration shall not be confirmed until the court is satisfied as to the respective identities and shares of all persons beneficially entitled; and when confirmed such grant shall specify all such persons and their respective shares”

23. It is not within the jurisdiction of this court to determine who are the rightful beneficiaries as provided under section 29 Cap 160. Rather, this court is to be guided by the list of beneficiaries as per the existing list in the certificate of grant issued on 10th August 1998 which list has not been varied.

24. Consequently, it is my view and I so hold that the properties having been distributed before the filing of this suit. And the lease agreement having been executed in 2018 while Lucy Wamaitha’s rights in 1771 as a beneficiary was still subsisting, I find that she had capacity to deal with her portion as a beneficiary. I say so because once the assets are distributed, the duty of the administrator becomes a trustee for the benefit of the beneficiaries and is to execute documents to ensure that all beneficiaries acquire title documents for their respective portions.

25. Equity dictates that equity aids the vigilance and not the indolent. Civil suit No. 159 of 2007 was determined in January 2019. The plaintiff had the opportunity to pursue the claim in Succession 246 of 1996 to settle the matter of beneficiaries of his late father’s estate instead of filing the present dispute. I decline the invitation to determine the issue of fraud in filing Succession Cause 1055 of 2012 since the Environment and Land Court has no such powers in law. This court can only rely on the orders made in that file by the Probate Court.

26. In the circumstances of this case, I hold that this suit was prematurely brought against the defendant and the orders sought cannot issue. The suit is dismissed for want of merit with costs to the Defendant.

JUDGMENT DATED, SIGNED AND DELIVERED IN NAIROBI THIS 24TH DAY OF JANUARY 2024.

A. OMOLLO

JUDGE

