



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NYERI**

**ELC NO. 643 OF 2014**

**(Formerly Nyeri HCCC NO. 169 of 2011)**

**ELIZABETH WANJIRU WANDERI ..... PLAINTIFF**

**-VERSUS-**

**JOSEPH MWANGI WANDERI ..... 1ST DEFENDANT**

**JENERUS WANJAU WANDERI ..... 2ND DEFENDANT**

**JUDGMENT**

**Introduction**

1. On **21st November, 2011**, the plaintiff herein, Elizabeth Wanjiru Wanderi, brought the current suit seeking judgment against the defendants (Joseph Mwangi Wanderi and Jenerus Wanjau Wanderi) for an order directing the defendants to hand over to her vacant possession of the parcel of land known as **Loc. 14/Kagumoini/1762** (hereinafter referred to as the suit property) and in default an eviction order, to be supervised by the officer commanding Kiria-ini Police Station, to issue against the defendants. The plaintiff also prays for costs of the suit.

2. The plaintiff's claim is premised on the grounds that she is the registered proprietor of the suit property; that the defendants, with no legal claim or right in the suit property, trespassed into the suit property and committed acts of waste therein and that her requests and notices to have the defendants vacate the suit property have not been heeded by the defendants. Explaining that the defendants' continued stay in the suit property is prejudicial to her interest therein (has denied her peaceful and quiet enjoyment of the suit land), the plaintiff urges the court to grant her the orders sought to enable her enjoy her entitlement to the suit property.

3. In their statement of defence, dated **26th July, 2012**, the defendants have denied the averment that the plaintiff is the registered proprietor of the suit property and contended that if the plaintiff has title to the land, then the same must have been obtained fraudulently.

4. The defendants have denied knowledge of any court order decreeing the sub-division of Loc 14/Kagumoini/15 into equal portions. They, however, state that they are aware of the court order dated 24th November, 2006 where the Senior Resident Magistrate Court in Kangema ordered that land parcel Loc 14/Kagumoini/15 measuring 3.6 acres be equally sub-divided between them.

5. The defendants have further denied that they have trespassed into the suit property and contended that

they are rightfully living in their father's land.

6. That notwithstanding, the defendants have acknowledged receipt of the notice to vacate the suit property but termed it void on account of what they term their lawful occupation of the suit property.

## **EVIDENCE**

### **The plaintiff's case**

7. When the matter came up for hearing, the plaintiff told the court that the suit property is registered in her name. She produced the title deed in respect of the suit property as Pexbt-1. She informed the court that she obtained title pursuant to an order issued in Kangema Land Dispute Tribunal Case No. 31 of 2006 in which it was ordered that the land in dispute and which land belonged to her husband, Wanderi, be sub-divided into two portions. She produced the order and the ruling in respect thereof as **Pexbt-2(a)** and **(b)**. She also produced a search certificate obtained in 2010, as **Pexbt-3** and the proceedings in Kangema L.D.T Case No.31 of 2011 as **Pexbt-4**.

8. The plaintiff told the court that the land was, in accordance with the order of the court, sub-divided. She produced the sub-division sheet as **Pexh-5**.

9. Upon being cross-examined by the defendants, the plaintiff, explained that the land was sub-divided by a surveyor. She stated that the land was sub-divided in accordance with the wishes of her husband. The land was to be shared between the two houses of Wanderi (that is between her house and the house of her co-wife, Mercy Waithera).

10. The court heard that the reason the plaintiff had sued the defendants is that despite the land having been sub-divided between the two wives of Wanderi, the defendants had refused to move to their share of the land.

11. P.W.2, **Eustus Mwangi Wanderi**, corroborated the plaintiff's evidence to the effect that the land in dispute belonged to Pius Wanderi and that he (Pius Wanderi) had sub-divided it equally between his two wives. P.W.2 further informed the court that the claim at Kangema Land Disputes Tribunal had been lodged by the 1st defendant (Joseph Mwangi) to restrain his father from distributing the land in question. He informed the court that the dispute was ruled in favour of their father. Following that order, his mother obtained title to her share of the suit property.

12. Upon being cross-examined by the defendants, P.W.2 maintained that their father gave his land to his wives and not his children. He maintained that it is the plaintiff's husband who demarcated the land.

### **The Defence Case**

13. D.W.1, Joseph Mwangi Wanderi, told the court that the suit property belonged to his grandfather and that his grandfather had left him a share. He stated that during sub-division of the land, his father, his brother (2nd defendant) as well as himself were each given a share of the suit property.

14. D.W.1 further told the court that his father was told by their grandfather not to interfere with the manner he had sub-divided the suit land. According to D.W.1, his father was left a different parcel of land, Loc 14/Kagunoini/15 measuring 3 acres.

15. D.W.1 accuses the children of the plaintiff of having presurried their father to sub-divide the suit property into two equal parts. He contended that the Land Disputes Tribunal had ruled that the suit property be sub- divided in accordance with the wishes of his grandfather.

16. D.W.1 told the court that because his father was under intense pressure from the plaintiff's children, he defied the Tribunal's decision.

17. D.W.1 further told the court that the decision of the Tribunal was in their favour and was adopted by the lower court in Kangema.

18. Maintaining that the court ordered that the land be sub-divided in accordance with the wishes of his grandfather, he urged the court to order that a surveyor visits the suit land and place beacons as per the wishes of his grandfather.

19. In cross examination, he admitted that they had filed the case at the Tribunal and that the Tribunal held that the land should be divided equally between the two houses. He denied being aware that Loc 14/Kagumoini/15 was sub-divided into two parcels to wit 1762 and 1763. He contended that if such sub-division existed then the same, must be a forgery.

20. Like D.W.1, D.W.2, **Jenerus Wanjau Wanderi**, told the court that he was given the suit property (Loc 14/Kagumoini/15) by his grandfather. He informed the court that they had filed a claim at Kangema Land Disputes Tribunal after they were unable to agree on the mode of sub-division of the suit property. He also told the court that he was aware of the award of the Tribunal and the order of the court issued on 24th November, 2006 in respect of the award. He admitted that after the Tribunal made its decision, a surveyor visited the suit property but stated that he sub-divided it in accordance with the recommendations of the clan. He further informed the court that a second surveyor visited the suit property and sub-divided it by putting beacons, which they removed.

21. He contended that the order issued on 24th November, 2006 was never rectified and maintained that he lives in Loc 14/Kagumoini/15 which belongs to their father. He further stated that he does not know about the title held by the plaintiff. Finally, he urged the court to order that a surveyor visits the suit property with a view of dividing it among the beneficiaries thereof.

22. At the close of the case, the advocates for the respective parties filed submissions, which I have read and considered.

### **Plaintiff's submissions**

23. In the submissions filed on behalf the plaintiff, a brief overview of the pleadings and the testimonies of the respective parties is given and submitted that the plaintiff has proved that the suit property was sub-divided pursuant to a valid court order; the sub-division is said to have been acknowledged by the defendants, who went a head and removed the beacons.

24. It is submitted that no fraud was proved in the acquisition of title by the plaintiff and that the award pursuant to which the plaintiff obtained title was not challenged.

25. It is pointed out that the alleged unenforceable order was rectified and submitted that, in view of the foregoing, the defendants have no basis for continuing the unending family struggles. The court is urged to put the struggles to an end by granting the orders sought in the plaint.

### **Defendants' submissions**

26. On behalf of the defendants, it is pointed out that the suit property is a sub-division of Loc 14/Kagumoini/15 registered in the name of Wanderi Kanyoro (deceased) and acknowledged that before the deceased passed on, their was a dispute over the suit property. It is also acknowledged that the dispute was referred to the Kangema Land Disputes Tribunal which ordered that the suit property be divided into two equal parts, each measuring 1.8 acres. It is also acknowledged that the award of the Tribunal was adopted as a judgment of court in Kangema Law Courts.

27. Arguing that the dispute concerning entitlement of the suit property was not determined, counsel for the respondent submits that the order by the Tribunal did not specify who takes what portion of the suit property.

28. Arguing that it is not clear how the plaintiff obtained the title deed she holds, counsel for the defendants submits that there is a possibility that registration in favour of the plaintiff was effected using forged documents.

29. It is also submitted that it is not known whether Wanderi Kanyoro declared which house takes what portion of the suit property. It is further submitted that there is no evidence that the estate of the said Wanderi Kanyoro was lawfully succeeded.

30. The plaintiff is said to have failed to provide cogent explanation of how the property was sub-divided and who was assigned which portion of the suit property. According to defendant's counsel, until that is done, it is not possible to bring the dispute to its logical conclusion.

31. Maintaining that the dispute concerning the suit property had not being logically concluded at the time the plaintiff obtained title to her portion of the suit property, the defendants argue that the title held by the plaintiff is invalid for having been obtained when there was a pending dispute in respect of the suit property.

32. In the circumstances, the court is urged to preserve the defendants' right to the property and inheritance.

### **Analysis and determination**

33. From the evidence and submissions filed in respect thereof, the following facts are common ground/not in dispute:-

- a. That the suit property is a sub-division of Loc 14/Kagumoini/15 which was registered in the name of Wanderi Kanyoro (deceased);
- b. That the defendants had lodged a claim at the defunct Land Disputes Tribunal to wit, Kangema Land Dispute Tribunal Case No. 31 of 2006 to force the deceased to give the land to them in accordance with what the defendants termed the wishes of their grandfather.
- c. That upon hearing the case presented before it, the Tribunal determined that the suit property (Loc 14/Kagumoini/15) was family land and ordered that it be sub-divided equally among the two families of the deceased.
- d. That the award of the Tribunal was later adopted as the judgment of court in Kangema SRMCCC No. 31 of 2006.
- e. That there was an error in the order extracted pursuant to the judgement of the Court herein in that the order required the suit property which measures 3.6 acres to be sub-divided into three equal portions of 1.8 acres.
- f. That owing to the error referred to in (e) above, the defendants herein moved the court for stay of execution of the order on the ground that it was unenforceable.
- g. That the court dismissed the defendants' application for stay of execution of the judgment and the order issued pursuant thereto on the ground that the application had been overtaken by events (The impugned order had been corrected/rectified).

34. Apparently, pursuant to the order of the court, which directed the suit property to be sub-divided into two portions 1.8 acres each and distributed between the two families of the deceased, the plaintiff executed the decree and managed to have the suit property divided into two parcels as ordered by the Court.

35. Although the defendants claim that the sub-division of the suit property and transfer of a portion thereof in the name of the plaintiff was effected by fraud, the evidence on record, and in particular the decree directing that the property be sub-divided equally between the family of the plaintiff and the family of the defendants negates that assertion.

36. There is evidence that the defendants were participants in the processes that led to the issuance of the order for sub-division and sharing of the suit property. The evidence on record shows that their

application for stay of execution of the order for sub-division and sharing of the suit property between the two families of the deceased was refused.

37. Whilst the defendants claim that the sub-division and transfer of the suit property was done while the dispute concerning entitlement to the suit property was still pending, there is no evidence capable of proving that fact. The evidence on record shows that the decree for sub-division of the suit property equally between the two families of the deceased was not reviewed or appealed from.

38. There is evidence that pursuant to the order of the court that the suit property be divided equally between the two families of the deceased, a surveyor visited the suit property and sub-divided the suit property. There is evidence that after the surveyor sub-divided the suit property, the defendants removed the boundaries or interfered with the sub- divisions making the current suit necessary (D.W.2 acknowledged that they (read the defendants) removed the boundaries because they believed and still believe that the suit property belongs to their father (the deceased person herein).

39. I wish, at this juncture, to comment about the conduct of the defendants of interfering with the boundaries put up by a surveyor in execution of a valid decree of the court. In my view, that conduct was unlawful in that it offended the provisions of **Section 29** of the Survey Act, Cap 99 Laws of Kenya which provides:-

**“29. Penalty for tampering with survey marks**

**Any person, not being duly authorized so to do, who takes away, is found in possession of, removes, destroys or displaces, or alters the position of, any survey mark, or wilfully defaces, mutilates, obliterates or breaks any survey mark, shall be guilty of an offence and liable—**

**(a) if such act was done with intent to defraud, to imprisonment for a term not exceeding three years; or**

**(b) in any other case, to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding six months or to both such fine and such imprisonment, and, in addition to or instead of any such penalty, the court convicting a person of any such offence may order that person to pay to the Director the cost of restoring such survey mark (including the cost of any survey made for that purpose).”**

40. The procedure of handling boundaries disputes is provided for under Part II of the Land Registration Act. Under that part of the Law, it is an offence for a person, unless authorized to so by the Registrar, to deface, remove, injure or otherwise impair a boundary feature or any part of it. In this regard see **Section 21** thereof which provides as follows:-

**“Any person who defaces, removes, injures or otherwise impairs a boundary feature or any part of it unless authorized to do so by the Registrar commits an offence and is liable on conviction to imprisonment for a term not exceeding two years or to a fine not exceeding two hundred thousand shillings or to both.”**

41. It is my considered view that if the defendants were aggrieved by the sub-division effected pursuant to the decree of the court herein, they ought to have challenged it through the process contemplated in law.

Feigning ignorance of the orders issued by the court and pursuant to which the sub-division of the suit property was done and new titles in respect of the suit property issued, is in my view, a demonstration of impunity or disregard of the law and its processes on the part of the defendants. No court of law can countenance such disregard of court orders and its processes.

42. Concerning the argument that the suit property was not lawfully succeeded to, I begin by pointing out that such an issue was not raised in the pleadings filed in the suit property and that no evidence capable of proving or disproving that fact was adduced. There being no evidence capable of proving that fact and

the same having not being pleaded as by law required, I find and hold that the same cannot be relied on to challenge the plaintiff's entitlement to the orders sought.

43. Being of the view that the title held by the plaintiff was issued in a legally sanctioned process and there being no reason for continuing the allegedly dispute concerning the sharing of the suit property, I find and hold that the plaintiff has made up a case for being granted the orders sought. Consequently, I enter judgment in her favour as prayed for in the plaint dated 13th October, 2011.

44. This court gives the defendants 45 days to vacate Loc 14/Kagumoini/1762 failure of which they be evicted therefrom.

Orders accordingly.

**Dated, signed and delivered at Nyeri this 8<sup>th</sup> day of June, 2016.**

**L N WAITHAKA**

**JUDGE.**

In the presence of:

Mr. Gitibi h/b for Mr. Kimunya for the plaintiff

Joseph Mwangi Wanderi - 1st defendant

Jenerus Wanjau Wanderi -2nd defendant