



**Maitho (As the Legal Representative of Joshua Maitho Ndiang’ui - Deceased) v Kagika & 2 others
(Environment & Land Case 681 of 2017) [2024] KEELC 762 (KLR) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 762 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 681 OF 2017
MN GICHERU, J
FEBRUARY 19, 2024**

BETWEEN

**GRACE NYAWIRA MAITHO (AS THE LEGAL REPRESENTATIVE OF JOSHUA
MAITHO NDIANG’UI - DECEASED) PLAINTIFF**

AND

**JOSEPH GATHAGU KAGIKA 1ST DEFENDANT
ANDRIAN MURITHI 2ND DEFENDANT
ELIZABETH WAMBUI GITAU 3RD DEFENDANT**

RULING

1. On 18/5/2023, I issued directions that the parties file written submissions on the way forward in this matter.
2. Pursuant to these directions, the plaintiff’s counsel filed his submissions dated 3/10/2023 in which he raised the following points.
3. Firstly, he said it is unusual for the court to issue such direction without any application by any of the parties.
4. Secondly, learned counsel for the plaintiff urged that the Constitution of Kenya, the Environment and Land Court, the Civil Procedure Act and the Civil Procedure Rules do not empower the court to make such directions.
5. Thirdly, the plaintiffs are extremely prejudiced by the directions which require them to justify why their suit should be heard while there is no similar requirement on the part of the defendants to make similar submissions on their counterclaims.



6. Fourthly, the plaintiffs have a constitutional right to be heard under Article 50(1) of the Constitution and they should not be denied that right.
7. Fifthly, Article 40 of the Constitution protects the plaintiffs right to own property which right cannot be taken away from them without due compliance with the law.
8. Sixthly, it is not disputed that the plaintiffs are the registered proprietors of L.R Ngong/Ngong/59340, 59348 and 59357 and they were in occupation of even prior to the issuance of the title deeds.
9. Seventhly, an application to consolidate this case and ELC 743 of 2017 and 118 of 2018 was dismissed by Hon. Justice Ochieng in 2019 and that dismissal stands as there was no appeal preferred against it.
10. For the above stated reasons, counsel for the plaintiff is of the view that the plaintiffs' suit and the defendants' counterclaim be heard on merit.
11. The first defendant's counsel in his submissions dated 2/11/2023 raised the following points in reply. Firstly, the ownership of the suit land has already been determined by this court in Kajiado ELC No. 743 of 2017. This court cannot therefore rehear the case afresh as this would offend the *res judicata* principle.
12. Counsel for the second defendant in her submissions dated 7/11/2023 raised the following issues. Firstly, the parties in case Numbers 681/2017, 743/2017 and 118 of 2018 are similar.
13. Secondly, the subject matter is L.R Ngong/Ngong/48197 which was subdivided into thirty three (33) which are 59340-59372. The plaintiffs in this case claim L.R. 59355, 59356, 59372, 59340, 59357 and 59348.
14. Thirdly, in all the cases Jane Waithera Lesaloi was the vendor of the above mentioned parcels all of which emanated from L.R. No. 48197. The only difference between this case and case number 743 of 2017 is that in this case she is a witness while she was a defendant in the other case.
15. Fourthly, in case no. 743 of 2017, Jane Waithera Lesaroi was found to have unlawfully subdivided L.R. 48197 into the 33 parcels which include those registered in the names of the plaintiffs herein.
16. Fifthly, in Ngong Senior Principal Magistrate's Criminal Case No. 194 of 2016, the said Jane Waithera Lesaloi was convicted of forgery of the court order that she used to subdivide L.R. 48197 into 33 parcels. In this case, the plaintiffs had also been charged but they were acquitted because they were not parties in ELC 743/2017. In the criminal case they were represented by the same counsel as in this case.
17. Sixthly, on 24/4/2019 when this case was set down for hearing, the plaintiffs opted to proceed with an application for injunction and it is a wonder why they are not keen in prosecuting this case.
18. Seventhly, this court has been patient and lenient with the plaintiffs as this is a matter that should not be pending. There is nothing more left to litigate upon as the pertinent issue has already been dealt with. The plaintiff are accused of filing a multiplicity of suits which they do not want to prosecute with their sole aim being harassing, irritating, annoying the defendants with endless litigation.
19. I have carefully considered the submissions by learned counsel for the parties and the issues raised therein. I make the following findings.



Firstly, this court has power to make directions that give effect to the overriding objective of the *Civil Procedure Act*. The said overriding objective is to be found in Section 1A (I) of the *Civil Procedure Act* which provides as follows.

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the *Act*”.

Section 1A (3) of the *Civil Procedure Act* imposes a duty on a party or an advocate for such a party to assist the court in achieving the overriding objective. It provides.

“A party to civil proceedings or an advocate for such a party is under a duty to assist the court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court”.

Article 159 (2) (b) of the *Constitution* of Kenya provides

(2) “In exercising judicial authority, the courts shall be guided by the following principles

(b) “Justice shall not be delayed”

This case has been pending in court since the year 2016. This is its eighth year. This court has constitutional and statutory authority and duty to expedite the conclusion of this case and any other case. It is not therefore unusual or wrong for the court to issue directions that will give effect to its expeditious disposal.

20. Plaintiffs who filed a case in the year 2016 cannot be heard to say that they are prejudiced by an order that expedites the conclusion of their case. They would only be prejudiced if they do not wish the case to be concluded.
21. The directions given on 18/5/2023 are in black and white. They read as follows. “Submissions on the way forward to be on 9/11/2023. Written submissions to be filed before then”. Both sides were expected to file their submissions. The directions did not single out the plaintiffs. They did not state that there would be no submissions on the counterclaim. It is not therefore correct to say that the defendants were not required to justify their counterclaims.
22. It is true to say that the plaintiffs are entitled to a fair hearing. The same applies to the defendants. The plaintiffs have not been denied this right. They have however not been keen in prosecuting their case.
23. It is correct to say that Article 40 of the *Constitution* protects the right to own property but that protection does not extend to unlawfully acquired property and sub-article (6) of the same Article is explicit on this.
24. In ELC Case No. 743 of 2017, the court found that the defendants have been in occupation of the suit land since the eighties. If the plaintiffs were in occupation of the suit land since purchase, and if they are the registered owners, why then did they file this suit. In case no. 743 of 2017 which was originally filed as case No. 514/2013 in Nairobi, the main prayer was for the eviction of the defendants from the suit land. It is therefore not correct to say that it is not disputed that the plaintiffs’ are in occupation of the suit land.
25. The fact that an application to consolidate this case and other related cases was dismissed in 2019 cannot restrict the power of this court in making the orders that it deems fit. In its ruling of 18/5/2023, the court brought to the attention of the plaintiffs’ counsel the judgment dated 2/11/2022 in which



Jane Waithera Lesaloi was found to have unlawfully subdivided L.R. 8801 which gave rise to the suit land and the subsequent subdivisions.

26. In that judgment, the said Jane Waithera Lesaloi was ordered to pay costs to all the other parties for reasons that are stated in the judgment.
27. This court having decided on the ownership of the suit land in ELC No. 743 of 2017 cannot again be called to make another decision regarding the same land. In fact the plaintiffs in that case have in an affidavit dated 19/10/2023 deposed that there is a live appeal being Civil Appeal No. E243 of 2023. This court cannot proceed to hear a case in which it has already made a decision and which is also pending at the court of appeal. It would offend the principle of *res judicata*. I am therefore persuaded by the submissions by learned counsel for the defendant. The decision in case No. 743 of 2017 binds this case and the parties herein must abide by it.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 19TH DAY OF FEBRUARY 2024.

M.N. GICHERU

JUDGE

