



REPUBLIC OF KENYA



KENYA LAW
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**Wambui v Wangari (Environment and Land Appeal E006 of 2023)
[2024] KEELC 4214 (KLR) (29 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 4214 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

AK BOR, J

APRIL 29, 2024

BETWEEN

JANE NJERI WAMBUI APPELLANT

AND

IRENE NYAWIRA WANGARI RESPONDENT

JUDGMENT

1. This appeal challenges the decision of the Senior Principal magistrate, Hon. Ben Mararo delivered in Nanyuki Chief Magistrates ELC Case No. E041 of 2021 vide which the Learned Magistrate directed the Appellant to execute the forms for the application for Land Control Board (LCB) consent and other necessary documents to facilitate the partition of the suit land into two equal parts within 14 days to enable the Appellant and the Respondent have their own distinct portions. In default, the Executive Officer of the court was to execute the necessary documents according to the decision made on 4/4/2023.
2. Being aggrieved by that decision, the Appellant filed a memorandum of appeal on 12/4/2023 faulting the Learned Magistrate for failing to hold that there was no existing judgment, decree or order that she had refused to comply with and secondly, for prematurely allowing the application dated 10/1/2022 before the matter had gone for pretrial for it to be heard on merit. The Appellant emphasized that there was no basis for the court to allow the application dated 10/1/2022.
3. The other ground advanced by the Appellant was that according to the report prepared by Homeland Surveyors on 27/1/2022, the suit land could not be subdivided into two equal portions without contravening the relevant planning regulations. The Appellant also relied on the agreement dated 30/8/2019 between the parties in this appeal and Joseph Mugo Thinwa, which prohibited further subdivision of the land known as Narumoru/Narumoru Block 1/Ragati 2530.



4. The Appellant faulted the trial magistrate for finding that there was no decree or order of the court directing her to execute any conveyance, contract or other documents but nevertheless allowing the application.
5. Parties filed and exchanged written submissions, which the court has considered. The Appellant submitted that she was jointly registered as proprietor of the land measuring approximately 0.08 hectares with the Respondent on 24/11/2020. She submitted that the Respondent entered the suit land in June 2021 and started destroying her structures with the intention of disposing of the whole suit property to a third party to defeat her claim in the suit property. She pointed out that in the suit before the Magistrate's Court, she sought a permanent injunction to restrain the Respondent from transferring, selling, alienating, entering, trespassing, demolishing structures, contracting or in any manner interfering with her ownership, use and possession of her portion of the suit property. The injunction was granted but was later set aside by the court.
6. Thereafter, the Respondent filed the application dated 10/1/2022 seeking to have her execute the application for LCB consent together with other documents to facilitate the partition of the suit land into two equal portions so that they could each have their own distinct portions. She faulted the Learned Magistrate for allowing that application and contended that there was no judgment or decree capable of being complied with. She also faulted the Learned Magistrate for failing to consider the agreement and instead invoking Article 40 of the Constitution to defeat the agreement.
7. The Appellant submitted that Section 98 of the Civil Procedure Act through which the Respondent moved the court was inapplicable in the circumstances of this case and that there was no decree capable of enforcement under that section. The Appellant cited Milimani HCCC No. 227 of 2003 – National Industrial Credit Bank Limited v Ndemi Lane Apartments in support of that point.
8. The Appellant contended that the Respondent should have instituted a suit under Section 2 of the Civil Procedure Act instead of filing the application dated 10/1/2022. The Appellant contended that having relied on the wrong provisions of the law, the trial court should not have granted the orders the Respondent sought. The Appellant urged the court to set aside the ruling of the Learned Magistrate and dismiss the application dated 10/1/2022 with costs. She also sought to be awarded the costs of the appeal.
9. The Respondent set out three issues for determination in the appeal to wit, whether the Appellant had violated the Respondent's constitutional right to property, whether she had come to court with clean hands and lastly, whether the trial court was right in considering the substance of the Respondent's application rather than the form. The Respondent cited Article 40 of the Constitution which guarantees every person the right to own, use and enjoy property. She averred that the clause in the agreement dated 30/8/2019 barring the parties from further sub-dividing the suit land was unconstitutional. She expresses concern about the report prepared by Homeland Surveyors who are private practitioners and added that the report could not override a physical planner working for the government who had been instructed by the Assistant County Commissioner to approve the partition of the suit land. She conceded that they were the joint owners of the suit property and went on to add that the Appellant occupied the suit land exclusively and had denied her access which was in violation of her right to own property.
10. The Respondent submitted that the Appellant failed to disclose that she was only facilitating the partition of the suit land so that each party would have their own distinct portion. She added that the Appellant misled the court in stating that the Respondent had trespassed onto the Appellant's property with the aim of selling the whole land to a third party. She adverted to the resolution reached



at the meeting held at the Assistant County Commissioner's office on 22/6/2021 to the effect that the suit property would be partitioned for the two parties to get their distinct portions.

11. The Respondent maintained that the Appellant had not come to court with clean hands and urged that the appeal should be rejected. The Respondent relied on Article 159 of the *Constitution* on justice being administered without undue regard to procedural technicalities in urging that her application before the Learned Magistrate was clear in substance and that the court considered substance over form.
12. The issue for determination is whether the court should allow the appeal and set aside the decision of the Learned Magistrate which directed the Appellant to execute the forms for LCB consent and other documents for the partition of the suit property into two equal portions.
13. It is not in dispute that the parties to the appeal own the land jointly and are registered as proprietors of the suit land. The dispute arose after the Respondent obtained orders for the execution of documents to facilitate the subdivision of the suit land into two portions so that either party could have their own distinct portion. The Appellant appears to be using the agreement and the report opposing the subdivision of the suit land on grounds that it would contravene planning laws both as a sword and as a shield.
14. The court notes that in the suit before the Magistrate's Court, the Appellant sought a permanent injunction to restrain the Respondent from transferring, selling, alienating, entering, trespassing, demolishing structures, contracting or in any manner interfering with her ownership, use and possession of her portion of the suit property, creating the impression that the joint owners each have their distinct portion already mapped out in the suit land.
15. Section 98 of the *Civil Procedure Act*, which is the law the Respondent relied on in her application before the Learned Magistrate, deals with execution of instruments by order of the court where a person neglects or refuses to comply with the decree or order directing him to execute any conveyance, contract or other documents. The court may on conditions it may determine, order that the conveyance, contract or other document should be executed or the negotiable instrument endorsed. There is no evidence of the existence of a decree or order that had directed the Appellant to execute any conveyance, contract or other document.
16. The court allows the appeal to the extent that the orders which the Learned Magistrate made with regard to the application dated 10/5/2022 fell outside the ambit of Section 98 of the *Civil Procedure Act* which relates to compliance with a decree or order directing a person to execute a conveyance or contract.
17. The orders made by the Learned Magistrate on 4/4/2023 are set aside. Each party will bear her costs for the appeal.
18. The matter is remitted to the Chief Magistrate's court for determination by another Magistrate other than the Hon B. Mararo, SPM, of the issue whether the suit land is capable of partitioning and if it is not, whether parties can agree to have one party purchase the other party's portion in the suit land. Failing agreement, the suit land is to be sold and the proceeds shared equally between the parties.
19. Each party will bear her costs for the appeal.

DELIVERED VIRTUALLY AT NYAHURURU THIS 29TH DAY OF APRIL 2024.

**K. BOR
JUDGE**



In the presence of: -

Mr. William Bwonwonga for the Appellant

Mr. Jesse Mwiti for the Respondent

