



**Njoroge (Suing as the Personal Representative of the Estate of Patrick Njoroge Mwangi - Deceased) v Mwangi & 4 others (Environment & Land Case 73 of 2018) [2024] KEELC 14145 (KLR) (29 October 2024) (Judgment)**

Neutral citation: [2024] KEELC 14145 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 73 OF 2018  
BM EBOSO, J  
OCTOBER 29, 2024**

**BETWEEN**

**CATHERINE MUTHONI NJOROGE ..... PLAINTIFF  
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF  
PATRICK NJOROGE MWANGI - DECEASED**

**AND**

**MICHAEL KIMANI MWANGI ..... 1<sup>ST</sup> DEFENDANT  
SIMON MWANGI KIMANI ..... 2<sup>ND</sup> DEFENDANT  
THIKA DISTRICT LAND SURVEYOR, THIKA ..... 3<sup>RD</sup> DEFENDANT  
LAND REGISTRAR, GATUNDU ..... 4<sup>TH</sup> DEFENDANT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. This suit was instituted by the late Patrick Njoroge Mwangi [referred to in this Judgment as “the late Patrick”] in March 2018. He died during the pendency of the suit. He was succeeded by his widow, Catherine Muthoni Njoroge.
2. The dispute in the suit revolves around the question as to how land parcel number Ndaragu/Gathaite/46, measuring approximately 4.5 acres, should be surveyed and vested in the three parties that are entitled to the land. There is no contestation on the acreage each of the parties is entitled to. The only contestation is on how the subdivision survey should be done.



3. The land was initially co-owned by: (i) Felista Mugure Mwangi – Deceased – 1 Acre; (ii) Michael Kimani Mwangi – 2 Acres; and (iii) Patrick Njoroge Mwangi – 1.5. Acres. The late Felista Mugure Mwangi was mother to Michael Kimani Mwangi [1st defendant] and Patrick Njoroge Mwangi [the deceased plaintiff]. Felista died in 2008. A Certificate of Confirmation of Grant relating to her estate was issued to Michael Kimani Mwangi. The Certificate of Confirmation of Grant vested her one (1) Acre in Patrick Njoroge Mwangi [her son], and Simon Mwangi Kang’u [her grandson and son to Michael Kimani Mwangi] in equal shares, that is, 0.5 acres for each beneficiary.
4. The dispute in this suit was triggered by the above succession court order. On the ground, the 1 acre portion that was occupied by Felista abuts the 2 acre portion that is occupied by Michael but does not abut the 1.5 acre portion that is occupied by Patrick’s estate. The administrator of the estate of Patrick wants to disturb the existing land occupation set-up so that the 0.5 acre portion which the late Patrick inherited from his late mother [Felista] is consolidated with the 1.5 acre portion that his estate occupies, to make 2 consolidated acres. Michael is opposed to any disturbance of the existing land occupation set- up. He contends that parties have always known their respective portions which they have extensively developed. Michael’s position is that the 1 acre inherited from their mother by Patrick and Simon should be shared between the two of them without any disturbance to the existing land occupation set-up. Before I analyse and dispose the key issue in the suit, I will briefly outline the parties’ respective cases, evidence and submissions.

#### **Plaintiff’s Case**

5. Patrick Njoroge Mwangi (deceased plaintiff) instituted this suit through a plaint dated 5/3/2018. Upon his death, he was succeeded by his widow, Catherine Muthoni Njoroge. He sought the following reliefs: (i) an order that Land Parcel No Ndarugu/ Gathaite/46 be sub-divided as per the Surveyor’s Report dated 31/1/2018; (ii) an order that she be issued with a single title deed for Patrick’s 2 acres out of parcel number Ndarugu/ Gathaite/46; (iii) costs and interests;
6. The case of the plaintiff was that the title deed relating to the suit land which measures approximately 4.5 acres was registered in the name of Felista Mugure Mwangi (deceased), Patrick Njoroge Mwangi (deceased) and the 1st defendant in the ratio of 1 acre; 1.5 acres; and 2 acres respectively. Before the death of Felista, her family cultivated the suit land collectively while alternating the area under cultivation. The plaintiff contended that initially she, together with her late husband, Patrick Njoroge Mwangi (deceased), cultivated the middle portion of the suit land and subsequently cultivated the eastern part upon the request of the late Felista Mugure Mwangi (deceased) and her late husband. The late Felista Mugure Mwangi died on 27/8/2008. Consequently, Patrick Njoroge Mwangi (deceased) [the 1st defendant] and their elder brother Francis Mwangi Kangu instituted succession proceedings relating to the estate of Felista Mugure Mwangi (deceased) in 2012 and they were issued with a Grant. The grant was confirmed on 14/5/2014. Prior to the confirmation of the Grant, the three brothers agreed that Patrick Njoroge Mwangi’s inheritance of 0.5 acre of the suit land from Felista Mugure Mwangi’s (deceased) estate would be consolidated with his other 1.5 acre portion to enable him get a single title. However, the 1st defendant refused to consent to the proposed consolidation. The plaintiff contended that the 3rd defendant surveyed the suit land pursuant to the court order issued by the Thika Chief Magistrate Court on 29/6/2017 in Succession Cause No 752 of 2012.

#### **Case of the 1st and 2nd Defendants**

7. The 1st and 2nd defendants filed a statement of defence dated 25/5/2018. The case of the 1st and 2nd defendants was that the Certificate of Confirmation of Grant issued by the Thika Chief Magistrate Court in Succession Cause No 752 of 2012 directed that Felista Mugure Mwangi’s 1 acre share of the



suit land be shared equally between Patrick Njoroge Mwangi and the 2nd defendant. The said court subsequently rendered an order on 5/12/2017 directing that the 1-acre portion be shared in accordance with the Confirmed Grant issued on 16/5/2014. The 1st and 2nd defendants contended that the late Patrick Njoroge Mwangi neither appealed against any of the orders given in Succession Cause No 752 of 2012 nor applied to revoke the confirmed Grant.

### **3rd, 4th and 5th Defendants' Case**

8. The 3rd, 4th and 5th defendants filed a statement of defence dated 24/4/2018. The case of the 3rd, 4th and 5th defendants was that this Court lacked jurisdiction to adjudicate upon the claim in the suit. The 3rd, 4th and 5th defendants contended that the register for the suit land was opened on 13/1/1958 and on the same day the suit land was registered in the name of Mwangi Gathiomi (deceased). Vide a transfer registered on 20/9/1989, the suit land was transferred from Mwangi Gathiomi to Felista Mugure, Michael Kimani Mwangi and Patrick Njoroge Mwangi to be owned in common in the ratio of 1 acre, 2 acres and 1.5 acres respectively.

### **Plaintiff's Evidence**

9. During trial, Catherine Muthoni Njoroge testified as PW1. She adopted her written witness statement dated 17/9/2021 as part of her evidence-in-chief. PW1 stated that she was the administrator of the estate of her late husband, Patrick Njoroge Mwangi. Her evidence was that, initially the suit land was registered in the names of Felista Mugure Mwangi (deceased), Michael Kimani Mwangi and Patrick Njoroge Mwangi (deceased) as tenants in common in the ratio of 1 acre, 2 acres and 1.5 acres respectively. PW1 testified that upon the death of Felista on 27/8/2008, her 1 acre share of the suit land was inherited equally in the ratio of 0.5 acres each by Patrick Njoroge Mwangi (deceased) and the 2nd defendant.
10. PW1 testified that she lived in a timber house built on the 1.5-acre portion belonging to her late husband, Patrick Njoroge Mwangi (deceased) and that she had to cover a long distance to access the additional 0.5 acre land which Patrick Njoroge Mwangi (deceased) inherited from Felista Mugure Mwangi's estate. PW1 further testified that she had no issue with the orders given in Thika Chief Magistrate Court Succession Cause No 752 of 2012. She added that she had an issue with the fact that the two portions of the suit land belonging to Patrick Njoroge Mwangi (deceased) are not consolidated. PW1 stated that the 1st and 2nd defendants declined her proposal to conduct a fresh subdivision survey of the suit land.
11. She produced the following 10 exhibits: (i) Copy of the title for land parcel number Ndarugu/Gathaite/46; (ii) Certified copy of the initial search for land parcel number Ndarugu/Gathaite/46; (iii) Copy of the death certificate for Felista Mugure Mwangi; (iv) Copy of Certificate of Confirmation of Grant dated 16/5/2014, (v) Copy of the current official search for the suit land; (vi) Copy of an order dated 11/1/2018; (vii) Copy of an order dated 29/6/2017; (viii) Copy of order dated 30/3/2017; (ix) Surveyors report dated 31/1/2018; and (x) Copy of ID for Francis Mwangi Kang'u.
12. During cross-examination, PW1 stated that she was aware that on 22/6/2017, the Thika Chief Magistrate Court issued an order directing the administrator of the estate of Felista Mugure Mwangi (deceased) to allocate the share of each beneficiary according to their current homestead occupation. PW1 further stated that she and the 1st defendant had lived in the positions they currently occupy on the suit land since 1989 when she was married into the family.
13. In re-examination, PW1 testified that the surveyor's report filed in Thika Chief Magistrate Court Succession Cause No 752 of 2012 indicated that it was possible to consolidate the two parcels belonging to Patrick Njoroge Mwangi (deceased).



## Evidence by the 1st and 2nd Defendants

14. Michael Kimani Mwangi testified as DW1. He adopted his witness statement dated 21/12/2021 as part of his sworn evidence-in-chief. It was DW1's testimony that the suit land was registered in the joint names of his late mother, Felista Mugure Mwangi; his late brother Patrick Njoroge Mwangi; and himself in 1990 in the ratio of 1 acre, 1.5 acres and 2 acres respectively. DW1 stated that each of the parties' portions were demarcated by a surveyor. DW1 testified that the late Felista Mugure Mwangi also co-owned land parcel number Ndarugu/ Gathaite/901 measuring 3 acres together with his sons Francis Mwangi Kang'u and Patrick Njoroge Mwangi in the ratio of 0.5 acres, 2 acres and 0.5 acres respectively. DW1 further testified that upon Felista Mugure Mwangi's death, Francis Mwangi Kang'u inherited her 0.5-acre portion, making his portion of the property 2.5 acres. It was DW1's testimony that Patrick Njoroge Mwangi inherited a 0.5-acre share of Felista Mugure Mwangi's (deceased) share on the suit land and as a result, each of the three brothers owned a 2.5 acre share of their parents' properties. DW1 contended that he was opposed to consolidation of the two portions on the suit land as sought by the plaintiff because the suit land was demarcated in 1990 and parties were given their portions. DW1 further contended that he could not go against his late father's wishes.
15. DW1 produced the following 6 exhibits: (i) Copy of the title deed for land parcel number Ndarugu/ Gathaite/46; (ii) Copy of the Grants of Letters of Administration issued on 25/6/2013; (iii) Copy of the Certificate of Confirmation of Grant dated 16/5/2014; (iv) Copy of a sketch showing the parties occupation of land parcel number Ndarugu/Gathaite/46; (v) Copy of an order issued by the court on 5/12/2017; and (vi) Copy of a search dated 1/2/2018.
16. During cross-examination, DW1 testified that there was only one title to the suit land. DW1 added that the 2nd defendant built a new house on the 0.5 acre property he inherited from Felista Mugure Mwangi's (deceased).
17. In re-examination, DW1 testified that the current demarcations on the suit land have been in place since 1990. DW1 added that because they have developed their respective portions, he is opposed to alteration of the demarcations currently in place.

## Plaintiff's Submissions

18. The plaintiff filed written submissions dated 11/3/2024 through M/s Kithunka Kithunka & Company Advocates. Counsel submitted that it was Felista Mugure Mwangi's wish that upon her demise, her portion of the suit land be shared equally among her two sons, Patrick Njoroge Mwangi (deceased) and the 1st defendant. Counsel contended that the 1st defendant gave evidence that he decided to include the 2nd defendant [his son] as a beneficiary of the estate of Felista Mugure Mwangi (deceased). Counsel argued that the 2nd defendant was not a beneficiary of the estate Felista Mugure Mwangi (deceased) hence he ought not to have been included in either the succession proceedings or the confirmed grant. Counsel contended that during the trial, the 1st defendant testified that there were many disagreements in their family because the 1st defendant included the 2nd defendant in the succession proceedings.
19. Counsel added that initially, the 1st defendant agreed to Patrick Njoroge Mwangi (deceased) obtaining a single title relating to his 2 acre portion of the suit land but later reneged on the agreement, prompting Patrick Njoroge Mwangi (deceased) to file various applications within the succession cause. Counsel further contended that the 1st defendant selfishly secured a wholesome portion of the suit land measuring 2.5 acres for himself and his son by giving the 2nd defendant a 0.5-acre portion immediately adjacent to his 2-acre portion. Counsel argued that the foregoing action by the 1st defendant offends Section 91 (6) of the [Land Registration Act](#), 2012.



20. Counsel relied on the decision of Eboso J in ELC Civil Case No 378 of 2017 consolidated with ELC Civil Case No 345 of 2017 in submitting that even though tenants to a property may have contributed different portions towards acquiring ownership, they still have equal rights towards enjoyment of the property and in decision making. Counsel further submitted that the plaintiff gave evidence during trial that she was inconvenienced by having to farm on the 1.5-acre portion of the land where she lives and which is located on one end of the suit land and subsequently farm the 0.5 acre located on the other end of the suit land.
21. Counsel submitted that the District Land Surveyor - Thika, submitted a report dated 31/1/2018 in adherence to the trial court orders issued on 30/3/2017. Counsel further submitted that despite the said report stating that there was a possibility that the two subject portions could be consolidated, the trial court did not consider the report on the ground that it could only address itself on the issue of succession before it. Counsel contended that the 1st respondent lacked a substantive reason why he would not move the 0.5 acre portion eastwards to allow the plaintiff to consolidate her land given that he did not have permanent buildings on his portion that would be affected. Counsel added that the 1st defendant has to honour the regime under which the title to the suit land belongs which stipulates that each tenant holding a property in common has an equal right to possess and use the entire property. Counsel argued that if the 1st defendant intended to hold his 2-acre portion absolutely, then he had sufficient time from 1989 to sever his interest. Counsel urged this Court to grant her an order consolidating the two portions of the suit land and end the common ownership.

#### **Submissions by the 1st and 2nd Defendants**

22. The 1st and 2nd defendants filed written submissions dated 29/5/2024 through M/s Wambui Ngugi & Company Advocates. They deciphered the following as the main issues that fell for determination in the suit: (a) Whether the plaint raises triable issues in view of the Confirmed Grant issued in Thika Chief Magistrate Court Succession Cause No 752 of 2012 on 16/5/2014; and (b) Whether the plaint raises any cause of action known in law.
23. On whether the plaint raises triable issues in view of the Confirmed Grant issued in Thika Chief Magistrate Court Succession Cause No 752 of 2012 on 16/5/2014, counsel submitted that the plaint did not raise any triable issues capable of being heard and determined. Counsel relied on the decision in the case of *Job Kilach v Nation Media Group Ltd & others* [2015] eKLR where the court defined what constitutes “a triable issue”. Counsel further submitted that the Grant in Thika Chief Magistrate Court Succession Cause No 752 of 2012 was confirmed on 16/5/2014 in which Patrick Njoroge Mwangi (deceased) and the 2nd defendant were each given 0.5-acre portions from the 1 acre portion of the suit land that was owned by Felista Mugure Mwangi (deceased). Counsel added that the plaintiff then moved the lower court vide an application dated 11/11/2016 and as a result two contradictory orders were delivered. Counsel contended that the plaintiff once again moved the lower court vide an application dated 5/7/2017 and by a ruling delivered on 5/12/2017, the lower court ordered the the District Land Surveyor to visit the suit land and land parcel number Ndarugu/Gaithaite/901 to carry out subdivision according to the confirmed Grant issued on 16/5/2014. Counsel added that the said confirmed Grant stated that the 1-acre portion of the suit land belonging to Felista Mugure Mwangi (deceased) be shared equally between Patrick Njoroge Mwangi (deceased) and the 2nd defendant. Counsel argued that the said ruling was neither challenged nor appealed against by the parties. Counsel further argued that the lower court already dealt with issues relating to the estate of Felista Mugure Mwangi (deceased), adding that the plaintiff ought to have pursued her claim through the same forum.
24. On whether the plaint raises any cause of action known in law, counsel for the 1st and 2nd respondents relied on the decision in the case of *Edward Moonge Lengusuranga v James Lanaiyara & another*



[2019] eKLR where the court defined “a cause of action”. Counsel submitted that the plaintiff’s claim against the 1st defendant was that he refused to give consent for the consolidation of the two subject portions of the suit property. Counsel further submitted that the plaintiff raised a similar claim in the succession court. Counsel added that orders of the lower court given on 5/12/2017 were still in force hence the plaintiff’s claim in this Court was an abuse of court process. Counsel contended that the district surveyor visited the suit land and made a report dated 31/1/2018. Counsel faulted the plaintiff for failing to move the lower court to either reject or enforce the said report. Counsel relied on the decision in the case of *Republic v Wajir County Government & 2 others; Jibril Noor t/a Bashir & Noor Advocates & another (Ex parte Applicants)* (Judicial Review Application E001 of 2021) [2024] eKLR in submitting that the orders issued in the succession cause were valid, noting that the said orders haven’t been set aside, appealed against or reviewed. Counsel further submitted that the plaintiff’s allegation that the lower court could not be moved to arbitrate on the surveyor’s report because it could only adjudicate upon matters of succession was misconceived. Counsel added that the plaintiff had previously filed and prosecuted applications relating to subdivision and consolidation of parcels on the suit land and the said applications had been determined. Counsel argued that this suit raised no fresh cause of action against the 1st and 2nd defendants that was different from the one raised in the lower court.

25. Counsel submitted that the subject of litigation in this suit was the subdivision of the suit land and consolidation of the plaintiff’s two portions and that the same was adjudicated upon by a court of competent jurisdiction. Counsel further submitted that the plea sought by the plaintiff were untenable. Counsel added that no proper ground had been proved to warrant the consolidation of the two parcels as sought by the plaintiff. Counsel contended that the submission by the plaintiff that the 1st defendant got a lion’s share of the suit land was misleading given that in a succession cause, every beneficiary’s consent is sought on the proposed distribution of the estate’s property. Counsel further contended that Patrick Njoroge Mwangi (deceased) did not object to the confirmation of the Grant. Counsel reiterated that the suit land was transferred to Patrick Njoroge Mwangi (deceased), the 1st defendant and Felista Mugure Mwangi (deceased) in 1989. Counsel submitted that the current status quo has subsisted for over 34 years, adding and that during trial, the plaintiff confirmed that she had no complaint with regard the 0.5 acre portion inherited by her late husband Patrick Njoroge Mwangi (deceased) from land parcel number Ndarugu/Gathaite/901. Counsel for the 1st and 2nd defendants urged the court to dismiss this suit and award them costs of the suit.

### **Analysis and Determination**

26. The court has considered the parties’ respective pleadings, evidence and submissions. The key question to be answered in this Judgment is how land parcel number Ndarugu/ Gathaite/46, measuring approximately 4.5 acres, should be surveyed and vested in the names of the parties entitled to the land.
27. In her evidence during cross-examination, the plaintiff confirmed that the 1st defendant has occupied his 2 acre portion since she [the plaintiff] got married into the family in 1989. Secondly, she confirmed that on 22/6/2017, the Thika Chief Magistrate Court issued an order directing the Administrator of the estate of Felista to allocate Felista’s share of the land to the estate of Felistas according to the current existing occupation by the respective homesteads. The plaintiff added that the succession court did not deal with consolidation because it was distributing the one acre that belonged to and was occupied by Felista.
28. The plaintiff added that the three brothers together with their respective families had lived on their respective portions of the land since she got married into the family in the 1980s. She further confirmed that Felista, Michael and Patrick had developed their respective portions, adding that each of the three



portion has tea, coffee and avocado trees planted by the respective occupants. With the above evidence, I do not think there is a proper basis for disturbing the current set up.

29. That is not all. It does emerge from the evidence tendered by the 1st and 2nd defendants that the Succession Court was alive to the fact that the land it was distributing was comprised in a title that was co-owned. Indeed, the Succession Court requisitioned a surveyor's report. Taking into account the above fact and guided by the surveyor's report, the Succession Court distributed the undisputed portion that was owned and occupied by Felista. The succession orders have not been challenged in the succession cause. This suit is certainly not the platform on which to challenge the succession orders. What this court is saying is that, the succession court distributed an undisputed one acre portion that belonged to and was occupied by Felista. The court is also saying that it does not have jurisdiction to review the succession orders of the succession court.
30. For the above reasons, this court finds that there is no proper basis for disturbing the current set-up. Put differently, the finding of the court is that the suitland should be surveyed as per the occupation set-up as at the time of the demise of Felista Mugure Mwangi and at the time of confirmation of the Grant relating to her estate. The court has not found merit in the plaintiff's suit. The suit is dismissed for lack of merit.
31. This dispute arose because the concerned parties [the original registered co-owner] did not finalize the subdivision survey in reasonable time. For that reason, parties will bear their respective costs of the suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 29TH DAY OF OCTOBER 2024**

**B M EBOSO**

**JUDGE**

In the presence of:

Ms Kithunka for the Plaintiff

Ms Wambui for the 1st and 2nd Defendant

Court Assistant: Melita

