



Muiruri v Public Trustee & 5 others (Environment & Land Case E027 of 2022) [2024] KEELC 13678 (KLR) (10 December 2024) (Judgment)

Neutral citation: [2024] KEELC 13678 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE E027 OF 2022
LN GACHERU, J
DECEMBER 10, 2024**

BETWEEN

SUSAN WANGUI MUIRURI PLAINTIFF

AND

THE PUBLIC TRUSTEE 1ST DEFENDANT

NAOMI NJERI NDUNGU 2ND DEFENDANT

WAIRIMU MUIRURI 3RD DEFENDANT

WANJIRU MUIRURI 4TH DEFENDANT

JOYCE WAITHIRA NGUGI 5TH DEFENDANT

REGINA WANJA MUIRURI 6TH DEFENDANT

JUDGMENT

1. The Plaintiff herein Susan Wangui Muiruri, vide a Plaint dated 14th December 2022, sought for Judgement against the Defendants herein, jointly and severally for orders; -
 - a. That the land parcel No. LOC.1/Kiunyu/233, be sub-divided into two equal portions with the 1st family as per paragraph 8 above getting its share of 1.62 Hectares in the Western side and the second family to get its share of [1.62] Hectares in the Eastern side.
 - b. That each of the two families to thereafter distribute its share equally to the beneficiaries/dependents in that house.
 - c. That the honorable Court do appoint two persons from each house to hold their respective portions in trust for all members in that family.
 - d. That the costs of this suit be provided for.



2. The Plaintiff is a daughter to one Jacob Muiruri King'ara (Deceased), and she claims that land parcel No. LOC.1/Kiunyu/233 (the suit property) belongs to the estate of her father, the said Jacob Muiruri King'ara who died on 13th March 1976, and a Succession Cause was instituted by the 1st Defendant in respect of his estate.
3. She further averred that the deceased left a written Will, wherein the suit land was distributed between the deceased's two widows (or houses) namely WanjikuMuiruri and Wanjiru Muiruri alias Gachiru Muiruri, in equal shares, with each house being allocated 1.62 Hectares, out of the suit property as per the deceased's written Will.
4. The Plaintiff listed the beneficiaries of the estate of the deceased from the 1st House as follows:
 1. WanjikuMuiruri (Widow-Deceased).
 2. Francis Ndung'u Muiruri (Son-Deceased and represented in the suit by his widow Naomi Njeri).
 3. Njoki Muiruri (Daughter-Deceased).
 4. Wanjiru Muiruri (Daughter).
 5. Nyakihu Muiruri (Daughter-Deceased).
 6. Wairimu Muiruri (Daughter).
5. Further, she listed the beneficiaries from the 2nd House as follows; -
 1. Wanjiru Muiruri alias Gachiru Muiruri (Widow-Deceased).
 2. Gabriel Ngugi Muiruri (Son-Deceased - Represented by his Widow Joyce Waithira)
 3. Mary Ngonyo Muiruri (Daughter-Deceased and represented in the cause herein by her son Simon Mburu.
 4. Regina Wanja Muiruri (Daughter).
 5. Susan Wangui Muiruri (Daughter, and the Plaintiff herein).
6. It was her claim that the two widows of the deceased are deceased, and that following the demise of her father, a Succession Cause No. 647 of 1983-Estate of Jacob Muiruri King'ara, was commenced culminating in a Grant wherein the Public Trustee, was appointed as the Legal Representative of the estate, which Grant was confirmed on 25th June 2014, and which grant has been annexed in the Plaintiff's bundle of documents.
7. The Plaintiff further contended that her father left a written Will dated 21st September 1975, which was probated in the Succession cause, thus, the Grant was confirmed as per the said Will. She also averred that the suit property was carved out by her father through the available Will as follows: The 1st house was to receive half a share of the suit land in the Western side while the 2nd house was allocated half a share of the same property in the eastern side. Further, that according to the Will dated 21st September 1975, the portion which was being utilized by her father during his lifetime was shared out equally between the 1st and 2nd houses in the following manner: each house would retain its part thereof depending on whether the share in question fell on the western or the eastern side of the property.
8. The Plaintiff further contended that the family has failed to agree on the sub-division of the suit property, and the matter was referred to the Assistant County Commissioner – Gatanga, for resolution



without success. That the suit land should be sub divided in accordance with her father's wishes as expressed in the said written Will. Further, that all children of the deceased are equally entitled to a share of their father's Estate.

9. The Plaintiff also averred that this Court is possessed of the necessary jurisdiction to determine the instant suit, and she urged the court to distribute the suit property according to the terms of the deceased's Will, that is, equally between the 1st and 2nd Houses with each house receiving 1.62 Hectares from the property.

The 5th Defendant's Response

10. The suit herein is opposed by 5th Defendant through her Statement of Defence dated 30th January 2023, wherein she contended that the Succession Court distributed the suit property in accordance with the deceased's Will dated 21st September 1975.
11. The 5th Defendant controverted the Plaintiff's contention that the suit land was bequeathed by the deceased to his two houses, and she claimed that the deceased allocated the suit property to his two wives namely Wanjiku and Gachiru as opposed to his two houses.
12. Further, she accused the Plaintiff of attempting to hijack the sub-division and transfer process related to the suit land being undertaken by the Public Trustee with a view to disinheriting the deceased's beneficiaries. It was her further contention that the Plaintiff colluded with the 1st Defendant (the Public Trustee) to sub-divide the suit property into three portions contrary to the deceased's Will, and the Certificate of Confirmation of Grant, but that sub-division which was illegal and unprocedural was nullified by the Court in Murang'a ELC Case No. 144 of 2017.
13. Further, she argued that the deceased did not mention his family in his written Will dated 21st September 1975. In the circumstances, the only way to include the family as a beneficiary of the deceased's estate is through a rectification of the Grant in question.
14. The 5th Defendant further averred that the distribution of the deceased's estate can only be finalized through Nairobi Succession Cause No. 647 of 1983-Estate of Jacob Muiruri King'ara. That all persons in the Will dated 21st September 1975, died before execution of the said Will; and therefore, they ought to be substituted and the relevant Grant rectified to allow for a fair and justified distribution of the deceased's estate.
15. She argued that the Plaintiff instituted other lawsuits concerning the suit land namely Elc Misc. Case No. E003 Of 2021, And Elc Case No. 144 OF 2017, both of which were determined by the Court; therein, rendering the instant suit res judicata. She urged the Court to dismiss the instant suit, with costs.
16. It was the 5th Defendant's further averment that the Plaintiff is a daughter to the registered proprietor of the suit land (deceased), who is married and living with her husband, yet is intent on interfering with the distribution of her late father's estate.
17. In her Written Statement dated 30th January 2023, the 5th Defendant contended that the deceased died on 13th March 1976, and through a written Will dated 12th September 1975, he had distributed his estate to his two wives, and his two sons namely Ngugi Muiruri (Deceased) and Francis Ndung'u (Deceased), and not to his two houses as claimed by the Plaintiff.
18. The 5th Defendant further averred that the deceased's daughters were not named as beneficiaries of his estate because they were married. It was her further contention that the deceased in his written Will stated that his sons would distribute his estate upon the death of their respective mothers.



19. The 5th Defendant further averred that the deceased's estate should be distributed by herself and one Naomi Njeri Ndung'u, by virtue of being wives to the deceased's sons.
20. That the Court issued a Certificate of Confirmation of Grant on 25th June, 2014, in respect of the deceased's estate, and determined that the distribution of the deceased's estate would be conducted as per the deceased's last Will dated 21st September 1975.
21. The matter was referred to Court Annexed Mediation, and upon failure to reach a settlement, the suit proceeded for hearing by way of viva voce evidence. The Court had observed that a Court-Annexed Mediation was a suitable means to settle the issues raised in the suit herein being a dispute between members of the same family.

The Plaintiff's Case

22. PW1 Susan Wangui Muiruri, who lives in Kiunyu area of Gatanga, adopted her Witness Statement dated and also produced a List of documents as exhibits which were produced as P Exhibit 1.
23. It was her testimony that her father was married to two wives, and a Succession Cause was commenced in Nairobi upon his death. She further testified that the suit land was to be sub-divided to the two houses of Beatrice Wanjiku And Josephine Wanjiru, both of whom died before the distribution of the suit property.
24. PW1 testified that the 5th Defendant is entitled to a share of the suit land through her husband Gabriel Ngugi Muiruri (Deceased), a son to the registered proprietor of the property.
25. After giving her evidence in chief, PW1, was not cross examined by the 5th Defendant, who was the only Defendant present in court.

The 5th Defendant's Case

26. DW1 Joyce Waithira Ngugi, testified and affirmed that the Plaintiff is her sister-in-law, and that the suit property should be distributed as per the written Will left by her father-in-law, and the Plaintiff was not named in the Will as a beneficiary. She urged the Court to dismiss the Plaintiff's suit with costs
27. On cross-examination by Mr. Mwangi Ben, counsel for the Plaintiff, DW1 testified that according to the Will crafted by her father-in-law, the suit land was divided into two and distributed to the houses of Wanjiku And Wanjiru, and that she is in possession of her parcel of land.
28. She further testified that the case involving the suit property was presented before the Public Trustee, but she denied having disallowed the distribution of the suit land. She affirmed that the dispute was referred to a Mediator, but there was no settlement.
29. DW1 further testified that she cannot allow the Plaintiff to distribute the suit property, and that her wish is for the suit property to be distributed as per the terms of the deceased's Will, not according to the Plaintiff's wishes. It was her further testimony that she lives on the suit property together with other 20 persons.
30. After, the close of viva voce evidence, the court directed the parties to file their respective written submissions, which directives the parties complied with.

The Plaintiff's Submissions

31. The Plaintiff filed her written submissions dated 17th July 2024, through the Law Firm of Kirubi, Mwangi Ben & Co. Advocates, and submitted that she is a beneficiary of the estate of her late father



- estate one Jacob Muiruri King'ara . That she is therefore entitled to a share of the suit property on her own behalf and on behalf of her mother Josephine Wanjiru Muiruri Alias Gachiru Muiruri, the legal representative of that estate pursuant to the directives issued Succession Cause No.1692 of 2012, filed before the Court of Law at Kikuyu.
32. Further, that despite being served with Summons to Enter Appearance, all the Defendants save for the 5th Defendant did not Enter Appearance in the suit nor appear before the Mediator to whom the Court referred the matter to. The Plaintiff therefore, submitted that save for the 5th Defendant, all the other Defendants were agreeable to the Plaintiff's claim for the suit land to be shared out equally between the two houses of her deceased father.
 33. Further, that the instant claim is informed by the decision of the Court in Nairobi Succession Cause No. 647 of 1983-Estate of Jacob Muiruri King'ara, wherein, the Court ruled that the suit property should be shared equally between the two houses of the deceased, with each house getting 1.62 Hectares thereof. That the 5th Defendant proved uncooperative to the Public Trustee's attempts to have the suit land sub-divided as per the terms of the deceased's Will.
 34. Further, that the Succession Court ruled that it had handled the probate aspect in respect of her late father's estate, and directed the parties to this Court to resolve the issues related to the sharing out of the suit property.
 35. It was her further submissions that the 5th Defendant declined to have the issues raised in the instant suit resolved by way of Mediation by failing to turn up for any of the three (3) sessions called by the Mediator resulting in the dispute being referred back to this Court.
 36. The Plaintiff's further submitted that according to the written Will probated by the Court in Nairobi Succession Cause No. 647 of 1983-Estate of Jacob Muiruri King'ara, the suit land was to be shared between the two widows of the deceased, who were then alive; thereafter, each house would sub-divide its share amongst its respective beneficiaries being the children of each widow. The Plaintiff argued that the above decision of the Court was not appealed against; however, it has not been executed due to interference by the 5th Defendant and her children.
 37. The Plaintiff argued that the Public Trustee's proposal for each house of the deceased to receive its share of the suit land through two individuals nominated by each house was fair, equitable and consistent with the law, and the Judgment of the Succession Court.
 38. That the Plaintiff conceded both in her Witness Statement and Statement of Defence, that the suit property was allocated to the deceased's two houses equally. However, the Plaintiff does not recognize the deceased's daughters as beneficiaries of their father's estate. It was submitted that according to the testimony provided by the 5th Defendant in Court, she wishes that the land be shared between herself and Naomi Njeri Ndungu, another daughter-in-law to the deceased, without, however availing any basis for the said position. That the 5th Defendant wishes for the status quo to be maintained because she is cultivating the suit property which outcome is inequitable and unfair.
 39. The Plaintiff submitted that the 5th Defendant did not produce either the pleadings, proceedings or Judgment upon which she has relied in the cause; thereby, running afoul of the requirements of Sections 107 and 108 of the *Evidence Act*. Further, that the matters cited by the Plaintiff did not deal with the issues before the Court. That litigation must come to an end and the Plaintiff's proposal as prayed for in this suit is both fair and equitable and should be allowed by the Court.



The 5th Defendant's Submissions

40. The 5th Defendant filed her written submissions dated 19th August 2024, drawn under her own hand, and submitted that the suit land was distributed in Nairobi Succession Cause No. 647 of 1983-Estate of Jacob Muiruri King'ara, and the Judgment of the Court in the said suit was never appealed against, or otherwise challenged.
41. She reiterated the claim contained in her Statement of Defence, to the effect that the deceased willed the suit property to his two wives namely Wanjikuand Gachiru, and not to the deceased's two houses as claimed by the Plaintiff.
42. Further, that this Court lacks jurisdiction to entertain the current suit as it cannot interfere with the Orders issued by the Succession Court. That the distribution of the suit land should conform with the terms of the Certificate of Confirmation of Grant dated 25th June 2014, and/or the deceased written Will dated 21st September 1975.
43. The 5th Defendant characterized the instant suit as motivated by bad faith and ill motive, and that the Plaintiff filed ELC Misc. Case No. E003 of 2021 and ELC CASE NO. 144 OF 2017, in an attempt to overturn the distribution of the deceased's estate, which suits were determined and their outcome had no effect on the terms of the Certificate of Confirmation of Grant dated 25th June, 2014.
44. She described the present suit as baseless and one that has been overtaken by event, as the suit land was transferred to the administrator for purposes of sub-division and transfer. She further submitted that the Plaintiff needed to have sought for rectification of grant, rather than initiate the instant suit. She urged the court to dismiss the Plaintiff's suit with costs.
45. The above is the available evidence which this court has carefully considered and the rival written submissions, and from both of them, the court finds the issues for determination are;-
 - i) Whether the instant suit is rendered res judicata?
 - ii) Whether the Plaintiff is entitled to the Orders sought?
 - iii) Who shall bear the costs of the suit?
- i). Whether the instant suit is rendered res judicata
46. The 5th Defendant argued and submitted that the Plaintiff commenced two lawsuits over the distribution of the suit property namely: ELC MISC. Case No. E003 of 2021 and Elc Case No. 144 OF 2017, whose outcome did not alter the terms of the Certificate of Confirmation of Grant dated 25th June 2014. She further argued and submitted that the instant suit is rendered res judicata on account of the above mentioned suits filed by the Plaintiff.
47. The Plaintiff denied that the suit herein is res judicata, and urged the court to dismiss that argument and submission.
48. The substantive law on Res Judicata is found in Section 7 of the [Civil Procedure Act](#) Cap 21 which stipulates as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court



competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

49. Further, in the case of Christopher Kenyariri vs Salama Beach (2017) eKLR, the Court clearly stated the elements to be satisfied when determining whether a matter is rendered res judicata as follows:
- a) The suit or issue was directly and substantially in issue in the former suit
 - b) Former suit between same parties or parties under whom they or any of them claim
 - c) Those parties are litigating under the same title
 - d) The issue was heard and finally determined.
 - e) The court was competent to try the subsequent suit in which the suit is raised.
50. The 5th Defendant herein has raised the issue of res judicata, and therefore, it was her responsibility to adduce sufficient evidence to demonstrate that the issues adverted to by the Plaintiff in the instant suit were the subject of determination in different lawsuits as claimed by herself.
51. The provisions of Sections 107, 108, 109 and 112 of the *Evidence Act*, are very clear on this aspect. Further, the Court of Appeal in the case Mbuthia Macharia vs Annah Mutua & Another [2017] eKLR, reasoned as follows:
- “The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.”
52. Having considered the available evidence, and taking into account the elements of res judicata, it is clear that the 5th Defendant did not furnish this Court with the Judgments of the Court in respect of ELC MISC. CASE NO. E003 of 2021 and ELC CASE NO. 144 OF 2017, in support of her claim of res judicata. Consequently, this Court holds and finds that on the strength of the evidence availed by the 5th Defendant, there is no basis to conclude that the instant suit has been rendered res judicata.

Whether the Plaintiff is entitled to the Orders sought.

53. The gravamen of the instant suit is that the suit land herein which measures approximately 3.24 Ha. is the subject of the deceased’s registered proprietor’s written Will dated 12th September 1975, wherein he allocated the said property to the houses of his two wives namely Wanjiku and Gachiru, in equal shares with Wanjikutaking half of the suit land to the west of its boundary and Gachiru the other half falling to the east of the boundary.
54. The Court has carefully perused the pleadings, oral evidence and rival written submissions of the parties, and it is evident that Elias Muiruri Thiong’o And Ndung’u Thiong’o, who both filed Witness Statements dated 30th January 2023, in support of the 5th Defendant’s case, did not turn up for the hearing of the case, and therefore, their statements were not adopted by the court since they never gave oral testimony in Court. Consequently, their Witness Statements did not become part of the



evidence to be considered by the Court. See the case of *Reef Hotel Limited v Josephine Chivatsi [2021] eKLR(CIVIL APPEAL NO E004 OF 2020)*, where the court held that;

“..... The trial court appears to have adopted this consent, which in my view, was problematic because a witness statement only becomes testimony once its maker adopts it on oath.

As it is, the three statements, which were not adopted on oath were of no probative value. That being the case, only the witness statement of Kai, who appeared before the trial court and was cross examined, was available for use as viva voce evidence.”

55. The Plaintiff testified and submitted that the 5th Defendant by her conduct has thwarted all efforts at an amicable apportionment of the suit land, and distribution in a just manner.
56. The 5th Defendant argued, testified and submitted that her father-in-law allocated the suit property to his two wives as distinguished from the two houses belonging to each of his wives. She further contended and submitted that following the demise of the deceased's two wives, their sons namely the 5th Defendant's husband (Gabriel Ngugi Muiruri) and the husband to Naomi Njeri (son to the Deceased through Wanjiru) were tasked with the responsibility of distributing the suit property. Further, that upon the death of the two sons of deceased, the task of distribution of the suit land became the exclusive preserve of the 5th Defendant and Naomi Njeri.
57. The Court also considered a letter dated 20th January 2021 on record signed by Angela Makau -for The Deputy County Commissioner-gatanga, addressed to the Public Trustee wherein it is stated that two members from the family of Gachiru (mother-in-law to the 5th Defendant) namely, the deceased daughter Susan Wangui Muiruri (the Plaintiff herein), and the 5th Defendant disagreed on the mode of distribution of half of the suit land allocated to Gachiru(deceased).
58. There is no doubt that the dispute herein is between Gachiru'S daughter, and her daughter-in-law, that is the Plaintiff and the 5th Defendant herein, as the 2nd, 3rd, 4th and 6th Defendants did not Enter Appearance in the suit, despite being served with the Summons to Enter Appearance.
59. The 5th Defendant argued and submitted that she was not opposed to the distribution of the suit property, but would not distribute the same in accordance with the Plaintiff's wishes, but would distribute it only as per the terms of the Deceased's mentioned Will.
60. The Court has perused the Deceased's written Will dated 12th September 1975, on record, as translated to English. From the above referred Will, particularly paragraph No. (2), which addresses the suit property, the testator did not indicate what is to happen as regards distribution of the suit land upon the demise of his two wives.
61. Therefore, this Court finds distribution of the estate in another method other than the available Will, cannot form the basis of the 5th Defendant's position. The 5th Defendant has taken the position that as per the Will dated 12th September 1975, the suit land should be distributed by the deceased's sons upon the death of their respective mothers.
62. However, this Court upon carefully consideration of the said Will did not find any statement to the effect, that upon the death of the deceased's sons, their wives would assume the responsibility of distributing the suit property. For the avoidance of doubt, what is addressed under paragraph 3 of the said Will, is the coffee bushes found on the suit land wherein , the deceased bequeathed the coffee trees to the west of the boundary to his son with Wanjikunamed Ndungu, while the 655 coffee trees to the east of the property's boundary were allocated to Ngugi, his son with Gachiru.



63. The 5th Defendant also argued, testified and submitted that the Plaintiff needs to substitute her deceased mother in the suit through a rectification of the Certificate of Confirmation of Grant dated 25th June 2014, as the Plaintiff was not named in the deceased's Will. The Court is persuaded that the deceased's Will is sufficiently clear as to its contents.
64. On the other hand, the 5th Defendant has not claimed that she needs to substitute her husband in order to be put in a position to distribute the suit land. The 5th Defendant's position is simply self-serving, and thus, untenable, as she cannot allow herself the exact thing which she seeks to disallow the Plaintiff. It is evident that during cross-examination, the 5th Defendant admitted that the suit land belongs to the two houses of the deceased.
65. However, in her evidence and submissions, she backtracked from the above position and denied that the distribution of the estate was to be done as per houses. The Court is satisfied that the 5th Defendant's conduct in the entire matter has been intransigent and unhelpful.
66. Having carefully considered the available evidence, the written submissions, and the relevant provisions of law, this court finds that the Plaintiff has proved her case on the required standard of balance of probabilities, and consequently, this court enters judgement in her favour. However, the court finds and holds that the 5th Defendant's Defence is not merited, and the same is dismissed entirely.
67. Accordingly, the Court enters Judgement for the Plaintiff against the Defendants herein jointly and severally in terms of the prayers Nos(a), (b) and (c), of the Plaintiff's Plaint dated 14th December, 2022.
68. With regard to the prayer (c), the Court directs that Wanjiru Muiruri and Wairimu Muiruri (both daughters), from the 1st house and Regina Wanja Muiruri and Susan Wangui Muiruri (both daughters), from the 2nd house to hold the respective portions of the suit land in trust for all members in their respective houses in equal shares.

Who should bear costs of this suit?

69. On the issue of costs, this court is guided by section 27 of the *Civil Procedure Act*, that costs are awarded at the discretion of the court. The court too rely on the case of Republic vs Rosemary Wairimu Munene, Ex-Parte Applicant Vs Ihururu Dairy Farmers Co-operative Society Ltd[2], where the court held as follows:-

“The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case”.

70. The Plaintiff herein is the successful litigant and is thus entitled to costs of this suit. The upshot of the foregoing is that the Plaintiff's suit is allowed as above with costs to be borne by the 5th Defendant herein.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 10TH DAY OF DECEMBER 2024.

L. GACHERU

JUDGE



10/12/2024

Delivered online in the presence of:

Joel Njonjo - Court Assistant

Mr Mwangi Ben Mwangi for the Plaintiff

N/A 1,2,3, 4, 6th Defendants

N/A for 5TH Defendant.

