



Njenga & 2 others (All suing as the legal representatives of the Estate of Joseph Njenga Waweru - Deceased) v Kagure & another (Environmental and Land Originating Summons 47 of 2019) [2024] KEELC 13764 (KLR) (10 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13764 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS 47 OF 2019
JG KEMEL, J
DECEMBER 10, 2024**

BETWEEN

**ESTHER NJERI NJENGA 1ST PLAINTIFF
FRANCIS KUIBITA NJENGA 2ND PLAINTIFF
KAMAU NJENGA 3RD PLAINTIFF
ALL SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JOSEPH
NJENGA WAWERU - DECEASED**

AND

**MARTIN KIUNGU KAGURE 1ST DEFENDANT
JENNIFER NGENDO WAWERU (BEING SUED AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF STEPHEN WAWERU
NJENGA) 2ND DEFENDANT**

RULING

1. The 2nd Defendant/Applicant filed this Motion dated 26/9/2024 pursuant to Section 1A, B 3A and B of the Civil Procedure Act, Orders 9 rule 1 & 5 and 51 of the Civil Procedure Rules seeking the following Orders:-
 - a. Spent.
 - b. That upon hearing exparte, the firm of Messrs. Olaka & Co. Advocates be granted leave to come on record for the 2nd Defendant in place of Messrs. Ndungu Mwaura & Co. Advocates.
 - c. That this Honourable Court do issue orders directing the District Land Surveyor Kiambu to visit L.R. No. Githunguri/Kimathi/607 and establish beacons separating the share of Martin



Kungu Kagure (now sold to Stephen Waweru Njenga) from that of Joseph Njenga Waweru as per the title deed issued on 9th June, 1972.

- d. That this Honourable Court be pleased to order the District Land Registrar or the Commission of Lands Kiambu to dispense with the production of the Original Title Deed for L.R. No. Githunguri/Kimathi/607 while issuing a title deed for the share of Stephen Waweru Njenga (Deceased) in the name of Jennifer Ngendo Waweru, the legal representative of his estate.
 - e. That the OCS, Githunguri Police Station or any Administration Police Commander within the vicinity, to accompany District Land Surveyor during said subdivision to maintain security, law and order.
 - f. That the costs of this application be provided for.
2. The application is premised on the grounds annexed thereto and the Supporting Affidavit of Jennifer Ngendo Waweru sworn on even date. The Applicant averred that she is the legal representative of the Estate of Stephen Waweru Njenga (Deceased) and competent to swear the Affidavit. That on 20/12/2022 this Court delivered a Judgment dismissing the claim of the Plaintiffs with costs and further that under paragraph 36 of the said Judgment the Court stated as follows:-
- “In this case there is no dispute that Kungu held 3/7 shares of the land and Njenga owned 4/7. It is not disputed that the shares held by the two owners are undivided. Going by the decisions cited above I find that the Plaintiffs claim for adverse possession fails on that account.”
3. That according to the said judgment the late Joseph Njenga Waweru owned 4 acres of the suit land which share is undivided and inseparable from the 3 acres share owned by Martin Kungu Kagure, deceased. That the said Kungu then sold his 3 acres share of the suit property to Stephen Waweru Njenga, a fact not disputed by the beneficiaries of the Estate of Kungu.
 4. That arising from the above, there is therefore need for the shares to be divided and separated so that each party can have their respective shares of the suit land registered in their names and thereafter transmitted and distributed to their beneficiaries. The deponent urged this Court to order the Land Registrar to do so and dispense with the production of the original title deed for parcel No. Githunguri/Kimathi/607 while issuing a title deed for the share of Stephen Waweru Njenga in her name as the legal representative of his estate. That unless the orders sought are issued the transmission and the subsequent distribution of the suit land to the rightful beneficiaries of the estate of Stephen Waweru Njenga will be halted / delayed to the detriment of his estate. Lastly, that the orders being sought in the instant Motion are meant to facilitate the enforcement of the decision of this Court rendered on 20/12/2022.
 5. The application is opposed by the Plaintiffs vide their Grounds of Opposition dated 14/10/2024. The Plaintiffs contended that having fully and finally rendered itself in the Judgment of 20/12/2022 this Court is now functus officio and cannot reopen this suit for relitigation or redetermination by any of the parties including the 2nd Defendant. It was their view that the Court does not have any additional jurisdiction left to grant the orders sought in this application. Further, that the Estate of Joseph Njenga Waweru and the Estate of Martin Kungu Kagure are currently the subject matter of succession proceedings in Kiambu High Court and Githunguri Magistrate’s Court respectively. The orders sought by the Applicant herein are premature pending the successful conclusion of succession proceedings aforesaid. That the absence of a Certificate of Confirmation of Grant in any



of the Estates is sufficient evidence that the succession proceedings are yet to be concluded. In their opinion there are still issues pending for resolution with respect to the suit land namely Githunguri/Kimathi/607. Finally, that the proper legal procedure open to the Applicant would have been to file separate and distinct proceedings for the proposed partitioning of the suit land. That this being an interlocutory application, the orders sought therein have far reaching ramifications which cannot be granted in an interlocutory application as the current one. The application was termed as *res judicata* and a blatant abuse of the Court process unknown in law and therefore does not lie.

6. On 16/10/2024 prayer No. 1 in the application was allowed by consent of the parties and subsequently the Motion was argued orally by Mr. Oraka for the 2nd Defendant/Applicant and Ms Micah representing the Plaintiffs/Respondents. Both Counsels by and large reiterated the contents of the pleadings set out above.
7. The key issue before the Court is whether the Court is *functus officio* for purposes of prayer No. 3 and 4 of the application and secondly whether the application is merited.
8. By way of background the Plaintiffs moved the Court through an Originating Summons filed on 5/3/2019 where they sought orders for title in respect to 3/7 acres of the suit property currently held by Martin Kungu Kagure.
9. Upon hearing the parties, the Court delivered its decision on 20/12/2022 and dismissed the Plaintiffs claim. The Court found that there was no evidence led to support the proposition that Stephen Waweru Njenga was a trustee of Joseph Njenga Waweru. Secondly the Court found that the Plaintiffs failed to prove title by way of adverse possession.
10. A Court is said to be *functus officio* when it is without further authority or legal competency because its duty and functions has been fully accomplished. In this case the cause of action was premised on two grounds; firstly, whether Stephen was a trustee of the Estate of Njenga with respect to 3/7 share of the suit land and secondly whether the Plaintiffs established title to land by way of adverse possession.
11. I have keenly perused the application before Court in which the Applicant is seeking orders directing the Land Surveyor to establish beacons partitioning the portion/ share of the suit land between the estate of Njenga and the Estate of Stephen Njenga. In addition, the Applicant has sought orders allowing the Land Registrar to dispense with production of the title deed for parcel No. Githunguri/Kimathi/607 for purposes of facilitating the demarcation/partitioning of the suit land in favour of the Estates of Joseph Njenga Waweru and Stephen Waweru Njenga.
12. In the main suit, the Applicant responded to the claim of the Plaintiffs vide her Replying Affidavit sworn on 31/12/2019 in which she denied the claim in totality. Granted that there was no counterclaim proffered by the Applicant, it is the view of this Court that the orders sought vide the Notice of Motion cannot be anchored on the judgment nor are available to the Applicant. The reason being that the orders sought with respect to partitioning of the suit land and apportioning of the Applicant are substantive orders which cannot be determined in an interlocutory application. Needless to note that should the parties be intent on partitioning the land, the [Land Registration Act](#) under Part IX thereof has a detailed mechanism for partitioning land. The Court has not been shown that that mechanism has been invoked.
13. The Court has also noted that other than the prayers sought in the Motion fashioning a new cause of action, the orders sought ordinarily do not fall within post Judgment proceedings provided for under Civil Procedure Rules. I find that to the extent that the Court is being called upon to grant substantive orders, this Court is *functus officio*.
14. In the upshot the application is unmerited and it is dismissed.



15. Parties being related I make no orders as to costs.

16. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 10TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Judy Micah for 1st, 2nd and 3rd Plaintiffs

1st Defendant – Absent

Ms. Kariuki HB Olaka for 2nd Defendant

Court Assistant – Phyllis

