



**Gitenya v Ongwae & 3 others (Environment & Land Case
3 of 2022) [2023] KEELC 16336 (KLR) (16 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16336 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT & LAND CASE 3 OF 2022
JM KAMAU, J
MARCH 16, 2023**

BETWEEN

SUSAN MANOTI GITENYA PLAINTIFF

AND

STEPHEN MAMBOLEO ONGWAE 1ST RESPONDENT

JOHNSON MACHORA ONGWAE 2ND RESPONDENT

GEORGE MOGAMBI ONGWAE 3RD RESPONDENT

THE COUNTY LAND REGISTRAR NYAMIRA COUNTY .. 4TH RESPONDENT

RULING

1. The suit herein was commenced by way of a Plaint dated 22/10/2021 filed in the Chief Magistrate's Court, Nyamira but which was later transferred to the Environment & Land Court due to the monetary jurisdiction of the subject matter of the suit vide the order of this court dated 08/12/2022. The Plaintiff seeks the following orders: -
 - a. A permanent injunction be and is hereby issued against the Defendants restraining them, their servants, agents and/or employees whosoever and howsoever acting from evicting the Plaintiff from land parcel number West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
 - b. By way of a permanent injunction the 1st Defendant be restrained by himself, his servants, agents and/or employees whosoever and howsoever acting from destroying crops, trees, buildings and/or developments belonging to the Plaintiff on or in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.



- c. By way of a permanent injunction the 4th Defendant be restrained by himself, his servants, agents and/or employees whosoever and howsoever acting from registering any transmission, transfer, mortgage or any other dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
 - d. By way of permanent injunction, the 1st, 2nd and 3rd Defendants be restrained by themselves, their servants, agents and/or employees whosever and howsoever acting from gifting, alienating, subdividing, transferring, selling, charging or mortgaging, or any way dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
 - e. An order of inhibition do issue restraining the 4th Defendant by himself, his servants and/or employees whosoever and howsoever acting from registering any transmission, transfer, mortgage or any other dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
 - f. An order cancelling the Title Deeds West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141 and restoring them back to the name of the deceased, Richard Moenga.
 - g. The cost of this suit be borne by the Defendants jointly and severally.
 - h. Any such other or further relief this Honourable Court may deem fit and just to grant.
2. The Plaintiff is the 1st Defendant's wife since 1979 and the 2nd and 3rd Defendants are her brothers in law, and brothers to the 1st Defendant being the children of her father in law Richard Ongwae Moenga who died on 26/04/2006 intestate at Nyangena Hospital, Kisii. She avers that LR West Mugirango/Siamani/3427 and West Mugirango/Siamani/318 were registered in the name of her late father in law on 15/07/1993 and 17/11/1977 respectively. She says she has developed the portion she and the 1st Defendant are entitled to as beneficiaries having been allegedly allocated by the Deceased whereon she has lived and also where she has been farming for the last 40 years. This is on both West Mugirango/Siamani/3427 and West Mugirango/Siamani/ 318. Her claim is that the 1st Defendant intends to evict her, dispossess and deprive her of a portion of West Mugirango/Siamani/3427 and has given her a verbal Notice demanding she and her children do vacate. She claims to have erected a shop building thereon. She further avers that letters of administration in respect of the Estate of the late Richard Ongwae have never been issued. In spite of this, the said Estate has been intermeddled with by way of sub-division of the parcels of land with the 2nd Defendant being a beneficiary thereof and not by way of transmission but through misrepresentation, illegality and unprocedurally. She further claims that the 1st Defendant has started to destroy her trees and tea on West Mugirango/Siamani/318 which matter was reported to Nyamira Police Station. Despite her huge investment on West Mugirango/Siamani/318 the 1st Defendant is in the process of illegally and unlawfully alienating and disposing of the suit properties.
 3. The above averments have been duplicated in verbatim in the grounds supporting the Plaintiff's Notice of Motion dated 22/10/2021 filed contemporaneously with the Plaint and also reproduced in first person singular by the Plaintiff in her Affidavit in support of the said Application sworn on even date. The Application seeks the following Orders:-



1. Spent.
2. Pending the hearing and determination of this Application inter partes, an order of temporary injunction do issue restraining the Defendants by themselves, their servants, agents and/or employees whatsoever and howsoever acting from evicting the Plaintiff from land parcel number West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
3. Pending the hearing and determination of the Application inter partes, an order of temporary injunction do issue restraining the 1st Defendant by himself, his servants, agents and/or employees whatsoever and howsoever acting from destroying crops, trees, buildings and/or developments belonging to the Plaintiff on or in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
4. Pending the hearing and determination of this Application inter partes, an order of inhibition do issue restraining the 4th Defendant by himself, his servants, agents and/or employees whatsoever and howsoever acting from registering any transmission, transfer, mortgage or any other dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
5. Pending the hearing and determination of this Application inter partes, an order of temporary injunction do issue restraining the Defendants by themselves, their servants, agents and/or employees whatsoever and howsoever acting from gifting, alienating, sub-dividing, transferring, selling, charging or mortgaging, or any way dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
6. Pending the hearing and determination of this suit, an order of temporary injunction do issue restraining the Defendants by themselves, their servants, agents and/or employees whatsoever and howsoever acting from evicting the Plaintiff from land parcel number West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
7. Pending the hearing and determination of this suit, an order of temporary injunction do issue restraining the 1st Defendant by himself, his servants, agents and/or employees whatsoever and howsoever acting from destroying crops, trees, building and/or developments on or in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
8. Pending the hearing and determination of this suit, an order of inhibition do issue restraining the 4th Defendant by himself, his servants, agents and/or employees whatsoever and however acting, from registering any transmission, transfer, mortgage or any other dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.
9. Pending the hearing and determination of this suit, an order of temporary injunction do issue restraining the Defendants by themselves, their servants, agents and/or employees whatsoever and howsoever acting from gifting, alienating, sub-dividing, transferring, selling, charging or



mortgaging, or any way dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141 in a way that would divest the Plaintiff of her property rights thereon without her consent.

10. The Officer Commanding Station, Nyamira Police Station be ordered to enforce the injunctive orders granted under prayer 2, 3, 4, 5, 6, 7 and 8 herein above.
11. The cost of this Application be borne by the Defendants jointly and severally.
4. The 2nd Defendant responded to the Application vide his Replying Affidavit sworn on 10/12/2021 denying all the allegations in the Application and further deponed that his brothers and himself (Defendants) have all come to realize that the procedure followed in the transfer of the suit properties are not right and that he has no objection to the Titles they all hold being cancelled since the same ought to have been by way of transmission.
5. The 1st Defendant on his part swore a Replying Affidavit on 10/12/2021 where he admitted that LR West Mugirango/Siamani/318 has since been sub-divided into LR Nos. 9139, 9140 and 9141 and registered in the name of the 2nd Defendant and that he is also registered the owner of West Mugirango/Siamani/9141 and West Mugirango/Siamani/3427 and that the Plaintiff has no registrable interest over any of the suit properties. He depones that all the developments the Plaintiff lays a claim over belong to him by virtue of customary law and investment. The 1st Defendant also depones that West Mugirango/Siamani/344 is now illegally registered in the name of his son James Mamboleo since 13/09/2018. He denies that the Plaintiff is in exclusive possession of the suit land(s). He concludes by deponing that the intermeddling of the Deceased's Estate was authored by the 2nd Defendant and not by himself and if cancellation of the Title Deeds the product of the intermeddling was to be done then even the one for West Mugirango/Siamani/344 in the name of James Mamboleo ought to be equally effected. He also sums up by claiming that the Plaintiff and her children want to push him out of the Estate of his father to which he and his 2 other wives are entitled to.
6. In her further Affidavit of 10/01/2022 the Plaintiff denies any knowledge of other wives of the 1st Defendant and even annexes an Affidavit of marriage sworn on 02/09/2006 which makes no mention of any other wife. She also denies any knowledge of the existence of West Mugirango/Siamani/344.
7. I invited all the parties herein to file their written submissions and then highlight on the same all of which I have considered before retiring to write this Ruling. The issues in this case are simple and straight forward and in his oral Submissions highlighting his written Submissions, the 1st Defendant says that he is not opposing the Plaintiff's Application dated 22/10/2021. In fact this seems to be a dispute between the nuclear family of one of the beneficiaries of the Estate of the late Richard Ongwae Moenga, the 1st Defendant inter se. The other 2 Beneficiaries don't seem to have a problem with one another. Nor do they have a problem with the 1st Defendant. This is a matter that should not even have seen the 4 corners of the court room. In fact, the greater part of the feud herein is misapprehension. The same seems to be caused by the fact that 2 other women have joined the succession race for the Estate of the late Moenga. The Plaintiff fears that soon the 2 wives and their progeny will be claiming a piece of the cake. The baker of the same is long gone and is sleeping peacefully having toiled day and night and invested wisely. I hope he is not watching the scramble for his wealth. However, the process of the sub-divisions and transfer of the Estate of the late Ongwae Moenga is in question. But this is just a smokescreen. However, its legitimacy must be decided since it forms part of the substratum of this suit though the question is not ripe for determination at this stage.



8. The threshold and the conditions for the grant of an injunction were set out in the celebrated case of *Giella v Cassman Brown & Co. Ltd.* The conditions include; one, *prima facie* case with a probability of success, two, where the Applicant might suffer irreparable injury incapable of being compensated by damages and three, balance of convenience.
9. Has the Plaintiff demonstrated a *prima facie* case with a probability of success? This Application is ill-advised. In the first place the Plaintiff claims that the suit land was transferred to the 1st, 2nd and 3rd Defendants through intermeddling, which is illegal. The 1st and 2nd Defendant admit this and are ready to rectify the situation by commencing the process of transfer by way of transmission after confirmation of Grant. We must allow them the opportunity to do so. Unless and until the process of confirmation of Grant has been finalized, no rights to the beneficiaries have crystallized. The 1st Defendant is not an owner yet. Therefore, his household has no rights whatsoever of an intestate Estate over his entitlement. The Plaintiff and her children are not direct beneficiaries of the Estate of the late Richard Ongwae Moenga. Only the 1st, 2nd and 3rd Defendants are. There could be others but certainly not the Plaintiff. If we are to allow the spouses and off-springs of a beneficiary of a Deceased person to be named as beneficiaries of an Estate alongside the direct beneficiary, the process would turn to be very intricate and elaborate with a long chain and a pyramid of beneficiaries. The only way that a person can show that he has a right over the Deceased's Estate is if he was a direct Dependant of the Deceased prior to his death under Section 29 of the [Law of Succession Act](#) as follows: -

For the purposes of this Part, "dependant" means-

- a. the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death;
 - b. such of the deceased's parents, step-parents, grandparents, grandchildren, step-children, children whom the deceased had taken into his family as his own, brothers and sisters, and half-brothers and half-sisters, as were being maintained by the deceased immediately prior to his death; and
 - c. where the deceased was a woman, her husband if he was being maintained by her immediately prior to the date of her death.
9. This has not been pleaded herein let alone being proved and the Plaintiff would certainly not fall under Section 29 of the [Law of Succession Act](#).
 10. In case of intestate estates, the [Law of Succession Act](#) Cap 160 Laws of Kenya must be followed to the letter. Under Section 39 of the [Law of Succession Act](#), Cap 160 Laws of Kenya the order of priority in the Succession equation is as follows: -
 - a. Spouse.
 - b. Children.
 - c. Father.
 - d. Mother.
 - e. Brothers and sisters and their children.



- f. half-brothers/ half-sisters and any child or children of deceased half-brothers and half-sisters.
 - g. the relatives who are in the nearest degree of consanguinity up to and including the 6th degree.
11. While daughters in law can inherit their fathers in law in an intestate estate, it is my considered view that the daughter in law does not rank on equal footing with her husband and/or the latter's siblings with respect to her father in law's Estate while her husband is still alive. She only comes in if her husband is also deceased and this is also treated cautiously because the moment the husband dies, his estate becomes subject of its own administration and in the absence of the deceased's son there could be other beneficiaries on a similar footing with the daughter in law?
 12. Under Section 45 (1) of the [Law of Succession Act](#) no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 13. Secondly, the Plaintiff's insinuation that the suit property is matrimonial has no foundation at all. The parcels of land cannot be part of an undistributed Estate and at the same time matrimonial property of people who have not yet been identified as beneficiaries.
 14. Article 45 (3) of the [Constitution](#) of Kenya, 2010 provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
 15. Under Article 68 (c) (iii) of the [Constitution](#) of Kenya 2010, Parliament shall enact legislation to regulate the recognition and protection of matrimonial property and in particular the matrimonial home during and on the termination of marriage.
 16. Section 7 of the [Matrimonial Property Act](#), 2013 No 49 of 2013 provides that: -
 - “Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
 17. It is clear in our case that the Plaintiff never contributed to the acquisition of the suit property since the same ought to be an inheritance of the 1st Defendant from his late father. The only interest that the Plaintiff can claim upon proof is beneficial interest under Section 9 of the [Matrimonial Property Act](#), 2013: -
 - “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”
 18. All that the Plaintiff is saying is that she had developed a portion of LR West Mugirango/Siamani/3427 which was allocated to herself and the 1st Defendant by the 1st Defendant's father. This claim should be a subject of a Succession Cause.
 19. What the Plaintiff has brought to court is a moral issue and the same seems to have been provoked and precipitated by the fact that the 1st Defendant has become a loose cannon in as far as acquiring new wives is concerned and the only safeguard the Plaintiff has is to ensure that none of the new brides settles on the suit land. The court cannot be dragged into this. The Plaintiff is advised to seek help from community leaders, the clan or spiritual leaders. As for the law, only identifiable rights and interests



can be protected by the court. The only interests this Court can protect over the Deceased's Estate are those that are direct but should not be peripheral or secondary.

20. Should I make orders of injunction as sought by the Plaintiff in this case when all the parties who have participated in this case are in agreement that the process that placed the first 3 Defendants where they call their own today was not flawless, then I shall have made the work of the Succession Court difficult. This is not a Succession court and I am not seized with such jurisdiction.
21. The Plaintiff has asked this court to cancel Title Number West Mugirango/Siamani/3427, West Mugirango/Siamani/318, West Mugirango/Siamani/ 9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141. Should I act so, the parcels of land will either revert back to the name of the late Richard Ongwae Moenga or be non-existent. If the result is the latter, the restraining Orders will then be in vain. And I have difficulties in granting an injunction in respect to the Estate of a Deceased person when I am not sure that the recipient of the same is a beneficiary of the Estate before the issuance of Grant- of letters of administration and its confirmation. I cannot also gag the 4th Defendant from performing his statutory duties through:

“an order of inhibition do issue restraining the 4th Defendant by himself, his servants, agents and/or employees whosoever and however acting, from registering any transmission, transfer, mortgage or any other dealing in land parcel numbers West Mugirango/Siamani/318, West Mugirango/Siamani/3427, West Mugirango/Siamani/9139, West Mugirango/Siamani/9140 and West Mugirango/Siamani/9141.”

as has been urged by the Plaintiff. The Plaintiff has said that there was irregularity in transferring the Suit properties from the Deceased to the 1st, 2nd and 3rd Defendants. The said Defendants are ready to effect the transfers the right way. Who would clear the clutter if the 4th Defendant is restrained from registering the transfers by way of Transmission. Further, once the Transfers are effected upon their rightful owners the owners' constitutional rights are protected under Article 40 of the Constitution of Kenya, 2010: -

1. Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
 - a. of any description; and
 - b. in any part of Kenya.

Not even legislation can take away such rights. Sub-Article (2) (b) provides: -

2. Parliament shall not enact a law that permits the State or any person—
 - a. to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
 - b. to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

22. It is imperative for the concerned parties to do first things first i.e. to determine what belongs to who before which no one can determine the parties' rights over the suit lands.



23. Having found that the Plaintiff has not demonstrated a prima facie case with a probability of success, I need not dig into the other conditions. Since there is no prima facie case with a probability of success, no injury or prejudice would be occasioned by not granting the Orders sought.
24. Finally, with all the parties having owned up that they are holding their Title Deeds in respect to the suit properties irregularly, I hereby order all the Title Deeds in respect of LR Nos. West Mugirango/Siamani/318, West Mugirango/Siamani/3427 and West Mugirango/Siamani/344 (now registered in the name of James Mamboleo) and/ or all sub-divisions arising from LR No West Mugirango/Siamani/318 including Title Numbers West Mugirango/Siamani/ 9139, West Mugirango/Siamani/ 9140 and West Mugirango/Siamani/9141 be returned to the lands office, Nyamira within the next 15 Days for cancellation and reversion to the name of Richard Ongwae Moenga until such time as the beneficiaries of the Estate of the late Richard Ongwae Moenga will apply and obtain letters of administration and certificate of confirmation of Grant of the Estate of Richard Ongwae Moenga.
25. For the avoidance of doubt, all transfers made of all the properties and assets that formed part of the Estate of the late Richard Ongwae Moenga at the time of his demise on 26/04/2006 at Nyangena Hospital, Kisii are hereby revoked and henceforth revert to the name of Richard Ongwae Moenga and the Registers in respect to the said properties be rectified accordingly.
26. This is a case of a nuclear family trying to sort out their domestic issues through the court which I find to be an abuse of the process of the court and I hereby invoke the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules: -

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that: -

- a. it discloses no reasonable cause of action or Defence in law; or
- b. it is scandalous, frivolous or vexatious; or
- c. it may prejudice, embarrass or delay the fair trial of the action; or
- d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

27. Having made the above Order, there is nothing that remains to be determined in this case. The main Suit serves no useful purpose and is unworthy of consideration. The same is accordingly dismissed. And since this is a family dispute, I order that each party bears his/her own costs.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 16TH DAY OF MARCH 2023.

MUGO KAMAU

JUDGE

