



**Muthungu v Kituma (Environment & Land Case E006 of 2022)
[2023] KEELC 17017 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17017 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E006 OF 2022**

**TW MURIGI, J
APRIL 19, 2023**

BETWEEN

JULIUS ALEXIUS PAUL MUTHUNGU PLAINTIFF

AND

MBULUNGA KITUMA DEFENDANT

RULING

1. By a Notice of Motion dated October 28, 2022 brought pursuant to Sections 1A, 1B, 3, 3A, 79G and 95 of the Civil Procedure Act, Order 42 Rule 6, Order 43 Rule 1 and Order 50 Rule 1 of the Civil Procedure Rules the Applicant seeks the following orders:-
 1. That leave be granted to the Plaintiff/Applicant to appeal against the ruling delivered on October 19, 2022.
 2. That *status quo* on land title No Ukia/Utaati/449 as of October 19, 2022 to prevail pending the hearing and determination of the intended appeal and the Defendant/Respondent not to invade or trespass onto the subject land.
 3. That the costs of the application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Julius Alexius Muthungu sworn on even date.

The Applicant's Case

3. The Applicant averred that vide a ruling delivered on October 19, 2022, his suit was dismissed with costs pursuant to a preliminary objection raised by the Defendant/Respondent herein.



4. That being aggrieved by the ruling, he prays for leave to appeal against the same. He argued that he will suffer substantial loss in addition to the appeal being rendered nugatory if the status quo is not maintained.
5. He further averred that unless the orders sought are granted the Defendant will invade the land and thereby defeat the Applicant's interest on the suit property. He urged the Court to allow the application.

The Respondent's Case

6. Opposing the application, the Respondent vide his replying affidavit sworn on February 14, 2023 averred that the application is an abuse of the Court process as the grounds in support of the application together with the supporting affidavit do not warrant the grant of the orders sought. He argued that the intended appeal is incurable and an abuse of the Court process as the Court upheld the Preliminary objection that the suit is statute barred.
7. Finally, he contended that the Applicant has not demonstrated that he will suffer any substantial loss if the orders sought are not granted. He argued that his family will be prejudiced if the orders sought are granted as they will be hindered from utilising the suit property.

Analysis And Determination

8. Having considered the application and the response thereto, I find that the only issue for determination is whether the Applicant is entitled to the orders sought.
9. The Applicant is seeking leave of this Court to appeal against the ruling delivered on October 19, 2022.
10. The application was made before the expiry of the statutory period of 30 days. The application has been made without delay. The Respondent will not be prejudiced if the Applicant is granted leave to appeal against the ruling. The upshot of the foregoing is that the Applicant is granted leave to appeal against the ruling delivered on October 19, 2022.
11. The Applicant is seeking for an order of *status quo* to be maintained with regards to land parcel No Ukia/Utaati/449 as at October 19, 2021 pending the hearing and determination of the Intended Appeal. The Applicant averred that he is apprehensive that the Defendant will invade the land and thus defeat his proprietary interest in the suit property.
12. The Plaintiff vide a Plaint dated March 25, 2022 instituted this suit against the Defendant and sought the following orders:-
 - a. A declaration that the deceased Kituma Nganda Musau had sold to the Plaintiff Land Title No Ukia/Utaati/449 and the Plaintiff is entitled to be registered as owner and proprietor thereof and issuance of title deed in his favour.
 - b. Cancellation and revocation of Land Title No Ukia/Utaati/449 in the name of the deceased and for its registration to be rectified and to be in the name of the Plaintiff herein.
 - c. The Defendant as Administrator of the Estate of the deceased Kituma Nganda Musau to avail the original title deed for the land and execute the necessary conveyance transfer forms in favour of transfer of ownership to the Plaintiff's name failure of which the Deputy Registrar of this Court to execute the conveyance transfer forms and the Land Registrar Makueni to cancel the registration and title deed in the name of Kituma Nganda Musau and to effect transfer of the land to the Plaintiff and issue title deeds of Land Title No Ukia/Utaati/449.



- d. Permanent injunction restraining the Defendant from entering, remaining on, trespassing, squatting on and/or carrying out any activity of whatever nature on the land and for orders for the Defendant's eviction from the land together with his relatives, children, wives, animals, servants and removal of anything of whatever nature which is his on the land.
 - e. Mesne profits against the Defendant for unauthorized entry into and use of the land.
 - f. Any other remedy as the Honourable Court may deem fit and applicable in the circumstances.
13. The Defendant filed a Statement of Defence dated May 9, 2022 and denied the Plaintiff's claim. Alongside the Defence, the Defendant filed a Notice of Preliminary Objection on the following grounds:-
- i. The suit is time barred having been brought outside the statutory limitation of 12 years in view of Section 7 of the Limitation of Action Act Cap 22.
 - ii. The Plaintiff's suit is incompetent, bad in law, barred in law, an abuse of the Court's process and should be dismissed with costs to the Defendant.
14. The Preliminary Objection was canvassed by way of written submissions. The Court upheld the Defendant's Preliminary Objection vide its ruling delivered on October 19, 2022 and struck out the Plaintiff's entire suit for being statute barred with costs to the 1st, 2nd and 3rd Defendants.
15. The Plaintiff is seeking for an order of status quo to be maintained on Land Parcel No Ukia/Utaati/449 as at 19/10/ 2022 pending the hearing and determination of the intended appeal. The *status quo* is not clear on who is in possession of the suit property. From the record it is clear that the Plaintiff's suit was struck out on account of being time barred. If I were to allow this prayer, it would amount to reviving the Plaintiff's suit.
16. In light of the foregoing, the application dated October 28, 2022 partially succeeds to the extent that the Applicant is granted leave to appeal against the ruling delivered on October 19, 2022. I make no orders as to costs.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 19TH DAY OF APRIL, 2023.

HON T MURIGI

JUDGE

In The Presence Of: -

Court Assistant – Mr Mohammed

Odawa for the Applicant.

Ms Kellen holding brief for Ms Munyao for the Respondent.

