



**Muiruri ((Suing on her own behalf and on behalf of James Kuria Ngugi - Deceased)) v Kamau & 3 others (Environment & Land Case E017 of 2021) [2023] KEELC 17669 (KLR) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17669 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E017 OF 2021**

**BM EBOSO, J  
MAY 26, 2023**

**BETWEEN**

**ESTHER WANJIKU MUIRURI ..... PLAINTIFF  
(SUING ON HER OWN BEHALF AND ON BEHALF OF JAMES KURIA NGUGI  
- DECEASED)**

**AND**

**RUTH WAMBUI KAMAU ..... 1<sup>ST</sup> DEFENDANT  
LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT  
NATHANIEL NJOROGI KAMAU (SUED IN THEIR CAPACITIES AS THE  
LEGAL REPRESENTATIVES OF THE ESTATE OF ISAAC KAMAU NDOGE -  
DECEASED) ..... 3<sup>RD</sup> DEFENDANT  
ATTORNEY GENERAL ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. What falls for determination in this ruling is the plaintiff's notice of motion dated 20/9/2022 in which she seeks two orders: (i) an order granting her leave to amend the originating summons (pleadings) filed in this suit; and (ii) an interlocutory injunction restraining the 1st and 2nd defendants against transferring, selling or advertising for sale, land parcel numbers Kiambu/Munyu/8428 and Kiambu/Munyu/8429 which are subdivisions out of Kiambu/ Munyu/147. I outlined the background to this suit in my preceding ruling rendered on 22/8/2022.
2. The gist of the plaintiff's case in the main suit is that her late husband [the late James Kuria Ngugi] acquired one [1] acre out of land parcel number Kiambu/ Munyu/147 from Esther Muthoni Kamau (now deceased). She contends that they have been in occupation of the one acre since the year 2001 and that when the late Kuria died, he was buried on the one (1) acre that they occupy. She seeks a declaration



that the late Isaac Kamau Ndoge held the said one acre in trust for the estate her late husband. The defendants contest the claim. The defendants' preliminary objection urging the court to strike out/dismiss the suit in limine was declined by this court in the ruling rendered on 22/8/2022.

3. It is against the above contextual background that the application under consideration was brought and canvassed. The plaintiff contends that the two defendants have, during the pendency of this suit, subdivided parcel number Kiambu/ Munyu/147 into two parcels: (i) Kiambu/ Munyu 8428 and 8429, and that she has credible information that they have advertised the two subdivisions for sale. It is her case that the actions of the defendants are intended to defeat justice in this suit.
4. The 1st defendant opposed the application through a replying affidavit sworn on 4/11/2022 by Ruth Wambui Kamau [1st defendant] and written submissions dated 21/3/2023. Her case is that the subdivision process was initiated before the plaintiff instituted this suit and that the delay in the finalization of the subdivision was occasioned by the 2nd defendant's unwillingness to be privy to the subdivision. She adds that the plaintiff was aware that the succession process was in motion and did not bother to seek interlocutory reliefs. It is her position that the subdivision process was lawful.
5. The 1st defendant contends that by asking this court to grant her leave to amend her pleadings, the applicant is inviting the court to step out of its powers and jurisdiction and to interfere with a judgement/ruling of a "probate court". She contends that the plaintiff ought to have first initiated objection proceedings in the succession cause and sought a stay of the succession orders. Lastly, the 1st defendant contends that the plaintiff's application does not demonstrate a prima facie case. She urges the court to dismiss the application.
6. The 2nd defendant filed a replying affidavit dated 17/10/2022 in response to the originating summons but did not respond to the application dated 20/9/2022.
7. I have considered the application dated 20/9/2022, the 1st defendant's response to the application, and the rival written submissions filed in relation to the application. The following two key issues fall for determination in the application: (i) Whether the application satisfies the criteria upon which our courts exercise jurisdiction to grant leave to amend pleadings; (ii) Whether the application satisfies the criteria upon which a trial court exercises jurisdiction to grant interlocutory injunctive reliefs. I will dispose the two issues sequentially in the above order.
8. The guiding principle in the exercise of jurisdiction to grant leave to amend pleadings was outlined by the Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] where the court adopted the following principle as outlined in Vol 2, 6th Edition at Page 2245 in *AIR Commentaries on the Indian Civil Procedure Code* by Chiftaley and Rao:

“That a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected, and that the amendment can be allowed without injustice to the other side.”
9. In the application under consideration, it is contended that the intended amendments have been occasioned by subdivisions and registrations that were carried out by the defendants during the pendency of this suit. On the ground, the suit property is the same. A perusal of the exhibited mutation forms indicates that the survey leading to the new titles were carried out between March and May 2022. The exhibited official search reveals that the resultant subdivisions were registered in June 2022. This suit was filed in May 2021. The defendants do not contest the above facts. They have not demonstrated



- any prejudice that they are likely to suffer in the event that the plaintiff is granted leave to amend the originating summons as prayed.
10. Given the above circumstances, this court is satisfied that the application meets the criteria for grant of leave to amend pleadings. That is my finding on the first issue.
  11. The second issue is whether the application satisfies the criteria for grant of an interlocutory injunction. The relevant criteria was spelt out in the case of *Giella v Cassman Brown* (1973) EA 358. First the applicant is required to demonstrate a *prima facie* case with a probability of success. Second, the applicant is required to demonstrate that if the interlocutory injunction is not granted, she would stand to suffer damage that may not be indemnified through an award of damages. Third, should there be doubts regarding both or either of the above two requirements, the application is to be decided based on the balance of convenience. Lastly, at the stage of disposing an application for interlocutory injunction, the court does not make definitive or conclusive pronouncements on the issues that fall for determination in the main suit.
  12. The applicant contends that her late husband purchased one (1) acre out of the suit property and that they have been in occupation of the one acre since the year 2001. They have their residence on the one acre. It is her case that when her husband died, he was buried on the one acre. She contends that the estate of Isaac Kamau Ndoge holds title to the one acre in trust for the estate of her late husband, James Kuria Ngugi.
  13. The fact of occupation is not contested. What is contested are the circumstances under which the deceased settled on the land with his family. To the extent that there is uncertainty about the true circumstances under which the deceased settled on the one acre, the court has doubts on the first limb of the principle in *Giella v Cassman Brown*.
  14. On the second limb, there is a likelihood that if the suit property is not preserved, there is real danger that the two subdivisions may be disposed and the family of the late James Kuria Ngugi may be evicted from what they contend is their home. No amount of monetary award can adequately indemnify injury occasioned by an eviction.
  15. The result of the foregoing is that the application under consideration is one that should be determined on the balance of convenience. The balance of convenience favours preserving the two titles as they exist now, pending the hearing and determination of this suit.
  16. In the end, the notice of motion dated 20/9/2022 is disposed in the following terms:
    - a. The plaintiff/applicant is granted leave to amend the originating summons dated 30/4/2021 in terms of the draft that was annexed to the application dated 20/9/2022.
    - b. There shall be no dealings in the land registers relating to the two subdivisions surveyed out of Kiambu/Munyu/147, namely, Kiambu/ Munyu/ 8428 and Kiambu/ Munyu/8429.
    - c. Unless extended by the court, the above preservative order shall lapse after 12 months.
    - d. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26<sup>TH</sup> DAY OF MAY 2023**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**



**Mr Muiruri for the Applicant/Plaintiff**

**Ms Njuguna holding brief for Mr. Gachau for the 1st Defendant**

**Court Assistant: Elvis Hinga**

