



Muthoka (Suing as the administrator and the legal representatives of the Estate of Muthoka Itumo - Deceased) v Munguti & another (Sued as the administrator and the legal representatives of the Estate of Kamene Nzalai - Deceased & Mutetema Itumo - Deceased) (Environment & Land Case E012 of 2024) [2025] KEELC 1370 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1370 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E012 OF 2024**

**EO OBAGA, J
MARCH 20, 2025**

BETWEEN

**JOSEPH MAKUSA MUTHOKA PLAINTIFF
SUING AS THE ADMINISTRATOR AND THE LEGAL REPRESENTATIVES OF
THE ESTATE OF MUTHOKA ITUMO - DECEASED**

AND

**DORCUS MBELE MUNGUTI 1ST RESPONDENT
LABAN NDUVA MASAI 2ND RESPONDENT
SUED AS THE ADMINISTRATOR AND THE LEGAL REPRESENTATIVES OF
THE ESTATE OF KAMENE NZALAI - DECEASED & MUTETEMA ITUMO -
DECEASED**

RULING

Introduction

1. This is a ruling in respect of a Notice of Motion dated 14th June, 2024 in which the Plaintiff/Applicant seeks the following orders:
 1. Spent
 2. Spent
 3. That this honourable court be pleased to order that pending the hearing and determination of this suit, the Defendants/Respondents by themselves and/or agents, servants or anyone acting under their instructions be restrained by a temporary injunction from any actual interference or threats of wasting, damaging or alienating and or disposing of any portion and property



on the land parcels numbers Machakos/Ulu/450 and Machakos/451 belonging on the late Muthoka Itumo.

4. That cost of the application be borne by the Respondents herein.

Background

2. The history of this litigation dates back to the 1970's. Muthoka Itumo had filed Kilungu Magistrates court Civil Case No. 126 of 1977 against Mutetema Itumo and Kamene Nzalai. He obtained judgment against the two and others in respect of parcel No. 380 which gave rise to the suit properties. He obtained eviction orders against the two and others.
3. Later on, the two filed Nairobi HCCC No. 1727 of 1990 and obtained an exparte judgment against Muthoka Itumo. The two then moved quickly and had the suit properties registered in their names based on orders given in the case.
4. Muthoka Itumo applied to have the exparte judgment set aside. His application was allowed but by the time the exparte judgment was set aside, the two had already had the suit properties registered in their names. The suit was thereafter dismissed for want of prosecution at the instance of Muthoka Itumo
5. The original litigants died and the present litigation is being conducted by their legal representatives.

Applicant's case

6. The Applicant contends that the beneficiaries of the Estate of Muthoka Itumo are in possession of the suit properties but the Defendants/Respondents have proceeded to interfere with the suit properties based on a judgment which was set aside. He states that if there are no injunctive orders granted against the Respondents, the beneficiaries of the Estate of Muthoka Itumo shall live in perpetual fear of being evicted from land they have known as their only home.

Respondent's Case

7. The Respondents opposed the application based on a replying affidavit sworn on 21st August, 2024. The Respondents contend that the Applicant's application is fatally defective and is an abuse of the process of court. They state that the Applicant has been filing numerous applications all of which have been dismissed and that what he is doing amounts to forum shopping.
8. The Respondent further states that LR No. Machakos/Ulu/450 does not exist and that LR No. Machakos/Ulu/451 exists but is not registered in the Applicant's name. The Respondents further argue that the present application is res judicata in that he filed a similar application in Machakos ELC No. 69 of 2017 which application was dismissed by Judge Angote.
9. The Respondents state that the ownership of the suit properties was transferred to the beneficiaries of the Estate of Mutetema Itumo and Kamene Nzalai in Succession cause No. 27 and 28 of 2016 respectively.

Analysis and determination

10. The parties were directed to file written submissions in respect of the application. The Applicant filed his submissions dated 31st October, 2024. The Respondents filed their submissions dated 13th September, 2024.
11. I have considered the application, the opposition to the same by the Respondents, the submissions as well as the authorities cited. The issues which emerge for determination are firstly, whether this



application is res judicata. Secondly, whether the Applicant has shown a prima facie case to warrant issuance of an injunction. Lastly, which order should be made on costs.

12. On the first issue, the Respondents submitted that the present application is res judicata as similar applications were filed in Machakos ELC 69 of 2017 and were determined. I have gone through the two rulings delivered by Justice Angote. In one of the applications, the Applicant who was the Defendant in the suit had sought revival of Nairobi HCCC No. 1727 of 1990. The application was dismissed because a suit which had been dismissed on 1st November, 2006 could not be revived. There was no determination of the prayer for injunction which the Applicant had prayed for. The present application is therefore not res judicata.
13. In the other application which was dismissed, the Applicant had applied to the court to authorize the Deputy Registrar to execute the necessary documents to have the suit properties re-transferred to the Applicant. The court found that the suit having been dismissed for want of prosecution on 1st November, 2006 there was no suit upon which the court could grant the orders sought.
14. On the second issue, the principles for grant fo an injunction were well set out in the case of Giella -vs- Cassman Brown & Co. Ltd (1973) EA 354 where it was held as follows:

“First, an Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which whould not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (EA Industries v Trufoods, [1972] EA 420”.
15. In the case of Mrao Ltd -vs- First American Bank of Kenya Limited & 2 others (2003) eKLR 125 the court held as follows:

“A prima facie case is a civil application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and probability of success of the Applicant’s case upon trial. That is clearly a standard which is higher than an arguable case”.
16. I have considered the material placed before me. There is no doubt that the judgment and order which resulted in the registration of the suit properties in the name of Mutetema Itumo and Kamene Nzalai were set aside. This being the case the Applicant has demonstrated that he has a prima facie case with probability of success.
17. The Applicant including the beneficiaries of the Estate of Muthoka Itumo are in possession of the suit properties. If they were to be evicted from the same, this will amount to loss which will never be compensated in damages the suit properties having been their only home.
18. Even if the court were in doubt, the balance of convenience tilts in favour of the Applicant who is in possession of the suit properties. I therefore find that the Applicant’s application has merits. The same is allowed in terms of prayer 3 and 4 of the Notice of Motion dated June 14, 2024.

It is so ordered.

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HON. E. O. OBAGA

JUDGE

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 20TH DAY OF MARCH, 2025.

IN THE PRESENCE OF:

Mr. Kiluva for Mr. Makundi for Respondent.

Ms. Ngumbao for Mr. Mutia for Applicant.

Court assistant Steve Musyoki

