



**Mwangi (Suing as the Administrator of the Estate of Mwangi Muhoro) v Wambugu  
(Environment & Land Case E22 of 2023) [2023] KEELC 18569 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18569 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E22 OF 2023**

**A OMBWAYO, J  
JUNE 29, 2023**

**BETWEEN**

**ESTHER NJERI MWANGI (SUING AS THE ADMINISTRATOR OF THE  
ESTATE OF MWANGI MUHORO) ..... PLAINTIFF**

**AND**

**ARTHUR WAMBUGU ..... DEFENDANT**

**RULING**

- 1 This ruling is in respect to the plaintiff's application dated March 21, 2023 and filed on March 27, 2023 which is expressed to be brought under Order 40 Rule 1(a), 2, 4 and 8 of the *Civil Procedure Rules* and Section 1A, 1B and 3A of the *Civil Procedure Act* and the application dated April 5, 2023 and filed on April 6, 2023 which is expressed to be brought under Section 3A & 6 of the *Civil Procedure Act*, Article 159 of the *Constitution* of Kenya and Order 51 Rule 1 of the Civil Procedure Rules.
- 2 The application dated March 21, 2023 is seeking the following orders;
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the Defendant/Respondent either by himself, his agents or his servants from conducting any dealings and from further trespassing into the Plaintiff's/Applicant's land known as L R No 9271/3 (I R No 9271/1/1/).
  4. That costs of the application be provided for.
- 3 The grounds on the face of the application are that the plaintiff had filed Nakuru HCC no 165 of 1974 between Mwangi Kihoro versus Willy Kiritu, Lawrence Mwangi, Arthur Wambugu and Makundui Farm Company Limited. That the suit was heard and judgement delivered on May 4, 2001 and a decree



issued on August 28, 2001 where it was held that the transfer of IR No 9271/1 to the 4<sup>th</sup> defendant would be cancelled and the said property be subdivided between Mwangi Muhoro who was to get 290 acres, Willie Kiritu who was to get 149 acres and Lawrence Mwangi who was to get 28 acres with Arthur Wambugu getting 121 acres. That Willie Kiritu appealed against the said judgement and the judgement on appeal was delivered on November 12, 2010. The Court of Appeal upheld the judgement of the High Court and awarded half of the costs of the counterclaim to the defendants. That the deputy registrar of the High Court issued a consolidated decree on July 1, 2016 and after the issuance of the said decree, Mwangi Muhoro settled on LR No 9271/3 (IR No 9271/1/1) measuring 290 acres, Arthur Wambugu settled on LR No 9271/4 (IR No 9271/1/2) measuring 121 acres, Willie Kiritu settled on LR No 9271/5 (IR No 9271/1/3) measuring 147 acres and Lawrence Mwangi on LR No 9271/6 (IR No 9271/1/4) measuring 25 acres.

- 4 That despite the valid court decree, the defendant fraudulently acquired a title for LR No 9271/9 measuring 77.88 Ha and the extra 43.44 acres are to be excised from the plaintiff's land thereby significantly reducing its size. That the defendant's actions are intended to prevent the plaintiff from enjoying her property rights. That between the months of February and March, the defendant had trespassed onto the plaintiff's property in the company of a surveyor with the intention of subdividing it. That it was in the interest of justice that the court allows the application as the plaintiff stands to suffer substantial loss if the orders sought are not granted.
- 5 The application is supported by the affidavit of the plaintiff who deposed that she is the administrator of the estate of the late Geoffrey Mwangi Muhoro. She then reiterated the grounds on the face of the application.
- 6 The application dated April 5, 2023 sought the following prayers;
  - a. That this honourable court be pleased to issue an order of stay of proceedings in the case serialized as NAKURU CM ELC No 184 OF 2022 Arthur Wambugu Muiga vs Thomas Willington Ngeno & 11 others pending the hearing and determination of this case.
  - b. That this honourable court be pleased to issue an order that the file serialized as NAKURU CM ELC No 184 OF 2022 Arthur Wambugu Muiga vs Thomas Willington Ngeno & 11 others be consolidated with this file and that they be heard together by the Environment and Land Court.
  - c. That costs of this application be in the cause.
- 7 The grounds on the face of the application were that the plaintiff is the administrator of the estate of Mwangi Muhoro and that she instituted the present case vide a plaint dated March 21, 2023 to protect the interests of his estate. The plaintiff is seeking in her plaint for the orders that; An order of permanent injunction restraining the Defendant herein, his employees, servants and or agents from further dealing and/or trespassing into the Plaintiff's land known as L R No 9271/3 (1 R No 9271/1/1/), An order declaring that the Defendant's Title for Land Reference No. 9271/9 - measuring approximately 192 acres was issued fraudulently and the Defendant is only entitled to 121 acres of LR 9271/1, An order directing the Land Registrar to cancel the Certificate of Title issued to the Defendant for all that parcel of land known as Land Reference No. 9274/9 measuring 77.88 Ha or 192.44 acres and in its place issue the Defendant with a Certificate for 121 acres, Costs of the Suit and interest.
- 8 The plaintiff reiterated that she is seeking to enforce her rights over LR No 9271/3. That the defendant filed Nakuru CM ELC No 184 of 2022 between Arthur Wambugu Muiga vs Thomas Willington Ngeno & 11 Others against her tenants vide the plaint dated November 18, 2022 and sought the following prayers; An order for declaration of rights in respect to the ownership of the parcel of land



known as IR 246235 L.R No. 927/9 measuring approximately 77.88 Ha, situate at Rongai within Nakuru County, A permanent injunction restraining the Defendants by themselves, their agents, servants and other persons acting at their behest from trespassing, planting, cultivating, ploughing and grazing their livestock or in any other way interfering with the said Plaintiffs parcel known as IL R 246235 L R No 927/9 measuring approximately 77.88 Ha situate at Rongai within Nakuru County and costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant. That the Defendants in the above-mentioned case were all tenants of the Plaintiff/Applicant herein having leased portions of land from the larger parcel known as LR No 9271/3 ( R No 9271/1/1/ that belonged to the Estate of Mwangi Muhoro. That this matter will determine which portion of land belongs to the Plaintiff/Applicant and which one belongs to the Defendant/Respondent and therefore tender a final determination as to the boundary of each party's land. That this court should stay the said proceedings so that it can hear the matters on merit. That if the two suits proceed simultaneously, the court will reach two conflicting decisions. That where there are common questions of law or facts in actions having sufficient importance in proportion to the rest of each action it would desirable that the matters should be disposed of at the same time and consolidation ordered. That the essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties.

- 9 The application was supported by the affidavit of Lawrence Macharia Karanja counsel for the plaintiff who reiterated the grounds on the face of the application and deposed it is in the interest of justice that the court grants the orders sought by the plaintiff.
- 10 In response to the application dated March 21, 2023, the defendant filed a replying affidavit sworn on March 5, 2023 and filed on April 6, 2023. He deposed that the Certificate of Confirmation of the Grant issued on June 2008 at the Nakuru High Court, Succession Cause No.203 OF 2006 (Estate of the late Mwangi Muhoro-deceased) and from the list of the deceased's assets, the subject parcel of land (1 R 17573/12 LR No 9271/1) or any shares thereof are not among the deceased's assets. That it is very clear that the Plaintiff is not the Administrator of the deceased's estate in so far as land parcel No I R 17573/12 LR No 9271/1 or any shares thereof are concerned and does not therefore have locus to sue with respect to the suit property. That notwithstanding that, it was clear that that land parcel No I R 17573/12 LR No 9271/1 measuring 581 acres (after deducting 7 acres for roads) was to be shared among Arthur Wambugu Muiga, Lawrence Mwangi Muya, Willie Kiritu Kigotho and Mwangi Muhoro in accordance with each person's capital contribution. That they contributed Kshs 160,000/= which would have entitled him 192.274 acres, Mwangi Muhoro 192.274 acres, Willie Kiritu Kigotho 174.3 acres and Lawrence Mwangi Muya 22.15 acres. That during subdivision, the surveyor took into consideration where each contributor was occupying and that he had not trespassed on anyone's parcel of land. He then sought that the plaintiff's application be dismissed.
- 11 The plaintiff then filed a supplementary affidavit sworn on April 20, 2023 and filed on April 25, 2023. She deposed that she had the locus standi to institute the present suit on the basis that she was the administrator of the estate of Mwangi Muhoro and that the only reason that the suit property did not form part of the deceased's estate was because it was not free property as there was an active case in court challenging its proprietorship. That after the court decreed that Mwangi Muhoro was entitled to 290 acres then it automatically formed part of his estate. That the mode of distribution adopted by both the High Court and the Court of Appeal was as per the capital contribution of the parties. That the said mode of distribution was derived from the minutes of a meeting where it was recorded that W. Kiritu was to get 149 acres, I.M Munyua was to get 28 acres, Mwangi Muhoro was to get 290 acres and A Wambugu was to get 121 acres. That each of the parties signed against their shares and the judgement by the Court of Appeal has never been set aside. She reiterated that the Court of Appeal



did not set aside the judgement of the High Court but only awarded costs to the defendant on the basis that the counterclaim had partially succeeded. That to date the suit property has never been subdivided as per the court's decree and that the defendant was using this as an opportunity to solely subdivide the land and award himself a portion that was bigger than what the court had awarded him. That it was in the interest of justice that the court intervenes and issues orders that the suit property be protected pending the hearing and determination of this suit.

- 12 The defendant then filed a Notice of Preliminary Objection dated April 20, 2023 on the same date which was on the following grounds;
  - a. That the plaintiff Esther Njeri Mwangi (Suing as the Administrator of the Estate of Mwangi Muhoro) has no locus standi to institute and sustain this suit for and on behalf of the Estate of Mwangi Muhoro in so far as it relates to LR No 9271/3 (1 R No 9771/1/1)
  - b. That the institution of this suit by the Plaintiff is in violation of section 34 of the Civil Procedure Act which states.
    - (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.
  - c. That due to lack of capacity to institute and sustain this suit on the plaintiff's part and owing to the mandatory provisions of section 34 (1) of the Civil Procedure Act, this suit is incompetent and the court has no jurisdiction to hear or hear or even entertain it.
- 13 Thereafter the defendant filed a replying affidavit to the plaintiff's application dated April 5, 2023. The said replying affidavit was sworn by the defendant on May 3, 2023 and filed on the same date. He deposed that none of the parties in Nakuru CMC ELC No 184 of 2022 between Arthur Wambugu vs Thomas Willingtone Ngeno & 11 Others had not applied for transfer of the case for consolidation of the two suits. He also deposed that Section 18 of the Civil Procedure Act is clear that only parties to the suit needs to be transferred can apply for the said transfer. That Esther Njeri Mwangi is not a party to the case before the subordinate court and therefore lacks capacity to apply for transfer of the case to this court. That the other advocates in the lower court case were not served with the said application and they are not aware that an application has been filed to transfer and consolidate the said suit with the present suit. That for there to be transfer and consolidation of suits, the parties and issues for determination have to be identical. That in the present matter the issues are dissimilar on facts and issues of law and the rights and reliefs sought are different. That the subject matters of both suits are different and so the said application should be dismissed with costs.
- 14 The plaintiff filed her submissions dated April 20, 2023 on April 25, 2023 while the defendant filed his submissions dated May 3, 2023 on May 4, 2023.
- 15 The plaintiff in her submissions gave a summary of the facts of the case and submitted on whether she has the locus standi to file the suit, whether she is entitled to the orders sought and whether costs should issue.
- 16 On the first issue, the plaintiff submitted that she is the widow of the deceased and the administrator of his estate. She also submitted that LR No 9271/3 (1 R No 9271/1/1) did not form part of his estate at the time of distribution by the probate and administration court on the basis that it was not free property because there was an active matter pending in court. The plaintiff further submitted that the deceased's assets listed in the petition for letters of administration were all free properties that formed part of his estate at the time but later, the High Court and the Court of Appeal pronounced that LR No. 9271/1 was to be subdivided among the parties. That therefore given that she was an administrator



of the estate of the deceased, she has the competency to bring any claim regarding the property for grant of the said order.

- 17 On the second issue, the plaintiff relied on the cases of *Giella vs Cassman Brown & Co. Ltd* [1973] EA 358 and *Nguruman Limited vs Jan Bonde Nielson & 2 Others* [2014] eKLR and submitted that she had established a *prima facie* case with a probability of success given the previous determinations by the court in HCC No 165 of 1974 and the Court of Appeal in Civil Appeal No 127 of 2004. She then reiterated the contents of her supporting affidavits and supplementary affidavit on the mode of distribution of Lr No 9271/1 and submitted that she will suffer irreparable injury that cannot be adequately compensated by an award of damages if the orders sought are not granted. The plaintiff also relied on the cases of *Paul Kipchirchir Kogo vs Frank Kimeli Tenai* [2018] eKLR, *Banis Africa Ventures Limited vs National Land Commission* [2021] eKLR and submitted that the court should grant the orders of temporary injunction pending the hearing and determination of this suit.
- 18 The defendant in his submissions addressed the preliminary objection dated April 20, 2023. He submitted that it was not disputed that the plaintiff filed the present suit on behalf of the estate of Mwangi Muhoro and that it was also not disputed that the suit property does not appear in the certificate of confirmation of grant issued on October 9, 2008 as the assets of the late Mwangi Muhoro (deceased). The defendant further submitted that the plaintiff can only sue with regard to the deceased assets listed in the certificate of confirmation of grant and that she has not indicated why she did not apply for rectification of the said grant to include the suit properties. The defendant relied on the cases of *Wambugu s/o Gatimu vs Stephen Nyaga Kimani* [1992] 2 KAR 292, *John Kasyoki Kieti vs Tabitha Nzivulu Kieti & another* Machakos HCC No 95 of 2001 among other cases and sought that the court allows ground No. 1 on his preliminary objection and find that the plaintiff has no locus standi to file the present suit.
- 19 The defendant further submitted that his second ground on the preliminary objection was based on the mandatory provisions of Section 34(1) of the *Civil Procedure Act*. The defendant submitted that the plaintiff's claim in the plaint is based on previous litigation in Nakuru HCC No 165 of 1974 between Mwangi Muhoro vs Willy Kiritu & 3 Others and the resultant appeal which could only be resolved in the said suits and not by filing of a fresh case. The defendant relied on Section 34 of the *Civil Procedure Act*, the cases of Nakuru HCC No 28 of 2017 *Charles Ngare Karaya vs Florence Muthoni & Sarah Njoki Munge t/a Sanjomu Auctioneers*, Nakuru HCC No 170 of 2010(OS) *DML vs ML alias EL*, Nakuru HCC No 4 of 2014 *Kepue ole Ngweta vs Karino Ole Mesbunko & Sarah Njoki Munge t/a Sanjomu Auctioneers* among other cases and sought that his preliminary objection be allowed as prayed.

### Analysis and determination

- 20 Before addressing the plaintiff's applications dated March 21, 2023 and April 5, 2023, I will first address the defendant's preliminary objection dated April 20, 2023.
- 21 The defendant's preliminary objection is on two grounds. Firstly, that the plaintiff does not have the *locus standi* to institute the suit on behalf of the estate of Mwangi Muhoro in so far as it relates to LR No 9271/3 (I R No 9271/1/1) and secondly that the institution of the suit violates the provisions of Section 34 of the *Civil Procedure Act*.
- 22 The plaintiff admits that the suit property was not indicated in the certificate of confirmation of grant because at the time of confirmation, there was an active litigation over the suit property. The plaintiff argues that since the court held that the suit property belonged to the estate of Mwangi Muhoro and even though it was not included in the certificate of confirmation of grant, as the legal representative of his estate, she had the authority to file a suit with respect to it.



- 23 The plaintiff argued that the decree issued by the court on July 1, 2016 indicated that LR No 9271/1 was to be subdivided and Mwangi Muhoro was to be given 290 acres. It is not disputed that the plaintiff is the legal representative of the estate of Mwangi Muhoro. It is also not disputed that the suit property was not listed as part of the estate of Mwangi Muhoro on the certificate of confirmation of grant that was issued on June 9, 2008 as there was an active matter in court.
- 24 The law is that one can only represent the estate of a deceased person when a grant of representation has been made in respect of the estate of such deceased person under the *Law of Succession Act*. It is my view that given that the plaintiff is the legal representative of the estate of the late Mwangi Muhoro, she has the right to institute proceedings with respect to the suit property. This is on the basis of the judgement given by the court that held that the deceased Mwangi Muhoro was entitled to 290 acres of LR No 9271/1.
- 25 The second ground on the defendant’s preliminary objection is that the suit is in violation of Section 34 of the *Civil Procedure Act*. Section 34(1) of the *Civil Procedure Act* provides as follows;
- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”
- 26 A perusal of the plaint filed herein indicates that the basis of the plaintiff’s claim is on previous litigation between the late Mwangi Muhoro, the defendant and other parties. The plaintiff averred in her plaint that Mwangi Muhoro (deceased) had instituted HCC No 165 of 1974 and judgement delivered on May 4, 2001. The plaintiff also had averred that the defendant in this matter was aggrieved with the said judgement and appealed to the Court of Appeal in case No 126 of 2004. The court of Appeal in its judgement upheld the determination by the High Court and awarded the defendant half of the costs of the counter claim. The plaintiff further averred that as per the decree, the late Mwangi Muhoro was entitled to 290 acres and the defendant entitled to 121 acres. It was the averment of the plaintiff that despite the valid court order, the defendant fraudulently acquired a title deed for LR No 9271/9 measuring 77.88 ha (192.44 acres) with the extra acres to be excised from the plaintiff’s land. Prayer (b) of the plaint was seeking for an order that the defendant’s title for LR No 9271/9 measuring 192 acres was issued fraudulently and that the defendant was only entitled to 121 acres of LR 9271/1.
- 27 The court in the case of *James Wainaina Imunyo & 6 Others V Karanja Mbugua & Co. Advocates & Another* [2012] eKLR while considering the provisions of Section 34 of the *Civil Procedure Act* stated that;
- ...that if the plaintiff wishes to contest the execution process in that suit, then the only avenue open is to challenge that process in the same suit, and not by filing a fresh suit. I need not belabour the point, section 34 speaks for itself.”
- 28 It is my view therefore that this ground of the preliminary objection has merit and therefore ought to succeed. This is because it is quite evident that the plaintiff is challenging the execution of the decree issued on July 1, 2016 which should only be done in the said suit. Given this finding, I will not address the applications filed by the plaintiff. Consequently, the plaintiff’s suit is hereby struck out with costs to the defendant.

**RULING DATED SIGNED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF JUNE 2023.**

**A.O. OMBWAYO**

**JUDGE**

