



**Ngumi Farm Limited v Kariuki & 5 others (Environment & Land
Case 28 of 2022) [2023] KEELC 18042 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18042 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT & LAND CASE 28 OF 2022**

LN GACHERU, J

JUNE 13, 2023

BETWEEN

NGUMI FARM LIMITED PLAINTIFF

AND

PATRICK NJUGUNA KARIUKI 1ST DEFENDANT

FRANCIS MBAU MURIGI 2ND DEFENDANT

**MURANG'A COUNTY TEACHERS CO-OPERATIVE SOCIETY
LIMITED 3RD DEFENDANT**

MUYENGA 2040 SELF HELP GROUP 4TH DEFENDANT

WALLACE MAINA MICHIRE 5TH DEFENDANT

REGISTRAR OF LANDS, MURANG'A 6TH DEFENDANT

RULING

1 By a plaint dated November 28, 2022, the plaintiff/applicant herein Ngimu Farm Ltd filed the instant suit against the defendants/respondents jointly and severally, claiming proprietary rights over suit properties known as Makuyu/ Kimorori/ 1599, 1601, 1625, 1629 and 1632, which it alleged were fraudulently transferred to the defendants. Contemporaneously, the plaintiff/applicant filed the instant notice of motion application for orders that: -

1. Spent
2. Spent
3. That pending the hearing and final determination of this suit, a temporary injunction do issue restraining the defendants whether by themselves, their agents, servants and/ or employees or any other person(s) acting for the defendants or under the defendants' authority from entering



onto, using, taking possession of, encroaching onto, alienating, disposing of or in any other way interfering with the plaintiff's quiet enjoyment and possession of the parcels land known as Makuyu/ Kimorori/ 1599, 1601, 1625, 1629, 1632, 1596, 1771, 1603, 1621, 1630 and 1609

4. That such other or further orders be granted as this court may deem fit and necessary
 5. That the costs of this application be provided for.
- 2 The application is premised on five grounds stated on the face of it, and the supporting affidavit sworn by Peter Kamande Mungai, sworn on the November 28, 2022. The plaintiff/applicant contends that it is the absolute and indefeasible owner of Makuyu/ Kimorori/ 1599, 1601, 1625, 1629, 1632, 1596, 1771, 1603, 1621, 1630 and 1609, the suit property and which properties, the defendants have by fraud and misrepresentation caused it to be registered in their names, without the plaintiff's/applicant's knowledge. The plaintiff/applicant further deponed that it is apprehensive that the defendants/respondents are up to no good and may deal with the suit properties to its detriment.
- 3 The 5th defendant entered appearance and filed a notice of preliminary objection in opposition to the notice motion and the whole suit on the grounds:
1. That the 5th defendant has been wrongly sued as he does not own any of the properties listed by the plaintiff in its documents before this honourable court. The application and plaint raise cause on Makuyu/ Kimorori/ 1599, 1601, 1625, 1629 and 1632; the 5th defendant does not own any of the aforementioned properties
 2. That the plaint does not raise any legal cause of action against the 5th defendant
 3. The application and the plaint filed by the plaintiff are bad in law and an abuse of court process and should be dismissed with costs.
- 4 The 5th defendant/respondent Wallace Maina Michire further filed replying affidavit sworn on the February 2, 2023. It is his disposition that he is the owner of Makuyu/Kimorori/ Block 1/1632, and has enjoyed quiet possession of it since 2011. He further averred that the instant notice of motion application should be dismissed as it is an abuse of the court process.
- 5 The 2nd defendant equally opposed the suit and filed a notice of preliminary objection on the sole ground that the suit herein contravenes section 7 of the *Limitation of Actions Act* cap 22 of the Laws of Kenya. Additionally, Kennedy Murigi Mbau, swore a replying affidavit for and on behalf of the 2nd defendant as the legal representative. He deponed that his deceased father bought land parcel No Makuyu/Kimorori/ Block 1/1601, from the plaintiff *vide* a sale agreement dated October 13, 1993. That upon execution of the sale agreement, the 2nd defendant (deceased) acquired possession of the property which he had been in peaceful occupation and use until his demise. That Joyce Wambui Mbaru, the legal representative of Francis Mbau Mungai was in possession of the said land until her demise in 2020. He deponed further that the plaintiff had never raised an issue for the past 29 years that the 2nd defendant/respondent (deceased) and his estate have been in occupation and as such, the application is frivolous and abuse of the court process.
- 6 The plaintiff filed a further affidavit sworn on the April 13, 2023 by Peter Kamande Mungai, who averred that he is one of the directors of the plaintiff. He maintained that the plaintiff/applicant is the registered proprietor of the suit properties. That in 2018, with the intentions of knowing the outstanding loan that the plaintiff/applicant owed to Kenya Planters Co-operative Union Ltd, they approached the Ministry of Lands and Physical Planning, who in turn wrote to the said Co-operative Union. That on November 19, 2018 the plaintiff received a letter from the Ministry of Lands and Physical Planning informing it that the original title deeds for the suit property are held by the said



Co-operative Union, until the outstanding amount is paid in full. That as a result therefore, there was no way the suit properties could be transferred to the defendants, yet the original title deeds have not been released. He further deponed that this court should issue injunctive orders to conserve the suit properties.

- 7 In a rejoinder to the supplementary affidavit, the 1st defendant filed a further affidavit sworn on the April 20, 2023. He deponed that the plaintiff/applicant is making reference to two distinct parcels of land, there being a distinction between Makuyu/ Kimorori and Makuyu/Kimorori/Block 1. He further stated that the letter attached to the supplementary affidavit does not support the plaintiff's case, as it has conflicting information. He further averred that the plaintiff/applicant has failed to attach a copy of the title deed detailing the alleged charge in favour of Kenya Planters Co-operative Union Limited. That the attachments without a title deed abstract have no significant forbearance and the suit should be struck out. There was no response by the 3rd, 4th and 6th defendants.
- 8 The notice of motion application and the two preliminary objections were dispensed together by way of written submissions as directed by the court on February 14, 2023.
- 9 The plaintiff/applicant through the law firm of Ombati Otieno Opondo & Awino Advocates filed the written submissions on June 9, 2023 and urged the court to allow the instant application. The plaintiff/applicant submitted that; the plaintiff being the legal owner of the suit properties would like the Land Registrar Muranga to confirm the legal status of the said suit properties.
- 10 It was further submitted that in the year 2018, the plaintiff/applicant approached the Ministry of Lands to confirm the outstanding balance of a loan taken from Kenya Planters Co-operative Union who are holding the original title as security. Further, that the Ministry of Lands confirmed the ownership of the parcels of land to be the plaintiff/applicant and therefore no transfer could have happened as the title deed is held by the Kenya Planters Co-operative Union Ltd and the said loan has not been cleared yet. It was further submitted that the suit parcels of land belong to the plaintiff/applicant and the defendants/respondents must have fraudulently acquired the titles. The plaintiff urged the court to grant the orders sought to protect the plaintiff/applicant's interest. However, the plaintiff/applicant did not submit on the two preliminary objections.
- 11 The 1st defendant/respondent only filed a further replying affidavit but no submissions.
- 12 The 2nd defendant/respondent filed his written submissions through Mutali Wanyama & Co Advocates in support of his preliminary objection and opposition to the notice of motion application. The 2nd defendant/respondent submitted that the application was defective and contravened section 7 of the Law of Limitations of Actions Act which states as follows:
- Any action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accord to him or if it first accord to some persons through whom he claims to that person.”
- 13 It was his further submissions that the suit is time barred and that the question of limitations is a jurisdictional, one, since if the court has no jurisdiction, the preliminary objection may dispose of the suit. The 2nd plaintiff/respondent relied on the case of *Sobanladurgadass Rajput and another v Divisions Integrated Development Programmes Co Ltd* (2021) eKLR where the court quoted with approval the case of *Mehta v Shah* (infs) EA 321, where it had been held.

The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand and on the other protect a defendant from after he has lost evidence of his defence from being disturbed after a long lapse of time. The effect of a limitation enactment is to remove remedies irrespective of the merit of the parameter case”.



- 14 The 5th defendant/respondent through the law firm of Shako & Co Advocates, filed the written submissions on May 24, 2023 and raised two issues.
- 15 On the 1st issue of whether the court should grant the orders of injunction, the 5th defendant/respondent submitted that there were no triable issues for the court to consider as the plaintiff/applicant failed to establish all the conditions set out in *Giella v Cassman Brown & Co Ltd* 1973 (EA) and also *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) eKLR.
- 16 The second issue was whether the suit against the 5th defendant ought to be dismissed. The 5th defendant/respondent submitted that the suit and the application are non-starters and ought to be dismissed. It was his submissions that the alleged suit property was not accurately described. He relied on the case of *Esther Murigi Muboi & 9 others v Jane Wanjiru Kamau & 2 others* (2009) EKLK where the court held”
- “On the merits, the court finds that the ingredients for the granting of an injunctive relief herein have not been satisfied because of the following
- i
 - ii
 - iii. Some of the properties were not properly described.
- 17 The 5th defendant/objector urged the court to dismiss the suit against him as it raises no triable issues.
- 18 The court has carefully considered the instant notice of motion application, the two preliminary objections, the whole pleadings and the rival written submissions and finds the issues for determination are:
- i. Whether the two notices of preliminary objections are merited.
 - ii. Whether the notice of motions application dated November 28, 2022 is merited.

I. Whether the two notices of preliminary objections are merited

- 19 A preliminary Objections was described in the case of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696 to mean
- A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
- The court further held:
- A preliminary objection is in the nature of what used to be a demurrer. it raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”
- 20 The court will first determine whether what has been raised herein by the two defendants/respondents meet the description of a preliminary objection as per *Mukisa Biscuits case* (supra).
- 21 The 2nd defendant/respondent in its notice of preliminary objection dated December 19, 2022 stated that the suit herein contravenes the provisions of section 7 of the *Limitation of Actions*



Act, cap 22 Laws of Kenya. The 2nd defendant/respondent averred and submitted that the sale agreement in issue was entered in 1993, and this suit was filed in 2022.

- 22 The 2nd defendant/respondent referred to several documents such as; -Sale agreement dated October 13, 1993 Copy of title deed Copy of land search
- 23 The above documents were attached to buttress the 2nd defendant/respondent's averments and submissions that the suit is caught by Limitation of Actions Act. However, from the description of what a preliminary objections is, the same should be based on pure points of law which arise out of the pleadings.
- 24 The plaintiff/applicant herein did not indicate in the pleadings that the 2nd defendant/objector got registered as the proprietor of the alleged suit property in 1993. For the court to ascertain the above, it has to revert to ascertainment of facts through perusal the exhibits. Therefore, the 2nd defendant/objector's preliminary objection will entail ascertainment of facts and that is not a pure point of law. It does not meet the criteria of what amounts to a preliminary objections as stated in the *Mukisa Biscuits case* (supra)
- 25 With regard to 5th defendant's preliminary objection on the fact that the plaint does not raise any legal cause of action against 5th defendant, it is also clear that the court will have to ascertain whether land parcel No Makuyu/Kimorori/1632 and Makuyu/Kimorori/Block 1/1632 refers to one and the same parcel of land. In doing so, the court will have to ascertain facts and thus the preliminary objection by the 5th defendant dated December 16, 2012, also fails to meet the criteria of what amount to a preliminary objection.
- 26 For the above reasons, the court finds that the two preliminary objections as filed by the 2nd and 5th defendants/objector are not merited and the two preliminary objections are dismissed entirely.
- 27 However, the court has noted that the plaintiff has sued 2nd defendant Francis Mbau Murigi who is deceased. The replying affidavit on record was sworn by one Kennedy Murigi Mbau, who is the legal representative of the estate of Joyce Wanjiru Mbau, who died on June 14, 2020. Joyce Wanjiru Mbau was the legal representative of the Estate of Francis Mbau Murigi (deceased) and she became the legal owner of the suit property through a confirmed grant dated June 25, 2003.
- 28 Therefore, Francis Mbau Murigi, the alleged 2nd defendant herein is deceased and no suit can stand against a deceased person. The 2nd defendant (deceased) Francis Murigi Mbau is wrongly sued and his name is hereby struck out of the pleadings since he is deceased and no suit can stand against a deceased person. The plaintiff ought to have sued the estate of the said Francis Mbau Murigi (deceased) and not the deceased person. It is trite law that no suit can issue against a deceased person, the Court of Appeal in Joseph Kamau Musa & others v Eleri Company Limited & others [2017] eKLR had this to say about proceedings for or against deceased persons:
-it cannot be gainsaid that persons who are deceased or persons who do not desire to be part of proceedings cannot be joined. It has been alleged that some of the 155 persons seeking to be joined are deceased. Those deceased cannot be joined unless legal representatives have been duly appointed in respect of their estates.”
- 29 Similarly, the court in Geeta Bharat Shah & 4 others v Omar Said Mwatayari & another [2009] eKLR when concluding that a suit against a deceased person was a nullity held:



We have no doubt whatsoever that the learned judge, in refusing to allow the application as in favour of the deceased against whom a suit was filed after his demise, was plainly wrong. Indeed, in our view, there was no need for the administrators of the deceased's estate to urge the court to do so for once the respondent also admitted that he sued a dead person, the court was duty bound to down its tools as it had no jurisdiction to proceed to hear a suit filed against a person who was already dead by the time the suit was filed.

II. Whether the notice of motion application is dated November 28, 2022 is merited.

30 The plaintiff/applicant has sought for injunctive relief. This said application is anchored under order 40 rules 1, 2 & 3 of the [Civil Procedure Rules](#). Order 40 rules 1 states: -

1 cases in which temporary injunction may be granted.

Rule 1. Where in any suit it is proved by affidavit or otherwise —

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or is wrongfully sold in execution of a decree; or
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

31 For an injunctive order to be issued, there must exist a threat or danger to the suit property being wasted or disposed of to defeat the intended outcome or decree of the court.

32 The plaintiff/applicant in the supplementary affidavit of Peter Kamande Mungai, averred in para 3 that in the course of pursuing the matter involving the suit property, had in 2018 approached the Ministry of Lands and Physical Planning to enquire about the balance of the loan owed to Kenya Planters Co-operatives Union Ltd. That on November 1, 2018, the Ministry of Lands wrote a letter to KPCU marked "Pkm1" to inquire about the debt.

33 Further that on November 19, 2018, the Ministry of Lands wrote to the plaintiff/applicant a letter stating "please note that we have confirmed that the original title deeds in the name of Ngimu Farm Ltd for properties Makuyu/Kimorori/Block 1/1598, 1601, 1602,1609,1610, 1611, 1615,1616, 1625 and 1630 is held by Kenya Planters Co-operative Union Limited until the payment is cleared in full".

34 From the above averments, it is evident that the discovery herein was done in 2018. The suit herein was filed in 2022, and it is evident that injunctive orders are sought to avert immediate danger to property by sale or other disposition (see the case of [Noor Mohammed Jobnmohammed v Kassam Ali Virji Madhani](#) (1953) 20 CRK 8 where the court held

To justify temporary injunction, there must be evidence of immediate danger to property by sale or other disposition".

35 The plaintiff/applicant has not deponed that the defendants/respondent herein are intending to sell the suit properties. The plaintiff/applicant has not proved any of the incidents set out in order 40 rule 1 of the appeals which the plaintiff/applicant has anchored its application upon.



These conditions are that any property in dispute is a suit in danger of being wasted, damaged, or alienated by any party to the suit or is wrongfully sold, in execution of a decree”

- 36 In the instant suit, the plaintiff/applicant is claiming that the defendants/respondents acquired the suit properties fraudulently but it has not alluded to the fact that the defendants/respondents are threatening to waste, damage or alienate the suit properties aforementioned.
- 37 Having found that there is no threat or danger over the suit properties, this court finds that there is no justification for seeking injunctive orders and therefore the court will not dwell on whether the conditions set out in *Giella v Cassman Brown* (supra) have been established.
- 38 The application too having been anchored under sections 1A,1B & 3A, of the [Civil Procedure Act](#), the court takes refuge in section 3A of the said act which grants the court powers to issue orders that are necessary for the end of justice.
- 39 The necessary orders herein are therefore to have this notice of motion application dated November 28, 2022, dismissed entirely as it is not merited.
- 40 The parties should prepare this suit for hearing of the main suit expeditiously so that the issues in dispute are heard and determined at once.
- 41 For the above reasons the court makes the final findings as follows:
- i. The two notices of preliminary objections by the 2nd and 5th defendants/objectors are dismissed entirely.
 - ii. The 2nd defendant Francis Mbau Murigi (deceased) is struck out of the suit herein as he is deceased person.
 - iii. The notice of motion application dated November 28, 2022 is found not merited and it is hereby dismissed entirely with costs to the 1st and 2nd defendants/respondents herein.
 - iv. The suit to be set down for hearing expeditiously.
 - v. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 13TH JUNE 2023.

L. GACHERU

JUDGE

Delivered online in the presence of

Mr Awino- for Plaintiff/Applicant

Mr Ndungu- H/B for G.M. Muhoro for 1st Defendant/Respondent

Mr Mutali- for 2nd Defendant/Respondent/Objector

Absent- 3rd Defendant/Respondent

Absent- 4th Defendant/Respondent

Mr Thuo- for 5th Defendant/Respondent/Objector

Absent – 6th Defendant/Respondent.

Joel Njonjo – Court Assistant



L. GACHERU
JUDGE

