



REPUBLIC OF KENYA



Ng'ang'a & another v Njenga & another (Environment & Land Case E015 of 2023) [2023] KEELC 19263 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19263 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E015 OF 2023**

**JG KEMEI, J
JULY 28, 2023**

BETWEEN

ESTHER NJERI NG'ANG'A 1ST PLAINTIFF

DAMARIS DOTTY WANJIRU NG'ANG'A 2ND PLAINTIFF

AND

MARY WANJIRU NJENGA 1ST DEFENDANT

LILIAN WANJIKU AUGUSTUS 2ND DEFENDANT

RULING

1. The Plaintiffs filed suit against the Defendants on February 23, 2023 seeking inter alia declaratory orders that Kiambaa/Waguthu/1121 and subsequently Kiambaa/Waguthu/4823 (suit land) currently registered in the 2nd Respondent's name was encumbered by a customary trust in favour of the 1st Plaintiff and that the said customary trust be dissolved.
2. Simultaneously, the Applicants filed an application dated February 23, 2023 seeking the following orders:-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. Pending the hearing and determination of the Suit herewith; a Conservatory order be, and is hereby, issued restraining the Respondents, their servants, agents, employees and whosoever from Interfering, by way of any means, with the suit Plot; to wit Title No. Kiambaa/Waguthu/4823; Only In So Far as they concern the interfering by way of evicting the



Applicants, trespassing, charging, transferring, demarcating or through any other means at the Suit Plot; to wit Title No Kiambaa/Waguthu/4823.

- e. Spent
 - f. Pending the hearing and determination of the application and suit herewith; an Injunction order be, and is hereby, issued restraining the Respondents, their servants, agents, and or employees from Evicting the Applicants from the suit property; to with Title No Kiambaa/Waguthu/4823.
 - g. Costs be in the cause.
3. The application is based on the grounds adduced thereto together with Supporting Affidavit of Esther Njeri Ng'ang'a sworn on the February 23, 2023. The deponent avers that the mother title Kiambaa/Waguthu/1121 was registered in the name of Samuel Njenga Kaindo (Deceased), her father in law. That the said mother title has been subdivided in two portions, that is to say, Parcels 4822 and 4823.
 4. Further she avers that she has been living on the suit property since 1993 when she got married to James Ng'ang'a Njenga, the 1st respondent's son. That she has developed a home and continues to pay utility bills for the management of the property. It is her case that the suit land is encumbered by a customary trust and that the registration of the suit in the name of the 2nd Respondent did not dissolve the said customary trust.
 5. She alleges that the Respondents are threatening her with eviction from the suit land and has annexed a letter marked as 'ENN 6' dated February 21, 2023 authored by the 2nd Respondent and addressed to the 1st Applicant and James Nganga Njenga demanding that they discontinue further use and cultivation of the property. The said letter demanded vacant possession of the property within 21 days.
 6. She avers that it was illegal for the 1st Respondent to cause the registration of the suit land in her name and further transfer it to the 2nd Respondent yet she did not purchase nor was she gifted the property. That no prejudice will be suffered by the Respondents if the orders are granted for, in any event, the orders are aimed at preserving the subject of this litigation.
 7. The Respondents have opposed the application vide on the Grounds of Opposition filed on the April 11, 2023 on the grounds set out as follows:-
 - a. The application is frivolous, misconceived and is an abuse of the Court process.
 - b. The application has been filed in bad faith through misrepresentation of material fact.
 - c. The application is res sub judice the application dated July 12, 2019 in Nairobi High Court (Family Division) Succession Cause No 2184 of 2013 (Estate of Samwel Njenga Kaindo (Deceased) Esther Gitau –Vs- Mary Wanjiru Njenga.
 - d. The suit and the application herein are a backdoor attempt by the 1st Applicant to wrestle the suit property from her mother-in-law (1st Respondent herein) and sister-in-law (2nd Respondent) without her husband's (James Nganga Njenga) consent and/or involvement.
 - e. There is no law or custom that allows a daughter-in-law to bypass her husband and stake "customary trust" claims over her in-laws ancestral land and therefore the Applicants 'claim is untenable in law.'
 - f. The Applicants have not met the principles established in Giella Vs. Cassman Brown are therefore undeserving of equitable reliefs.



- g. In the circumstances, the application is without merits and should be dismissed with costs.
8. In addition, Mary Wanjiru Njenga, the 1st Respondent in her sworn Replying Affidavit dated April 6, 2023 stated as follows; she is the wife of Samuel Njenga Kaindo (Deceased); Esther Njeri Nganga is her daughter in law, married to James Nganga Njenga, her son and the 2nd Applicant is her granddaughter; Lilian Wanjiku Augustus, 2nd Respondent is her daughter.
 9. That the mother title (Parcel 1121) was registered in the name of her deceased husband, Samuel Njenga Kaindo. That they allowed their son James Nganga Njenga to occupy a portion of the mother title where he constructed a house married and lived with his wife, the 1st Applicant together with their children. Upon the death of Samuel Njenga Kaindo in 2013 she was appointed as an administratrix of his estate in 2015. In 2017 Letters of grant of Administration were confirmed in her favour and the title was transmitted to her wholly. That she did this with the consent of her children, the Applicant's husband included.
 10. That in 2019 the 1st Applicant unsuccessfully sought to revoke the Grant issued in her name on the grounds that the suit property had been gifted to her *inter vivos* by Samuel Njenga Kaindo, deceased. That the Court disallowed her application halting her attempts to wrestle the said property from the 1st Respondent.
 11. Further, she contends that the application is sub *judice* in view of the existence of Succession Cause No 2184 of 2013 – The Estate of Samuel Njenga Kaindo (Deceased) - Esther Gitau Damaris Ndoti Wanjiru Vs Mary Wanjiru Njenga.
 12. That upon acquiring the property by way of distribution / transmission she proceeded to subdivide the suit land into two portions Parcel 4822 and Parcel 4823 registered in the names of James Nganga Njenga and Lilian Wanjiku Augustus. That she did not require any permission from the Applicants to subdivide and transfer the suit land to the current beneficiaries. She contended that in any event, the 1st Applicant's husband James Nganga Njenga who is estranged from the Applicant, is the registered owner of 4822 and not 4823 (suit land). That she is not aware of any established law or custom where a daughter in law would bypass her husband and claim ancestral or customary trust in his lifetime. Further that the Applicants have not been evicted from the portion which they presently occupy which is parcel 4822 – registered in the name of James Nganga Njenga. Moreover, the 1st Applicant evicted her husband in the year 2000 from the house she occupies situate on parcel 4822. That the application is motivated by personal ulterior motives on the part of the 1st Applicant.
 13. The Court was urged to dismiss the application as the same is untenable.
 14. In a Further Supplementary Affidavit filed by the 1st Applicant filed June 12, 2023, the Applicant reiterated her averments in her previous Affidavit and added that her father in law allowed her and her husband to live on a portion of the suit land which parcels she avers was gifted to them where they erected a house and continued cultivating for the last 30 years.
 15. In answer to the question of sub*judice*, the 1st Applicant contended that the present cause of action relate to customary trust which is triable in the Environment and Land Court and not the Family Division. She avers that her claim is aimed at protecting the intergenerational customary trust created over the suit land in favour of her children. She denied evicting her husband James Nganga Njenga in 2000 and states that the said Njenga walked out on her on his own volition in 2016.
 16. On April 24, 2022 the Applicants elected to file written submissions in support of their application while the Respondents chose to rely on the Replying Affidavit of Mary Wanjiru Njenga together with the Grounds of Opposition dated April 6, 2023.



17. The Court has considered the written submissions filed by the firm Nchogu Omwanza & Nyasimi Advocates on behalf of the Applicants dated March 13, 2023 together with Supplementary submissions dated June 6, 2023. The Court would like to thank Counsel for their highlights.
18. Having considered the application, the Affidavit evidence placed before me, written submissions, list of authorities and all the material placed before the Court the following issues commend themselves for determination: -
- a. Whether the Applicant is entitled to orders of injunction.
 - b. Who meets the costs of the application?
19. Before delving into the main issue revolving around restraining orders I find it necessary to determine the question on whether or not the application is subjudice in view of HCC Succ No 2184 of 2013 – The Estate of Samuel Njenga Kaindo (Deceased) Esther Gitau -Vs- Mary Wanjiru Njenga.
20. Section 6 of the [Civil Procedure Act](#) provides as follows;
- " No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.'
21. In the case of [Republic Vs Paul Kihara Kariuki, Attorney General & 2 Others Ex parte Law Society of Kenya \[2020\] eKLR](#) the Court stated as follows:-
- ' ... there exists the concept of subjudice which in Latin means under Judgement. It denotes that a matter is being considered by a Court or judge. The concept of subjudice that where an issue is pending in a Court of law for adjudication between the same parties, any other Court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent Court to stay the proceeding and such order can be made at any stage.'
22. It is the Respondents case that the 1st Applicant filed a similar application in the Succession Cause aforesaid and therefore the application is subjudice. I have perused the chamber summons filed on the July 12, 2013 in which the Applicants in this suit sought restraining orders against the administrator of the estate from eviction threats intimidation and or interfering in any manner with the Applicants occupation of the suit land. That she had sought to revoke the grant but she later withdrew the application. The fate of the application has not been stated.
23. I find that there is no evidence that the succession case is still pending. From the pleadings annexed to the Replying Affidavit of the 1st Respondent the application was made in 2013 and the confirmation of grant was issued in 2017. Even if the Court was to find in the positive and stay the suit, it would be acting in vain because it appears that the succession cause was heard and determined.
24. I find that the application is not subjudice. The objection is therefore rejected.
25. I shall now consider the application for injunction against the Respondents. Order 40 rule 1 and 2 of the [Civil Procedure Rules](#) provides for the following:-
- ' 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 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.

[Order 40, rule 2.] Injunction to restrain breach of contract or other injury.

2. (1) In any suit for restraining the Defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the Plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the Court for a temporary injunction to restrain the Defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

- (2) The Court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the Court deems fit.'

26. This Court is guided by the principles in *Giella Vs Cassman Brown (1973) EA* which include: whether the Applicant has shown prima facie case with a probability of success; whether the Applicant shall suffer irreparable injury which cannot be compensated by damages; and if the Court is in doubt then it can decide the application on a balance of convenience.

27. The Applicant has annexed various documents to prove to this Court that they have a prima facie case. What is a prima facie case? In the case of [*Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others Civil Appeal No 39 of 2002*](#), the Court described prima facie case as:

' In Civil case, it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has been infringed by the opposite party as to call for an explanation or rebuttal from the latter.'

28. It is the Applicant's case that she has lived on the suit land since 1993 when she got married to the 1st Respondents son. That she has developed the land and erected a family home for her children without any interference by the respondents. The respondent has admitted that the Applicant resides on parcel 4823 belonging to the 2nd Respondent instead of parcel 4822 registered in the name of her husband. That the demand letter dated the February 21, 2023 required the Applicant to discontinue the cultivation of the land and in default face eviction. The occupation of the Applicant on the suit land is not denied. The exact occupation is a matter of evidence and it is not for the Court at the preliminary stage to make any determination as the same is reserved for trial. I find that the Applicant has established a prima facie case.

29. On irreparable injury, the Applicant states that she has lived on the land for over 30 years and that the land being family land her claim is premised on customary trust. Customary trust being an intergenerational trust when proven is a claim laced with family ties and no other land is the same.



It carries along emotional linkages which may not be compensated with damages. I find that the Applicant has established that if the orders are not granted she will suffer irreparable loss.

30. Since the Court is not in doubt, I grant the orders to preserve the substratum of the suit land.
31. Final orders
 - a. The application is not subjudice.
 - b. Status quo is granted in terms of prayer d and f.
 - c. Each party to bear their costs.
32. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF JULY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Saka HB Omwanza for 1st and 2nd Plaintiffs

Njuguna for 1st and 2nd Defendants

Court Assistants – Phylis & Lilian

