



REPUBLIC OF KENYA



KENYA LAW
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**Njau (Legal Representative Ad Litem of the Estate of George Maina Ndung'u - Deceased)
& 10 others v Ndung'u & 3 others; New Fortis Savings and Credit Co-operative
Society (Formerly Nyeri Teachers Sacco) & 4 others (Interested Parties) (Environment
& Land Case E014 of 2022) [2023] KEELC 19098 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E014 OF 2022**

**JO OLOLA, J
JULY 28, 2023**

BETWEEN

**FAITH WAMBUI NJAU (LEGAL REPRESENTATIVE AD LITEM OF THE
ESTATE OF GEORGE MAINA NDUNG'U - DECEASED) 1ST PLAINTIFF
GRACE WAITHIRA MAINA (LEGAL REPRESENTATIVE AD LITEM OF THE
ESTATE OF GEORGE MAINA NDUNG'U - DECEASED) 2ND PLAINTIFF
JOSEPH GACAGUA NYINGI 3RD PLAINTIFF
GRACE HAY 4TH PLAINTIFF
BONIFACE MURIITHI 5TH PLAINTIFF
PAUL MUREITHI GITAHU 6TH PLAINTIFF
CATHERINE N. NDUNG'U 7TH PLAINTIFF
TIMOTHY THUITA MWANGI 8TH PLAINTIFF
PATRICK KAGOIYA 9TH PLAINTIFF
CAROLINE WANJA 10TH PLAINTIFF
PASTOR GITHAE 11TH PLAINTIFF**

AND

**JOHN MWANGI NDUNG'U 1ST DEFENDANT
PASQUELINA NYOKABI NDUNG'U 2ND DEFENDANT
CHARLES NDIRANGU NDUNG'U 3RD DEFENDANT
JANE NDUNGU GEORGE 4TH DEFENDANT**



AND

**NEW FORTIS SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
(FORMERLY NYERI TEACHERS SACCO) INTERESTED PARTY**
LAND REGISTRAR, NYERI INTERESTED PARTY
DIRECTOR OF SURVEYS INTERESTED PARTY
ATTORNEY GENERAL INTERESTED PARTY
MOUNT KENYA BOTTLERS LIMITED INTERESTED PARTY

RULING

1. By the notice of motion dated June 3, 2022, the eleven (11) plaintiffs herein pray for orders that:
 3. Pending the hearing and determination of this suit, an order of injunction do issue inhibiting and prohibiting the defendants, Land Registrars and Director of Surveys by themselves, their agents, servants or any person claiming under them from alienating, surveying, registering, selling, charging, leasing, titling or prejudicially dealing with LR No 2274, or any excised portion of LR No 2274 (hereinafter “Mweiga Farm”) located in Nyeri county and land registered as Plot No XXI/423/MI (hereinafter “Gathecha Building) located in Mombasa county;
 4. ...
 5. Pending the hearing and determination of this suit, an order of injunction do issue restraining the defendants or their agents, servants or persons claiming authority from the defendants from entering or interfering with the plaintiffs’ peaceful and quiet enjoyment of their plots in LR No 2274 located in Mweiga, Nyeri county;
 6. Costs of this application be borne by the defendants (respondents); and
 7. Any other or further order/s do issue which this court may deem fit and just to grant, so to preserve the subject matter of this suit and to maintain law and order.
2. The application is supported by two affidavits sworn by the 1st plaintiff – Faith Wambui Njau and is premised on the grounds that:
 - (a) Before his death, Festus George Ndung’u was the husband of the 2nd defendant. He died on December 20, 2004;
 - (b) The 2nd defendant is over 94 years old and suffers from old-age dementia and unsoundness of mind;
 - (c) The said Festus was the registered owner of the said Mweiga Farm and Gathecha Building;
 - (d) Festus was among others the father of the 1st plaintiff’s husband George Maina with whom the 1st plaintiff had a matrimonial home in the said Mweiga Farm;



- (e) Before the death of the 1st plaintiff's husband on August 12, 2021, the parties herein co-existed peacefully and respected each other's legal or equitable proprietary rights and interests in the said Mweiga Farm and Gathecha Building;
 - (f) In the year 2007, the 2nd defendant and her children instituted succession proceedings in Mombasa High Court Probate and Administration Cause No 247 of 2007; In the matter of the estate of Festus George Ndung'u and an order of confirmation of grant was issued in the year 2017;
 - (g) Recently and in an unlawful attempt to defraud the plaintiffs, the interested parties and the estate of George Maina, the defendants have taken advantage of the death of their father, their eldest brother and the mental infirmity of their mother so as to grab the plaintiff's plots in Mweiga Farm and evict the 1st plaintiff from her matrimonial home, and to continue rents of, and beneficial ownership of Gathecha Building to the loss and detriment of the plaintiffs;
 - (h) The 1st defendant has roped in Survey and Lands Offices in Nyeri so as to perpetuate the defendants' fraudulent land grab of the plaintiffs' portion of Mweiga Farm; and
 - (i) Unless the orders sought are granted, the plaintiffs are reasonably apprehensive that the defendants will evict them and re-alienate the subject properties thereby rendering the plaintiffs homeless.
3. The application is opposed. In a replying affidavit sworn on their behalf by the 1st defendant – John Mwangi Ndung'u on August 22, 2022. The defendants aver that the plaintiff's application is bad in law, incurably defective, frivolous and vexatious and that the same is filed in abuse of the court process.
 4. The defendants assert that the application is pegged on a substantive suit which is *res judicata* for offending section 7 of the [Civil Procedure Act](#). The 1st defendant asserts that he together with the 2nd defendant have sued the plaintiffs together with the interested parties over the same issues being raised herein in Nyeri ELC Case No E003 of 2022; Pasquelina Nyokabi Ndung'u & another v Faith Wambui Njau & 12 others.
 5. The 1st defendant denies that his mother (the 2nd defendant) suffers from old-age dementia and unsoundness of mind as stated by the 1st plaintiff. He further denies that the 1st plaintiff and/or her husband had a matrimonial home in Mweiga. The 1st defendant asserts that the Mweiga Farm was home to all the children of their father while the 1st plaintiff and her husband had their matrimonial home in Mombasa.
 6. In addition to the replying affidavit, the defendants have taken out a notice of preliminary objection dated August 22, 2022 wherein they object to both the suit and the application on the grounds:
 1. That the plaintiffs' suit is bad in law, incurably defective, vexatious and frivolous and amounts to (an) abuse of the court process;
 2. That the suit is *res judicata* for it offends section 7 of the [Civil Procedure Act](#), cap 21 Laws of Kenya;
 3. That there is a similar suit pending before this court i.e Nyeri ELC Case No E003 of 2022; Pasquelina Nyokabi Ndung'u & another v Faith Wambui Njau & 12 others;



4. That the suit contravenes section 45 of the [Law of Succession Act](#), cap 160 Laws of Kenya for it amounts to intermeddling of the estate of the deceased before it has been distributed per the grant issued on the December 1, 2017 and rectified at Mombasa on January 30, 2018 in the High Court of Kenya at Mombasa.
7. Following directions given herein on September 27, 2022, it was agreed that both the preliminary objection as filed by the defendants and the plaintiffs' notice of motion application be disposed of simultaneously. I have accordingly carefully considered both the objection and the motion as well as the written submissions placed before me by the learned advocates representing the parties herein.
8. Whereas the notice of preliminary objection as instituted by the defendants seeks to have both the plaintiffs' suit dismissed, in limine, the plaintiffs' application basically urges the court to grant orders of injunction restraining the defendants from surveying and/or alienating the suit properties and/or from interfering with the plaintiffs' quiet and peaceful enjoyment thereof.
9. From the manner in which their preliminary objection was framed, the defendants were objecting to the plaintiff's suit on account that there was another suit pending between the parties herein and that hence, according to them, the suit herein was *res judicata*. As it turned out, the suit pending between the parties is Nyeri ELC Case No E003 of 2020; Pasquelina Nyokabi Ndung'u & another v Faith Wambui Njau & 12 others.
10. As it were, the doctrine of *res judicata* as encapsulated under section 7 of the [Civil Procedure Act](#) bars a court from trying a matter which was directly and substantially in issue in a former suit between the same parties where such matter had been heard and finally decided upon by a court competent to try the issue. There was no evidence that the suit cited by the defendants in their preliminary objection had been heard and finally determined.
11. Upon realizing the error on their part, the defendants have sneaked in a purported amendment to their pleadings *vide* paragraph 5 of their submissions filed herein on November 28, 2022 where they state as follows:
 - “ 5. My lord, the defendants/applicants wish to draw the point of law in (limb (b) of the preliminary objection) and substitute it with the point that the suit is bad in law for contravening the sub-judice rule under section 6 of the [Civil Procedure Act](#), cap 21 Laws of Kenya.”
12. I did not however think that the defendants could be allowed to proceed in that manner. Their notice of preliminary objection as given to the plaintiffs was in complete contrast to their submissions and it would not be fair to ambush the plaintiff with an issue which had not been pleaded and for which they had not taken time to consider and respond to.
13. The other issue raised by the defendants is the claim that the plaintiff's suit contravenes section 45 of the [Law of Succession Act](#) in that it amounts to intermeddling with the estate of the deceased before it has fully been distributed. Try as I may, I was unable to see how the filing of a suit in a court of law can amount to intermeddling as defined under section 45 of the [Law of Succession Act](#). While indeed actions of parties in the suit may be said to amount to intermeddling, it was not clear to me how the institution of the suit would ipso facto amount to intermeddling.
14. At any rate, it was apparent to me that whether or not the plaintiffs had intermeddled with the estate of the said deceased was not a point of law capable of disposing of the suit but a matter of fact which the parties would have to prove by way of evidence placed before the court.



15. Having conceded that the aspects constituting limbs ‘a’, ‘b’ and ‘c’ of their preliminary objection was in error and this court having found no basis for their last ground of objection it follows that I did not find any basis for the preliminary objection. The same was misconceived and is hereby struck out.
16. Moving on to the plaintiffs’ application, it is their case that they are deserving of injunctive orders on the basis that the defendants have in recent times taken advantage of the death of their father Festus George Ndung’u, the death of their elder brother George Maina and the mental infirmity of their mother – Pasquelina Nyokabi Ndung’u to take away from the plaintiffs their parcels of land in Mwiega Farm, to evict the plaintiffs’ from their matrimonial home thereon and to deprive them of rents and other benefits from their Gathecha Building in Mombasa
17. The plaintiffs accuse the defendants of entering the suit properties and carrying out surveys of portions thereof with a view to alienating the same and evicting the plaintiffs therefrom.
18. In response to the application, the 1st defendant denies that they have taken steps to disinherit the plaintiffs of their entitlements. On the contrary, it is his case that it is the 1st plaintiff who is trying to disinherit the rest of the beneficiaries of the estate of his late father after the 1st plaintiff and her late husband squandered their share of the estate. He denies having roped in Surveyors and the Lands Office at Nyeri to help him disinherit the plaintiffs.
19. As was stated by the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:

 - (a) establish his case only at a *prima facie* level;
 - (b) demonstrate irreparable injury if a temporary injunction is not granted; and
 - (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”
20. What then constitutes a *prima facie* case? In *Mrao Limited v First American Bank of Kenya Limited & 2 others* (2003) KLR 125, the Court of Appeal offered guidance as follows:

“In civil cases, a *prima facie* case is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter ...”
21. Elaborating on the question of a *prima facie* case in *Nguruman Limited* (supra), the Court of Appeal went on to state thus:

“The party on whom the burden of a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion ...”
22. In that regard I have looked at the averments made in the 1st plaintiff’s supporting and further affidavits. I was unable to find anything to show that the parcel of land said to be measuring 160 acres was the 1st plaintiff’s matrimonial home and/or that it was exclusively in their control vis-a-vis the other members



of the family of the late Festus George Ndung'u. It was also not clear from a perusal of paragraphs 20 to 22 of the supporting affidavit which were the plots of land within the Mweiga Farm which the defendants are accused of attempting to alienate.

23. It follows that I was not persuaded either that the plaintiffs had shown a clear and unmistakable right that deserves protection by this court in the manner sought in the motion dated June 3, 2022.
24. In the premises both the preliminary objection and the motion are dismissed.
25. Each Party shall bear their own costs.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 28TH DAY OF JULY, 2023.**

In the presence of:

Mr. Kuria for the Plaintiff

Mr. Makura for the Defendant/Respondent

Ms. Mahugu for the 5th Interested Party

Court assistant - Kendi

.....

J. O. Olola

JUDGE

