



Ithili (Suing as the legal representative of the Estate of Elijah Mithire (Deceased) v John & 12 others (Environment & Land Case E023 of 2022) [2023] KEELC 19016 (KLR) (19 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19016 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E023 OF 2022**

**CK NZILI, J
JULY 19, 2023**

BETWEEN

MARITHA KIELU ITHILI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ELIJAH MITHIRE (DECEASED)) PLAINTIFF

AND

NEWTON THURANIRA JOHN 1ST DEFENDANT
MONICA MUKIRI 2ND DEFENDANT
MUTABARI JOHN ELIJAH MIRIANGA 3RD DEFENDANT
MOSES MUTUA GITONGA 4TH DEFENDANT
MWITI ROGERS 5TH DEFENDANT
MATHIU ELIJAH SOLOMON 6TH DEFENDANT
KABERIA KEN MUTABARI 7TH DEFENDANT
GRACE KAGENDO KAUMBUTHU 8TH DEFENDANT
LAND REGISTRAR URUU LAND REGISTRY 9TH DEFENDANT
LAND SURVEYOR URUU LAND REGISTRY 10TH DEFENDANT
LAND REGISTRAR ISIOLO LAND REGISTRY 11TH DEFENDANT
LAND SURVEYOR ISIOLO LAND REGISTRY 12TH DEFENDANT
THE ATTORNEY GENERAL 13TH DEFENDANT



RULING

1. The court is asked to review, discharge or set aside the injunction order granted against the 2nd and 6th defendants on March 1, 2023. The application is based on the reasons stated in the supporting and supplementary affidavits sworn by Monica Mukiri on March 30, 2023 and May 22, 2023, respectively.
2. The deponent deposes that she is the owner of LR No Kianjai/Mituntu is the wife of the 2nd defendant, now deceased; the plaintiff is her mother-in-law, and the rest of the defendants are beneficiaries of the estate of Elijah Mithire, who had shared the land during his lifetime.
3. The 2nd defendant averred that she lives on LR No Kianjai/Mituntu/702, where she has developed by planting coffee and macadamia trees, nappier grass and food crops. Therefore, she says that to stop her from working on her land would be an injustice and contrary to her constitutional rights to own and enjoy her land.
4. The plaintiff opposes the application through a replying affidavit sworn on April 24, 2023. The plaintiff avers that the 2nd defendant participated in the application which issued the injunctive orders and was now attempting to re-litigate the issues afresh after an inordinate delay and for no reason. The respondents aver that no evidence has been attached to substantiate the wild allegations or arguments, more particularly so when the 2nd defendant has been summoned by the County Land Registrar Isiolo by a letter dated March 9, 2023, to show cause why they dealt with the deceased's property to surrender the certificate of lease fraudulently obtained and lastly, because she has obtained a grant of letters of administration to represent the 6th defendant, hence cannot hide from the law.
5. In a supplementary affidavit sworn on May 23, 2023, the 2nd defendant avers that the LR No Kianjai/Mituntu/702 was transferred to the 6th defendant by the deceased father-in-law, where her matrimonial home is, now transferred to her following a succession cause.
6. The 2nd defendant further avers that even though the rest of that defendant live separately, they were all against her out of jealousy, due to their wealth and would not mind her title being cancelled.
7. A court has the power to discharge an injunction upon being shown that the person's conduct concerning the matter did not meet the approval of the court which granted the orders, used the orders to the prejudice of the opponent, was oppressive to the opponent out of post injunctive behaviour of the beneficiary which amounts to an abuse of the purpose for which the injunction was granted and lastly, if the orders have been used to defeat the end of justice. See *Ocbola Kamili Holding Ltd v Guardian Bank Ltd* [2018] eKLR.
8. In the case of *St. Patrick Hill School Ltd v Bank of Africa (K) Ltd* [2018] eKLR, the court observed that questions such as whether it was just to maintain the injunction in force or it was otherwise unjust and inequitable to let the order remain would be asked when considering an application to discharge an injunction.
9. In *Nahashon Njagi Ngagah v Savings & Loan (K) Ltd* [2006], eKLR cited with approval *Ragul v Barclays Bank (K) Ltd* [2002] eKLR, that it was settled law that an injunction obtained through misrepresentation or concealment of material facts could be discharged or if the application was res judicata as held in *Mburu Kinyua v Gachini Tuti* [1979] KLR 69.
10. Further, in *JSL vs JKL* [2020] eKLR, the court cited with approval *Mobile Kitale Service Station vs Mobil Oil (K) Ltd & another* [2004] eKLR that an injunction is given on the court's understanding



that the defendant was trampling on the rights of the plaintiff and being an equitable remedy, it could be discharged if it was shown that the persons conduct with matters pertinent to the suit did not meet the approval of the court which had granted the order and if the orders were used to intimidate or oppress the other party.

11. In *KSC International Ltd (Under receivership) & 3 others vs Bank of Africa (K) Ltd and others* Civil Appeal No 27 of 2019 [2022] KECA 911 (KLR) 22 July 2022 (Judgment), the court observed that a temporary injunction is ordinarily issued for purposes of preserving the suit property. In *Filista Chamaiyo Sosten vs Samson Mutai* [2012] eKLR, the court observed that the discretion under Order 40 Rule 7 of the *Civil Procedure Rules* ought to be sparingly used to avoid a situation where it would appear as if the same was being used as a tool of appeal given that before issuing an injunction the court must have been satisfied that it was necessary to grant the same.
12. There is no dispute in this application that the 2nd and 6th defendants entered an appearance to the suit on January 17, 2023, filed a replying affidavit dated 3.2.2023, and had an opportunity to raise the issues now being deponed in this application. The applicant never raised the issues of a matrimonial home or farming activities on the LR No Kianjai/Mituntu/703. Additionally, by the time the ruling was delivered, the 3rd defendant had filed a statement of defence dated February 3, 2023. In the said defence, there was no mention that LR No Kianjai/Mituntu/703 was occupied exclusively by the 2nd defendant with developments thereon.
13. The particulars of the developments thereon are also missing in the said pleading. Again the 2nd defendant did not indicate that she was counterclaiming for the suit land.
14. As to this application, the law is that a party aggrieved by an injunction must demonstrate how oppressive and unjust it was and how circumstances had changed after the injunction was issued to make the operation of the injunction untenable, oppressive, unfair and defeating the ends of justice. Other than saying that it was unconstitutional to maintain the injunction, the 2nd defendant has not brought any photographic or documentary evidence to demonstrate that the injunction has results that were not intended when the orders were issued. There was no site visit or land registrar or land surveyor reports to show that the 2nd defendant has become landlocked or cannot access the land she claims to be owning or occupying since 1987.
15. The applicant is also yet to file any list of exhibits before the court in support of her statement of defence to show that the purpose of preserving the suit parcels of land has been defeated or that the plaintiff failed to disclose material facts or obtained the orders through misrepresentation of facts.
16. Without new material and justification, the court finds no reason to discharge the injunction issued under order 40 rule 7 of the *Civil Procedure Rules*. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU ON THIS 19TH DAY OF JULY 2023.

HON. CK NZILI

ELC JUDGE

In presence of

C.A John Paul

2nd defendant present

Kajuju for Thangicia for plaintiff

