



**Kimondo v Nderitu & 2 others (Environment & Land Case E024 of 2022)
[2023] KEELC 19938 (KLR) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19938 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E024 OF 2022
JO OLOLA, J
SEPTEMBER 22, 2023**

BETWEEN

JOHN MIGUNDA KIMONDO APPLICANT

AND

PETER CHIMBA NDERITU 1ST RESPONDENT

PAUL NDARUA GITHAE 2ND RESPONDENT

PAUL MWANGI GITIKU 3RD RESPONDENT

RULING

1. By the Notice of Motion dated 7th November 2022, John Migunda Kimondo (the Applicant) prays for an order that pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order restraining the three (3) Respondents from entering, encroaching upon, trespassing, working on, constructing, using or in any manner whatsoever interfering with the Applicant's possession and occupation of a one (1) acre parcel of land comprised in the parcel of land formerly known as Mahiga/Ugachiku/741 and now subdivided into portions 868 to 874.
2. The application is supported by an Affidavit sworn by the Applicant wherein he states that he bought the said 1 acre of land from one Joseph Ndarua Gitiku in the year 1993. At the time of sale the land was registered in the name of one Nderitu Gitiku who held the same in trust for his three brothers, namely; Joseph Ndarua Gitiku, Githae Gitiku and Njaga Gitiku
3. The Applicant further asserts that subsequent to the sale agreement, the parcel of land was sub-divided in September, 1993 and he immediately got into his portion of the land and started utilizing the same by planting coffee and other trees.
4. The Applicant avers further that despite the sub-divisions being done and the consent of the Land Control Board being obtained, it did turn out that the surveyor who carried out the exercise did not



- register the sub-divisions and in the meantime, the said Nderitu Gitiku passed away in 1997 thereby necessitating Succession proceedings before the process could be concluded.
5. The Applicant further avers that unknown to him, Succession proceedings were instituted and a Grant obtained by the Respondents who have since barred him from accessing the land through violence and have been harvesting his trees, coffee and nappier grass from the suit land.
 6. Peter Chimba Nderitu (the 1st Respondent) is opposed to the application. In a Replying Affidavit sworn on 21st November, 2022 on his own behalf and on behalf of Paul Ndarua Githae (the 2nd Respondent) they aver that Joseph Ndarua Gituku is not known to them and the agreement entered into with the Applicant is unknown to their family. They further assert that L.R No. Mahiga/Ugachiku/8 belonged to Nderitu Gitiku who is their father and that as a family they are not privy to any prior sub-divisions of the land or the alleged L.R No. Mahiga/Ugachiku/741.
 7. The 1st and 2nd Respondents further aver that the Applicant is dishonest to the Court as he did not plant coffee or any other trees on the parcel of land as he has not been in possession thereof.
 8. The Respondents further assert that the parcel of land known as Mahiga/Ugachiku/741 is unknown to them and that it is over 29 years since the alleged transactions and further that the claim is not only time-barred but also instituted against the wrong Parties.
 9. The 3rd Respondent – Paul Mwangi Gitiku is equally opposed to the grant of the orders sought. In his brief Replying Affidavit sworn on 21st November 2022, the 3rd Respondent avers that he has not sold any parcel of land to the Applicant and that he has not entered into any agreement for sale of any land with the Applicant.
 10. I have carefully perused and considered the application before me as well as the respective responses thereto. I have similarly perused and considered the submissions placed before me by the Learned Advocates representing the parties herein.
 11. By this application before me, the Applicant urges the Court to restrain the three (3) Respondents from entering, encroaching, trespassing or in any other manner whatsoever interfering with his possession and occupation of a portion of land measuring 1 acre as comprised in the parcel of land formerly known as Mahiga/Ugachiku/741 which has now been sub-divided into parcel numbers 868 to 874.
 12. The basis for the application is the Applicant's contention that he bought the said portion of land from one Joseph Ndarua Gitiku in the year 1993 and that he was subsequently thereafter put in possession and that he has since been planting coffee, nappier grass and other trees thereon. According to the Applicant, as at the time of the said sale, the suit property was registered in the name of one Nderitu Gitiku who held the same in trust for his three brothers, namely; the said Joseph Ndarua Gitiku, Githae Gitiku and Njaga Gitiku.
 13. It is the Applicant's case that subsequent to the sale, the parcel of land was sub-divided in September, 1993 and he took over his portion. It later turned out that the Surveyor who did the sub-divisions never submitted the mutation for approval and the transfer documents duly executed could not be registered by the Land Registrar.
 14. The Applicant asserts that the holder of the title – Nderitu Gitiku passed on in the year 1997 before the sub-divisions were registered and that it then became necessary that a Succession Cause be instituted before the transfers could be effected. He accused the Respondents of secretly filing a Succession Cause and failing to include him as a beneficiary of the land. It is his case that upon receipt of a grant



of probate, the Respondents have now violently barred him from accessing the land and that the Respondents have been harvesting his trees and nappier grass without his authority.

15. As was stated in the oft-cited case of *Giella -vs- Cassman Brown & Company Limited* (1973) EA 358:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

16. That being the case, the first question which this Court must ask itself is whether on the material placed before it this far, the Applicant has established a prima facie case with a probability of success. Again as the Court of Appeal explained in *Mrao Limited -vs- First American Bank of Kenya Limited & 2 others* (2003) KLR 125:

“... a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It 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.”

17. In the matter before me, the Applicant urges the Court to restrain the three (3) Respondents from interfering with his possession of 1 acre of land comprised in the parcel of land known as Mahiga/Ugachiku/741 now sub-divided into parcel numbers 868 – 874. In support of that prayer he avers as follows at

Paragraphs 2 to 4 of the Affidavit in support:

2. That sometime in the year 1993 I bought one (1) acre of land from Joseph Ndarua Gitiku from Mahiga/Ugachiku/8. Annexed is a copy of the agreement and marked “JMK1”.
3. That at the time of sale the land was registered in the name of Nderitu Gitiku who held the land in trust for his three brothers; Joseph Ndarua Gitiku, Githae Gitiku and Njaga Gitiku; and
4. That Joseph Ndarua Gitiku would later introduce me to his brother Nderitu Gitiku where we held a meeting and it was agreed that after sub-divisions, I would get 1 acre the interest of Ndarua.”

18. Those averments are repeated verbatim in the Affidavit filed in Support of the Applicants Originating Summons. As it turned out the 1st and 2nd Respondents while acknowledging that the said Nderitu Gitiku was the 1st Respondents father have denied any knowledge of the person known as Joseph Ndarua Gitiku whom the Applicant avers to have sold him the land.

19. The Applicant has not offered any further explanation as to who that person was. A perusal of annexure JMK1 attached to the Affidavit and said to be the Sale Agreement between the Applicant and the said seller reveals that the seller was not Joseph Ndarua Gitiku but Paul Mwangi Gitiku who is named herein as the 3rd Respondent. In his submissions lodged before the Court, the Applicant has turned around and submits that it is the 3rd Respondent who sold the land. I did not think it was open for the Applicant to do so through submissions while his averments on oath point to a totally different person as the vendor.



20. Further, a perusal of the Sale Agreement dated 22nd June, 1993 does not show which parcel of land was being sold to the Applicant. Indeed while the Applicant claims to have purchased 1 acre of land, the only apparent reference to the size of the land being bought is to be found in the indorsement made thereon on 9th December, 1995 which refers to ¼ of an acre.
21. As it were, it was also unclear to me if the parcel of land referred to as Mahiga/Ugachiku/741 was a sub-division of the parcel previously known as Mahiga/Ugachiku/8. The Respondents have denied that the land which was in their father's name had been sub-divided prior to their father's death in 1997 and the Letter of Consent from the Land Control Board dated 14th September, 1993 exhibited by the Applicant does not make any mention of Title No. Mahiga/Ugachiku/8. No evidence has been attached of any such sub-division.
22. From a perusal of the Certificate of Confirmation of Grant issued to the Respondents and other family members by the High Court at Nyeri on 20th February, 2018, it was evident that Title No. Mahiga/Ugachiku/8 measuring 6.1 acres remained intact as at that date and the same was distributed accordingly to the heirs of the late Nderitu Gitiku.
23. Arising from the foregoing, I was not persuaded that the Applicant had made out a prima facie case with a probability of success against the Respondents.
24. In the premises I was not persuaded that there was any merit in the Applicant's Notice of Motion dated 7th November, 2022. The same is dismissed with costs to the Respondents.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 22ND DAY OF SEPTEMBER, 2023.**

In the presence of:

Ms. Miriti for the Applicant

Ms. Waweru holding brief for Gachomo for the Respondents

Court assistant - Kendi

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J. O. OLOLA

JUDGE

