



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mbataru v Kiragua (Sued as the legal representative of Itunga Kiragu Alias M'itonga Kiragua)  
(Environment & Land Case E003 of 2022) [2022] KEELC 2938 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2938 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT & LAND CASE E003 OF 2022**

**CK NZILI, J**

**MAY 18, 2022**

**BETWEEN**

**JULIUS MBATARU ..... PLAINTIFF**

**AND**

**JUDSON MWENDA GITUNGA ..... DEFENDANT**

**SUED AS THE LEGAL REPRESENTATIVE OF ITUNGA KIRAGU ALIAS  
M'TONGA KIRAGUA**

**RULING**

1. The court is asked to issue temporary orders of injunction and inhibition, barring and restraining the respondents from subdividing, alienating, charging, transferring, cutting down trees, depositing building materials, demolishing houses, or in any other way whatsoever interfering or dealing with LR No Abogeta U-Kithangari/502 and 503 pending the hearing and determination of the suit. The second prayer is the court to issue an order staying the implementation of the certificate of confirmation of grant issued on 17/10/2017 to the 1<sup>st</sup> respondent for and on behalf of the estate of Itunga Kiragua in Nkubu Succession Cause No 92 of 2016 that was alleged processed secretly by the 1<sup>st</sup> – 7<sup>th</sup> respondents, pending the hearing of this suit.
2. The application is supported by an affidavit sworn on 3/2/2022 by Julius Mbataru. The grounds upon which the application is based are the two parcels of land were ancestral land held by his late two elder brothers in trust for him, intervention by clan elders to settle him were unsuccessful before the two brothers passed on; his existing rights were not factored in the succession cause; his home was invaded by the 1<sup>st</sup> defendant through hired goons who caused damage to his land; the property was beyond the jurisdiction of the succession court; and his elderly sickly and faced with eviction unless there be stay of the implementation of the grant.



3. In support of his claim the application has attached uncertified sketch map, copy of records for the two parcels, minutes by the clan, copy of grant, photos and valuation report as annexures marked JM 1 JM 6 respectively.
4. The respondent have opposed the application through a replying affidavit sworn on behalf of the 2<sup>nd</sup>-7<sup>th</sup> respondents by the 1<sup>st</sup> respondent on 18/2/2022 and a supplementary affidavit sworn on 16/3/2022. The first ground is that LR No 502 was gathered by their grandfather where he moved to and settled leaving his young brothers on Parcel No 503 to share the same equally among themselves.
5. It was averred after the confirmation of grant, they realized that the applicant had allegedly encroached on Parcel No 502. It was also averred the applicant was requested to be a surety in the succession cause but he refused saying he did not wish to be involved and never challenged the process despite being aware since 2016. That if indeed it was customary land, the plaintiffs application did not have to wait for over 57 years from the time of the registration and 15 years after the death of their grandfather on 3/11/2007 to file the suit hence there was no justification to delay the distribution of the estate of the deceased to the rightful beneficiaries who had engaged survey services for consistency checks, boundary verification and subdivision with the appropriate security coverage by the OCS Murungurune Police Station.
6. Further, it was averred that after the boundary was cleared to ensure that beacons as placed by survey were visible on November 11, 2021 but the applicant chased away their workers and the matter was reported to the police, who instead of taking action allegedly arrested and charged him in Nkubu PMCR case No E 488 of 2021 on malicious damage on the respondent's property on 9/11/2021. It was averred the applicant was being dishonest since in the Nkubu case, he had stated that the destroyed items belonged to 8<sup>th</sup> defendant's father. Further it was averred that there was no intervention by the clan as alleged and the minutes attached were incorrect, fabricated, not signed and misleading. The respondent averred that a similar suit namely ELC No 143 of 2009 was before Nkubu Law courts as ELC NO 121 of 2014. Again it was averred that the legal representative of the estate of M'Itunga Kirangua alias Itunga Kiranguu had not been sued on account of trust was parcel No 502 hence the suit was an afterthought; lacks merit and was based on falsehoods and misrepresentation.
7. To buttress their claim, the respondents have attached a copy of grant, death certificate of M'Itunga Kirangua surveyor's report order for security in the succession cause, letter to the Police dated November 16, 2021 and 20/12/21 to IPOA, copy of charge sheet, Police witness statements by the plaintiff and copy of plaint in ELC no 121 of 2014, as annexures marked JM a-01 to JM a 08 respectively.
8. The 8<sup>th</sup> respondent as a neighbor George swore an affidavit on 18/2/2022 and denied that there was such a clan meeting on 23/3/1991 as alleged or at all.
9. With leave of court, the applicant filed a further affidavit sworn on 8/3/2022 by himself and Mark K Mugambi, claiming the version given on family history was incorrect and that the so called fixing of boundaries was meant to evict him from part of the land within Parcel No 502 which he has been occupying approximately 1 acre. Regarding the suit in Nkubu, the applicant averred he was condemned unheard and sought for review. Further, the applicant admitted the existence of Meru CMCC No 182 of 1992 which was still pending. As regards Meru ELC No 143B of 2009 the applicant admitted it was instituted barely two years after the demise of the late Itunga Kiragau and later transferred to Nkubu Law Courts which could not be determined since his brother passed on before it was finalized but a consent judgment was eventually filed in court on 10/2/2021 which he was ready to enforce save for the court's lack of pecuniary jurisdiction.



## Written Submissions

10. With leave and in line with Order 51 Rule 16 [Civil Procedure Rules](#) parties filed written submissions dated 11/3/2022 and 16/3/2022 respectively.
11. The applicant has submitted the issues for determination are whether the court has jurisdiction to hear and determine the suit and if the applicant had established a case for the grant of temporary injunction.
12. On the first issue the applicant submitted under Article 162 (2) of the [Constitution](#) and Section 13 (2) & (7) of the [ELC Act](#) 2011 this court has the requisite jurisdiction to hear and determine the suit on customary trust, since the succession court was functus officio and/or lacked such jurisdiction. Reliance was placed on the [owners of Motor Vessel Lillian "S" US Caltex Oil \(K\) Ltd](#) [1989] eKLR & [Re estate of Alice Mumbua Mutua \(deceased\)](#) 2017 eKLR hence the need to preserve the suit land pending this suit.
13. As regards the temporary orders, the applicant submitted he had been in occupation of part of Parcel No Abogeta/U-Kithangari/503, his claim of trust was real; apparent and rightfully acknowledged by the 8<sup>th</sup> respondent as a legal representative of his other brothers.
14. Further, it was submitted that the relationship between the parties was a clear demonstration of close relatives making the claim of trust even more plausible since by the time first registration occurred in 1965, he was still a minor.
15. Moving to the second issue of irreparable loss and injury, it was submitted the 1<sup>st</sup> - 7<sup>th</sup> respondent were in possession a rectified confirmed grant which they were determined to implement and had already committed acts of destruction to his houses located in the suit family land. Such irreparable loss and damages was therefore real and imminent. Reliance was placed on [Giella v Cassman Brown](#) [1978] EA 358 [Pius Kipchirchir Kogo vs Frank Kimeli Tenia](#) [2018] eKLR and [Estate of Elijah Ngari \(deceased\)](#) [2019] eKLR.
16. The 1<sup>st</sup> - 7<sup>th</sup> respondents submitted that there was no dispute the applicant was a blood brother to the late Itunga Kirangua and Festus Giitu Kirangua sons of the late Kirangua Mbaya, that LR No 502 was still registered in the name of Itunga Kirangua while LR No 503 was in the name of Riria Kirangua whereof, the 1<sup>st</sup> respondent was the legal representative for Itunga Kirangua and the 2<sup>nd</sup> – 7<sup>th</sup> respondents, the children of the deceased whose succession cause was determined and concluded without any objection by the applicant.
17. Secondly, it was submitted that the applicant had failed to meet the threshold in [Giella Vs Cassman Brown](#) supra, since his Meru CMCC No 182 of 1992 for 1.5 acres. Abated after Gitonga Kiragau died on 3/11/2007 he had not demonstrated he occupied the suit land; his trespass as shown in the geoland survey report was illegal and inhibiting the implementation of the unchallenged confirmed grant; the alleged property destroyed belonged to the 8<sup>th</sup> respondent which the applicant cannot seek injunctive orders to protect the property of another person and in which it had taken him 57 years to sue the 8<sup>th</sup> respondent in Meru Hccc No 143 of 2009.
18. As regards irreparable loss, the 2<sup>nd</sup> – 7<sup>th</sup> respondents submitted that a trespasser could not suffer loss let alone irreparable loss after he had allegedly trespassed on 0.5 acres of Parcel No 502 and purport to seek for orders to protect his transgression.
19. Further, it was submitted if the applicant had any claim by dint of Rule 41 (3) [Probate and Administration Rules](#) Pursuant to the [Law of Succession Act](#), he would have sought for isolation of the parcel to allow him prove his case and was only coming to court too late in the day.



20. Lastly it was submitted that the balance of convenience under the circumstances tilted in their favour and not the applicants.

### Issues for Determination

21. Having gone through the pleadings, deposition and written submissions, the issue commending themselves for determination are -;
- i. If the court has powers to determine the right of the applicant concerning the suit land after a regular valid confirmed grant in favour of the respondent.
  - ii. If the court has powers to stay implementation of a confirmed grant.
  - iii. If the applicants is entitled to temporary orders of both inhibition and injunction.
22. The plaintiff/applicant's claim is based on the plaint dated 3/2/2022 seeking for declaration of customary trust over Parcel No 502 and 503, allegedly breached by the 1<sup>st</sup> – 7<sup>th</sup> respondent to the extent of 3 acres of Parcel No 502 and Parcel No 503; vacant possession; permanent injunction; compensation for Kshs 536,098.56/= for destruction and punitive damages.
23. The defendants were served with summons to enter appearance. They entered appearance on 18/2/2022 through Ngunjiri Michael & Co Advocates whereas the 8<sup>th</sup> respondent filed a notice to act in person dated 22/2/2022. None of the respondents had filed a defence or notice of preliminary objection to the suit as at the writing of this ruling.
24. Be that as it may, the respondents have attached pleadings and ruling in the previous suits including summons dated November 25, 2021 in PMCC Succession Cause No 92 of 2016, which sought for similar orders as in the instant case.
25. Section 76 of the *Law of Succession Act* provides a grant of representation whether or not confirmed may be revoked or annulled through an application by an interested party. On inter-alia the basis that the proceedings were defective in substance, was obtained fraudulently or through false statements or by concealment of material facts or through untrue allegation of facts.
26. In this matter the applicant has attached a confirmed grant relating to Parcel No 502 and in which the suit land was shared out by a competent court to the 1<sup>st</sup> – 7<sup>th</sup> respondents with effect from October 19, 2017.
27. The 1<sup>st</sup> – 7<sup>th</sup> respondents to have averred the process of the implementation of the decree was a lawful and regular process and there was no justification to stop it on alleged interests of the applicant which he had never enforced during the lifetime of the deceased. On the other hand, the applicant urged the court to find the purported implementation was aimed at evicting him or destroying his properties so as to defeat his rights.
28. In other words, the court is being asked to stop a lawful process of executing a confirmation of grant until the hearing and determination of a customary claim by the applicant.
29. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the court held that a *prima facie* case is established where based on material before the court a right is established so as to call the other side for rebuttal.



30. In this matter, the applicant's interest on rights over Parcel No's 502 and 503 are yet to be ascertained by this court unlike the 1<sup>st</sup> – 7<sup>th</sup> respondents who have valid rights which have been confirmed by a probate court.
31. Annexure marked JM 2(a) to the applicant's further affidavit sworn on 8/3/2022 was not filed under the provisions of Section 76 of the [Law of Succession Act](#).
32. There is no indication if the applicant had applied for the revocation or annulment of the confirmed grant on account of reasons of his occupation, customary interest or beneficial interests.
33. The applicant has not told this court if he had moved the succession court for the isolation of the suit property in line with Rule 41 of the [Probate and Administration Rules](#) pending the determination of the instant suit.
34. Further, there was no indication of what became of the application dated November 25, 2021 aforementioned, which sought similar orders as in the instant application. The applicant must not approach two different courts for similar prayers at the same time.
35. This court has not been told if there was a pending appeal against the confirmed grant as a justification why it should grant orders which ideally would render the confirmed grant in inoperational (see [RE Estate of Stone Kathuli Muinde \(deceased\)](#) (2016) eKLR.
36. An inhibition is in the nature of a prohibitory injunction as provided under Section 68 of the [Land Registration Act](#) [Dorcas Muthoni Vs Michael Ireri Ngari](#) (2016) eLKR. Before the court issues such an order, it must be satisfied that the land in dispute is at the risk of being disposed or alienated to the detriment of the applicant that the failure to issue the orders would render the suit nugatory and that the applicant had an arguable case.
37. As indicated above, the court is being asked to stay the implementation of the confirmed grant yet there is no indication if there are pending cases on appeal or revocation of the grant in line with Section 76 of the [Law of Succession Act](#) and Rule 41 (3) [Probate and Administration Rules](#).
38. The applicant has admitted there have been pending suits related to the respondents' deceased parents but which have never been prosecuted to conclusion and/or have abated one way or the other. Since 2017, there is no explanation why the applicant did not assert his interests and or appeal against the confirmed grant.
39. This court is being invited to interfere with the ownership rights of the respondent. There are no copies of any mutation forms indicating that there are pending subdivisions and or transfers in favour of the respondents. Other than a copy of records, there is nothing attached to the application to show that a surveyor has prepared or mutation forms and is in the process of preparing or consents have been obtained to transfer the land to the respondents. In any event as indicated above, the applicant has not questioned the process of the transmission on account of fraud illegality, misrepresentation and or mistake (see [Re estate of Bosco Rono \(deceased\)](#) [2020] eKLR.
40. A court should always take the course that carries the lower risk of injustice. More injustice would be caused to the respondents if the court were to issue inhibition orders and stay the implementation of the confirmed grant, and later the applicant fails to prove his case.
41. There is also evidence that the applicant has had several cases including a pending application before the lower court which instead of prosecuting, it has moved to this court for similar orders. This is a clear indication that the applicant is using the court otherwise instead of the furtherance of his interests as to the expeditious disposal of cases and prudent use of judicial resources.



42. In sum, I find the application lacking merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 18<sup>TH</sup> DAY OF MAY, 2022**

**In presence of:**

**Njindo for plaintiff/applicant**

**Njeru holding brief Arithi for 1<sup>st</sup> – 7<sup>th</sup> defendant**

**HON. C.K. NZILI**

**ELC JUDGE**

