



**Muthora (Suing as the administratrix of the Estate of Loise Nyawira Muthiora alias Nyawira Muthiora) v Njuguna & 6 others (Environment & Land Case E347 of 2021) [2022] KEELC 3303 (KLR) (9 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3303 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E347 OF 2021**

**EK WABWOTO, J**

**JUNE 9, 2022**

**BETWEEN**

**HANNAH WAMAITHA MUTHORA ..... PLAINTIFF  
SUING AS THE ADMINISTRATRIX OF THE ESTATE OF LOISE NYAWIRA  
MUTHIORA ALIAS NYAWIRA MUTHIORA**

**AND**

**FRANCIS KUNGU NJUGUNA ..... 1<sup>ST</sup> RESPONDENT  
PAUL KIBUI KARANJA ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**TERESIAH WANJIRU KIRICHO (PERSONAL REPRESENTATIVE OF PETER  
KIRICHU MWAURA DECEASED) ..... DEFENDANT**

**AND**

**TERESIAH WANJIRU KIRICHO ..... RESPONDENT**

**AND**

**MARK NJUGUNA MWAURA ..... 1<sup>ST</sup> DEFENDANT  
PETER NGANGA NGUGI ..... 2<sup>ND</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect to the Plaintiff's Application dated 23<sup>rd</sup> September 2021 seeking for temporary injunctive orders against the Defendants pending the hearing and determination of the suit and the



1<sup>st</sup> Defendant's Notice of Preliminary Objection dated 21<sup>st</sup> October 2021 and Plaintiff's Application dated 29<sup>th</sup> October 2021.

2. The Plaintiff herein commenced this suit vide a plaint dated 23<sup>rd</sup> September 2021 seeking for various reliefs. Contemporaneously to the filing of the plaint she also filed a Notice of Motion application where she sought for temporary injunctive orders against the Defendants pending the hearing and determination of the suit in respect to suit properties Dagoretti/riruta/1827; dagoretti/riruta/1828; dagoretti/riruta/1829; dagoretti/riruta/1830; dagoretti/riruta/1831; dagoretti/riruta/1832; dagoretti/riruta/1833; & Dagoretti/riruta/1834 resultant subdivisions of Dagoretti/riruta/1173 . Both of the Plaintiff's Applications are supported by grounds stated on their face as well as the supporting Affidavits of the Plaintiff, sworn on 23<sup>rd</sup> September 2021 and 29<sup>th</sup> October 2021.
3. The Plaintiff filed the application dated 23<sup>rd</sup> September 2021 seeking the following prayers;
  - i. That the defendants by themselves, servants, agents and or employees be restrained by way of an interim injunction of the honorable court from alienation sale disposal and or in any respect interfering with the title to the Land Parcels Dagoretti/riruta/1827; dagoretti/riruta/1828; Dagoretti/riruta/1829; dagoretti/riruta/1830; Dagoretti/riruta/1831; dagoretti/riruta/1832; Dagoretti/riruta/1833; & Dagoretti/riruta/1834 being resultant subdivisions of the suit property Dagoretti/Riruta/1173 pending hearing and determination of this application.
  - ii. That the defendants by themselves, servants, agents and or employees be restrained by way of an interim injunction of the honorable court from alienation sale disposal and or in any respect interfering with the title to the Land Parcels Dagoretti/riruta/1827; dagoretti/riruta/1828; dagoretti/riruta/1829; dagoretti/riruta/1830; dagoretti/riruta/1831; dagoretti/riruta/1832; Dagoretti/riruta/1833; & Dagoretti/riruta/1834 being resultant subdivisions of the suit property Dagoretti/Riruta/1173 pending hearing and determination of this case.
  - iii. That an inhibition order do issue to the Chief Land Registrar inhibiting registration of any dealing with the land parcels Dagoretti/riruta/1827; dagoretti/riruta/1828; dagoretti/riruta/1829; dagoretti/riruta/1830; dagoretti/riruta/1831; dagoretti/riruta/1832; dagoretti/riruta/1833; & dagoretti/riruta/1834 resultant subdivisions of the suit property Dagoretti/riruta/1173 Pending hearing and determination of this case.
  - iv. That costs of this application be provided for.
4. Upon service of the summons, plaint and the application above said, the plaintiff came to learn that the 1<sup>st</sup> defendant was dead, which fact prompted the filing of the application dated 29<sup>th</sup> October, 2021 seeking the prayers following;
  - i. That the name of Francis Kungu Njuguna the 1<sup>st</sup> defendant be struck out.
  - ii. That Serah Njeri Njuguna the administratrix of the estate of the deceased (Francis Kungu Njuguna) be joined to the case as 1<sup>st</sup> defendant and leave be granted to the plaintiff to amend the plaint appropriately; and the draft amended plaint annexed hereto be deemed to have been duly filed, with the necessary changes to apply mutati mutandis to all other pleadings filed before this honourable court.
  - iii. That Peter Mburu Kariukia co-administrator of the estate of Loise Nyawira Muthiora) be joined as a plaintiff to this case.



- iv. That costs of this application be in the cause.
5. The Personal representative of the 1st defendant filed the Notice of preliminary objection dated 21st October, 2021 to the effect that the claim against the 1st defendant is bad in law, the 1st defendant having died on 29/4/2019. The Personal representative of the 1st defendant also filed grounds of opposition dated 3/11/2021 to the application dated 29/10/2021. The firm of Peter Gachuhi & Co. Advocates entered a notice of appointment for the 5th Defendant. The said firm filed grounds of opposition dated 16/11/2021 in respect of Mark Mwaura Kamau citing the grounds;
  - i. The claim is bad in law for including defendants who are dead.
  - ii. The plaintiff's case is caught by *Limitation of Action Act* and bad in law
  - iii. The plaintiff's case does not disclose any cause of action.
6. Pursuant to the directions of the Court issued on 23<sup>rd</sup> February 2022 and 24<sup>th</sup> March 2022 the Court directed that the Plaintiff's applications dated 23<sup>rd</sup> September 2021 and 29<sup>th</sup> October 2021 and the 1<sup>st</sup> Defendants' preliminary objection dated 21<sup>st</sup> October 2021 be canvassed through written submissions upon which the court would proceed to render its ruling.

### **The Plaintiff's submissions**

7. In support of both applications dated 23<sup>rd</sup> September 2021 and 29<sup>th</sup> October 2021 the Plaintiff relied on her own supporting affidavits sworn in support of the applications. The Plaintiff also filed written submissions dated 18<sup>th</sup> February 2022 and supplementary written submissions dated 10<sup>th</sup> March 2022.
8. It was submitted that this application was for granting since the principles of granting of an interim injunction had been demonstrated. Counsel for the Plaintiff referred to the case of *Joel Kipkurui arap Koech v Alice Wambui Magandu & 3 others* [2018]. Counsel submitted that the Plaintiff has averred in the supporting affidavit that her mother one of the registered proprietors Loise Nyawira Muthiora died on 1/6/1996 (See exh. HWM dated 23/9/2021) and hence she could not have subdivided the suit property in 2006 as alleged. Further as pleaded under paragraph 21 of the plaintiff's statement, the alleged entry No. 6 of the purported subdivision dated 26/10/2006 on the green card is positioned between entry No. 5 dated 25/7/74 and entry No. 7 dated 26/10/2004, which on the face of it is irregular and cannot officially happen for the reason that all entries on the register are in sequence and follow the order of dates when the entry is made. According to the Plaintiff, there is no way a transaction for the year 2006, would have been registered prior to the subsequent entry dated 26/10/2004. The averments by the plaintiff have not been disputed in absence of any replying affidavit.
9. As to whether there was a subdivision and the date of alleged subdivision, counsel argued that it is a matter of fact of which the court has to consider the evidence before the court and thus cannot be raised as a preliminary objection and that the ground of opposition lacks merit.
10. In respect to the suit against the 1<sup>st</sup> Defendant Francis Kungu Njuguna who was deceased as at the time of filing this suit on 23<sup>rd</sup> September 2021, Counsel submitted that they only became aware when the same had been served upon the personal representative of the 1<sup>st</sup> Defendant and as such they had sought to have his name struck from the proceedings and substituted with the name of Serah Njeri Njuguna the administratrix of the estate of the deceased (Francis Kungu Njuguna). Counsel argued that It is not denied that the person sought to be joined to the suit is the administrator of the deceased Francis Kungu Njuguna and that the said deceased is the current registered proprietor of part of the suit property namely Dagoretti/Riruta/1827.



11. It was also submitted that the personal representative had no cause in law to appear for a dead person. For the same reason that the claim against the deceased was a nullity so is any appearance, pleadings and presentation made for the dead person. Counsel relied on the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others* [2018] eKLR where the court stated

“It is common ground that the 7th defendant was not alive when the suit was filed against him. It is also inconceivable how a party who is deceased can instruct counsel and that counsel takes over instructions from a non-existent person. It follows therefore any action including the filing of the plaint, the extraction of the summons; the entering of appearance and filing of the defence were a nullity. The cases cited by counsel for the plaintiffs include, *Benjamin Leonard Mc foy v United Africa Company Limited* [1961] All ER 1169. In that case the court stated as follows, “If an Act is void, then it is in Law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

12. Guided by the above quoted authority, counsel submitted that the case before the court which involves more than one defendant cannot be purported to be bad in respect of all the defendants. It is only bad in respect of the deceased and for this reason, it was her submission that the grounds of opposition by the alleged 5th defendant as well as the representative of the deceased 1st defendant lack merit in law.
13. Counsel prayed that both applications be allowed as prayed.

#### **1st Defendant’s submissions**

14. The 1<sup>st</sup> Defendant relied on the submissions dated 24<sup>th</sup> January 2022. In the written submissions, Counsel referred to the Notice of Preliminary Objection dated 21<sup>st</sup> October 2021 and the Grounds of Opposition dated 3<sup>rd</sup> November 2021.
15. Counsel submitted that the 1<sup>st</sup> Defendant died on 29<sup>th</sup> April 2019 which was before the commencement of this suit on 23<sup>rd</sup> September 2021. It was argued that a suit against a dead person cannot be sustained in law and neither can it be saved by the personal representative of the estate of the deceased person. In support of this position, reference was made to the case of *Viktar Maina Ngunjiri & 4 Others v Attorney General & Others* (2018) eKLR . The court was requested to dismiss the application with costs and strike out the suit for being a nullity.

#### **The submissions for the 2nd, 3rd and 4th Defendants**

16. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants opposed the application through their replying affidavits dated 18<sup>th</sup> February 2022. They also filed their written submissions dated 23<sup>rd</sup> February 2022. Counsel submitted that the Plaintiff suit being an action for recovery of land had been brought to court after 12 years and was time barred. It was stated that pursuant to the witness statement dated 23<sup>rd</sup> September 2021, the Plaintiff was well aware of the alleged particulars of fraud from the year 2007 but chose not to file the suit earlier. In support of this position, reference was made to the case of *Joyce Sarange Kenyatta v Lucas Nyabegera Nyangweso* 2021 eKLR where the court held that the applicants proposed amendments sought to introduce a claim on alleged fraud which was time barred.
17. On whether or not the interim injunction ought to issue, Counsel submitted the same could not be issued since no prima facie case had been established by the Applicant. It was contended that the



Plaintiff's claim revolves around events which took place in the year 2006. The court was equally urged to dismiss the Applications together with the suit.

### **Analysis and determination**

18. I have considered both applications together with the 1<sup>st</sup> Defendant's Notice of Preliminary Objection, the written submissions and the responses filed thereto. The issues which in my opinion arise for determination and which can dispose of the applications together with the notice of preliminary objection are summarized as follows: -
- i. Whether the suit filed herein is a nullity against the 1<sup>st</sup> Defendant?
  - ii. Whether the suit herein is time barred?
  - iii. What are the appropriate orders/remedies that can be issued herein?

### **Issue No. 1 Whether the suit filed herein is a nullity against the 1<sup>st</sup> Defendant?**

19. It was submitted by the 1<sup>st</sup> Defendant that this suit was instituted by the Plaintiff after the death of the 1<sup>st</sup> Defendant. The issue was comprehensively addressed by Mbogholi Msagha J. (as he then was) in the case of *Viktar Maina Ngunjiri & 4 Others v Attorney General & 6 Others*, High Court at Nairobi, Civil Suit No. 21 of 2016 (2018) eKLR where he reviewed various authorities as follows :-

In the Indian case of *C. Muttu v Bharath Match Works* AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

In yet another Indian Case of *Pratap Chand Mehta v Chrisna Devi Mehta* AIR 1988 Delhi 267 the court citing another decision observed as follows,

“.....if a suit is filed against a dead person then it is a nullity and we cannot join any legal representative; you cannot even join any other party, because, it is just as if no suit had been filed. On the other hand, if a suit has been filed against a number of persons one of whom happens to be dead when the proceedings were instituted, then the proceedings are not null and void but the court has to strike out the name of the party who has been wrongly joined. If the case has been instituted against a dead person and that person happened to be the only person then the proceedings are a nullity and even Order 1 Rule 10 or Order 6 Rule 17 cannot be availed of to bring about amendment.”

20. Being guided by the above authority, I find that the suit is a nullity against the 1<sup>st</sup> Defendant, the same having been instituted on 23<sup>rd</sup> September 2021 after the death of the 1<sup>st</sup> Defendant on 29<sup>th</sup> April 2019. However, I cannot strike out the entire suit since they are other defendants who are still proper parties to the suit.



## Issue No. 2 Whether the suit herein is time barred?

21. Counsel for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants submitted that the Plaintiff suit being an action for recovery of land had been brought to court after 12 years and was time barred. It was stated that pursuant to the witness statement dated 23<sup>rd</sup> September 2021, the Plaintiff was well aware of the alleged particulars of fraud from the year 2007 but chose not to file the suit earlier. In response to this averment, the Plaintiff stated that under paragraph 15 of the affidavit dated 23<sup>rd</sup> September 2021, she has sworn that she is not aware of the restrictions on the suit property ever having been removed from the register. The plaintiff being the administrator of the deceased Nyawira Muthiora has not participated in the transfer to the Defendants of the suit property and it is manifest that the Defendants have effected transfers to themselves of the property on diverse dates, in the period 15/11/2017- 20/2/2018 which is after the death of the Nyawira Muthiora. The Plaintiff also maintained that there has been no subdivision of the mother title, what is in existence are false entries and illegal transfers of the purported subdivisions. There being no legally registered subdivisions, there can be no subdivision let alone the purported transfers of the fraudulent alleged subdivisions.

22. Section 7 of the *Limitation of Actions Act* stipulates thus:

‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’

These provisions require a suit for a claim to land to be instituted not later than twelve years after the accrual of the cause of action.

23. I have perused the Plaintiff’s plaint and note that at paragraphs 16 and 17 of the said plaint, the Plaintiff has averred that pursuant to official searches of the suit property conducted on 21<sup>st</sup> May 2018 and 23<sup>rd</sup> August 2021 she became aware that the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> Defendants had on diverse dates registered various interests in the suit property which were done from the period of 2006 to 2019.

24. Based on the evidential material placed before the court and the relevant provisions of the Limitation of Actions Act and owing to various uncertainties as to when exactly the cause of action arose, the issues as to whether or not the Plaintiff’s claim is time barred is one that can only be determined after the suit has been heard on merit.

## Issue No. 3 What are the appropriate orders/remedies that can be issued herein?

25. The other key issue for determination is whether the Plaintiff is entitled to the orders sought in respect to the applications dated 23<sup>rd</sup> September 2021 and 29<sup>th</sup> October 2021. At this point, I wish to point out that the Applicant has sought for temporary injunction and also an inhibition order pending the hearing and determination of the suit.

26. The case of *Giella v Cassman Brown* (1973) EA 358 sets out principles for grant of interlocutory injunctions, as follows;

“The conditions for 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 normally be 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.”

27. Therefore, as submitted by the Applicant, for an Applicant to be granted an interlocutory injunction, they must prove these three conditions;
- a) The Applicant must demonstrate a prima facie case with a probability of success.
  - b) The Applicant must demonstrate that they will suffer irreparable loss which may not be compensated by an award of damages if the injunction is not granted.
  - c) Where the Court is in doubt, the Court should decide the Application on the balance of convenience.
28. In *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) eKLR, a *prima facie case* was described as follows;
- “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.”
29. In dealing with this Interlocutory Application, I am cognizant of the fact that my findings at this point are inconclusive and must await full trial. In *Airland Tours & Travels Limited v National Industrial Credit Bank* Milimani High Court Civil Case No. 1234 of 2002 the Court stated as follows;
- “In an Interlocutory Application, the Court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”
30. On the question as to whether the Plaintiff has established a prima facie case with a probability of success, I note that the Plaintiff claimed to be one of the administrators of the estate of Nyawira Muthiora who was at all times one of the registered owners of the LR Dagoreti/Riruta/1173 (suit property). I am therefore satisfied that the Applicant has demonstrated a prima facie case with a probability of success.
31. The plaintiff has also stated that being the administrator of the deceased Nyawira Muthiora she has not participated in the transfer to the Defendants of the suit property and it is manifest that the Defendants have effected transfers to themselves of the property on diverse dates, in the period 15/11/2017-20/2/2018 which is after the death of Nyawira Muthiora. It was also averred that the 4<sup>th</sup> Defendant has by a letter dated 1<sup>st</sup> September 2021 addressed by her lawyers threatened to evict the Plaintiff from the property. This only means that if the Defendants are not restrained, they may take actions which may be detrimental where damages may not suffice to compensate the Plaintiff in the event she succeeds. It is my finding therefore that the Applicant may suffer irreparable damage, which may not be sufficiently compensated by an award of damages if the injunction is not granted.
32. On the question of the balance of convenience, it is my finding that the balance of convenience tilts in favour of the Applicant.
33. The Plaintiff also sought for orders that Serah Njeri Njuguna the administratrix of the estate of the deceased (Francis Kungu Njuguna) be joined to the case as 1st defendant and leave be granted to the plaintiff to amend the plaint appropriately. However, the same was challenged by the 1<sup>st</sup> Defendant



who submitted that order 1 rule 10(1) only applies where the Defendant was alive at the time the suit was filed.

34. In buttressing the said prayer, Counsel for the Plaintiff submitted that It is not in dispute that the person sought to be joined as a defendant to the suit is the personal representative of the deceased Francis Kungu Njuguna currently appearing as the registered proprietor of part of the suit property Dagoretti/Riruta/1827, of which the claim before the court by the plaintiff touches on. Under the circumstances it is necessary to bring on record the administrator. It was further submitted that, In principle “the objective of the Rules of joining a party which is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings”. It would be unnecessary to institute another independent suit against the administrator in the circumstances of this case. Counsel also urged the court to invoke article 159 (2) d of the Constitution and ensure that the proposed amendment is done to allow substantive justice.
35. Having perused the Plaintiff’s application dated 29<sup>th</sup> October 2021, it is clear that the Plaintiff sought to have the name of the 1<sup>st</sup> Defendant struck out from the proceedings and equally sought as a separate prayer to have Serah Njeri Njuguna the administratrix of the estate of the deceased (Francis Kungu Njuguna) be joined to the case as 1st defendant and leave be granted to the plaintiff to amend the plaint appropriately. In the circumstances and considering the fact that the Defendants did not controvert the fact that Serah Njeri Njuguna is the administratrix of the estate of the deceased Francis Kungu Njuguna and further for the purposes of ensuring substantive justice to the matter, I would grant leave for amendment of the Plaint.

### Disposition

36. In the end, the Plaintiff’s application dated 23<sup>rd</sup> September 2021, the 1<sup>st</sup> Defendant’s Notice of Preliminary Objection dated 21<sup>st</sup> October 2021 and Plaintiff’s Application dated 29<sup>th</sup> October 2021 are disposed in the following terms;
- i. The suit and all consequential proceedings herein against the 1<sup>st</sup> Defendant is struck out.
  - ii. That Serah Njeri Njuguna the administratrix of the estate of the deceased (Francis Kungu Njuguna) is hereby joined to the case as 1st defendant and leave is hereby granted to the plaintiff to file and serve an amended plaint within the next 14 days from today.
  - iii. That Peter Mburu Kariuki a co-administrator of the estate of Loise Nyawira Muthiora) be joined as a 2<sup>nd</sup> plaintiff to this case.
  - iv. That a temporary injunction is hereby issued restraining the defendants by themselves, servants, agents and or employees from alienation sale disposal and or in any respect interfering with the title to the Land Parcels Dagoretti/riruta/1827;dagoretti/riruta/1828;dagoretti/riruta/1829;dagoretti/riruta/1830;dagoretti/riruta/1831;dagoretti/riruta/1832;dagoretti/riruta/1833;& Dagoretti/riruta/1834 being resultant subdivisions of the suit property Dagoretti/Riruta/1173 pending hearing and determination of this case.
  - v. That an inhibition order do issue to the Chief Land Registrar inhibiting registration of any dealing with the land parcels Dagoretti/riruta/1827; Dagoretti/riruta/1828;dagoretti/riruta/1829;dagoretti/riruta/1830;dagoretti/riruta/1831;dagoretti/riruta/1832;Dagoretti/riruta/1833;&dagoretti/riruta/1834 resultant



subdivisions of the suit property Dagoretti/riruta/1173 Pending hearing and determination of this case.

vi. Each party to bear their own costs of the Applications.

37. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF JUNE 2022.**

**E. K. WABWOTO**

**JUDGE**

In the Virtual Presence of:-

N/A for the Plaintiff.

Mr. Mboga h/b for Mr. Wanjohi for the 1st Defendant and 2nd Defendant.

Mr. Gachuhi for the 5th Defendant.

N/A for other parties.

Court Assistant: Caroline Nafuna.

