



**Kiruthu v Wanjohi (Environment & Land Case 19 of 2021)
[2022] KEELC 13257 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE 19 OF 2021
JO OLOLA, J
SEPTEMBER 28, 2022**

BETWEEN

ALICE NYARUAI KIRUTHU APPLICANT

AND

JOSEPH MUNDUI WANJOHI RESPONDENT

RULING

1. By the notice of motion dated August 26, 2021 Alice Nyaruai Kiruthu (the plaintiff) prays for an order that pending the hearing and determination of this suit, the defendant/respondent, his agents, servants or anyone else acting under his directions be restrained by an order of temporary injunction from denying the plaintiff access to, use, possession and occupation of the suit land being LR No Nyeri/Uaso-Nyiro/21.
2. The application is supported by an affidavit sworn by the plaintiff and is premised on the grounds that:
 - (i) The suit land is in the name of one Wanjohi Mundui who died on August 4, 2021 leaving behind the plaintiff as his only widow;
 - (ii) The suit land comprises the plaintiff's martial home and source of livelihood where she farms;
 - (iii) The defendant who is the plaintiff's step-son has kept the plaintiff away from the marital home and the suit land as a whole;
 - (iv) The defendant has damaged and continues to damage the plaintiff's properties on the land; and
 - (v) The plaintiff has suffered and continues to suffer great loss and hardship as a consequence of the said acts of the defendant.



3. Joseph Mundui Wanjohi (the defendant) is opposed to the application. By his notice of preliminary objection filed herein dated September 22, 2021, the defendant objects to the application on the grounds that:
 1. The matter herein relates to the property of a deceased person (John Wanjohi Mundui – deceased) and any challenge to the same ought to be dealt with in a succession cause;
 2. The plaintiff/applicant’s claim that she is the widow and/or dependant and or a former wife and or beneficiary of the estate of the deceased ought to be canvassed through a petition/application presented under section 29 of the *Law of Succession Act*;
 3. The suit is incompetent as it offends section 29 and 54 of the *Law of Succession Act*;
 4. The suit is further incompetent as it offends order 5 of the *Civil Procedure Rules* (as well as) rule 7 and 12 of the *Probate and Administration Rules*;
 5. The plaintiff/applicant herein has not petitioned any court for and has not taken limited letters of grant to institute this suit and therefore has no *locus standi* to present this suit;
 6. The application is frivolous, defective bad in law and an abuse of the court process.
4. I have carefully perused and considered both the plaintiff’s application as well as the preliminary objection thereto by the defendant. I have similarly perused and considered the rival submissions and authorities placed before me by the learned advocates acting for the parties.
5. By the application before me, the plaintiff prays for a temporary order of injunction restraining the defendant whom she refers to as her step-son from denying her access to, use, possession and occupation of the suit property. In support of her case the plaintiff asserts that she was married to one Wanjohi Mundui who passed away on August 4, 2021. The plaintiff further avers that as at the time of his death, the suit property which comprised their marital home and farm was solely registered in the name of her husband.
6. The plaintiff further told the court that following the burial of the deceased, the defendant who is the son of the deceased by a previous marriage immediately denied her access to the matrimonial compound by locking it up and verbally directing the plaintiff and her children to keep away from the home and the suit land as a whole. It is the plaintiff’s case that as a result of the defendant’s actions, she has literally been rendered homeless with no source of livelihood as she depended on the farm measuring some 60 acres for her livelihood.
7. By his preliminary objection to the application the defendant terms the application as fatally defective and a breach of the law relating to succession in particular section 3, 29 and 54 of the *Law of Succession Act*, order 5 of the *Civil Procedure Rules* as well as rules 7 and 12 of the *Probate and Administration Rules*. In the main, the defendant submits that having not taken any letters of administration, the plaintiff lacks the locus standi to institute and prosecute both the suit and the application before the court.
8. As it were, other than the preliminary objection, the defendant has neither filed a defence to the suit nor a replying affidavit to the plaintiff’s application. The defendant has not thus denied the plaintiff’s contention that she was married to the late Wanjohi Mundui and that the suit property comprised their marital home. As a matter of fact, the plaintiff has annexed to her supporting affidavit a certificate of marriage (Annexure A1) indicating that she did on September 7, 2018 enter into a marriage with the said John Wanjohi Mundui under African Customary Law.



9. It is also apparent that when the deceased passed away as aforesaid, there was a dispute between the plaintiff on the one part and the defendant herein amongst three other parties as to who had a right to participate in the burial. That dispute forced the plaintiff to institute Nyeri CMCC No 242 of 2021 against the defendant and the three other individuals. By a consent recorded in court on August 11, 2021 (annexture “A 3” to the supporting affidavit), it was ordered:
 1. That the burial of the deceased do proceed as arranged on August 13, 2021 with the participation of the applicant (the plaintiff herein) and the respondent; and
 2. That the order be served upon St Francis Community Hospital.
10. By this present application, the plaintiff accuses the defendant of locking up her home shortly after the burial on August 13, 2021 and verbally directing the plaintiff and her children to vacate the suit premises. Without denying those allegations and stating his source of authority to deny the plaintiff access to and use of the home and the suit property, the defendant has come to court questioning the capacity of the plaintiff to file the suit.
11. With this preliminary objection apparently, the defendant now urges this court to hold that once a husband dies, a widow who is in possession of her husband’s land has no known interest therein which can be protected by law until she is constituted as the administratrix of the estate of her deceased husband and that until that is done, she can be thrown out of the land by anyone. In my considered view, that would be an absurd conclusion offensive to the legal foundations of justice and morality.
12. Given that it has not been denied that the plaintiff was in possession and occupation of the land during the lifetime of the late Wanjohi Mundui, I did not think, barring any proven irregularity, that there was anything that should stop her from continuing to enjoy her husband’s land and estate whether the husband’s estate had been administered or not. As was stated in *Betha Kanini Baini v Agnes Ithiru Njoka* (2011) eKLR:

“Possession of land if lawful entitles the possessor to exercise right to possess, use and enjoy that land. It can indeed be said that the rights of a possessor of land are akin to the rights of the registered owner. Those rights in my view are enforceable. A possessor can enforce those rights against one seeking to either eject them from the land or to interfere with their occupation of it.”
13. Arising from the foregoing, I am persuaded at this stage that the plaintiff has established a prima facie case with a probability of success at the trial. Having asserted without contradiction that she was a wife in possession of the suit land prior to the death of the said Wanjohi Mundui, it was clear to me that she had the locus standi to protect her interest on the suit property not only as a wife with a life interest thereon but also as the one in possession thereof.
14. It follows that I find no merit in the defendant’s preliminary objection and I hereby dismiss the same. I am however persuaded that there is merit in the plaintiff’s motion dated August 26, 2021.

I allow the same in terms of prayer No ‘6’ thereof.
15. The costs of both the objection and the application shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 28TH DAY OF SEPTEMBER, 2022.

In the presence of:

Mr. C. M. King’ori for the Plaintiff



Mr. Mitei for the Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

