



Mururu & 7 others v Estate of M’Imirongo M’Muthaka through the administrators Andrew Muriuki M’Muthaka & 2 others (Environment & Land Case 43 of 2020) [2022] KEELC 15116 (KLR) (30 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15116 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 43 OF 2020
CK NZILI, J
NOVEMBER 30, 2022**

BETWEEN

**CHRISTINE MURURU 1ST PLAINTIFF
JACINTA KAREMA MUCHIRI 2ND PLAINTIFF
FRANCIS MBAE NYAGA 3RD PLAINTIFF
ISAIAH ITHALII M’IMANYARA 4TH PLAINTIFF
NICHOLAS NJUE NYAGA 5TH PLAINTIFF
LAWRENCE MWITHALII MICHUBU 6TH PLAINTIFF
MONICA AGATA 7TH PLAINTIFF
IBRAHIM KOBIA 8TH PLAINTIFF**

AND

**ESTATE OF M’IMIRONGO M’MUTHAKA THROUGH THE
ADMINISTRATORS ANDREW MURIUKI M’MUTHAKA 1ST DEFENDANT
SUSAN NKATHA 2ND DEFENDANT
PATRICK KAMENGU 3RD DEFENDANT**

RULING

1. By an application dated 8.9.2020 the court is asked to issue temporary orders of injunction restraining the defendants from entering into, interfering with or alienating LR No’s Ithima/Antuambui/5596, 1212, 2936, 1239, 1295, 1294, 1226, 1257, 1286, 4257 pending the hearing and determination of the suit. Further, the court is asked to stay the execution of the confirmed grant in H.C Succession Cause



- No. 308 of 2010 with respect to the aforesaid properties until the hearing and determination of this suit.
2. The application is supported by an affidavit sworn by Christine W. Mururu on 8.9.2020 attaching a consent to sue, copies of grant ad litem, photos on developments thereon, death certificate, chief's letter and consent on the mode of distribution in the succession cause.
 3. The applicants aver that they bought parcels No's 5596, 1212, 1294, 1295, 1226, 1239, 1286 and 2936 from the deceased but they were not transferred to them before his demise and have undertaken various developments on their respective portions as per the attached photographs. It is the applicant's contention that should the distribution be affected as per the confirmed grant, they stand to suffer irreparable loss and damage before there is declaration of ownership in their favour.
 4. This application was filed alongside the originating summons dated 8.9.2020 in which the plaintiffs seek to be declared as adverse possessors of the various suit parcels by virtue of long occupation and permissive entry.
 5. In response, the 1st & 3rd defendants filed a notice of preliminary objection dated 22.9.2020 on the basis that the application was an abuse of court process, it lacks substratum, it is frivolous, vexatious and scandalous, discloses no cause of action and it infringes on the doctrine of subjudice.
 6. On the part of the 1st & 2nd defendants they filed replying affidavits sworn on 22.9.2020 and 6.11.2020 respectively.
 7. On his part, the 1st defendant admitted that the plaintiffs are recognized beneficiaries to the deceased estate and more so parties to the succession cause still pending determination and hence this suit is premature since none of the defendants were disputing the rights of the plaintiffs.
 8. On her part, the 2nd defendant averred that the plaintiffs were intermeddlers who invaded the estate of the deceased after his demise by allegedly purchasing part of it from the 1st & 3rd defendants who had no letters of administration at the time hence the transactions are invalid.
 9. The 2nd defendant averred that the recognition of the plaintiffs as beneficiaries in the succession cause by the 1st & 3rd defendants was aimed at disinheriting the rightful beneficiaries and was made through falsehoods and misrepresentation. The 2nd defendant further averred that the deceased during his lifetime had affected all the transfers for the properties he had sold and the plaintiff's properties were not among them. That the probate court has distributed the estate of the deceased to all lawful and rightful beneficiaries after hearing all the parties among them the plaintiffs who failed to prove their rights. That the only option is for the plaintiffs to pursue the 1st & 3rd defendants for any refund or for an offer of an alternative land out of their respective shares since the two could not pass to the applicants a better title than they had acquired.
 10. That the purchaser of unlawfully obtained property cannot use the fact of purchase to defeat the interests of the legal owner declared as such by a court of law. That the applicants do not deserve the orders sought which are discretionary in nature.
 11. Pursuant to directions given on 19.7.2022, the plaintiffs filed written submissions dated 28.9.2022. It is their submission that the deceased knew that they were in occupation of their respective portions which is confirmed by the scene visit report dated 25.3.2022. Therefore, their rights as per Sections 7, 9, 10, 11, 12, 13, 16, 17 & 38 of the Limitation of Actions Act as read together with Section 28 (h) of the Land Registration Act and Section 7 of the Land Act should be protected.



12. For a party to be entitled to a temporary injunction he has to establish a prima facie case with a probability of success. Secondly, he has to establish that he stands to suffer irreparable loss and damage which cannot be compensated by way of damages and lastly, that the balance of convenience tilts in favour of granting the injunction. The three ingredients must be proved conjunctively.
13. In *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) eKLR a prima facie case was described as established where a tribunal directing its mind on the material placed before it finds a right which has been infringed so as to call the opposite party to rebut it.
14. In *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, the court held that while considering if a prima facie case has been established, the court has only to see that on the face of it, the person applying for an injunction has a right which has been threatened with violation and the applicant need not establish title. Further, the court said it is enough if an applicant can show that he has a fair and bonafide question to raise to the existence of the right which he alleges.
15. In this matter, the applicants' case is for declaratory orders that they have acquired the suit premises by virtue of adverse possession. They have pleaded that there was permissive entry into the suit land on account of purchase from the deceased.
16. The applicants have not attached copies of the sale agreements or stated the date of purchase and the consideration that they paid to the former registered owner or the beneficiaries herein. As much as the applicants are alleging rights to possession, they are in law required to prove a sale in line with Section 3 (3) the *Law of Contract Act* and the Section 38 of the *Land Act*.
17. In absence of that evidence, I find no prima facie case established for this court to issue temporary injunction. Further, there is a regular confirmed grant issued by a court of concurrent status after giving the applicants an opportunity to prove their purchaser's rights.
18. The applicant must also prove irreparable loss or harm. What constitute irreparable damage has been said as the injury that is substantial and which can not be adequately atoned or remedied by way of damages. See *Nguruman Ltd supra*. The applicants have not demonstrated what loss they are likely to suffer and which is not quantifiable in law. The applicant must show the balance of convenience tilts in their favor otherwise they should be exposed to the danger of rendering their case otiose.
19. In this suit, the 2nd defendant has stated that the acts by the applicants amount to intermeddling with the estate of the deceased and that if any sale ever occurred, the same was done between the applicants, the 1st and 3rd defendant's and should not therefore be used to interfere with inheritance rights of the rest of the beneficiaries to the estate by stopping the implementation of the confirmed grant.
20. In *Paul Gitonga Wanjau vs Gathuthi's Tea Factory co. Ltd & 2 others* (2016) eKLR the court while dealing with the issue of balance of convenience expressed itself thus;

“Where any doubt exists as to the applicants right to if the right is not disputed but its violation is denied, the court in determining whether an interlocutory injunction should be granted takes into consideration the balance of convenience to the parties and the nature of injury which the respondent on the other hand would suffer if the injunction was granted and should he ultimately turn out to be right and that which injury the applicant on the other hand, might sustain if the injunction was refused and should he ultimately turn out to be right..... thus, the court decides as to which party will suffer greater harm with the outcome of the motion”. The court will seek to maintain the status quo in determining where the balance of convenience lies”.



21. The scene visit report has confirmed that the applicants are currently in occupation of the suit parcels of land. The confirmed grant was issued on 14.2.2019, while this suit was filed on 15.9.2020. This is close to 1 ½ years after the grant was confirmed. The delay has not been explained. The applicants have not attached a copy of the official search as at the filing of this suit. Similarly, the applicants have not stated if the respondents have served them with a notice of eviction from the suit land. Additionally, the grant shows other beneficiaries to the estate who have not been sued in this matter. In view of the foregoing reasons, the applicants have not established the other two key ingredients on irreparable loss and the balance of convenience to be entitled to a temporary injunction.
22. On the issue of stay of execution of the confirmed grant, the applicants took over one and half years to move to this court. There is no indication if the respondents have lodged the paper work for transmission of the suit properties to the names of the respective beneficiaries. There is no recent official search to demonstrate if the properties may have changed hands from the names of the deceased.
23. The applicants have to demonstrate substantial loss they are likely to incur if the implementation takes place. The applicants have also not defined the current status on the execution of the confirmed grant since February 2019.
24. In *Machira t/a Machira & Co. Advocates vs E.A Standard* (2002) 2 KLR 63 the court held that it was not enough to merely state that substantial loss will result and that a party must prove the specific details and particulars of loss if stay is not granted.
25. The applicants have also not offered any security for the due performance of the orders or commitment thereof. In *Equity Bank Ltd vs Taiga Adams Co. Ltd* (2006) eKLR the court held that one of the mandatory tenets, was an offer for security. The applicants have therefore failed to show a just cause why the beneficiaries to the estate as well as the defendants should be deprived of their inheritance rights until the applicants can prove that they are entitled on account of adverse possession to some of the properties of the deceased.
26. The up shot is that the application herein lacks merits. The same is dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 30TH DAY OF NOVEMBER, 2022

In presence of:

C/A: Kananu

Miss Aketch for applicants

HON. C.K. NZILI

ELC JUDGE

