



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maina (Suing as administrator of the Estate of Eliud Wanjohi Maina  
(Deceased)) v Mwangi (Environment and Land Case Civil Suit  
E032 of 2021) [2022] KEELC 15040 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15040 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIRONMENT AND LAND CASE CIVIL SUIT E032 OF 2021  
CK NZILI, J  
NOVEMBER 23, 2022**

**BETWEEN**

**EARNEST WANJOHI MAINA ..... PLAINTIFF  
SUING AS ADMINISTRATOR OF THE ESTATE OF ELIUD WANJOHI MAINA  
(DECEASED)**

**AND**

**ALBERT GACHORE MWANGI ..... DEFENDANT**

**RULING**

1. Before the court is the application dated June 28, 2022 in which the defendant seeks orders of inhibition against LR No Ntima/Igoki/2406 on the grounds set out in the affidavit sworn by Albert Gachore Mwangi on June 29, 2022. It is the applicant's contention that the plaintiff respondent has obtained a confirmed grant to the estate of the late Eliud Wanjohi Maina and the suit property has been distributed to Judy Wanjiru Wamae. Therefore, if the transfer is effected, the applicant would suffer grave prejudice and irreparable damage as to the compensation for the developments on the suit land estimated at Kshs 48,000,000/=. Further, the applicant takes the view that he is likely to be evicted from the suit land.
2. The application is opposed through a replying affidavit of Stephen Wachira Waiganjo on the basis inter alia that the court lacks jurisdiction to interfere with a decree of the High Court Nanyuki; the orders sought will contradict the confirmed grant; the applicant can be compensated by way of damages as per his counterclaim; the plaintiff remains an administrator under section 83 of the *Law of Succession Act* until all debts are paid; the applicant only occupies a portion of the entire land and hence the court's orders cannot be used to stop the respondent from subdividing and occupying the  $\frac{3}{4}$  of the suit land; the orders sought will serve no useful purpose since the grant has been confirmed and will interfere with its implementation and lastly, it is only fair the matter be heard on priority basis.



3. Section 68 of the *Land Registration Act* grants the court the powers to issue inhibition for a particular time or until the occurrence of a particular event or generally, until a further order the registration of any dealing with any land lease or charge.
4. In *Dorcas Muthoni & 2 others v Michael Ireri [2016] eKLR*, the court held that an inhibition was similar to an order of prohibitory injunction and a court issuing such an order must be satisfied that the applicant has good grounds because, like an interlocutory application, such an order preserves the property in dispute pending trial.
5. In *Films Rover International & others v Cannon Films Sales Ltd [1986] ALL ER 772*, it was stated that a court should always be guided by the course that carries the lower risk of injustice.
6. In this matter, it is not in dispute that the suit property forms part of the estate of the late Eliud Maina Wanjohi and the plaintiff which is now clearly settled in the probate cause and distributed to Judy Wamae who is not a party to this suit.
7. The plaintiff has admitted that the lease entered into on May 15, 2014 was signed on their part as guardian ad litem of the deceased vide an order issued on May 9, 2013.
8. Subsequently, the deceased passed on March 17, 2021 and a grant ad litem under section 54 and the 5<sup>th</sup> schedule of the *Law of Succession Act* was issued to the plaintiff on August 17, 2021, which was limited only to the filing of the suit until further representation. The plaintiff was subsequently issued with letters of administration now confirmed in High Court Succession Case No 1008 of 2021 and LR No Ntima/Igoki/2406 distributed to Judy Wanjiru Wamae. The plaintiff has not joined the beneficiary as a party to this suit.
9. Similarly, neither the plaintiff nor the beneficiary have replied to the application herein. The replying affidavit is sworn by a lawyer representing the plaintiff and not the beneficiary. In *Raila Odinga & 16 others vs Ruto & 10 others (2022) eKLR*, the court deplored the tendency of lawyers representing parties in deponing on contested facts which may subject them to cross examination. The affidavit offends both the *Advocates Act* and the *Civil Procedure Rules* for the deponent does not disclose any authority to swear and sources of what he is swearing on. Therefore, I find the affidavit lacking probative value save on matters of law.
10. As regards the merits of the application, though the facts are undisputed, the defendant says he stands to suffer irreparable loss and damage for he has used immense sums of money to develop the suit premises and if transferred to a third party, there is a likelihood of an eviction by that party and to his detriment for a loss estimated at Kshs 48,000,000/= yet there was an undertaking by the plaintiff to compensate him before termination of the tenancy agreement.
11. In *Mrao Ltd v First American Bank Ltd & 2 others [2003] eKLR*, the court held that a prima facie case is established where on the material placed before the court there is evidence of a right which has been infringed or likely to be breached calling for the opposite party to give an explanation.
12. The defendant alleges his rights as a tenant are contained in the tenancy agreement dated May 15, 2014 which binds not only the plaintiff but any successors and or assignees in title. It relates to 1.03 acre. The valuation report states that the defendant's alleged developments sit on approximately 0.002 ha per ground measurements. The copy of search availed to court indicates the plaintiff's property is 0.40 ha. The lease is clear what was leased to the defendant was half of LR No Ntima/Igoki/2406 measuring 1.03 acres.



13. The defendant's defence and counterclaim, though offensive of order 7 rule 1 [Civil Procedure Rules](#), quantifies the damages and seeks for an order to continue occupying the entire land without regularizing the payment of rent and or taking accounts with the new landlord.
14. The counterclaim was filed after the grant was confirmed. There is no indication from the defendant in the application herein if he has engaged the new beneficial owner for an amicable solution or consent. The same position obtains with the plaintiff who has failed to expressly respond to the application and perhaps shed light on whether the said Judy Wamae is aware that there is a pending suit touching on her inheritance rights to the suit property.
15. No party should be condemned unheard and or his property taken away or adverse orders made against it without notice. If the court were to do so, it would be offensive to article 40 of the [Constitution](#), order 40 of the [Civil Procedure Rules](#) as well as section 68 of the [Land Registration Act](#). The plaintiff averred that the applicant is forcefully on the land when the lease expired in 2019 and without any payment of rent.
16. Trespass under section 3 (1) of the [Trespass Act](#) is defined as being on one's land without reasonable excuse and or consent of the occupier thereof. There is evidence the defendant had a permissive entry into the land. It is however not clear if in the initial lease agreement prior to 2014, there was permission to effect developments on the suitland.
17. The dispute touches on whether the plaintiff was to compensate the defendant for the alleged developments in the event the tenancy was not renewed and for how much.
18. In [Nguruman Ltd v Shompole Group Ranch & 3 others \[2007\] eKLR](#), the court held every continuance of a trespass was fresh trespass of which a new cause of action arises from day to day as long as the trespass continues. In this matter, the defendant is merely stating possessory rights and not ownership rights. He has however said and which is admitted that the property has changed hands.
19. In [Samuel Mwangi v Jeremiah M'Itobu \[2012\] eKLR](#), the court cited with approval *Winfred & Jolowitz 12<sup>th</sup> Edition at page 361* that possession in fact confers no actual right of property but a possessor may nevertheless maintain trespass against anyone whose interest he cannot himself show that he has the right to recover possession immediately.
20. Section 57 (1) (c) of the [Land Act](#) 2012 provides that a person who remains in occupation with the consent of the owner of the suit property after an expiry of the lease is deemed to be a periodic tenant.
21. The plaintiff has admitted that the lease has expired, the defendant is in possession and that they were unable to agree on the new lease terms. The court made an order on November 16, 2021 for payment of rent and clearance of the outstanding rent. A specific averment has been made in the reply to defence and to the counterclaim that the defendant has defied that order. The defendant has not filed a supplementary affidavit to counter the said specific averments.
22. In my considered view therefore, the defendant has no known legal or equitable interest in the suit property if at all he has failed to adhere to clear court orders and pay monthly rents on their due dates so as to be termed to be a periodic tenant.
23. All what he is undertaking on the suit premises is a business. The defendant has not said the plaintiff's are unable to pay the quantified damages to him in the event he was to succeed in the counterclaim. See [National Oil Corporation of Kenya v Robert Obegi Ongera & another \[2014\] eKLR](#).



24. In the circumstances obtaining, I find the defendant has not established the ingredients required for this court to grant inhibition orders, or to stop the distribution of the suitland by a decree of a court of concurrent status, more particularly where the beneficiary is not a party to this suit.
25. I dismiss the application dated June 26, 2022 and order that the suit be heard on priority basis since the parties have complied with order 11 *Civil Procedure Rules* as ordered.

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

**THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022**

**In presence of:**

**C/A: Zamzam**

**Wairimu for plaintiffs**

**Miss Gichohi for Mwachumba for defendant**

**HON C K NZILI**

**ELC JUDGE**

