



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 443 of 2005

1. Land and Environmental Law Division
2. Subject of main suit: Adverse Possession by estate of deceased
 - i) LR Kiambaa/Wambugu 351
Now sub-divided LR Kiambaa/Wambugu 2256 – 2271
 - ii) Deceased used to live on 1/8 of land belonging to the respondent defendant.
 - iii) Applicant applies for deceased estate to be awarded one acre or hectares of the 7/8 land.
3. Application for injunction
 - iv) Files application 17 August 2007 for injunction to restrain respondent from sub-dividing land. Caution lodged removed.
3. Held:
 - i) Injunction dismissed
 - ii) Main suit struck out disclosing no cause of action.
4. Case law – Nil
5. Advocate

Ngara C.N. for Mangerere Ngisa & Co. Advocates for plaintiff/applicant –present

Kitheka J.M. for Kitheka & Co. Advocates for the defendant/respondent –absent

FREDRICK MBUGU.....PLAINTIFF

VERSUS

MUNGAI MUHOHO.....DEFENDANT

RULING

I: Application for injunction dated 17 August 2007

1. The subject of the main suit is Land ownership by way of Adverse Possession.
2. Fredrick Mbugua and Priscilla Wangai Kuonga are joint administrator and administratrix respectively of the estate of Mungai Kahuru now deceased. They filed suit on 19 April 2005 for an Adverse Possession for the estate of Mungai Kaburu for the original land being registered. Kiambaa/Waguthu/351 that was divided later into three portion being LR Kiamba Wanguthu 2256 to 2271 by Mungai Muhoho the defendant herein who is the said registered owner.
3. The plaintiff filed under a certificate of urgency dated 17 August 2007 an injunction application to restrain the defendant from dealing with the sub-divided pieces of land till the determination of the main suit. Temporary injunction had been issued to them earlier pending the hearing of this application.
4. According to the applicant the original parcel of land Kiambaa/Waguthu.351 the deceased estate claim and 1/8th of 7/8 shares. The defendant/respondent in sub-dividing the land into 16 portions was under a threat to dispose of the said parcel of land. The plaintiff had lodged a caution but this was removed by the registrar in collusion with the defendant. An injunction was therefore prayed to restrain the defendant from dealing with the said land.
5. In reply the defendant respondent revealed that he and the late Mungai Muhoho were very good friends and relatives. He sold 1/8 of the portion of his land in 1960s to the deceased. The deceased passed away in 1988. The deceased when alive asked the defendant/respondent to gaze his cow in portion of his land. This cow unfortunately died and passed away in 1970s. The deceased stopped utilizing the portion of land.
6. The deceased passed away before the land was sub-divided. The said Fredrick Mbugua (plaintiff member are herein) attempted to expand the area occupied by the defendant respondent. An attempt to bury his daughter was even made.
7. On 5 October 2004, the defendant respondent with the assistance of the administration and the District Surveyor sub-divided the land which was equivalent to 1/8 of the total portion of land. The land sub-divided was to Mbugua Kungu (plaintiff) 0.420 ha Mungai Muhoho (defendant) 3.376 ha.
8. The sub-division being complete, the defendant proceeded to further sub-divide his rightful portion of land.
9. The plaintiff No.1's case has been that the claims 1/8 of the 7.8 portion of land of the defendant/respondent. He had already built dwelling houses for rent after the deceased had passed away in 1988. He then proceeded to further built beyond the boundary between the respondent and the plaintiffs land.
10. The impression given to this court is that the applicant/plaintiff had in effect claimed 1/8 out of the defendants 7/8. This meant he wanted more land over and above the 1/8 already sub-divided to him by the defendant herein.
11. The advocate for the respondent described how the parties had proceeded to have the sub-division done after the filing of the suit and his portion given to him. He can now not claim a further 1/8 again – twice.

II: Finding.

12. The application for an injunction has no merits. The applicant seeks to mislead this court. He has already obtained his share of land as a result has no further claim. What the plaintiff seeks to do is encroach into the defendant's respondents land and claim what he is not entitled to, being 1/8 further from

what he obtained.

13. The Originating Summons claim that the Adverse Possession was being claimed by the deceased – who died in 1988. That it is the deceased estate who should claim and be awarded the land.

14. I reject the arguments put forward by the plaintiff/applicant. There is no prima facie case made out to warrant own injunction. It is hereby dismissed.

15. The Originating Summons discloses no cause of action as a dead man cannot claim Adverse Possession between 1988 and 2005. The estate may sue to claim property and to gather the deceased estate but that in this case was done when the defendant subdivided 1/8 of the land to the 1st plaintiff. The plaintiffs originating Summons has been spent. The application for an injunction seeks for land (7/8) that is not the respondents to have.

15. I accordingly struck out the main suit by way of Originating Summons.

16. I award the costs of the application and the costs of the main suit to the defendant/respondent to be taxed.

Dated this 15th day of November 2007 at Nairobi.

M.A. ANG'AWA

JUDGE

Ngara C.N. for Mangerere Ngisa & Co. Advocates for plaintiff/applicant –present

Kitheka J.M. for Kitheka & Co. Advocates for the defendant/respondent –absent