



Kaiganaine v Wanderi & another ((Sued as the Administrators of the Estate of Walter Maitai Mathenge)) (Environment & Land Case E022 of 2021) [2022] KEELC 15313 (KLR) (9 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15313 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYERI
ENVIRONMENT & LAND CASE E022 OF 2021
JO OLOLA, J
DECEMBER 9, 2022**

BETWEEN

JOHN GACHANGA KAIGANAINE PLAINTIFF

AND

MATHENGE WANDERI 1ST DEFENDANT

MUCHANGI MAITAI MATHENGE 2ND DEFENDANT

(SUED AS THE ADMINISTRATORS OF THE ESTATE OF WALTER MAITAI MATHENGE)

RULING

1. By the notice of motion dated September 30, 2021 as filed herein on October 25, 2021, John Gachanga Kaiganaine (the plaintiff) prays for orders that:
 3. Pending the hearing and determination of this suit, the 2nd defendant be restrained from excising, alienating, transferring and from in any manner howsoever, effecting a transfer of a portion of 20 acres out of LR No 25103/5; title No LR 141700 (previously LR No 51555/1 and LR No 3430) or any part thereof, to the 1st defendant;
 4. The costs of this application be borne by the respondents.
2. The application which is supported by an affidavit sworn by the plaintiff is based on the grounds *inter alia*;
 - (i) That the plaintiff is the beneficial owner of a 20 acre portion of land on the suit property which forms part of the estate of Walter Maitai Mathenge (deceased);



- (ii) That the plaintiff purchased the 20 acre portion of land from the 1st defendant who had purchased the same from Walter Maitai Mathenge (deceased), on the understanding that the 1st defendant would facilitate and ensure the transfer of the 20 acre portion from the deceased or his successors in title;
 - (iii) That the 2nd defendant has caused LR No 25103/5 and title No LR 141700 (previously LR No 51555/1 and LR No 3430/6) to be sub-divided with the intention of transmitting the portions thereof to the beneficiaries of the estate of Walter Maitai Mathenge, and to transfer portions thereof to the beneficial owners who claim under the beneficiaries;
 - (iv) That the 1st defendant has by his conduct and communication intimated that he has no intention of honouring the agreement between him and the plaintiff, and is insisting on the 20 acre portion being transferred to him;
 - (v) That the 2nd defendant, despite being aware of the plaintiff's interest, and the agreement between the plaintiff and the 1st defendant, has intimated that they do not recognize the plaintiff and are insistent on effecting the transfer to the 1st defendant.
 - (vi) That the plaintiff is, and has been in continuous occupation of the 20 acre portion of land for the last 14 years, as from 2007;
 - (vii) That the plaintiff is apprehensive that should the transfer be effected to the 1st defendant, the 1st defendant may not transfer the same to the plaintiff;
 - (viii) That the orders sought herein are necessary to secure the plaintiff's right to property, or at the very least protect the subject matter of this suit before the court makes a determination on the same; and
 - (ix) That the plaintiff stands to suffer irreparable loss should the orders sought not be granted.
3. In response to the application, Muchangi Maitai Mathenge (the 2nd defendant) sued in his capacity as the administrator of the estate of Walter Maitai Mathenge filed a notice of preliminary objection dated November 24, 2021 objecting to the application on the grounds:
- 1. That the notice of motion application dated September 30, 2021 is an abuse of court process as it seeks to restrain the 2nd defendant/respondent from executing a valid court order issued in Nairobi High Court Succession Cause No 517 of 2005;
 - 2. That the honourable court has no jurisdiction to entertain the notice of motion dated September 30, 2021 and the entire suit as filed by the plaintiff against the 2nd defendant as there is a grant of letters of administration with (a) will annexed issued (in) Nairobi High Court Succession Cause No 517 of 2005, which is still in force; and
 - 3. That the notice of motion dated September 30, 2021 is incompetent as it is premised on a suit filed in a court without jurisdiction.
4. I have carefully perused and considered both the plaintiff's motion as well as the preliminary objection filed by the 2nd defendant. I have similarly perused and considered the submissions filed by the parties herein. While the 1st defendant was said to have filed a replying affidavit to the motion, i was unable to find any copy filed in the court file.
5. By the application before the court, the plaintiff prays for a temporary order of injunction to restrain the 2nd defendant from excising, alienating, transferring and/or in any manner howsoever effecting a



transfer of a portion measuring 20 acres out of the parcel of land known as LR No 25103/5; and title No LR 141700 (previously LR No 51555/1 and LR No 3430/6) or any part thereof, to the 1st defendant.

6. The 2nd defendant on his part objects to the grant of such orders. In my understanding the main thrust of the defendant's preliminary objection is that this court lacks the jurisdiction to entertain the application, and by extension, the suit herein.
7. In support of the preliminary objection the 2nd defendant submits that the plaintiff's suit purely seeks to challenge the execution of the grant issued in Nairobi High Court Succession Cause No 517 of 2005. It is the 2nd defendant's case that the agreement sought to be enforced was solely between the plaintiff and the 1st defendant. The 2nd defendant submits that by this suit and the application, the plaintiff seeks a declaration that will make him a person entitled to a share in the estate of the late Walter Maitai Mathenge and that such a declaration can only be made by a court seized with jurisdiction under the *Law of Succession Act*.
8. The 2nd defendant further submits that as spelt out under article 162(2) of the *Constitution*, this court shall only deal with matters falling under land and environment and that matters under the *Law of Succession Act* shall be dealt with by the High Court. Accordingly, it is the 2nd defendant's submission that an order issued by the High Court in a succession matter can only be challenged in the High Court and not in the Environment and Land Court.
9. As it were, this court is a creation of article 162(2)(b) of the *Constitution* and the *Environment and Land Court Act*, No 19 of 2011. The said article 162(2)(b) of the *Constitution* gave Parliament the power to establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Subsequently, Parliament enacted the *Environment and Land Court Act* which provides at section 13 thereof as follows:
 - "(1) The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
 - (2) In exercise of its jurisdiction under article 162(2)(b) of the Constitution, the court shall have power to hear and determine disputes –
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interest in land; and
 - (e) any other disputes relating to environment and land."
10. By his plaint dated September 30, 2021 as filed herein on October 25, 2021, the plaintiff prays for a declaration that he is the actual beneficial owner of 20 acres of the suit property and an order directing the 2nd defendant to transfer the 20 acres to his name. In addition, the plaintiff prays for a permanent



injunction directed at the 2nd defendant restraining him from excising and transferring the 20 acres of land to the 1st defendant.

11. A perusal of the pleadings as filed herein reveals this suit relates to the ownership of the said 20 acres of land. I was unable to see anywhere in the plaintiff's pleadings where he has asked the court to stop the distribution of the estate of the late Walter Maitai Mathenge which is the subject of the said Nairobi High Court Succession Cause No 517 of 2005.
12. As we have found above, this court is clothed with the jurisdiction to deal with matters concerning the use, occupation, ownership and title to land. It follows that the 2nd defendant's preliminary objection is misconceived and without basis. I dismiss the same.
13. Turning to the plaintiff's application for injunction, the issue for determination is whether or not the plaintiff has satisfied the principles set down in the law for the grant of such orders. As was stated in the celebrated case of *Giella -vs- Cassman Brown* (1973) EA 358, the plaintiff in such an application needs to satisfy the following requirements in order to succeed:
 - (i) That the applicant has a *prima facie* case with a probability of success;
 - (ii) That if the orders sought are not granted, he stands to suffer irreparable loss which cannot be compensated by an award of damages; and
 - (iii) If the court is in doubt, it must then decide the case on a balance of convenience.
14. The question that then calls for consideration is whether the plaintiff has made out a *prima facie* case with a probability of success. As the Court of Appeal stated in *Mrao Limited -vs- First American Bank of Kenya & 2 others* (2003) KLR 125:

“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 there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
15. In support of his application, the plaintiff has annexed the terms of agreement (annexture JGK-5) and the supplemental agreement dated April 8, 2011 (annxutere JGK-9). A cursory perusal thereof reveals that the plaintiff and the 1st defendant herein entered into some arrangement in regard to some 20 acres of land which the 1st defendant was said to be in the process of purchasing from Walter Maitai Mathenge (now deceased). In addition the plaintiff has annexed proof of a number of payments made to the 1st defendant in relation to the said purchase of the land.
16. As it were, I was unable to find any response to the plaintiff's averments by the 1st defendant as no reply was filed by both the defendants herein. Given that the 1st defendant does not deny having sold his interest on the 20 acre portion of land, it would be wrong for this court to turn a blind eye to the plaintiff's contention that the defendants herein are intent of depriving him of his interest in the land.
17. From the submissions filed herein on April 11, 2022 by the 1st defendant, it is apparent that he would prefer that the property be transferred first to himself “as the person rightfully entitled to inherit from the deceased's estate and then thereafter he would transfer the same to the plaintiff.” A perusal of the entire submissions clearly reveals that the 1st defendant conceded that the plaintiff does indeed have a claim to the 20 acres only that the same should first pass through him as the person entitled to inherit.
18. In my view, the purpose of a temporary order of injunction is to preserve the property in dispute pending the determination of the dispute. By this application, the plaintiff seeks the protection of the



20 acres of land as he is apprehensive that the same would not be transferred to him. A perusal of the supplemental agreement for sale executed between the deceased and the 1st defendant reveals that the purchaser of the land was to be taken to include the purchaser's assigns.

19. That being the case, it was apparent to me that if the plaintiff were to be successful in proving he had purchased the land at the full trial, he would qualify as the 1st defendant's assign and the property is capable of being directly transferred to himself by the 2nd defendant as the administrator of the estate of the late Walter Maitai Mathenge.
20. Given that the subject matter is a large piece of land and that the plaintiff has demonstrated that he has made substantial payments towards the purchase thereof, I am persuaded that the plaintiff stands to suffer substantial loss if the orders sought herein are not granted.
21. Accordingly I am persuaded that there is merit in the motion dated September 30, 2021 and I allow the same.
22. The plaintiff shall have the costs of both the motion and the 2nd defendant's preliminary objection.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI
THIS 9TH DAY OF DECEMBER, 2022.**

In the presence of:

Mr. Gichigo for the Plaintiff

Mr. Okeyo holding brief for Njenga for 1st Defendant

Mr. Muchiri wa Gathoni for 2nd Defendant

Court assistant - Kendi

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J. O. Olola

JUDGE

