



**Mathiu & 5 others v Mwirigi & 2 others (Environment and Land Appeal
E060 of 2024) [2025] KEELC 317 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEELC 317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E060 OF 2024
BM EBOSO, J
FEBRUARY 4, 2025**

BETWEEN

**ANGELICA KENDI MATHIU 1ST APPELLANT
MARGARET NKIROTE MATHIU 2ND APPELLANT
CHARITY NAITORE MATHIU 3RD APPELLANT
CHRISTINE GAKII 4TH APPELLANT
ELIZABETH KAGWIRIA 5TH APPELLANT
WINFRED GATWIRI 6TH APPELLANT**

AND

**MOSES MWIRIGI 1ST RESPONDENT
SAMUEL MURITHI 2ND RESPONDENT
ALICE NJIRU KIJUKI 3RD RESPONDENT**

RULING

1. This appeal challenges the ruling rendered on 31/7/2024 in Githongo SPMC E&L Case No E002 of 2024. The appellants were the plaintiffs in the said suit. They contend that they pleaded a claim of customary trust against the respondents in relation to land parcel numbers Abothuguchi/Katheri/2237 and Abothuguchi/Katheri 468. The respondents objected to the suit on the ground of res judicata, contending that the appellants' claim had been the subject of adjudication and determination in Meru High Court Succession Cause No 1 of 1994. The Lower Court upheld the objection. The appellants are before this Court seeking to set aside the order of the Lower Court which struck out their suit on the ground of res judicata. They contend that the cause of action in the Lower



- Court was that of customary trust, adding that the cause of action was never heard and could not be adjudicated in Meru High Court Succession Cause No 1 of 1994.
2. Together with their memorandum of appeal, the appellants brought a notice of motion dated 20/8/2024, seeking interlocutory injunctive orders in the following terms:
 - (i) an order of inhibition in respect of the two parcels of land; and
 - (ii) a temporary injunction restraining the respondents against evicting them from the two parcels of land through succession. An interlocutory order of inhibition is, by and large, an interlocutory injunctive order. Therefore, the key issue that falls for determination in this ruling is whether the application dated 20/8/2024 meets the criteria for grant of an interlocutory injunction by a first appellate court under Order 42 rule 6(6) of the Civil Procedure Rules.
 3. The application is premised on the grounds outlined in the motion and in the two supporting affidavits sworn by Angelica Kendi Mathiu on 20/8/2024 and 28/10/2024 respectively. It was canvassed through written submissions dated 28/10/2024, filed by M/s Joshua Mwiti Law Advocates. In summary, the case of the applicants is that, they are in possession of the suit land and they have been in possession of the lands for “over decades”. They were born and brought up on the suit lands which had their common homestead. The respondents intend to evict them from the land. If the orders sought are not granted, they will suffer irreparable loss, harm and damage. Lastly, they contend that the orders sought are necessary to protect the substratum of the appeal.
 4. The respondents opposed the application through a replying affidavit dated 7/10/2024, sworn by Moses Mwirigi, and written submissions dated 6/12/2024, filed by M/s Gikunda Anampiu & Co Advocates. Their case is that the subject matter of the appeal has been litigated upon in the past and final decisions have been made in the past litigations, including litigation in Meru High Court Succession Cause No. 1 of 1994 in which the appellants lost. They add that the appellants were provided for by their late father, M’Imathiu M’Rukwaro by being allocated land parcel number Ntarami/Thau/339. The respondents add that the house which the applicants exhibited as evidence of their occupation of the suit lands belonged to their father and currently stands on Moses Mwirigi’s land, adding that at one point, Moses Mwirigi allowed the daughter of the 1st appellant to stay in the house but she subsequently got married and vacated the house. The respondents emphasize that the 1st and 2nd respondents are in exclusive possession and occupation of the suit lands.
 5. The respondents accuse the 1st applicant of perjury, contending that she has lied to the court that she lives on or occupies the suit lands yet she lives at Kiirua – Mbaria where she is married. They add that all the applicants “left long ago and settled in their respective families where they are married with even grand children”. They contend that the Lower Court made a proper finding on the issue of res judicata. They urge the court to reject the application.
 6. The court has considered the application, the response to the application, and the parties’ respective submissions on the application. As observed in one of the preceding, paragraphs of this ruling, the key question to be answered in this ruling is whether the application meets the criteria for grant of an interlocutory injunction by a first appellate court under Order 42 rule 6(6) of the Civil Procedure Rules. Put differently, the key issue in the application under consideration is whether the application meets the criteria for grant of an interlocutory injunction by a third tier superior court pending the hearing and determination of an appeal by the third tier superior court.



7. It is important to observe from the onset that, although the applicants did not cite Order 42 rule 6(6) of the Civil procedure Rules, it is clear from the prayers in the motion that they invited the court to exercise the jurisdiction granted under the above provisions. Order 42 rule 6(6) provides as follows:

Notwithstanding anything contained in subrule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just, provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

8. Over the years, Kenya’s superior courts have developed principles that guide the exercise of the above jurisdiction

(see

- (i) Madhupaper International Limited Vs Kerr [1985] KLR 840;
- (ii) Venture Capital & Credit Limited Vs Consolidated Bank of Kenya Ltd; Civil Application No. 349 of 2003 (174 of 2003 UR); and
- (iii) Butt V Rent Restriction Tribunal (1982) KLR 417).

9. Suffice it to state that, the jurisdiction of a first appellate court to grant an interlocutory injunction under Order 42 Rule 6(6) of the Civil Procedure Rules is a discretionary and equitable one. Secondly, the discretion will not be exercised in favour of an applicant whose appeal is frivolous; the applicant must demonstrate that a reasonable argument can be put forward in support of his appeal. Thirdly, the discretion should be refused where it would inflict greater hardship than it would prevent. Fourthly, the applicant must show that refusal to grant the injunction would render his appeal nugatory. Fifth, the court is to be guided by the principles in *Giella Vs Cassman Brown & Company Ltd* [1973] EA 358. Lastly, whenever disposing a plea for an interlocutory injunction, the court does not make definitive or conclusive pronouncements on the key issues in the dispute.

10. In the present application, it does emerge that the applicants, the 1st respondent, and the 2nd respondent are daughters and sons (scions) of the late Mathiu M’Rukwaro who was son of the late Rukwaro Ithiria. The suit lands were part of the estate of the late Rukwaro Ithiria. Succession relating to the estate of the late Rukwaro Ithiria were initiated in 1994 through Meru High Court Succession Cause No 1 of 1994. The succession was finalized in 2014. Mathiu M’Rukwaro [father to the appellants and to the 1st respondent and 2nd respondents] fully participated in the succession proceedings and was given the whole of Abothuguchi/Katheri/2237 and 1/3 portion of Abothuguchi/Katheri/468. During the process of confirmation of grant (distribution of the estate of Rukwaro Ithiria) the appellants’ father [Mathiu M’Rukwaro] decided to gift his entitlement in the estate to his two sons, the 1st and 2nd respondents. It has been contended at this interlocutory stage, without denial, that the appellants’ father [Mathiu M’Rukwaro], similarly, gifted the appellants land parcel number Ntarami/Thau/339. The appellants did not contest the gifting during the lifetime of their father.

11. It has also emerged at this interlocutory stage that after the death of their father, the appellants challenged the grant and the certificate of confirmation of grant issued in relation to the estate of their grandfather [the late Rukwaro Ithiria], contending that they had not been provided for. The High Court [Muriithi J] rejected their application for lack of merit through a ruling dated 15/2/2024. Muriithi J rendered himself thus:



- (17) All the parties herein are in agreement that the applicants' father, Samuel Mathiu Rukwaru (now deceased) was entitled to LR No Abothuguchi Katheri/2237 and 1/3 of L.R Abothuguchi/Katheri/468. According to the rectified certificate of confirmation of grant dated 26/5/2014, L.R No. Abothuguchi/Katheri 2237 and 1/3 of LR. Abothuguchi / Katheri/468 were given to Moses Mwirigi Mathiu and Samwel Murithi Murimi
- (18) This court finds that the respondent has proved on a balance of probabilities that the applicants' deceased father had given his entitlement in the deceased's estate to his 2 sons, subsequent to which the grant was confirmed.
- (19) The grant sought to be revoked was confirmed way back on 26/5/2014 while the instant application was filed on 16/2/2023. That delay of approximately 9 years is inordinate. This court finds that the applicants have not met the threshold laid down under Section 76 of the Law of Succession to justify grant of the orders sought
- (20) Besides, the fact that applicants are grand children of the deceased negated their claim on need to be notified and/or involved when the cause was filed, since their father, who was a direct beneficiary of the deceased, was then alive and in prior degree of priority on consanguinity table under Section 66 of the *Law of Succession Act.*"
12. It does appear that after the applicants lost the plea for revocation of the grant and the certificate of confirmation of grant, they initiated Githongo SPMC E&L Case No E002 of 2024, challenging the gift which their father had made during his life time and the defendants' absolute ownership of the suit lands. They did not, however, join the estate of their late father as a party to the suit.
13. It is also clear from the wording of the two principal prayers in the application that, essentially, the applicants want this Court to injunct the implementation of the High Court Succession Order.
14. Without making any definitive or conclusive pronouncement on this matter, the applicants appear to be telling this Court that they are entitled to inherit the suit lands. They have also expressly disclosed to this Court that they have appealed against the ruling of Muriithi J, which in my view, is a legitimate avenue for ventilating their perceived inheritance claim in the Court of Appeal.
15. Given the above circumstances, it is apparent that the applicants are at this point ventilating their inheritance claim in the Court of Appeal. It would, in the circumstances, not be appropriate for this Court to issue an interlocutory injunction whose sole purpose is to review the merit order which the High Court issued after hearing the applicants on what appears to be an inheritance dispute. Put differently, it would not be appropriate to injunct the implementation of a succession order in this suit on the basis of a perceived inheritance claim when the relevant succession courts are seized of the inheritance dispute.
16. For the above reasons, I do not think the applicants have satisfied the criteria for grant of an interlocutory injunction under Order 42 rule 6(6) of the Civil Procedure Rules. Consequently, the Application dated 20/8/2024 is rejected and dismissed for lack of merit. Costs shall be in the Appeal.

DATED SIGNED AND DELIVERED AT MERU THIS 4TH DAY OF FEBRUARY, 2025

B M EBOSO [MR]

JUDGE

In the Presence of:

Court Assistant - Tupet

