



**Lemasei (Suing as the Representative of the Estate of Benjamin Lemasei Tumpes) v
Kenya Commercial Bank Limited & another; Mwangi & 11 others (Interested Parties)
(Environment & Land Case 43 of 2017) [2024] KEELC 1175 (KLR) (5 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1175 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 43 OF 2017
MN GICHERU, J
FEBRUARY 5, 2024**

BETWEEN

**LEAH FLORAH PILANOI LEMASEI (SUING AS THE REPRESENTATIVE OF
THE ESTATE OF BENJAMIN LEMASEI TUMPES) PLAINTIFF**

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

JANE NYAMBURA MWANGI 2ND DEFENDANT

AND

ZIPPORAH GATHONI MWANGI INTERESTED PARTY

ZERAH WAITHIRA MWANGI INTERESTED PARTY

ISAAC KAROGO MWANGI INTERESTED PARTY

SAMUEL THUKU MWANGI INTERESTED PARTY

JOSEPH KARIUKI MWANGI INTERESTED PARTY

JOHN KIMANI MWANGI INTERESTED PARTY

RUTH WANJIRU THUKU INTERESTED PARTY

JOSEPH KAROGO MWANGI INTERESTED PARTY

ZIPPORAH GATHONI MWANGI INTERESTED PARTY

MARY WANGARI MWANGI INTERESTED PARTY

JOSHUA NDEGWA KAMAU INTERESTED PARTY

KAROGO NGARI INTERESTED PARTY



RULING

1. This ruling is on the notice of motion dated 4/5/2022. The motion which is by the plaintiff is brought under Orders 40 Rule (1), 51 Rule 1, Civil Procedure Rules, Sections 3A and 63(c) of the Civil Procedure Act and all other enabling provisions of the law. It seeks the following orders.

c. A temporary injunction against the 2nd defendant and interested parties, their agents, servants and or employees from entering, selling, disposing, alienating or in any manner whatsoever interfering with the plaintiffs' possession and enjoyment of the suit property being L.R. Kajiado/Olchore –Onyore/1171 including any subdivision thereof being Kajiado/Olchore-Onyore/10854-65 pending the hearing and determination of this suit.

d. The costs of this application be provided for.

2. The motion is supported by an affidavit sworn by Leah Florah Pilanoi Lemasei dated 4/5/2022 and a further affidavit dated 27/4/2023 in which she states as follows.

Firstly, she is the legal representative of the late Benjamin Lemasei Tumpes who charged L.R. 1171 with the first defendant, paid the loan in full but lost the records in a fire that burnt down his house.

Secondly, in 1992 the first defendant purported to sell the land by public auction and transferred it to the husband of the 2nd defendant.

Thirdly, the husband of the 2nd defendant, the late Mwangi Karogo, agreed to return the land to the plaintiff's husband but he died before doing so.

Fourthly, the land was registered in the name of the second defendant through a succession cause.

Fifthly, it is the deceased and his family who have been in exclusive, continuous and uninterrupted possession of the suit land and the family of Mwangi Karogo has never occupied the land.

Sixthly, it has now come to the attention of the plaintiff through an affidavit dated 7/11/2017 which is sworn by the second defendant that the suit land has been subdivided into twelve parcels namely L.R. Kajiado/Olchoro-Onyore/10854-65 which have been transferred to the interested parties.

3. The motion is opposed by the second defendant who has sworn a replying affidavit dated 15/3/2023 in which she responds as follows.

Firstly, the motion by the plaintiff is a delaying tactic to the quick conclusion of the suit.

Secondly, it is the second defendant and not the plaintiff's family that has been in occupation of the suit land since 1992.

Thirdly, the suit land was acquired lawfully through a public sale after the plaintiff's husband failed to repay the loan as agreed between him and the first defendant.

Fourthly, there is in existence a court order issued in succession cause no. 2254 of 1998 at the High Court in Nairobi that transmitted the suit land to various beneficiaries. There is also in existence a court order issued in Land Disputes Tribunal Case No. 4 of 2009 at Kajiado dated 16th April 2009 which allowed the subdivision of the L.R. 1171 into thirteen (13) portions and this was effected as can be seen from the certificate of official search dated 2017.

For the above and other reasons, the respondent prays for the dismissal of the motion dated 4/5/2022.



4. Counsel for the parties filed written submissions dated 3/10/2023 and 15/5/2023 and raised the following issues for determination.
 - a. Whether the suit is competent.
 - b. Whether the suit is res judicata.
 - c. Whether the plaintiff has established a prima facie case with a probability of success.
 - d. Whether the plaintiff has proved irreparable loss.
 - e. Where the balance of convenience tilts.
5. I have carefully considered the motion in its entirety including the affidavits by both parties, the annexures, the submissions by learned counsel for the parties and the issues and law raised therein. I have also perused the entire record.
6. I find that since the motion is primarily seeking an order of injunction, I should confine myself to that issue only instead of dealing with the competence of the suit and the issue of res judicata which should have been raised by way of a preliminary objection at an earlier stage. This suit is in its fourteenth year in court and is partly heard. It should be decided on merit so that it does not come back to this court in its current form. I will consequently only deal with issues (c), (d) and (e).
7. On the first issue, I find that the plaintiff has not made out a prima facie with a probability of success as far as application for an order of injunction is concerned. In her affidavit she deposes that it was through the affidavit of 17/11/2017 that it came to her attention that L.R. 1171 had been subdivided. The question that arises is why did she had to wait until May 2022 which is more than four years later to file the current application.

In her affidavit, she has not mentioned any recent activity on the land. It is not easy at this stage to determine who between the plaintiff and the second defendant and the interested parties is in possession of the suit land. This is because both parties claim possession. Again considering that the interested parties have been owners of the their respective parcels since at least 2017, it is difficult to know whether any of them is in occupation. Neither the plaintiff nor the second defendant has said anything about occupation by the interested parties even though they have filed lengthy affidavits.
8. It was incumbent upon the plaintiff to prove that she will suffer irreparable loss if the order sought is not allowed. She has not proved this because she has not proved any threat to the land or what she has put up on it. Again considering the lapse of time since the sale and since the filing of the suit, an order of injunction would only serve to create further delay in this very old dispute.
9. As for the final issue of balance of convenience, owing to lack of certainty on what status quo really is, it is difficult to say in whose favour it tilts.

For the above stated reasons, I find no merit in the motion dated 4/5/2022 and I dismiss it. Costs in the cause.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 5TH DAY OF FEBRUARY 2024.

M.N. GICHERU

JUDGE

