



Gichihi & another v Airtel Kenya Limited & 2 others (Environment and Land Case 21 of 2022) [2024] KEELC 5414 (KLR) (12 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5414 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND CASE 21 OF 2022**

**BM EBOSO, J
JULY 12, 2024**

BETWEEN

ELIAS NDIRANGU GICHIHI 1ST PLAINTIFF

DANIEL MBURU GICHIHI 2ND PLAINTIFF

AND

AIRTEL KENYA LIMITED 1ST DEFENDANT

GEORGE MUNDERU MURIITHI 2ND DEFENDANT

ATC KENYA OPERATIONS LIMITED 3RD DEFENDANT

RULING

1. This suit was initiated through an originating summons dated 5/9/2022. The plaintiffs named Airtel Kenya as the only defendant in the originating summons. Among other reliefs, they sought a declaration that the defendant had unlawfully erected its telecommunication booster on land parcel number Ruiru /Ruiru West Block 3/144. In addition, they sought a permanent injunction against the respondent. Subsequent to that, M/s ATC Kenya Operations Limited brought an application seeking to be joined in the suit as an interested party on the ground that they were the owners and operators of the impugned communication mast. George Munderu Muriithi similarly brought an application seeking to be joined in the suit as an interested party on the ground that he was the legal owner of the suit land. The two parties were joined to the suit as 3rd and 2nd defendants respectively.
2. On 13/10/2022, Airtel Kenya Limited brought an application dated 4/10/2022 seeking an order striking out the plaintiff's suit against it on the ground "of misjoinder, for want of cause of action" and/or for being fatally defective. The said application is one of the two items that fall for determination in this ruling. The second item is the preliminary objection dated 24/7/2023, brought by George Munderu Muriithi. Because the preliminary objection raises jurisdictional questions, the court will dispose it before disposing the application by Airtel Kenya Limited.



3. Through the preliminary objection dated 24/7/2023, the 2nd defendant objects to this suit on the following verbatim grounds:
 - a. The plaintiffs' instituting this suit are not administrators of the Estate of Nelson Gachihi Gichimu (deceased) and they are thus intermeddling with the estate of the deceased contrary to Section 45(1) of the Law of Succession Act Cap 160 which states that 'except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act, no person shall for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person.
 - b. The plaintiffs' originating summons have violated the provisions of Order 37 rule 1 of the Civil Procedure Rules, 2010, which gives directions on the persons who can take out originating summons and on what matters. This being a complex land issue that needs to first determine the true owner of the suit property, it cannot therefore be instituted by way of originating summons.
4. The preliminary objection was canvassed through written submissions dated 21/11/2023. The case of the objector is that the plaintiffs lack the locus standi to initiate a suit in relation to land that is registered in the name of the late Nelson Gachihi Gichimu. The objector further contends that an originating summons is not available as an appropriate platform on which to ventilate the grievance which the applicants in the originating summons are seeking to ventilate.
5. The 3rd defendant wholly supported the preliminary objection through written submissions dated 2/4/2024 filed by M/s Onyango Ndolo & Company Advocates.
6. The plaintiff opposed the preliminary objection through written submissions dated 1/9/2023 filed by M/s Kiama Kibathi & Co Advocates. On the issue of *locus standi*, their case is that by virtue of the certificate of confirmation of grant, they are the beneficiaries of the suit property, hence they have a direct legal and equitable interest in the suit property. They contend that, for that reason, they had the locus standi to initiate the suit against the defendants. On the availability of an originating summons as the platform on which to ventilate their claim, they contend that they brought their originating summons under Order 37 rule 8 of the Civil Procedure Rules which allows them to do so by dint of the provisions of Sections 120, 128, 133, 138 143 and 150 of the Registered Land Act.
7. The court has considered the two points raised in the notice of preliminary objection. The court has also considered the parties' submissions; the relevant legal frameworks; and the prevailing jurisprudence on the issues raised in the preliminary objection. The two key issues to be determined in the preliminary objection are: (i) Whether the two parties who initiated this originating summons had the requisite locus standi to initiate the suit in the circumstances of this case; and (ii) Whether an originating summons under Order 37 is available as a platform on which to ventilate the claim in this suit. I will dispose the two issues sequentially in the above order.
8. It emerges from the materials placed before the court at the time of initiating the suit that the suit property was registered in the name of the late Nelson Gachihi Gichimu [the deceased]. It is not clear when he died. What is clear is that in 2014, Muranga High Court Succession Cause No 819 of 2014 was opened in relation to his estate. It also emerges that on 26/1/2022, the High Court [Kimondo J] issued a Certificate of Confirmation of Grant relating to the estate. Under the Certificate of Confirmation of Grant, land parcel number Ruiru BLK 3/144 [sic] was to be conveyed to the applicants in equal shares. It is not clear whether the said land is the same as the suit property, which is, Ruiru/Ruiru West Block 3/144. It is also not clear why the administrators of the estate of the late Gichimu have not



completed the process of administration. Similarly, the court does not know whether the Certificate of Confirmation of Grant has been varied or revoked.

9. Most importantly, it emerges from the materials placed before this court that the two parties who initiated this suit are not the administrators of the estate of the late Gichimu. The administrators are Sabina Wanjiru Gachihi and George Gichimu Gachihi.
10. It is therefore clear from the foregoing that the estate of the deceased is still under administration by the duly appointed personal /legal representatives. Administration of the estate will end when the administrators of the estate complete the vesting of assets of the estate in the names of the beneficiaries.
11. At this point, George Munderu Muriithi has come to court waving a title he alleges relates to the land where the communication mast is located, to wit, Ruiru/Ruiru West Block 3/1070. Whether or not this title relates to the land that is alleged to form part of the estate of the deceased is a question to be determined in a dispute involving the administrators of the estate and George Munderu Muriithi. The parties who took out the present originating summons do not have the locus standi to represent the estate.
12. Strangely, instead of the two parties [the two plaintiffs] pursuing the administrators to complete the administration of the estate by vesting the assets into the names of the respective beneficiaries, they came to court without *locus standi*. They are waving a Certificate of Confirmation of Grant relating to “Ruiru BLK 3/144” and asserting alleged rights over Ruiru/Ruiru West Block 3/144. At this point of the administration of the estate, the persons with locus standi to initiate proceedings to ventilate the claim which the two parties have attempted to ventilate are the administrators of the estate. It is therefore the finding of this court that in the circumstances, of this suit, the two parties who took out the originating summons did not have the locus standi to do so.
13. Is an originating summons under Order 37 the appropriate platform on which to ventilate a claim such as the one in this suit. The claimants allege that a communication mast has been illegally erected on land parcel number Ruiru/Ruiru West Block 3/144. They seek a permanent injunction, mesne profits, general damages and special damages for trespass.
14. Order 37 rule 1 provides as follows:

“The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument, or any of them, and any person claiming to be interested in the relief sought as creditor, devisee, legatee, heir, or legal representative of a deceased person, or as cestui que trust under the terms of any deed or instrument, or as claiming by assignment, or otherwise, under any such creditor or other person as aforesaid, may take out as of course, an originating summons, returnable before a judge sitting in chambers for such relief of the nature or kind following, as may by the summons be specified, and as circumstances of the case may require, that is to say, the determination, without the administration of the estate or trust, of any of the following questions—

 - (a) any question affecting the rights or interest of the person claiming to be creditor, devisee, legatee, heir or cestui que trust;
 - (b) the ascertainment of any class of creditors, devisees, legatees, heirs, or others;
 - (c) the furnishing of any particular accounts by the executors, administrators or trustees, and the vouching, when necessary, of such accounts;



- (d) the payment into court of any money in the hands of the executors, administrators or trustees;
- (e) directing the executors, administrators or trustees to do, or abstain from doing, any particular act in their character as executors, administrators or trustees;
- (f) the approval of a sale, purchase, compromise or other transaction;
- (g) the determination of any question arising directly out of the administration of the estate or trust.”

15. Order 37 rule 8 provides as follows:

“An application under the [Land Registration Act](#) (Cap. 300) other than under Part VII and Part VIII thereof shall be made by originating summons unless there is pending a suit involving the same lands when the application may be made in that suit.”

16. A reading of Order 37 rule 1 reveals that an originating summons is available to an executor or administrator and to trustees. The two parties who brought this suit are none of the above. The two parties relied on Order 37 rule 8 to justify the originating summons. The [Registered Land Act](#) which counsel for the initiators of the originating summons cited was repealed in 2012. Reliance on the provisions of the repealed Act long after the Act was repealed is certainly a misconception. In my view, the proper platform on which to ventilate the cause of action in this suit is a plaint by the administrators of the estate.
17. For the above reasons, the preliminary objection dated 24/7/2023 is upheld. This suit is struck out on the grounds set out in the preliminary objection. In tandem with the principle in Section 27 of the [Civil Procedure Act](#), the plaintiffs [Applicants in the originating summons] shall bear costs of the suit.
18. Lastly, given that the suit is struck out, the application by Airtel Kenya Limited is overtaken by the order striking out the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 12TH DAY OF JULY 2024

B M EBOSO

JUDGE

In the Presence of: -

Ms Okinyi for the Plaintiff

Ms Ochieng for the 1st Defendant

Ms Thuo for the 2nd Defendant

Court Assistant: Hinga

