Munyi & 77 others v Gekara Group Ranch through Hebert Nthiri & 343 others (Petition 7 of 2018) [2023] KEELC 18909 (KLR) (10 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18909 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

PETITION 7 OF 2018

A KANIARU, J

JULY 10, 2023

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF INDIVIDUALS UNDER THE BILL OF RIGHTS OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 19,20,21,22(1),(2),(4),23,24,28,29(C),40,43(B) AND 63 OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 2(5), (6) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLES 1, 8(2), (B), 9, 10, 18, 26, 28, 33, 37, 42, 43 AND 46 OF THE UNITED NATIONS DECLARATIONS ON THE RIGHTS OF INDEGENOUS PEOPLE (UNDRIP)

AND

IN THE MATTER OF HISTORICAL AND CURRENT INFRINGMENT OF THE CULTURAL AND ECONOMIC RIGHTS OF THE GAKERA CLAN MEMBERS AS INDEGENEOUS PEOPLE WITHIN THE MEANING OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDEGINEOUS PEOPLE (UNDRIP)

AND

IN THE MATTER OF THE COMMUNITY LAND ACT NO. 27 OF 2016

AND

IN THE MATTER OF LAND (GROUP REPRESENTATIVE), ACT, 1968

AND CIVIL PROCEDURE

IN THE MATTER OF LAND ADJUDICATION ACT

AND IN THE MATTER OF PROTECTION FROM DEPRIVATION OF

PROPERTY AND THEIR ANCESTRAL LAND

BETWEEN

BEDAN MUNYI ..... 1ST PETITIONER

JOSHUA NJERU MUGO & 76 OTHERS ..... 2ND PETITIONER

AND

GEKARA GROUP RANCH THROUGH HEBERT NTHIRI & 343 OTHERS ..... RESPONDENT

RULING

1. I am impelled to begin this ruling by making some prefatory remarks related to the shortcomings clearly manifest on the face of the application before me. The application is an example of poor draftsmanship. And here is why: The petitioners are stated to be the applicants while everything shows that they are, or should be, the respondents in the application. The respondents in the petition are actually the applicants in the application. The application is expressed to be brought under Section 3A of the Constitution and Order 40 rule 7 of an unstated law. Our constitution does not have Section 3A and its provisions are not expressed as Sections but as Articles. One would presume that the unstated law on which Order 40 rule 7 is based is actually *Civil Procedure Rules, 2010* but that clearly needed to be stated. Instead, it was left hanging. The application therefore starts in a very confusing way.

2. Then the prayers sought to be lifted are said to be injunctions. That explains why order 40 rule 7 of unstated law, presumed by me to be *Civil Procedure Rules, 2010*, was invoked because it is the one that deals with discharge or setting aside of injunctive orders. But the orders sought to be lifted are actually conservatory orders in the nature of inhibition granted vide a ruling delivered by this court on May 16, 2019. Conservatory orders are not the same as injunctions and are not governed by the same law. The orders granted in the ruling I have mentioned were anchored on Articles 23(3) (b), 40 (1), 60, and 63 of the *Constitution of Kenya, 2020* and part VII Section 68 of the *Land Registration Act*, 2012. This law is clearly different from the one the applicants have invoked in the application.

3. It seems surprising to me that one can purport to lift or discharge them under a non-existent Section 3A of the Constitution or order 40 rule 7 of an unstated law. And even if it is assumed that the unstated law is order 40 rule 7 of *Civil Procedure Rules, 2010*, that still would be wrong as *Civil Procedure Rules, 2010*, was not the law used to grant the orders and had infact no bearing at all on the orders that the court granted. It seems to me that the application was drafted with un-nerving casualness.

4. I have pointed all this out because the impression created by the blunders made is that the counsel for applicant is a bit too reckless or even less than competent.

5. I now turn to the application for more substantive consideration. It is a motion on notice filed in court on December 19, 2022 and dated December 16, 2022. The petitioners, wrongly stated as applicants, are the respondents in the application. The respondents in the petition are actually the applicants in the application.

6. The prayers sought are as follows:

    1. That the injunctive orders (sic) issued in favour of the petitioners and against the respondents restricting transfer, sale, charge or any other issue affecting land Ref: Mbeti/Gachuriri/436 – 4490 be lifted and discharged and the respondents be free to deal with their parcels of land as they wish.

    2. That the petitioners, their servants, associates, relatives or any other person purporting to pursue the interest of Gekara clan against Gekara Group Ranch herein be restricted from filing any other suit anywhere in regard to the original parcel of land Ref Mbeti/Gachuriri/172

    3. That costs of this application be provided for.

7. As pointed out earlier, the application is expressed to be brought under Section 3A of the Constitution (sic) and order 40 rule 7 (sic) and all other enabling law. It is anchored on the grounds that the issue of land parcel No Mbeti/Gachuriri/172 was determined way back in 1976; that the petitioners filed this petition and the court declared itself on the same; and that the court is being urged to deal with a multiplicity of suits on the same subject matter, with the sons and grandsons of the original petitioners being made to appear as if they are different parties while in reality they are acting on behalf of the original petitioners.

8. The application came with an 11-paragraph supporting affidavit elaborating the grounds on which it is based.

9. The application was responded to via a replying affidavit filed on 22/2/2023 and dated 8/2/2023. According to the respondents in the application, the court is functus officio, having pronounced itself on the matter on October 11, 2022. It is deposed that when the court did so, the Land Registry effected the courts decision in ELC No 224 of 2015 and nullified the titles that the applicants are seeking to lift orders from. The land reverted to the original mother title – Mbeti/Gachuriri/172. The parcels of land – Mbeti/Gachuriri/426-4990 – were said to have ceased to exist and the court therefore was said to lack the proper basis to issue orders on non-existent parcels of land.

10. The response also addressed the prayer seeking restriction of the respondents from filing future cases. It was deposed that under Article 22 of the *Constitution of Kenya, 2010*, it is the right of every Kenyan to institute proceedings in relation to any violation of their rights. It was averred that the court can not therefore be called upon to curtail the respondents rights to institute proceedings.

11. The application was canvassed by way of written submissions. The applicant's submissions were filed on 27/2/2023. According to the applicants, the court has pronounced itself on this matter but when doing so, it failed to address itself "in (sic) subsequent prayers which had restricted the above parcel of land". To the applicants, this was an "oversight" that made the applicants "come to this honourable court to ask it to go ahead and lift the orders previously placed this (sic) parcels."

12. It was further submitted that the court directed that service be effected on the respondents but the respondents responded and raised new issues which were not part of the petition. Such issues were said to be ELC No 224 of 2015. The applicants submitted that this court is being invited by the respondents

"to sit on its own appeal of the petition which they have failed to prosecute after being given amble (sic) time to do so". It was pointed out that this is a simple application which ideally should be handled exparte because what is desired only is that this court addresses an oversight on its part which occurred when it was delivering its ruling. The court was urged not to allow the respondents to urge before it what they should have urged in the appeal to another court.

13. In the submissions, the applicants cited the case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Another* [2022] eKLR where cases of *Njangu v Wambugu & Another*: HCCC No 234 of 1991 and *Siri Ram Kaura v Mje Morgan*: CA 71/1960 [1961] EA 462, were relied upon. The court was asked to allow the application.

14. The respondents submissions – captioned "petitioners' Submissions" – were filed on 1/3/2023. According to the respondents, this court is funtus officio as it had pronounced itself on the entire matter on October 11, 2022 when it dismissed the petition. The respondents said that the court can not be invited to revisit the matter and purport to exercise judicial power over it. For effect, persuasion, and/or guidance, the respondents cited and even quoted the cases of *Telkom Kenya Limited v John Ochanda (suing on behalf of 996 former employees of Telkom Kenya Limited)* [2014] eKLR and *Jersey Evening Post Limited v A Thani* [2002] JLR 542.

15. The respondents also submitted that the subject matter is no longer in existence. According to the respondents land parcels Nos Mbeti/Gachuriri/426 – 4490 have ceased to exist as the Land Registry had revoked and/or annulled the titles in compliance with court's decision in ELC No 224 of 2015. The entire land now exists as Mbeti/Gachuriri/172. This was done on November 11, 2022. The respondents submitted that this court can not issue orders in vain.

16. This court was also said to lack jurisdiction to entertain the application before it. The respondents averred that the court had found the entire matter res-judicata. It can not therefore entertain it any further. It is in this context that the court is said to lack jurisdiction. To drive the point home, the cases of *Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, *Republic v Karisa Chengo & 2 others* [2017] eKLR, and *Joseph Muthe Kamau & Another v David Mwangi Gichure & Another* [2013] eKLR were cited and quoted as deemed necessary.

17. With regard to prayer 2 in the application – which seeks to restrict or restrain the respondents from filing cases in future – the respondents submitted that the prayer is untenable as granting it would violate the respondents right to seek redress in court as guaranteed by Article 22 of the *Constitution of Kenya, 2010*. The court was urged to dismiss the application.

18. Another set of submissions was filed on March 1, 2023 by one of the counsel on record for some of the respondents in the petition. The counsel, Njiru Mbogo, was associating himself with the applicants in the application before the court. Accord to the submissions filed, Land parcel No Mbeti/Gachuriri/172 ceased to exist in 1987 when the court of Appeal made a determination on it. Land parcels Nos Mbeti/Gachuriri/426 to 4490 were thereafter registered and no one can interfere with them. The court was asked to allow the application.

19. I have considered the application, the response, and the rival submissions. On October 11, 2022, the court determined this case with finality by making a finding that it was res judicata in relation to another concluded matter – ELC No 224 of 2015. In the course of the pendency of the matter in court, orders of inhibition had been placed on the register(s) of Land parcels No Mbeti/Gachuriri/426-4990. It is these orders that the applicants are calling temporary injunctions and praying that they should be lifted or discharged.

20. According to the applicants, it was an oversight on the part of the court to fail to order that the orders be lifted or discharged when it pronounced itself on the preliminary objections which had raised, among others, the issue of res judicata. I would wish to point out that I don't understand how the allegation of oversight is coming about. In the preliminary objections raised, the court had not been invited to pronounce itself on the issue of the orders placed on the land register. It was indeed not even necessary for the court to address the issue of the orders as it is clear that they had been placed on the register to last only for as long as the case was not determined. Once the ruling that determined the case was delivered, those orders on the register ceased to have any legal force. From then on, the orders became a dead letter on the land register. My considered view is that a court order was not needed to remove the orders placed on the land register. All what was required was an extracted order or decree derived from the final or conclusive determination of the case. This would serve to convince the Land's office that the orders on the land register were spent. The only thing that would necessitate a court order is recalcitrance of the land's office or an express request by that office to obtain an order.

21. The applicant's also submitted that the response by the respondent's amounted to an urging of an appeal against the ruling of this court which terminated the entire case. It appears to me that this was averred by the applicants because the respondents had made reference to case No ELC 224 of 2015. True, this court delivered a ruling which declared this matter res judicata in relation to ELC No 224 of 2015. What would amount to an urging of appeal before me would be an argument or submission that this matter is not res-judicata. But that is not the argument or submission of the respondents before this court. If I got their submissions right, the respondents are saying that when this court made a finding of res-judicata, the judgement in ELC No 224 of 2015 was implemented or executed and the relevant land office rectified the land register to conform to the courts findings in ELC No 224 of 2015. That in my view does not amount to arguing an appeal before me. It is merely stating a factual situation that exists.

22. It was the view of the applicants that the application filed by them should ideally be handled exparte and that the directive by the court to serve the respondents was possibly only a gratuitous gesture to which the respondents were not even entitled to. That view is wrong. The respondents are entitled at every stage to know what is happening in a case to which they are parties. Some of the prayers – like prayer 2 – in the application obviously require that those affected be given a right of hearing. It would be odd for instance to restrict exparte a party's fundamental right of accessing justice in our courts.

23. I now turn to the issues raised in the respondent's submissions. It is the respondent's position that the applicants application should not be entertained because the court is functus officio. This assertion arises from the fact that this court has already delivered the ruling that determined the case. It seems to me that the respondents have mis-apprehended the doctrine of functus officio. The doctrine requires that once a decision is made on issues raised for determination, the person who makes that decision lacks any power to re-visit or re-examine the decision. In the matter at hand, the court is not being invited to decide the case again. The duty to decide the case ended when the court rendered its ruling. What the court is being asked is to make post-ruling orders removing inhibition orders from the Land Register. That is not an invitation to decide the case again.

24. The court was also said to lack jurisdiction to entertain the application. This is asserted because the court has already declared that the case before it is res-judicata. The respondents submitted that "Henceforth, any proceedings in the instant suit are res judicata and this honourable court therefore lacks jurisdiction to entertain the litigation any further, having declared itself on the matter herein." True? This is simply not true and here is why: The court is not making a decision on Res-judicata. It is being invited to make an order for removal of orders of inhibition. These are orders that are encumbrances on the land register. The court had not pronounced itself on them. It didn't even mention them in the ruling that finalized the matter. When a court of law delivers a judgement or

any other decision that concludes a matter, there are post-judgement or post-decision processes that arise. It is trite that a court of law always has jurisdiction where and if called upon to intervene in these processes. What the applicants have invited the court to do should be seen in this context. I therefore don't agree with the respondents on this issue.

25. It is now crunch time and I must proceed to make a decision. The respondents raised the issue as to whether the subject matter – meaning the land parcels in dispute – is valid or existent. The submission was that the parcels of land no longer exists. In the respondents response to the application, and in their submissions too, it was made clear that when this court declared this matter res judicata in relation to ELC No 224 of 2015, the judgement in ELC No 224 of 2015 was implemented. In that regard, the Land's office revoked titles of land parcels Nos Mbeti/Gachuriri/426 to 4490 and the entire land reverted to its original title Mbeti/Gachuriri/172. The title is for Gekara clan.

26. A copy of green card (marked as annexure "BM-I") was made available to the court showing that these changes were effected on November 11, 2022. The application under consideration was filed on December 19, 2022 and is dated December 16, 2022. Quite clearly, by the time the application herein was filed, the above changes had already taken place. It stands to reason that the changes made could not have taken place without first removing the orders of inhibition placed on the land register. Yet the applicant's decided to proceed with the application even after being furnished with this clear evidence by the respondents.

27. One would have thought that if the applicant's position was that the orders were still on the land register, then they should have sought leave of court to file a supplementary affidavit or response showing clearly that the orders still existed. To me, it was a clear lack of tact and a manifestation of poor legal stratagem for the applicants to fail to respond to this clear evidence. Their choice of proceeding with the application in face of such evidence was akin to trying to flog a dead horse or attempting to rein in a horse that had already bolted out of the stables. I therefore agree with the respondent that the subject matter no longer exist, at least based on what has been made available before the court. It is trite law that a court of law does not make orders in vain. The applicant had the duty to show that the subject matter exists and/or that the orders of inhibition are still on the land register. They failed to do so.

28. Then there was the prayer seeking to restrict the petitioners, or others through them, from filing suit in relation to land parcel No Mbeti/Gachuriri/172. In outlook and perspective, this order seems anticipatory. The applicants seem apprehensive that the petitioner, or others through or connected to them, will file cases against them in future. As pointed out by the respondents, it is one likely to interfere with the petitioners rights to access justice. This is a fundamental right enshrined in Article 22 of the *Constitution*. It is an order which, if the applicant's are to be believed, should be granted Exparte. I say this because it was clear that the application as filed was meant to be heard exparte. I don't think the applicants paused to consider the likely ramifications of the order they were seeking. If granted it will affect all members of Gekara clan including children yet unborn. It is meant to prevent the clan from ever filing a case against the respondents.

29. Such a serious order would require the court to be moved by way of a substantive suit. What is before me is a poorly drafted application that is also not well thought – through. Yet on the basis of it, the applicant's want to get an order that seriously circumscribes the constitutional right of others to gain access to justice. My considered view is that the merits of that prayer have not been demonstrated. It is a prayer that the applicant's did not even submit on. It would be improper to grant it. It would abrogate the petitioners constitutional right to access justice. It would also condemn unheard persons who are not before court.

30. The upshot, when all is considered, is that the application now before me is for dismissal. It has no merits at all. I hereby dismiss it with no orders as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 10TH DAY OF MAY, 2023.

In the presence of Njiru Mbogo for some 63 respondents; Njiru Mbogo for Murigu for some respondent; M/s Migwi also for some respondents and Mutuma (absent) for petitioners.

Court assistant: Leadys

A.K. KANIARU

JUDGE

05.2023