



Theuri (Suing as the Administrator of the Estate of the Late Purity Beatrice Njoki Theuri and Manager/Guardian of the Estate of Wilson Theuri Kimuri) v Lekaram; Kimuri (Interested Party) (Environment & Land Case E008 of 2022) [2023] KEELC 19232 (KLR) (11 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19232 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE E008 OF 2022**

**AK BOR, J
JULY 11, 2023**

BETWEEN

GEORGE KIMURI THEURI PLAINTIFF

**SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE PURITY
BEATRICE NJOKI THEURI AND MANAGER/GUARDIAN OF THE ESTATE
OF WILSON THEURI KIMURI**

AND

EZEKIEL LETEPES LEKARAM DEFENDANT

AND

WILSON THEURI KIMURI INTERESTED PARTY

RULING

1. This ruling relates to two applications. The plaintiff filed the application dated September 26, 2022 seeking a temporary injunction to restrain dealings with the land known as land reference (LR No) 2787/421 pending hearing and determination of the suit. Based on the urgency disclosed, the court issued orders on September 27, 2022 which restrained the defendant from dealing with the suit land until October 5, 2022.
2. The defendant filed the second application on December 5, 2022 seeking the discharge of the orders of injunction which this court gave on September 27, 2022 citing the reason that the plaintiff misled the court when he obtained the *ex parte* orders through material non-disclosure and suppression of material facts.
3. The background to this case is that the plaintiff filed the amended plaint on September 26, 2022 claiming that his father, who is the interested party in this suit, was the registered owner of the land known as LR No 2787/421 and that he entered into a transaction with the defendant for the sale of



a portion of that land *vide* the agreement dated July 5, 2010. The defendant paid a deposit of Kshs 350,000/= following which the interested party surrendered the original title for the property. The plaintiff claimed that the interested party ignored the beneficial interest of his late wife and did not inform her that he was selling part of the land which had been their matrimonial home since 1975. The plaintiff averred that his late mother registered a caveat against the land on July 11, 2012.

4. The plaintiff claimed that as a purported purchaser, the defendant appeared on the suit land on September 21, 2022 accompanied by thugs bearing machetes with the intention of destroying the fence in preparation to erect structures once the subdivision of the land was completed. Further, that the defendant had been using faceless individuals to intimidate and harass the plaintiff despite knowing that the interested party was old and sickly. The plaintiff was apprehensive that if the subdivision process which was incomplete were to proceed and a title for the 1 ¼ acres issued to the defendant, he would suffer irreparable loss and damage because he had resided on that land for the better part of his life and his mother was interred there.
5. Through the application dated September 26, 2022, the plaintiff sought to restrain the defendant from dealing with the suit property and to have the Officer Commanding Nanyuki Police Division enforce the orders. The application was made on the grounds that the interested party was the registered proprietor of the suit property which was the matrimonial home of the interested party and his late wife since 1975. The interested party was declared incapable of handling any matter due to his mental incapacity and the plaintiff was appointed his guardian or manager.
6. The plaintiff swore the affidavit in support of the application. He attached a copy of the title over the suit property and the court order appointing him guardian of the interested party. He produced a copy of the sale agreement which the interested party and the defendant entered into on July 5, 2010. He averred that the interested party surrendered the original title deed to the defendant's advocate for purposes of the subdivision. when his late mother learned that the interested party had sold the property to the defendant, she registered a caveat against the land. The plaintiff claimed that the interested party had no recollection of the transaction because he had been suffering from mental issues since 2010 and did not have the mental capacity to enter into any agreement with the defendant. He averred that on September 21, 2022, the defendant entered into the interested party's land brandishing machetes and crude weapons and attacked the plaintiff's workers who were constructing the fence. The plaintiff contended that the construction of the fence had been going on for a month after he obtained the requisite approvals from the county government. He exhibited photographs taken of people brandishing weapons.
7. When the application was brought under certificate of urgency on September 22, 2022, the court directed the plaintiff to serve the application upon the defendant and restrained the defendant from accessing or dealing with the suit property until October 5, 2022 when it would issue further orders. When the matter came up on October 5, 2022, the plaintiff's advocate informed the court that they needed more time to serve the defendant and the court directed that the application would be heard on October 25, 2022. The matter came up again on November 9, 2022 when the application was fixed for hearing on December 19, 2022.
8. On December 6, 2022, the defendant filed the application dated December 5, 2022 seeking to set aside the temporary orders of injunction given by this court. The court directed the defendant to serve his application on the plaintiff.
9. When the matter came up on December 19, 2022, Nanyuki CMCC ELC No E42 of 2022 relating to the same suit property took center stage in the submissions by the parties with the plaintiff arguing that he had withdrawn that suit before filing this suit. The court directed that the application dated



- December 5, 2022 would be heard on February 8, 2023 and further that the status quo prevailing on the suit property was to be maintained until February 8, 2023.
10. When the matter came up on February 8, 2023, Mr Wangombe Wambugu Advocate informed the court that he had just come on record for the plaintiff and required time to acquaint himself with the matter and to take instructions from his client. He maintained that the suit before the magistrate's court had been withdrawn.
 11. On February 28, 2023 when the matter came up, again the issue of the withdrawal of the suit before the Magistrate's Court was argued extensively. The matter came up severally and on April 26, 2023 the court gave the plaintiff time to file a response to the application dated December 5, 2022 and for parties to file and exchange short written submission on the two applications and the preliminary objection raised by the defendant.
 12. The defendant made the application dated December 5, 2022 on the grounds that the plaintiff obtained the *ex parte* orders on September 27, 2022 by misleading this court through deliberate material non-disclosure or suppression of material facts. The defendant contended that the plaintiff failed to disclose that LR No 2787/421 had been subdivided to create Nanyuki Municipality Block 12/148 to 151 and that LR No 287/421 had therefore ceased to exist. Secondly, that the plaintiff had filed a similar suit being Nyeri ELC Case No 2 of 2012 and the *ex parte* orders in that case were vacated or discharged because of similar non-disclosure. The defendant added that the orders issued by the Nyeri Court abated by operation of law and that they could not be resurrected through this court. He urged that the entire suit was tainted with illegality and was an abuse of the court process. The defendant argued that if the orders were not set aside, he would continue to suffer irreparable loss and damage yet he had a right to his land which he lawfully acquired by paying the full purchase price of Kshs 3.5 million to the interested party.
 13. He swore the supporting affidavit and annexed documents relating to the suit before the Chief Magistrate's Court and produced copies of the sale agreement which he entered into with the interested party on July 25, 2010. He also annexed copies of cheques showing the payments he made on December 22, 2010 - Kshs 150,000/=, on December 2, 2010 - Kshs 30,000/=, on February 17, 2011 - Kshs 150,000/=, on April 28, 2011 - Kshs 69,000/=, on May 18, 2011 - Kshs 50,000/=, on April 4, 2011 - Kshs 150,000/= and a similar sum of 150,000/= on the same day, on May 10, 2011 - Kshs 100,000/= and on July 5, 2011 - Kshs 20,000/=.
 14. The defendant also exhibited subdivision scheme approvals for Nanyuki Block 12/148 – 151 dated August 11, 2011 and the letter from the Ministry of Lands directing the interested party to surrender the areas earmarked for roads and drainage as well as the original title. He also annexed documents showing a summary of the payments made through Kiget and Co Advocates presumably towards the agreed purchase price for the land. He also attached copies of the pleadings and orders made by the court in Nyeri ELC and the letter from the Director of Surveys confirming that the registry index map (RIM) for Nanyuki Municipality Block 12 had been amended to reflect parcel numbers 148-151.
 15. The court notes that an order was issued by the Nyeri ELC on May 7, 2018 confirming that that suit had abated by operation of law. The suit was brought by the plaintiff's late mother challenging the sale of the suit land to the defendant on the ground that the suit land was their matrimonial property.
 16. The plaintiff filed a replying affidavit on May 5, 2023 in which he deponed that he filed a matter before the magistrate's court over the suit property but on realising that the suit property exceeded the pecuniary jurisdiction of the Magistrate's Court, he withdrew the suit on September 23, 2022. He maintained that the matter before the magistrate's court had been properly withdrawn. He contended that the sale transaction between his father and the defendant was never completed and that the suit



property was yet to be subdivided. He produced a copy of the search done on LR No 4271/421 on October 7, 2022 confirming that LR No 2787/421 was registered in the interested parties name and had several encumbrances registered against the land.

17. The defendant filed a further affidavit on May 22, 2023 where he addressed the issue of the withdrawal of the magistrate's court case. The defendant argued that what the plaintiff was pursuing were spousal rights under the *Matrimonial Property Act* and the *Land Registration Act* yet he was not a wife so as to be entitled to pursue such a right. He denied that he had gone to the suit land with goons and clarified that he went to the land with police officers.
18. The court directed parties to file submissions, which the court considered. The plaintiff submitted that he had established a *prima facie* case with a probability of success based on the fact that the interested party was the current registered proprietor of the suit land. He maintained that the interested party was entitled to his right to quiet and peaceful enjoyment of the suit property as enshrined in article 40 of the *Constitution*, while contending that the defendant did not complete the sale transaction over the suit property. The plaintiff submitted that his mother died on December 19, 2015 and that is how the case she had instituted before the Nyeri ELC abated.
19. He argued that the issue as to whether the defendant legally purchased a portion of the suit property from the interested party could only be determined through a full hearing. He urged that this court had jurisdiction to deal with the suit based on article 162 of the *Constitution* and section 13 of the *Environment and Land Court Act*.
20. The plaintiff argued that he filed this derivative action as the administrator of his deceased mother's estate and as manager of his father's affairs to right the wrongs committed against his father's estate. He relied on the certificate of confirmation of grant dated June 5, 2017 over his late mother's estate and urged the court to dismiss the defendant's application and preliminary objection.
21. The defendant abandoned his preliminary objection relating to the suit filed before the Magistrate's Court and submitted that this court lacked jurisdiction to hear and determine the issue of matrimonial property because that was contrary to sections 2, 5, 6, 7, and 17 of the *Matrimonial Property Act* and section 13 of the ELC Act. He contended that the *Matrimonial Property Act* came into effect after the ELC Act and that issues dealing with matrimonial property cannot be dealt with by the ELC Court but should be handled by the High Court. The defendant cited decisions made by the court regarding the division of matrimonial property and on the existence of a valid marriage. The defendant maintained that the plaintiff was pursuing spousal rights in a matrimonial property, which could not be prosecuted by the son of a spouse who had died. He maintained that the plaintiff was abusing the process of the court to revive the suit which abated before the Nyeri ELC. He maintained that the plaintiff lacked capacity to file the suit on behalf of his late mother on September 26, 2022 and that he did not file the letters of administration at the time he filed this suit.
22. The issues for determination are whether the plaintiff has established a *prima facie* case with a probability of success against the defendant and whether he will suffer irreparable loss if the orders of injunction are not granted; and secondly, whether the orders granted on September 27, 2022 by the court should be discharged. In determining this issue, the court will have to make a determination regarding the preliminary objection brought by the defendant regarding the jurisdiction of this court and whether the plaintiff has the legal capacity to bring this suit.
23. The plaintiff brought this suit in his capacity both as administrator of the estate of his late mother and as manager of his father's estate based on the interested party's incapacity due to health challenges. The plaintiff produced the court order issued on March 3, 2022 in Nanyuki High Court miscellaneous



application No 3 of 2021 appointing him and Anthony Joseph Irungu joint guardians of the interested party.

24. In essence, the plaintiff challenges the sale transaction which the interested party entered into with the defendant for the purchase of 1 ¼ acres of the suit land in July 2010. The fact that the suit before the Nyeri ELC abated after the death of the plaintiff's mother was not controverted by the plaintiff. The order dated May 7, 2018 confirmed that the plaintiff's late mother's suit had abated by operation of the law. The proper manner to proceed should have been for the administrator of Purity Beatrice Theuri to apply to revive the suit before the Nyeri ELC and not to file afresh suit. This fact was not disclosed when the plaintiff filed this suit. Nevertheless, what is at the heart of this dispute is the sale transaction between the defendant and the interested party over a portion of the suit land.
25. A determination is yet to be made by a court of competent jurisdiction regarding the validity of the sale agreement which the defendant entered into with the interested party over a portion of the suit land. There is no certainty as to the status or completion of the subdivision which process was to yield the portion which is the subject matter of the sale transaction. In the ordinary course of things, a registered landowner has to play a part in the completion of the subdivision process and the difficulty in the circumstances of this case is that the interested party has been declared mentally unfit to conduct his own affairs and would only act through his guardians.
26. Delving into the preliminary objection on whether the court has jurisdiction to determine the issue as to whether the plaintiff can sustain the claim for matrimonial property or not will not resolve the dispute over the suit land, which the defendant claims to have purchased from the interested party in 2010 and which he claims is already subdivided. In the court's view, that is the crux of the dispute.
27. In the interest of justice, it is proper that the status quo prevailing on the disputed 1 ¼ acres portion of the suit land is maintained until the court makes a determination regarding the validity of the sale transaction between the defendant and the interested party as well as the defendant's interest, if any, in the suit land.
28. For the avoidance of doubt, the plaintiff and the interested party or their agents are also restrained from dealing with the 1 ¼ acres of land in dispute until the suit is determined or until further orders are made by the court.
29. Parties are directed to comply with order 11 of the *Civil Procedure Rules* forthwith so that the hearing of this case can be fast-tracked.
30. The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NANYUKI THIS 11TH DAY OF JULY 2023.

K. BOR

JUDGE

In the presence of:

Mr. Wangombe Wambugu for the Plaintiff

Mr. J. Okemwa holding brief for Mr. J. Abwuor for the Defendant

Ms. Stella Gakii – Court Assistant

