



**Miano & another v Chief Land Registrar & 3 others (3rd and 4th Defendant sued on their own and as the personal representative of the Estate of Kaakua Ole Lekalua (Deceased)) (Environment & Land Case E016 of 2022) [2023] KEELC 20811 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20811 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**  
**ENVIRONMENT & LAND CASE E016 OF 2022**  
**LC KOMINGOI, J**  
**OCTOBER 12, 2023**

**BETWEEN**

**JANE NYAGITHA MIANO ..... 1<sup>ST</sup> PLAINTIFF**

**PETER GRAHAM MOLL, JANE NYAGITHA MIANO, NYAWIRA MIANO &  
LINSEY TINGESI MOLL (SUING AS THE PERSONAL REPRESENTATIVES OF  
THE ESTATE OF NANCY GACHEKE MOLL (DECEASED)) ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE CHIEF LAND REGISTRAR ..... 1<sup>ST</sup> DEFENDANT**

**THE HONORABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**ANNA NUNA KAAKUA ..... 3<sup>RD</sup> DEFENDANT**

**JULIUS RIES KAAKUA ..... 4<sup>TH</sup> DEFENDANT**

**3RD AND 4TH DEFENDANT SUED ON THEIR OWN AND AS THE  
PERSONAL REPRESENTATIVE OF THE ESTATE OF KAAKUA OLE  
LEKALUA (DECEASED)**

**RULING**

1. The Plaintiffs filed a Notice of Motion Application dated 29<sup>th</sup> July, 2022 brought under Order 40 Rule 1(a) and Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#), Section 1A, 1B and 3B of the [Civil Procedure Act](#), Section 24, 25, 26 and 27 of the [Land Registration Act, 2012](#) and Article 40(1) of [the Constitution](#). The Application which is supported by Jane Nyagitha Miano Supporting Affidavit sworn on 21<sup>st</sup> July, 2022 and filed on 1<sup>st</sup> August, 2022 seeks for the following prayers.

- i. Spent



- ii. Spent
  - iii. This honorable court be and is hereby pleased to issue an injunction restraining the 3<sup>rd</sup> and 4<sup>th</sup> Defendants whether by themselves, their agents, employees or otherwise howsoever from trespassing, selling, disposing off, subdividing or otherwise interfering with the ownership of portions L.R Kajiado/Ntashart/45 and in particular L.R Kajiado/Ntashart/732,733,734 and 735 pending the hearing and determination of this suit..
  - iv. Spent
  - v. This honorable court be and is hereby pleased to issue an injunction restraining the 3<sup>rd</sup> and 4<sup>th</sup> Defendants whether by themselves, their agents, employees or otherwise howsoever from trespassing onto or otherwise interfering with the Plaintiffs possession of L.R Kajiado/ Ntashart/45 and in particular L.R Kajiado/Ntashart/732,733,734 and 735 pending the hearing and determination of this suit.
  - vi. Spent
  - vii. This honorable court be and is hereby pleased to issue an order staying the proceedings of the honorable court in Kajiado PM Succession Cause No.49 of 2012 –in the matter of the estate of Kaakua Ole Lekuka(deceased) pending the hearing and determination of this suit.
  - viii. Costs of the Application.
2. Jane Nyagitha Miano depones that she is a co-administrator of the estate of Nancy Gacheke Moll estate while the 3<sup>rd</sup> and 4<sup>th</sup> Defendant are personal representatives of the estate of Kaakua Ole Lekakua, the registered owner of L.R Kajiado/Ntashart/45. She faults them for fraudulently and illegally transferring the property to themselves and even obtaining a title deed on 18/06/2018. Prior to the death Kaakua Ole Lekakua death in 1990, mutation authorizing subdivision of L.R Kajiado/ Ntashart/45 into parcel Kajiado/Ntashart/731to 735 was approved on 15/06/1990. She states that between September 1986 and March 1989, she bought Kajiado/Ntashart/ 732(50 acres) and 733 (30 acres) from Kaakua Ole Lekuka for value consideration of Ksh.150,000/= and Ksh.120,000/= respectively. Ksh.65,000/= of the purchase price was paid to Agricultural Finance Corporation to clear the loan so that the title could be discharged. It is her case that even though the Land Control Board consent was granted on 5/1/1988 and transfer documents duly executed, the properties were never transferred to her even after the death of Kaakua Ole Lekakua.
  3. She further states that in 2005, Nancy Gacheke Moll (deceased) purchased Kajiado/Ntashart/735(15 acres) at Ksh.300, 000/= from Joseph Kaboi Kihumba and John Mburu Maina who had previously purchased it from Kaakua Ole Lekuka in 1989 for Ksh.52, 5000/=. She also purchased Kajiado/ Ntashart/734(10 acres) from Richard Lenana Ole Pulei who had bought from Kaakua Ole Lekuka for Ksh.50,000/=. As at 1990, transfer of properties to Joseph Kaboi Kihumba and John Mburu Maina had not been effected even though land control board consent was issued on 6/03/1990. Similarly, transfer to Nancy Gacheke Moll was not effected even though land control board consent had already been obtained.
  4. It is her case that efforts to effect transfers of Kajiado/Ntashart/731 to 735 in the Plaintiffs favour have not borne any fruit. As a result, they lodged a claim before Kajiado North District Land Dispute Tribunal which issued an award to the effect that Kajiado/Ntashart/732 and 733 belonged to the 1<sup>st</sup> Plaintiff, parcel 734 and 735 belonged to Nancy Gacheke Moll while parcel 731 which belonged to the estate of Kaaku Ole Lekuka would be transferred to the beneficiaries including the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. She further pleads that the award also stipulated that transfer documents would be



executed by Kajiado Land Registrar and parties were to appoint a surveyor to confirm the agreed acreage. She further states that even though the award was adopted as an order of the court in Kajiado SRM CC 76/2011, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants did not challenge it. Subsequently, they submitted to the 1<sup>st</sup> Defendant transfer documents duly executed by Kajiado Magistrate Courts Executive Officer to facilitate transfer of the properties to the Plaintiffs. She claims that despite continuous follow-up, in 2019, they were informed that the transfer would not be effected because the 3<sup>rd</sup> and 4<sup>th</sup> Defendant had been issued with title deeds for the said parcels on 18/06/2018. This was done after they submitted a separate mutation form despite existence of an approved mutation.

5. She further stated that when the 3<sup>rd</sup> and 4<sup>th</sup> Defendants obtained Letters of Administration in Kajiado PM Court Succession Cause No. 49 of 2012 which was confirmed on 8/12/2017, they neither disclosed to the court nor the Plaintiffs that the disputed properties had been sold. Further, the Plaintiffs application seeking to revoke the confirmed grant was declined. According to her, it is in the interest of justice that the proceedings of Succession Cause No.49 of 2012 ought to be stayed. The Defendants ought to be restrained from dealing with the disputed properties to the detriment of the estate of Kaakue Ole Lekuka.
6. On 26<sup>th</sup> September, 2022, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants responded to the application through a Replying affidavit by Julius Ries Kaakua sworn on the same date. He avers that the Application is an abuse of court process as it seeks to infringe upon the rights of the beneficiaries Kaakue Ole Lekuka. He further stated that Kajiado/Ntashart/45 was allocated to Kaakua Ole Lekuka on 17<sup>th</sup> May, 1982 who was then issued with a title deed on 19<sup>th</sup> June, 1982. According to him, Kaakua Ole Lekuka neither sold nor disposed the property to any person and therefore the purported sale agreement of Kajiado/Ntashart/732 and 733 is unfounded because the Plaintiff has not provided any executed nor attested documents to prove compliance with Section 3 of the [Law of Contract Act](#). Further no consideration was received neither did any person claim ownership of the property during his lifetime. He claims that following the death of Kaakua Ole Lekuka and Nancy Gacheke, the Plaintiff lodged a claim before the Kajiado Dispute Land Tribunal claiming transfer and interest of a portion of Kajiado/Ntashart/45. According to him, the Tribunal while issuing its award directed that Kajiado/Ntashart/45 be subdivided so that Jane Nyagitha Miano would get 80 acres, Nancy Gacheke 20 acres while 40 acres were to be given to Julius Ries Kaaku, Hannah Kaaku and Daniel Yiaile Kaakua. In addition, execution of transfer documents was to be done by Kajiado Land Registrar.
7. It is his case that the basis of Nancy Gacheke's claim before the Tribunal was that she purchased land from Kaakua Ole Lekuka prior to his death. It is also his case that the Plaintiff cannot therefore claim that Nancy Gacheke bought Kajiado/Ntashart/734 and 735 from Richard Lenana Ole Pulei, Joseph Kabui Kiumba and John Mburu Maina who allegedly bought it from Kaakua Ole Lekuka yet they were third parties who never had any documents to prove ownership of the said properties. Her claim for Kajiado/Ntashart/734 and 735 can only lie against the third parties who defrauded Nancy Gacheke as it is unfounded and based on hearsay. He quotes Section 26 of the [Land Registration Act](#) to state that registration, transfer and issuance of certificate of title do not amount to transfer of interest on land. It is his case that the Plaintiff's do not have anything to show that Kaakua Ole Lekuka sold them the suit property except for undated, unexecuted and unattested sale agreement, application for consent and fabricated receipts.
8. He contends that the Tribunal did not have jurisdiction to issue an award purporting to subdivide Kajiado/Ntashart/45 and ordering Kajiado Land Registrar to execute transfer documents. This is because only the High court or Magistrate Court have jurisdiction to determine the said dispute in according with Section 47 of the [Law of Succession Act](#) following the death of Kaakua Ole Lakuka on 17<sup>th</sup> June,1990. The Applicants cannot therefore purport to transfer properties based on an



illegal award. He admits that on 26<sup>th</sup> October, 2012, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants obtained Letters of Administration which were confirmed on 8<sup>th</sup> December, 2019. Subsequently, they applied for transmission of the suit properties and were issued with title deeds. He adds that considering they are legal representatives, Section 82 of the Law of Succession Act authorizes them to deal with the properties after confirmation of grant. He maintains that transmission and registration of properties to the 3<sup>rd</sup> and 4<sup>th</sup> Defendant was legally and procedurally done. What remains is transfer to the rightful beneficiaries because subdivision was done. The implication of this is that the Plaintiff Application has not demonstrated a prima facie case with a probability of success at the trial. Rather, the balance of convenience tilts in favor of the beneficiaries of Kaakui Ole Lekuka estate who are likely to suffer great injustice if the orders sought are granted.

9. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants though served with the Application, never responded to it. They however entered appearance to the suit.
10. Upon the court directing that the Application be canvassed by written submissions, on 24<sup>th</sup> October, 2022, the Plaintiff's counsel filed submissions dated 13<sup>th</sup> December, 2022. They raise the following issues for determination;
  - a. Whether the Plaintiffs/Applicants have established the grounds for grant of a temporary injunction.
  - b. Whether the proceedings in Kajiado PM succession Cause No.49 of 2012 ought to be stayed? and
  - c. Who should bear the costs of the Application?
11. It is further submitted that when Richard Lenana Ole Pulei, Joseph Kaboi Kiumba and Mr. John Mburu purchased the disputed property from Kaakua Ole Lekuka, Section 3(3) of the Law of the Contract was not applicable to the said transaction. Counsel maintains that the Plaintiff shall suffer irreparable harm if the orders sought are not granted. This is bearing in mind that the Defendants are interfering with its possession. Further the Plaintiff risks being evicted from the properties due to certificate of confirmed grant issued in succession cause No.49 of 2012. The implication of these arguments is that the balance of convenience tilts in favor of the Plaintiff.
12. According to the Plaintiff submissions, the proceedings in Succession Cause No.49 of 2012 ought to be stayed because they were conducted with a view of defrauding the Plaintiff of their proprietary rights in total disregard of Kajiado PMCC 76/2011. In addition, the 3<sup>rd</sup> and 4<sup>th</sup> Defendant did not inform the Plaintiff nor the court that the Tribunal had directed that Kajiado/Ntashart/47 be shared between the Plaintiff and the Defendant.
13. Submission for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant dated 18<sup>th</sup> October, 2022 were filed on 21<sup>st</sup> October, 2022 where it was reiterated that the Plaintiffs have not established a prima facie case with a possibility of success capable of being granted temporary injunction as was held in Giella (supra), Nguruman Limited (supra) and Mrao Limited (supra). This is because the sale agreement which the Plaintiffs seeks to rely on to claim ownership of Kajiado/Ntashart/732 and 733 is undated, unexecuted and unattested. In addition, it does not prove that Kaakua Ole Lekuka sold the said properties. Consequently, interest in land cannot pass from one proprietor to another on strength of an invalid sale agreement which is not in compliance with Section 3 of the Law of Contract Act. The decision of Erick K. Maritim & 6 Others v Esther Chepkemoi Birir (2020) eKRL is quoted to argue that the alleged sale agreement did not comply with the legal requirement. Counsel maintains that the 3<sup>rd</sup> and 4<sup>th</sup> Defendant being the registered proprietaries of Kajiado/Ntashart/45 are holding it in trust for the estate of Kaakua Ole Lekuka beneficiaries.



14. The court is urged to find that the evidentiary proof of payment recorded on hospital receipts is not sufficient to demonstrate existence of a valid agreement between the parties. This argument is supported by the decision of *Noor Abubakar v Gababa Enterprises Limited* (2018) eKLR. It is contended that the 2<sup>nd</sup> Applicant claim for Kajiado/Ntashart/734 and 735 which is founded on purported sale agreement from Richard Lenana Ole Pulai, Joseph Kabui Kiumba and John Mburu Maina has not been proved and cannot therefor be protected.
15. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants' counsel maintains that the argument that if the court grants the orders sought, the beneficiaries of Kaakua Ole Lekuka inclusive of the 3<sup>rd</sup> and 4<sup>th</sup> Defendant will suffer irreparable injury. This is because the Plaintiffs have not proved they will suffer injury that cannot adequately be compensated. However, should the Plaintiffs claim succeed, then this court can order that they be paid damages by the Respondent.
16. With regard to the test whether the balance of convenience rests in favor of dismissing the Application, it is argued that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants holds Kajiado/Ntashart/45 in trust for the other beneficiaries as they await subdivision and transfer to them in accordance with the confirmed grant issued after they were granted letters of administration of Kaakua Ole Lekuka estate. It is submitted that if the orders sought are granted, the rights of the beneficiaries will be threatened because distribution of the property will be postponed pending the outcome of this suit.
17. I have considered the Notice of Motion, the Affidavits in support, annexures, the submissions. The issues for determination are;
  - a. Whether the Plaintiffs should issue orders preserving Kajiado/Ntashart/732 to 734 pending the final determination of this suit?
  - b. Whether this court should issue orders staying the proceedings of Kajiado PM Succession Cause No.49 of 2012 pending the final determination of this suit?
  - c. Who should bear costs of this application?
18. It is not in dispute that Kajiado/Ntashart/45 was owned by Kaakua Ole Lekakua. The Plaintiffs claim over the portion of the property being Kajiado/Ntashart/732 to 734 is premised on a bonafide purchaser for value. According to them, there exists a duly executed Application for consent, letter of consent, approved mutation and duly executed transfer forms permitting transfer of the said portions to them. Even though this was done prior to Kaakua Ole Lekakua death in 1990, transfer of the properties is yet to be effected upon them. This made them lodge a claim before the Land Dispute Tribunal which directed that the said properties be transferred to them. The said award was also adopted as an order of the court. Julius Ries Kaakua acknowledges in his affidavit the existence of the said award authorizing subdivision of Kajiado/Ntashart/45 where portions of it should be transferred to the Plaintiffs. Even through the award was adopted as an order of the court, he asserts that the Tribunal did not have jurisdiction to issue the said award yet they never appealed against neither was it set aside.
19. I find that the plaintiffs have failed to establish a prima facie case with a probability of success at the trial.



20. In *Kenleb Cons. Limited Vs. Gatitu Services Station Limited & Another* (1990) KLR 557 Bosire J (as he then was) held that;

“To succeed in an application for injunction an applicant, must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right, legal or equitable, which requires protection by injunction”.

I am not satisfied that the Plaintiffs/Applicants deserve this kind of protection.

21. I also find that the Plaintiffs/Applicants have failed to demonstrate that they will suffer irreparably if these orders are not granted. I rely on the case of *Ooko Vs. Barclays Bank of Kenya Limited* (2002) KLR 394.

22. In conclusion I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 12<sup>TH</sup> DAY OF OCTOBER 2023.**

**L. KOMINGOI**

**JUDGE.**

