



REPUBLIC OF KENYA



Muitaime & 4 others v Njaaga & 6 others; Muitaime (Interested Party) (Environment & Land Case E005 of 2023) [2023] KEELC 21984 (KLR) (6 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE E005 OF 2023
AK BOR, J
NOVEMBER 6, 2023**

BETWEEN

**JOSEPH NDUNGU MUITAIME 1ST PLAINTIFF
JOHN KUNG’U CHEGE 2ND PLAINTIFF
MICHAEL MWIKO WANJHIA 3RD PLAINTIFF
SIMON MUCHAI NJIHIA 4TH PLAINTIFF
DAVID KARURI MURUGA 5TH PLAINTIFF**

AND

**AGNES WARUGURU NJAAGA 1ST DEFENDANT
ANDREW MUTHEE GITAU 2ND DEFENDANT
AMG REALTORS LIMITED 3RD DEFENDANT
THE CHIEF LAND REGISTRAR 4TH DEFENDANT
THE INSPECTOR GENERAL OF POLICE 5TH DEFENDANT
DIRECTORATE OF CRIMINAL INVESTIGATIONS 6TH DEFENDANT
HON ATTORNEY GENERAL 7TH DEFENDANT**

AND

HUMPHREY NJIHIA MUITAIME INTERESTED PARTY

RULING

1. The Plaintiffs filed suit on 8/5/2023 claiming that the land known as Nanyuki/Marura/Block 5 (Eleri)/50 (the suit property) was posthumously registered in the name of the late Muitaime Kung’u



on 19/12/2019 after he had died on 15/8/1992. They averred that that parcel of land was not known to the administrators of the estate of the late Muitaime Kung'u and therefore was not included among the assets of the estate which were distributed to the beneficiaries. The estate was administered by the late Joseph Chege Wanjihia who died on 1/12/2018 and Humphrey Njihia Muitaime, added to this suit as an Interested Party. They stated that the Interested Party confirmed in the affidavit filed in the succession cause that he did not transfer the suit property to the Defendants. The Plaintiffs averred that they learnt on 3/3/2022 that the suit property had been fraudulently transferred and reported the matter for investigation by the Land Fraud Unit of the Directorate of Criminal investigations (DCI). They stated that the Land Registrar closed the title register for the suit property and opened new registers for parcel numbers 7999 to 8324 for the resultant parcels created after subdivision of the suit property.

2. The Plaintiffs came to court after the 1st to 3rd Defendants placed advertisements in the social and print media inviting members of the public to purchase plot numbers 7999 to 8324 created from the suit property under what they referred to as the “Nanyuki Sundowner Project”. The Plaintiffs seek judgment to the effect that the sale and transfer of the suit property to the 1st to 3rd Defendants was fraudulent and an order directing the Land Registrar to issue a title over the suit property in the name of the Estate the late Muitaime Kung'u.
3. Contemporaneously with the filing of the plaint, the Plaintiffs filed the application dated 2/5/2023 seeking an injunction to restrain the 1st to 4th Defendants from dealing with the suit property together with parcel numbers 7999 to 8324 under the Nanyuki Sundowner Project pending hearing and determination of the suit. The application was made on the grounds that this matter was of great public interest and that it was necessary to prevent future mass displacement and loss of investments by innocent investors in the fraudulently acquired land. The Plaintiffs maintained that the 1st to 3rd Defendants did not have a good title to the suit land which they could pass to the purchasers in their project. They were apprehensive that the 1st to 3rd Defendants may dispose of the suit property through sale, mortgage or charge or that they may alienate it in any other manner which would deprive the Plaintiffs of their beneficial share in the estate of the late Mutaima Kung'u.
4. The 2nd Plaintiff swore the affidavit in support of the application in which he averred that he was the son of the Late David Chege Muitaime and was a direct beneficiary of the estate of the late Muitaime Kung'u. He exhibited the replying affidavit the Interested Party swore in the succession cause, the death certificate for Joseph Chege Wanjihia and the advertisement by the 3rd Defendant for the sale of the plots excised from the suit land.
5. The court directed the Plaintiffs to serve the application on the Defendants. The 2nd Defendant swore the replying affidavit filed in court on 2/6/2023 in which he averred that the Plaintiffs lacked the legal standing to bring this suit and urged the court to first hear and determine the preliminary objection. Further, he averred that on 2/11/2019, the 3rd Defendant bought the suit property measuring approximately 17.16 hectares from Stephen Mwai Muchene for the sum of Kshs. 8,400,000/=. He went further to argue that when the beneficiaries of the estate of the Late Muitaime Kung'u learned of the existence of the suit property, they should have applied to the relevant court to have it included in the estate of the deceased. He pointed out that the suit property was not among the assets of the estate of the Late Muitaime Kung'u that were to be distributed pursuant to the schedule in the confirmation of grant on 9/5/1995. He averred in paragraph 13 that he was ready to assist in the investigations and was willing to share information by providing documentation relating to the suit property if he was called upon to do so by the relevant authorities. However, he maintained that the 3rd Defendant purchased the suit property legally.



6. The 1st to 3rd Defendants filed a preliminary objection on 19/5/2023 claiming that the Plaintiffs lacked the locus standi to lodge the suit and the application for injunction for want of letters of administration to sue on behalf of the Estate of the late Muitaime Kung'u.
7. The 2nd Plaintiff filed the supplementary affidavit to which he annexed minutes of the family meeting held on 5/11/2022 together with the certificate of confirmation of the grant and grant of letters of administration.
8. The court directed parties to file submissions. Parties filed submissions which the court considered. The 1st to 3rd Defendants submitted that the Plaintiffs had not tendered documents in court such as the letters of administration to prove that they had the legal capacity to bring the suit. They maintained that even if the suit property belonged to the late Muitaime Kung'u, none of the Plaintiffs was an administrator of his estate hence they do not have power to deal with the suit property.
9. The Plaintiffs submitted that they added the surviving personal representative of the estate of the late Muitaime Kung'u as an interested party to the suit in recognition of the fact that it would help the court determine the application and suit on its merits. They relied on authorities touching on the provisions in *the Constitution* which give any member of the public power to institute proceedings challenging violations of the bill of rights. Those authorities are not relevant since this is not a constitutional petition.
10. The Plaintiffs went further to rely on section 51 (1) of the *Land Act* on the effect of transmission on death which mentions that subject to any restriction on a person's power to dispose of land contained in the appointment, the personal representative or the person beneficially entitled on the death of the deceased proprietor, shall hold the land subject to any liabilities, rights or interests that are unregistered but are nevertheless enforceable, subject to which the deceased proprietor held it, but for the purpose of any dealing the person shall be deemed to have been registered as proprietor with all the rights conferred by the Act on a proprietor who has acquired land for valuable consideration.
11. Regarding their application for injunction, the Plaintiffs urged the court to grant the injunctive orders based on the Defendants' admissions that the Nanyuki Sundowner Project existed and that the suit property had been divided to create new parcels of land.
12. The Plaintiffs also filed supplementary submissions in which they argued that since the 1st to 3rd Defendants were not beneficiaries of the estate of the late Muitaime Kung'u, the *Law of Succession Act* was not tailored to resolve disputes outside those between the personal representatives, survivors, beneficiaries or dependants of the deceased. They relied on *In Re Estate of Alice Mumbua Mutua (Deceased)* [2017] eKLR where the court stated that if a dispute arose after confirmation of grant then it ought to be determined outside the probate court because that court became functus officio after the distribution of the assets of the estate. They also relied on section 45 of the *Law of Succession Act* and urged the court to find that they were entitled under that Section to protect the free property of the deceased. They added that the suit property was not the free property of the late Muitaime Kung'u when he died 25 years ago because the title was not in his name. They contended that the 1st to 3rd Defendants were intermeddling with the assets of the estate of the late Muitaime Kung'u. Additionally, that as beneficiaries, they were of right recognised as having locus standi to approach the court where there was a threat to the estate of a deceased person.
13. In their supplementary submissions, the 1st to 3rd Defendants maintained that the Plaintiffs had not established a prima facie case since they were not competent to institute the suit without letters of administration. On the issue of suffering irreparable damage, the Defendants submitted that the Plaintiffs had not demonstrated the damage they would suffer and emphasised that the suit land was



- not included in the succession cause. Regarding the balance of convenience, the 1st to 3rd Defendants argued that it tilted in their favour because the 3rd Defendant had subdivided the suit property and sold the resultant portions to third parties.
14. The Learned State Counsel informed the court that they would not be filing any documents and that they were not opposed to the application.
 15. The issue for determination is whether the court should grant the orders sought by the Plaintiffs in the application dated 2/5/2023 or whether the court should uphold the preliminary objection taken up by the 1st to 3rd Defendants regarding the Plaintiffs' capacity to bring this suit and decline to grant the orders sought in the application for injunction.
 16. The Plaintiffs' claim is that the suit property, which they claim the 1st to 3rd Defendants illegally acquired, subdivided and are selling to members of the public, formed part of the estate of the late Muitaime Kung'u having been registered in his name on 19/12/2019 after distribution of the assets of the estate. One of the two administrators of the estate of the late Muitaime Kung'u, Joseph Chege Wanjihia died leaving the Interested Party as the sole administrator of that estate. According to the Plaintiffs, the Interested Party has denied transferring the suit land to the 1st to 3rd Defendants. The Plaintiffs claim that the suit property was transferred to the 3rd Defendant in unclear circumstances. The 1st to 3rd Defendants claim that the 3rd Defendant entered into a sale agreement with Stephen Mwai Muchene on 2/11/2019 vide which it purchased the suit property for Kshs. 8,400,000/= and was registered as proprietor of the land on 6/2/2020 when the title deed was issued in its name.
 17. The court agrees with the objection raised by the 1st to 3rd Defendants that not being the legal administrators of the estate of the late Muitaime Kung'u, the Plaintiffs are not the proper persons to pursue this claim on behalf of the estate of the late Muitaime Kung'u. They need to apply to be appointed administrators of the estate of the late Muitaime Kung'u in place of the deceased administrator or in the alternative, have the surviving administrator of that estate continue this suit as Plaintiff and not as an Interested Party.
 18. The 3rd Defendant claimed that the balance of convenience tilted in its favour because it had subdivided the suit property and sold the resultant portions being parcel numbers 7999 to 8324 to third parties. The 3rd Defendant did not state how many of the plots remained unsold.
 19. To preserve the subject matter of the suit, an order of injunction is issued to restrain dealings with the parcels of land known as Nanyuki Marura/ Block 5/7999 to 8324 until the dispute over the ownership of Nanyuki Marura/ Block 5 (Ereri)/50 from which parcel numbers Nanyuki Marura/ Block 5 (Ereri)/7999 to 8324 were created, is determined by the court.
 20. The court stays this suit to give the administrators of the estate of the late Muitaime Kung'u time to regularise the proceedings.

The costs of the application will be in the cause.

DELIVERED VIRTUALLY AT NANYUKI THIS 6TH DAY OF NOVEMBER 2023.

K. BOR

JUDGE

In the presence of: -

Ms. Wanjiru Kirongo for the Plaintiffs

Mr. Lloyd Njeru for the 1st to 3rd Defendants



Ms. Wahito Ngari for the 4th to 7th Defendants

Ms. Stella Gakii- Court Assistant

