



Mutiga v Mwilaria & another (Martin Thuranira Mungathi & Joseph Mungathia.....substitute for the 2nd Defendant.) (Environment & Land Case 10 of 2021) [2022] KEELC 2415 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2415 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 10 OF 2021**

CK NZILI, J

MAY 4, 2022

BETWEEN

SALESIO MURIUKI MUTIGA APPLICANT

AND

JOSPHAT DAVID MWILARIA 1ST DEFENDANT

STEPHEN MUNYATHIA 2ND DEFENDANT

**MARTIN THURANIRA MUNGATHI & JOSEPH
MUNGATHIA.....SUBSTITUTE FOR THE 2ND DEFENDANT.**

RULING

A. Two Applications

1. There are two applications before this court, the first one is dated 18.1.2021 seeking for temporary orders of injunction and an inhibition order restraining the defendants from interfering the plaintiff's user rights of LR No. Uringu II/2373 and 49 pending the hearing and determination of this suit. The application is supported by an affidavit sworn on 18.1.2021 by Salesio Muriuki Mutiga.
2. The grounds of the application are that; the plaintiff has been in occupation of the suit land for over 60 years which was allegedly illegally adjudicated in favour of the respondents but had been gathered by his later father Japhet Mutiga under Serial No. 987 folio No. 1014. It was averred unless the orders sought were granted, the plaintiff was likely to be evicted. In support thereof, the applicant attached a bundle of photos and official searches.
3. The plaintiff's suit is based on the originating summons taken out on 18.1.2020 seeking to be declared as entitled to the suit land through adverse possession since 1953 and out of extensive developments thereon.



4. The originating summons and the application are opposed through the 1st defendant's affidavit sworn on 22.2.2021. The first ground is that the 2nd defendant passed on 15.12.2008, which was ten years before this suit was filed; that the plaintiff possessed no letters of administration to sue for the estate of his deceased father; that the 1st defendant has a title deed to the land after he was previously adjudicated the land, following a gift in 1982 by his late father; that there were previous suits namely Meru CMCC NO. 400 of 1994; Meru JR Application No. 70 of 2010; Meru ELC No. 203 of 2012, which was later on transferred to Tigania Law Courts and dismissed.
5. In the second application dated 19.1.2022, the court is asked to allow for the substitution of the 2nd defendant, said to have passed away on 15.12.2008 with the two proposed defendants Martin Thurania Mungathia and Joseph Mungathia now appointed as joint administrators vide Chief Magistrates Court in Succession cause No. 6 of 2012 in 4.2.2012.
6. The application is supported by a sworn affidavit of Salesio Muriuki Mutiga 19.1.2022, in which it is stated the 2nd defendant passed away on 15.12.2008 and letters of administration issued on 4.5.2012.

B. Written Submissions

7. With leave, parties filed written submissions dated 2.3.2022 and 16.3.2021. The applicant submitted under Order 24 Rule 4 Civil Procedure Rules as read together with Section 2 *Civil Procedure Act*, that the court had jurisdiction to grant the orders sought given that letters of administration adlitem had been issued against the proposed parties. Reliance was placed on *Trouistik Union International & another vs Jane Mbeyu & another* [1993] eKLR 230.
8. The 1st defendant submitted the suit was filed against the 2nd defendant 13 years after his demise hence an application for injunction could not issue and that the suit was a non-starter. Reliance was placed on, *Geeta Bharat Shah & others vs Jomar Said Mwatayari & another* (2009) eKLR cited with approval in *Mayfair Establishments Ltd vs Stephen Mbugua Kibanya* (2020) eKLR, on the proposition that the entire suit was bad in law, incompetent, based on a false affidavit and amounted to an abuse of the court process.
9. The 1st defendant went on to submit the applicant had not satisfied the ingredients in *Giella vs Cassman Brown* (1973) 358 since he held a valid title to the suit land which was protected under Sections 25 and 26 of the *Land Registration Act* and could not be enjoined from his own land. Reliance was placed on *Josephine Chebet Ruto vs Stanley K. Chepkwony & another* (2017) eKLR, *American Cyanamid vs Ethicon Ltd* 1975 AC 396.
10. On the prayer for an inhibition, the 1st defendant submitted that there was no demonstration of any real danger to the suit land being disposed of before the suit was determined as held in *Mugambi Mwambi vs Joseph Karuti Mikwa & Stephen Kithure Murimi* Meru ELC No. 24 of 2012.

C. Issues for Determination

11. What appears to be the issues for determination are: -
 - i. If the court has jurisdiction to grant the orders sought to substitute the 2nd defendant.
 - ii. If the applicant has made a case for grant of temporary orders of injunction and inhibition.
12. Regarding the 1st issue both the plaintiff/applicant and the 1st defendant/respondent agree that the 2nd defendant passed on 15.12.2008 and letters of administration were issued on 4.5.2012. This was 13 and 9 years respectively prior to the filing of the suit.



13. Order 24 Civil Procedure Rules relates to death during the subsistence of a suit.
14. In *Joseph Nganga Njoroge vs Kabiri Mbiti* (1986) eKLR, the Court of Appeal held that there could never be any proceedings against a dead person, while in *Athman Omar Zuberi vs Mamson Asol Apinde* (2013) eKLR the court held, a court process could not be effected upon a dead person.
15. The plaintiff herein is the one who brought the case and swore the supporting affidavits regarding the defendants.
16. How and why the plaintiff did not know or could not such essential facts has not been explained at all in the supporting affidavit sworn on 19.1.2022.
17. Had the plaintiff exercised due diligence he would have obviously established that the 2nd defendant was long dead and could not have sued a dead person thirteen years after his demise.
18. In *Mayfair Establishments ltd supra*, Yano J. quoting with approval *Mc Foy vs United Africa Co. Ltd* (1961) 3 ALL ER 116 declared a suit filed against a dead party as nullity ab initio.
19. In this application the court is being asked to breathe life to an already dead suit.
20. The court cannot resuscitate a dead corpse on arrival. I find the application dated 19.1.2022 lacking merits and dismiss it. Similarly, the suit against the 2nd defendant is a nullity and is hereby struck out with no orders as to costs.
21. Coming to the application dated 18.1.2021 in *Mrao Ltd vs First American Bank & 2 others* (2003), the court held a prima facie case is established if on the material before a court, a party has established a right which calls for the other party's rebuttal.
22. The 1st defendant avers he has a title deed issued on 29.2.2016, following a lawful demarcation process and subsequent registration.
23. The 1st defendant has availed before this court annexures marked JDM "1 – 14" which trace his root title as well as court proceedings regarding the suit land.
24. The interests of the plaintiff, if any, are yet to crystallize and become protectable rights such as those held by the 1st defendant in line with Article 40 of *the Constitution* as read together with Section 25 and 26 of the *Land Registration Act*.
25. Therefore, my finding is the plaintiff has failed to disclose a prima facie case with a probability of success. Similarly, the plaintiff has not produced any documents to prove his assertion that the suit land had been initially allegedly recorded as Serial No. 987 and Folio No. 104, under any land registration regime in Kenya, in favour of his deceased parent. He does not possess any letters of administration to sue for his later father's estate.
26. There is also no proof of any irreparable loss and damage not compensable by way of damages. The balance of convenience tilts in favour of the 1st defendant who has a better title.
27. An inhibition is in the nature of a prohibitory order requiring prove of a prima facie case. The same fate as that of an interim injunction will affect the prayer for inhibition.
28. Given that there has been admission that both parties are occupying the suit land, I find there is need to confirm the status quo as at the filing of the suit herein.
29. The orders of status quo shall subsist for a period of one year only. Parties to comply with Order 11 Civil Procedure Rules and list the matter for hearing.



30 Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 4TH DAY OF MAY, 2022

In presence of:

C.P Mbaabu for 1st respondent

HON. C.K. NZILI

ELC JUDGE

