



REPUBLIC OF KENYA



**Nkirote v Land Registrar Meru County & 12 others (Environment & Land
Case E017 of 2021) [2022] KEELC 3733 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3733 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E017 OF 2021**

CK NZILI, J

MAY 4, 2022

BETWEEN

CELINA NKIROTE PLAINTIFF

AND

LAND REGISTRAR MERU COUNTY 1ST DEFENDANT

ATTORNEY GENERAL 2ND DEFENDANT

LAND ADJUDICATION & SETTLEMENT OFFICE 3RD DEFENDANT

MERU COUNTY SURVEYOR DEPARTMENT 4TH DEFENDANT

GEDION MUGAMBI MWORIA 5TH DEFENDANT

M'MBOROKI NDURA 6TH DEFENDANT

JULIUS KIMATHI MUNGANIA 7TH DEFENDANT

AFUSA GRACE SULEIMAN 8TH DEFENDANT

YUNUS ADAM MUTHAMIA 9TH DEFENDANT

JESEPH JUNYU THIRIKWA 10TH DEFENDANT

PRISCILLA MWARI 11TH DEFENDANT

MERCY KANYIRI 12TH DEFENDANT

MICHAEL MWIRIGI MAITIMA 13TH DEFENDANT

RULING

1. This ruling relates to the application dated 28.5.2021 and the preliminary objection dated 21.7.2021, following court's directions given on 4.10.2021.



Application dated 28.5.2021

2. The applicant seeks the court to grant temporary orders of injunction barring and restraining the 5th-13th defendants, agents, servants or employees from trespassing, constructing, wasting, alienating, damaging or otherwise dealing with Land Registration No. Ruiiri/Rwarera/890 pending the hearing and determination of this suit. Secondly, the applicant prays for an order of inhibition on L.R Nos. 2962, 840, 3801, 3834, 3835, 3836, 3832, 3273 pending the hearing and determination of this suit. The application is supported by a sworn affidavit by Celina Nkirote Moses on the even date and a further affidavit sworn on 27.8.2021.
3. The grounds of the application are that; - the applicant owns Land Registration Nos. 890 & 3273 Ruiiri/Rwarera pursuant to Objection Nos. 438 and 4041 conducted by the 3rd respondent whose findings were that the 5th-13th respondents had been allegedly imported on Land Registration No. 890 unlawfully. The applicant averred that the 5th- 13th respondents have now resorted into fencing off the land and destroying vegetation, whereas title deeds were in process of issuance for Land Registration No. 3273, 2962 and 840. The applicant averred he had been threatened and his family was living in fear. The applicant repeats the grounds on the face of the application in the supporting affidavit. He deposes his land measures approximately 17 acres, that he had a permanent house and a borehole. He attached a confirmation letter from the 3rd respondent indicating he was the recorded owner of the suit land as CMM “1” and “2” respectively, objection proceedings, photos showing invasions and destruction by the respondent, complaint letter to the office of the ombudsman, OB entry over threats, consent to sue all marked as CNM 1-7 respectively.
4. The application is opposed through the replying affidavits sworn by the 5th respondent on 29.6.2021 and 7th respondent on 22.10.2021, respectively.
5. When this matter came up on 21.1.0222, Mr. Mutunga Advocate for the applicant confirmed that parties had filed written submissions dated 10.1.2022 for the plaintiff/applicant and the undated submissions by the 5th & 12th respondents filed on 1.12.2021.
6. Miss Kaunyangi advocate instructed by the firm of Kaumbi & Co. Advocates for the 13th respondent told the court that the 4th, 7th and 10th respondents were deceased. Counsel submitted that Meru ELC JR No. E002/2021 had been determined in which the court had made a finding that the objection proceedings had been carried out illegally.
7. Counsel urged the court under Order 2 Rule 15 Civil Procedure Rules, to find no cause of action disclosed against the 13th respondent since the gist of the plaintiff's case was that the objection had been determined in her favour and now that the court in Meru ELC JR E0011/2021 had ordered for a re-hearing, no cause of action could succeed in this suit.
8. Mr. Karanja Advocate for the 1st – 3rd respondents associated himself with the submissions by the 13th respondent. Mr. Kiruai Advocate adopted his written submissions filed on 1.12.2021. He submitted that to bring a case against the deceased defendants was an action in futility.
9. The 7th respondent relied on his replying affidavit aforementioned. On the part of the 2nd, 3rd and 4th defendants, they filed a notice of preliminary objection dated 21.7.2021 on the basis that: -
 - i. The suit was sub-judice.
 - ii. The case was related to ELC No. E002 of 2021.
 - iii. The objection proceedings were stayed by JR E002/2021.



- iv. The plaintiff was forum shopping.
 - v. The suit was fatally defective, misconceived and an abuse of the court process.
10. In his oral submissions by Mr. Mutunga advocate for the plaintiff conceded that judgment had been delivered in Meru ELC JR. 2/2021 brought by the 13th respondent. He took the view that the court was able to point out the errors by the 3rd defendant. On the issue of no cause of action against the 13th defendant, counsel submitted that preliminary objection takes precedent.
 11. Counsel however took the view that the suit was not solely pegged on the objection alone but covered the aspects of fraud hence the same could not be determined summarily.
 12. Further counsel submitted the suit was also based on the discrepancies on the demarcation map vis a vis what was on the ground.
 13. Regarding the issue of substitution of the deceased defendants counsel submitted the death of the 5th defendant had occurred recently as well as that of the 10th defendant.

Pleadings

14. The basis of the plaintiff's suit is the plaint dated 28.5.2021. The plaintiff avers she is the owner of Parcel Nos. 890 and 3273 in which the defendants had allegedly colluded and fraudulently subdivided her Parcel No. 890 Ruiru/Rwarera and brought other parcels namely 2962, 840, 3804, 3833, 3834, 3835, 3836, 3832 and 3801 on map sheet no. 108/1/17/13.
15. She prayed for a declaration that she was the legal owner of land Registration Number Ruiru/Rwarera/890 & 3273 by way of adverse possession, permanent injunction, eviction of the defendants and for the 2nd defendant and county surveyor to reinstate Land Registration No. 890 to its original size as originally demarcated.
16. The 5th and 12th defendant filed a defence and cross claim on 12.10.2021. The 7th defendant filed a defence dated 22.10.2021.

Preliminary Objection

17. The basis of the 13th defendant's objection is the holding in *Republic vs A.G & another ex parte Michael Mwirigi, Celina Nkirote & 2 others (interested parties)* (2022) eKLR. It was submitted that since the court had quashed the award made on 22.7.2020 regarding Objection No. 438 Ruiru/Rwarera and issued an order of mandamus to rehear the said objection and given that the plaintiffs Land Registration No. Ruiru/Rwarera 3273 and 890 arose out of the aforesaid objection, no cause of action was disclosed or could be sustained based on facts which have now changed.
18. Further, as regards the objection by 1st, 2nd, 3rd, 5th and 12th respondents was largely based on res sub-judice since at the time of filing, Meru ELC JR E002/2021 was still pending.
19. A preliminary objection consists a point of law which has been pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. See *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) E.A 696.
20. Paragraph 4 of the plaint states the plaintiff was the recorded owner of Parcel No. 890 and 3273 Ruiru/Rwarera. At paragraph 26 of the plaint the plaintiff plead that the defendants had fraudulently colluded and or subdivided Land Registration No. 890 and imported several other parcels of land into it.



21. In the prayers, the plaintiff sought for the court to declare her the legal owner of Land Registration No. 890 and 3273 Ruiru/Rwarera, injunction to issue against the defendants and eviction thereof and lastly, the reinstatement of Land Registration No. 890 to its original size as originally demarcated.
22. The ELC court derives the power to deal with judicial review proceedings is provided for under Section 13 (7) of the *Environment and Land Court Act*, Order 53 *Civil Procedure Rules*, Section 8 & 9 of the *Law Reform Act* and the *Fair Administrative Action Act* 2015.
23. In Michael Mwirigi case (supra), parties were the plaintiff herein and, the 2nd, 3rd, 5th, 12th, 13th defendants. The subject matter was Objection No. 438 Ruiru/Rwarera adjudication section regarding Parcel No. Ruiru/Rwarera 890 and 3273 and the award delivered on 22.7.2020 by the Land Adjudication Officer.
24. This court determined the issue and ordered for the rehearing of the Objection No. 438 both the plaintiff and in the responses filed by the defendants refer to other parcels of land which were not included in two parcels of land in which this court invalidated the objection proceedings and ordered for the rehearing of the objection.
25. As indicated above, a preliminary objection is based on pure point of law on the assumption that what is pleaded by one party is admitted by the other.
26. As to whether the decision in Meru ELC JR E001/2021 and the pendency of this suit is governed by the rules of res-judicata, my view is that the facts herein appear disputed by both sides.
27. In *Accredo AG & 3others vs Stefano Uccelli & another* (2019) eKLR cited with approval in *IEBC vs Jane Cheperenger & 2 others* (2015) eKLR, the court held whether the application was res-judicata was a point of contention which would only be ascertained by a merit consideration of rival arguments by the parties.
28. In the premises, I find the preliminary objection raised by the 1st, 2nd, 3rd, 4th, 5th, 12th and 13th defendants not a pure point of law and lacking merits. The same are dismissed with costs.
29. Coming to the issue of injunction and inhibition, in *Mrao Ltd vs first American Bank (K) Ltd and 2 others* (2003) eKLR, the court held a prima facie case is established if on the material presented there exist a right which has been infringed by the opposite party to call for an explanation for rebuttal from the latter.
30. In this case the plaintiff based her claim on the proceedings and letter marked CNM”1” and CNM “2” respectively. The two documents have following exparte Michael Mwirigi Maitima (supra) been invalidated. In essence therefore the substratum no longer exists and therefore the entire application dated 28.5.2021 has no legs to stand on.
31. Similarly, Section 68 of the *Land Registration Act* operates on land where title deeds have been issued. The applicant has not attached any search certificates for this court to proceed and inhibit the listed properties. The court cannot act without prove of registration and or existence of title deed in favour of known registered owners. Regarding the deceased defendants, no evidence of death has been exhibited. The court cannot act on mere allegations.
32. Consequently, I find the application lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 4TH DAY OF MAY, 2022

In presence of:



Mutunga for respondents

Kieti for 1st – 4th defendants

Kunyangi for Kaumbi for 13th defendant

HON. C.K. NZILI

ELC JUDGE

