



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

CONSTITUTIONAL PETITION NO. E004 OF 2021

EVANGELINE KARUGWATA GIKONO.....PETITIONER

VERSUS

JOYCE NKUENE CYPRIANO.....1ST RESPONDENT

DAVID MWITI CYPRIANO.....2ND RESPONDENT

RULING

1. Vide the application dated 25.1.2021, the applicant seeks conservatory orders restraining *the plaintiffs (she must have meant the respondents)* and their family members from any dealings or interfering with the applicant's enjoyment of the parcel Nkuene/Taita/1631 (hereinafter the suit land) pending the hearing and determination of the application and the suit. The applicant also prays for inhibition orders to be registered on the suit land. Finally, she seeks a stay of the proceedings in *Nkubu ELC no. 55 of 2019 Joyce Nkuene Cypriano & David Mwiti Cypriano vs Evangeline Karugwata Gikono* pending the hearing and determination of this application and suit.

2. The application is based on the grounds on the face of it and on the supporting affidavit of Evangeline Karugwata Gikono, the applicant. She avers that the respondents are her sister in law and nephew respectively who are also the legal representatives of the estate of Cypriano Kaiji Gikono (deceased), that the suit land is a resultant subdivision of NKUENE/TAITA/489 initially registered in her brother's name one Francis Nyamu Gikono (deceased). That her father one Gikono Ibeere (deceased) gathered the original parcel NKUENE/TAITA/109 and prior to his demise he had shown her the portion which she was to occupy with her two brothers Cypriano Kaiji Gikono (deceased) and Francis Nyamu Gikono(deceased) sharing equally the remaining portion.

3. Upon her father's demise, her brother Cypriano Kaiji Gikono only shared the family land with his other brother leaving the applicant out and the resultant parcels were NKUENE/TAITA 489 & 490. That her brother Francis Nyamu Gikono (deceased) took her in and accommodated her on his parcel which he later sub divided into two portion NKUENE/TAITA 1630 & 1631 and sold NKUENE/TAITA/1630. He then gifted her parcel NKUENE/TAITA/1631 as he had no family of his own. That he later executed all relevant documents and even obtained land control board consent dated 28.10.1999 but he unfortunately died. Later, her other brother learnt of the land which was gifted to her and he accused her of forging documents and she was arrested and convicted in Criminal Case No. 315 of 2000, but she was acquitted on appeal in Meru HCCA No. 237 of 2001.

4. Her brother Cypriano Kaiji Gikono (deceased) filed Meru succession cause No. 63 of 2000, In The Matter Of The Estate Of Francis Nyamu Gikono (deceased) and registered the suit land in his name. She sought for a revocation of the grant, but her application was dismissed on the grounds that her registration as the proprietor of the suit land was through criminal activity as by that time, her appeal had not yet been determined.

5. The applicant then filed Meru HCCC No. 26 of 2006 Evangeline Karugwata Gikono V Cypriano Kaiji Gikono where she sought for a declaration that she is entitled to the suit land and a permanent injunction against the defendant. The defendant filed a preliminary objection that the suit was res judicata to Meru succession cause No. 63 of 2000 and the court upheld it striking out her suit.

6. That in 2008 she took the dispute to the Meru Central District Land Tribunal Case No. 68 of 2008, which ruled in her favour. The award thereof was adopted as a judgment in Nkubu Land Tribunal Case No. 2 of 2008. This culminated in the registration of the suit parcel NKUENE/TAITA/1631 in her name in the year 2015.

7. That the defendants herein filed Chuka Succession Cause No. 41 of 2010 In The Matter Of The Estate Of Cypriano Kaiji Gikono (deceased) and fraudulently included the suit parcel as part of the estate. This succession matter was transferred to Meru where it became Meru HC Succession Cause No. 752 of 2013 and the respondents proceeded to register the land in their names. Vide an application dated 23/04/2019 filed in the same suit, the applicant sought an injunction against the respondents and a rectification of the grant so as to remove the suit land from the list of the estate of the deceased, but the said application was dismissed on the grounds that she had not presented a

valid court order vesting ownership of the suit land in her name.

8. That now the respondents have filed Nkubu ELC No. 55 of 2019 seeking her eviction from the suit land and are threatening to sell and evict her and her family from the said land, yet she has been occupying and cultivating this land her entire lifetime over 80 years. She contends that she has extensively developed the suit land, which is the source of her livelihood and that of her family. If the orders sought are not granted, she will be impoverished, suffer great prejudice, irreparable loss and damages.

9. The application was served but no responses were filed. It is quite clear that the history of the suit land is long and convoluted. In particular, this court takes cognizance of the fact that the dispute has been before the courts severally in succession causes, in the criminal arena and in civil processes.

10. In paragraph 31 and 32 of her supporting affidavit, which is a reflection of the contents of paragraph 33 of her petition, the applicant states that vide the application dated 23.4.2019 filed in Meru HC succession cause no. 752 of 2013, she sought for inter alia injunction orders against the respondents herein, annulment or rectification of grant so as to remove the suit land from the list of the estate property and reversion of the suit land into her names, but her application was dismissed vide the ruling of 23.11.2020. What then is the import of that ruling of 23.11.2020?

11. If this court was to grant the conservatory orders sought herein, the applicant would have succeeded where she failed in the application of 23.4.2019, yet even at this stage of the trial, the applicant's claim to the ownership of the land is yet to be ascertained and determined. This court is cautious of granting orders which may appear to juxtapose orders which have been given by courts of concurrent and horizontal jurisdiction.

12. In the case of **Alvin Mbae and 2 others vs Kinyua Muketha and 2 others (2018) eKLR**, Judge P.M Njoroge stated that;

“I find that I have no authority to decide in favour of the plaintiffs when another court which had horizontal jurisdiction similar to mine had found the issues concerning the suit land as having been heard and determined on their merits..... A studious by stander watching the court doing so would surmise that he is beholding veritable judicial phantasmagoria. A decision made by a judge seized of concurrent and/or horizontal jurisdiction with another judge having his decision juxtaposed against that of another of similar status! he would think that the judiciary is a house of babel. I think that this would spawn judicial anarchy and chaos. I opine that the plaintiffs have been involved in a forum shopping misadventure.”

13. Having been denied the injunctive orders before the succession court on the basis that the applicant had no court order vesting ownership of the suit land in her, then it is imperative that she first proves her claim to the ownership of the land before the issuance of such orders.

14. On the issue of stay of proceedings, I find that the plaint in the Nkubu matter indicates that the issue of ownership of the suit land was determined in a court of law. The applicant herein has not indicated the nature of her defence or rebuttal to those averments. This court is not seized of the full proceedings in the Nkubu matter and in particular, the court does not know whether any orders have been issued in that court which may be in conflict with the orders sought herein.

15. All that is apparent is that the Nkubu matter was filed way back in year 2019 whereas this suit was filed in year 2021. I pose the question; Did the applicant attempt to get injunctive and inhibition orders in the Nkubu suit? The answer appears to be in the negative. This court is again cautious of giving orders that may appear to emasculate the independence of the Magistrate's courts.

16. In the Supreme Court of Kenya case of **Tullow Oil PLC & 3 others v PS Ministry of Energy & 15 others [2020] eKLR**, the court had this to say in regard to an application which was not opposed;

“In other circumstances, depending on its nature, where an application is unopposed, and the Court sees merit in it, then it should be granted without much ado. Not the present Motion as the same is fraught with all manner of difficulties”.

17. Likewise, the present application is unopposed, but it is fraught with all manner of difficulties including but not limited to past and present litigation forums. I decline to grant any orders at this stage. Instead, I direct that the suit be heard on priority basis. The application dated 25.1.2021 is hereby dismissed with no orders as to costs. The orders given on 22.2.2021 are hereby discharged.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 12TH DAY OF MAY, 2021 IN PRESENCE OF:

C/A: Kananu

M/S Murithi for petitioner

HON. LUCY. N. MBUGUA

ELC JUDGE