



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC NO. E002 OF 2021 (OS)

CONSOLATA MUTHONI (Suing as a legal Representative of the Estate of

BENJAMIN M'MAILUTHA KAILIBI (Deceased).....PLAINTIFF

VERSUS

CHARLES LIUNGIA.....1ST DEFENDANT/RESPONDENT

JUSTUS BENJAMIN IBUI.....2ND DEFENDANT/RESPONDENT

ATANASIO M'EKANDI M'MUKIRI.....3RD DEFENDANT/ RESPONDENT

RULING

1. Before me is a notice of motion dated 11/01/2021 brought pursuant to the provisions of Section 1A, 1B and 3A of the Civil Procedure Act and Section 68 of the Land Registration Act No. 3 of 2012. The applicant/plaintiff prays for the following orders;

1. Spent.

2. Spent.

3. That this Honorable court be pleased to issue an order of temporary Injunction restraining the respondents/defendants by themselves, their, servants and/or agents from entering, remaining, cultivating, selling, building or otherwise howsoever interfering with L.R NO. AKITHI III/3945, 642 and 3007 until this suit is heard and determined.

4. That this Honorable court be pleased to issue an order of temporary Injunction restraining the County Surveyor Meru North by himself, his servants and/or agents from entering, surveying or otherwise howsoever interfering with the boundary of L.R NO. AKITHI III/3945, 642 and 3007 until this suit is heard and determined.

5. That this Honorable court be pleased to make an order of inhibition, inhibiting all dealings with parcels *L.R NO. AKITHI III/3945, 642 and 3007 pending the hearing and determination of this suit or until FURTHER ORDERS.*

6. That the cost of this application be provided for

2. The application is based on the grounds on the face of it and on the supporting affidavit of the applicant, who avers that she is the granddaughter of the deceased who is the owner of land parcel no. AKITHI III/1475 which is situated on a prime area. That her grandfather had developed the land and constructed commercial houses which he rented out to various people doing business including the famous KANU and MAUMAU offices. That during the adjudication exercise between the year 1988 and 2000 parcels L.R NO. AKITHI III/3945, 642 and 3007 were moved from another area and strategically placed on the prime part of her grandfather's land hence taking away their land. Her grandfather has raised several objections to the said transfers and placement of the parcels on his land but he was not given a fair hearing as he was illiterate and he had no one helping him during the objections.

3. The 1st respondent was a member of the committee and he used his position to influence the decision of other committee members in particular the land adjudication officer to transfer the suit land to his relatives and friends.

4. That despite the transfers, the respondents have never taken possession and it is her grandfather and his family who have been living and openly utilizing the said land for more than 7 decades and are still in possession of the same. She was born on the suit land and in her

grandfather's house and lived there most of her life which house is currently occupied by her uncle and his family. The suit land is the only land they have and they have nowhere to go.

5. Further when her grandfather was sub-dividing the land to his sons, the area chief sneaked his own son's name so as to get a piece of the land which resulted in her grandfather filing MERU HCCC NO.47 OF 2011 in which the 1st respondent herein was a witness for the chief's son. Currently the County Surveyor Meru is scheduled to visit and resurvey the land for the purpose of re-establishing boundaries. She therefore prays that the application be allowed so as to preserve the land.

6. The application is opposed by all the respondents vide replying affidavits dated 26/01/2021 for 1st and 2nd respondents and one dated 27/01/2021 for the 3rd defendant. The 1st respondent denies that parcel no. I11/1575 was ever situated near the suit parcels. He contends that he was the original owner of the suit parcels nos. 642, 3007 and 3945 of which he sold parcel 3945 and 3007 to the 2nd and 3rd respondents respectively. That the family of the applicant has never utilized the suit parcels which were always under his control and occupation until he sold the aforementioned two parcels to the other respondents.

7. The 2nd defendant/respondent averred that he is the registered owner of parcel no. AKITHI III/3945 and he has availed a copy of a title to that effect. He avers that he is a bonafide purchaser of value of the said parcel from the 1st respondent and he has been in continuous control and possession of the same though it is the 1st respondent who looks after his land as he works and resides in Nairobi. There are no structures or any other development belonging to any other person on the land, the applicant is a stranger to him and to the parcel nor has he ever seen her or her grandfather on his parcel of land.

8. The 3rd respondent averred that he is the registered owner of land parcel no. AKITHI III/3007 and has been in exclusive possession of that land. That the photographs provided by the applicant showing maize and developments are his and not the applicants. The applicant is not in possession of the land and she does not have the capacity to bring this suit. Further, there is a pending suit relating to the issues raised herein in MERU CMCC NO. 17 OF 2015. He urges the court to reject the application with costs.

9. The applicant submitted that it is not in doubt that parcel AKITHI III/1475 belongs to the estate of the applicant and is in danger of being invaded and alienated by the respondents who have declared interests through the alleged parcel no's AKITHI III/642, 3007 and 3945. Further, the County Surveyor Meru County has scheduled a visit to the land to re-establish boundaries through the invitation of the area chief. These are all issues that can only be determined during the hearing of this suit. The applicant's family is in actual possession of the land, thus it is necessity for the court to intervene and issue injunction orders to restrain the respondents from interfering with the suit land as she stands to suffer irreparable loss and injury if the orders sought are not granted. It is important to preserve the status quo and it is in the interest of justice that the application be allowed. She relied on the cases of; **Paul Gitonga Wanjau V Gathuthi Tea Factory Company Ltd & 2 Others [2016]eKLR, Robert Mugo Wa Karanja V Ecobank (Kenya)Limited & another [2019]eKLR, Moses C. Muhia Njoroge & 2others V Jane W Lesaloi and 5 others[2014]eKLR, Mwambeja Ranching Company Limited & Another V Kenya National Capital Corporation Limited (Kenyac) & 6 others [2015]eKLR, Re Estate of Elijah Ngari (deceased)[2019]eKLR.**

10. The 1st and 2nd respondent submitted that the applicant has not met the threshold as articulated in **Giella V Cassman Brown** as the entire suit is also incompetent ab initio due to the fact that the applicant is not the registered owner of the suit parcels which are registered in the name of the 1st, 2nd and 3rd respondents thus they do not form part of the deceased estate. The grant ad litem issued to the applicant was issued for the purpose of concluding MERU CMCC NO. 47 OF 2011 and not for any other purpose. That the doctrine of adverse possession cannot be evoked as time did not start running until after registration which happened in 2017. It is also untrue that the applicant is in possession of the suit lands as the respondents are the ones in possession which has never been interrupted and if the orders sought are granted it would mean that the respondents will be removed from the land they occupy and it would be prejudicial to them. The respondents therefore urge the court to dismiss the application with costs.

11. The 3rd respondent submitted that the applicant has no capacity to bring this suit and that there is a pending suit relating to the same issues raised herein. The applicant purports to be the legal representative of the estate of the deceased on the strength of grant of letters of administration issued on 26th June 2015, however the same was issued for the sole purpose of concluding CMCC 47 OF 2011 and does not clothe the applicant with the authority to institute this suit, she ought to have obtained a limited grant to bring this suit and the same should be struck out with costs.

12. Further she has not established a prima facie case to warrant the grant of the orders sought, she has not proven that the deceased's occupation was non-permissive, exclusive and uninterrupted for a period of 12 years. He relied on the case of **Hawo Shanko V Mohamed Uta Shanko [2018]eKLR.**

13. I have carefully perused the application, the supporting affidavit and the replying affidavits and the issues to be determined are;

- a. Does the applicant have locus standi to file this suit?
- b. Has the applicant met the threshold for the grant of temporary injunction?
- c. Should the court issue an order of inhibition?
- d. Who should bear the cost of this application?

14. On the issue of locus, the respondents aver that the applicant's limited grant attached was for the sole purpose of concluding MERU CMCC NO. 47 OF 2011. Though I have seen a copy of that grant, I find that the issue of locus has not been properly raised in the pleadings. The issue was only put forward in the submissions of the respondents. As such, the issue is not up for determination. The respondents are at

liberty to properly raise the issue either in their pleadings or through a preliminary objection.

15. On injunction, I make reference to the case case of Giella vs Cassman Brown & Company Limited (1973) E A 358, where the conditions for granting injunctive orders were reiterated in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR as follows;

“in an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favor. These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially”

16. In the current situation, the applicant is not the registered owner of the suit parcels. She claims to be in occupation of the suit lands, but so do the respondents. It is therefore the word of the applicant against that of the respondents and vice versa. What is clearly apparent is that the issues at hand are deeply contested, in which the parties are actually advancing their substantive issues at this interlocutory stage.

17. The court cannot even give an order of status quo since the nexus between the 3 suit parcels 3945, 642 and 3007 in relation to parcel 1475 is yet to be established. The parties ought to pursue an early hearing date to have a full trial. As at now, I find that the injunctive orders are not merited. Nevertheless, it is crucial to preserve the suit land by having inhibition orders in the intervening period.

18. In the final analysis, an order of inhibition is granted in terms of prayer no. 5 in the application, while other prayers are dismissed. The costs of the application shall abide the outcome of the suit.

DATED, SIGNED AND DELIVERED VIA EMAIL AT MERU THIS 21ST DAY OF JULY, 2021.

HON. LUCY. N. MBUGUA

ELC JUDGE