



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Sebastian Gichuru M'Mitambo (Deceased) (Succession Cause 270 of 2008) [2024] KEHC 5848 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5848 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
SUCCESSION CAUSE 270 OF 2008
EM MURIITHI, J
MAY 23, 2024**

BETWEEN

MUCECE NKANATA APPLICANT

AND

STANLEY MUNYUA MITAMBO 1ST RESPONDENT

ALBERT GITOBU 2ND RESPONDENT

SAMMY NJAVANI 3RD RESPONDENT

VILISIA IGOKI 4TH RESPONDENT

DAVID KIRIMI 5TH RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 16/1/2024, pursuant to Order 40 Rules 1 and 2 of the *Civil Procedure Rules*, the Applicant seeks that:
 1. Spent
 2. This honorable court be pleased to grant an order of injunction restraining the Respondents from entering or in any way interfering with the Applicants user or damaging/cutting the Applicant's trees and harvesting the Applicant's tea on LR Abogeta Upper Kithangari/1841, 1842, 1843 and 1844 pending the hearing and determination of this application interpartes.
 3. This honorable court be pleased to grant an order of injunction restraining the Respondents from entering or in any way interfering with the Applicants user or damaging/cutting the Applicant's trees and harvesting the Applicant's tea on LR Abogeta Upper Kithangari/1841, 1842, 1843 and 1844 pending the hearing and determination of this Succession cause.



4. This honorable court be pleased to restrain Stanley Munyua and Albert Gitobu from cutting the trees on the suit land pending the hearing and determination of this application interpartes.
2. The application is based on grounds on the face of it and supported by an affidavit sworn by the Applicant. She avers that her deceased husband Sebastian Gichuru M'Mitambo was the registered owner of L.R Abogeta/ U-kithangari/1281. The 1st Respondent filed this cause whereby he distributed the land without her consent, and fraudulently subdivided it into 4 portions namely LR 1841, 1842 1843 and 1844. A certificate of confirmation of grant shows that Peter Mwebia, Siliver Kaari, Patrick Mwiti, John Muthomi, Lucy Nduru, Sammy Njavani, Verisia Igoki and David Kirimi, who are strangers to the estate, were given the land as beneficiaries. She has been in occupation of the suit land but on 13/1/2024, the Respondents forcefully entered the land and starting harvesting her gravilia trees. The Respondents had earlier on forcefully entered the land, cultivated it and harvested her trees. The Respondents are planting more tea and harvesting her husband's tea leaves, and unless they are restrained from interfering with the land, she stands to suffer irreparable loss.
3. The 1st Respondent opposed the application vide his replying affidavit sworn on 2/2/2024. He avers that upon the demise of his brother, the deceased herein, they filed this cause over their father's land namely L.R No. Abogeta/u-kithangari/629 which resulted into L.R No. Abogeta/kithangari/1281 & 1280 measuring 3.486 Ha & 0.405 Ha respectively. According to the green card, L.R No. Abogeta/u-kithangari/1281 was owned in common by the deceased and himself whereby he owns 0.866 Ha while the deceased owns 2.62 Ha. In law, the 0.866 Ha of L.R No. Abogeta/u-kithangari/1281 is his absolute property which is distinct from the share of the deceased. In 2022, his 0.866 Ha was excised from L.R No. Abogeta/u-kithangari/1281 and was registered as L.R No. Abogeta/kithangari/1843 measuring 0.866 Ha. In 2022, he sold 1 acre of his land and upon survey, he transferred the said acre to the 2nd Respondent which was registered as L.R No. Abogeta/u-kithangari/3216. He has no interest whatsoever in the deceased's acreage of 2.62 Ha, and he should not be restrained from enjoying his land, which was legally and procedurally registered in his name. He has owned and exclusively used his land even during the lifetime of his brother, the deceased herein, and he urges the court to dismiss the application with costs.
4. The 2nd Respondent opposed the application vide his replying affidavit sworn on 2/2/2024. He avers that the deceased and the 1st Respondent shared their late father's estate and they each received their respective shares. He has been farming on the 1st Respondent's land since 2000, with the 1st Respondent's permission. In 2022, he purchased one acre from the 1st Respondent which was surveyed and upon issuance of a new number to wit L.R No. Abogeta/u-kithangari/3216, the 1st Respondent transferred it to him. He is advised that since he got his title from the 1st Respondent's distinct share in parcel No. 1281, then the orders sought cannot issue. He has planted maize and tea bushes on his 1 acre and he is in occupation thereof.

Submissions

5. The Applicant urges that she has established a *prima facie* case with high chances of success, and cites *Giella v Cassman Brown* (1973) E.A 358 and *Mrao v First American Bank of Kenya Limited and 2 Others* (2003) KLR. She urges that unless the orders sought herein are granted, she stands to suffer irreparable loss since the subject matter is her only source of livelihood and she is in actual and peaceful occupation thereof. She urges that she has meticulously demonstrated that the application is merited and it ought to be allowed, and cites *Julius Onjiro Odera Amapesa & Another v Emily Judith Odera* (2013) eKLR and In *Re Estate of Kamau Mwanthi Kamatu (Deceased)* (2020) eKLR.



6. The 1st and 2nd Respondents urge that an order of injunction would technically amount to evicting them from their properties registered in their names. They urge that the doctrine of survivorship does not apply to land owned in common and they are entitled to deal with their land as they wish. They urge that they are protected under sections 25 and 26 of the [Land Registration Act](#), and pray for the dismissal of the application with costs.

Determination

7. An application for interlocutory injunction is governed by the principles of interlocutory injunction set out in *Giella v Cassman Brown* (1973) EA 358, and the question before the court is whether a prima facie case has been established; whether damages are adequate compensation in the circumstances of this case, and where, in case of doubt, the balance of convenience lies on the issue of grant of temporary prohibitive injunction.
8. The court notes the copy of green card for L.R No. Abogeta/u-kithangari/629 which was initially registered in the name of Mitambo Igweta before its subsequent subdivision into L.R No. Abogeta/u-kithangari/1280 and 1281.
9. The court equally notes the copy of green card for L.R No. Abogeta/u-kithangari/1281 measuring 3.486 Ha was registered in the name of the deceased owning 2.62 Ha and the 1st Respondent owning 0.866 Ha on 3/3/1999 and a title deed issued on 4/3/1999. The land was thereafter subdivided into L.R No. Abogeta/u-kithangari/1841, 1842, 1842 and 1844 on 17/2/2022. The 1st Respondent acquired title to L.R No. Abogeta/u-kithangari/1843 measuring 0.866 Ha on 23/2/2022.
10. The court further notes the copy of green card for L.R No. Abogeta/u-kithangari/1280 which was registered in the name of the deceased and the 1st Respondent on 3/3/1999.
11. According to the exhibited official search for L.R No. Abogeta/u-kithangari/3216, the same was registered in the name of the 2nd Respondent on 18/11/2022.
12. This court finds that the Applicant has not established a prima facie with a probability of success. The 1st Respondent has proved on a balance of probabilities that L.R No. Abogeta/u-kithangari/1281 was owned by the deceased and him, and he cannot be restrained from utilizing what legally belongs to him.
13. This court also finds that the Applicant will not suffer any irreparable loss as the 1st Respondent is only pursuing his 0.866 Ha of L.R No. Abogeta/u-kithangari/1281 which he has already obtained title to, and if there be any challenge on his title the same must be before an appropriate forum. The ownership of the 1st Respondent's land does not in any way interfere with the Applicant's occupation and use of the 2.62 Ha of L.R No. Abogeta/u-kithangari/1281 belonging to the deceased herein.
14. This court finds that the balance of convenience tilts in favour of the Respondent who has title to the parcel of land in dispute.

Orders

15. Accordingly, for the reasons set out above, this court finds that the principles for the grant of interlocutory injunction sought by the applicant have not been satisfied and, consequently, the application dated 16/1/2024 is dismissed with costs to the 1st and 2nd Respondents.

Order accordingly.

DATED AND DELIVERED THIS 23RD DAY OF MAY, 2024.

EDWARD M. MURIITHI



JUDGE

APPEARANCES:

Mr. Ayub Anampiu for the Applicant.

Mr. Mwirigi K. for the 2nd Respondent.

Mr. Ntarangwi for the estate of David Kirimi Dec'd. Interested Party.

