



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELC NO. E012 OF 2021 (OS)**

**IN THE MATTER OF THE ESTATE OF MUGWIKI RIMBERIA**

**ALIAS M'MUGWIKI M'RIMBERIA (DECEASED)**

**AND**

**IN THE MATTER OR ORDER 37 RULES 1, 16, 17,**

**18 & 19 OF THE CIVIL PROCEDURE RULES 2010**

**AND**

**IN THE MATTER OF L.R NO. NYAKI/MULATHANKARI/243**

**BETWEEN**

**TABITHA NTINYARI M'MUGWIKI.....1<sup>ST</sup> PLAINTIFF**

**AMOS KIMATHI JOTHAM.....2<sup>ND</sup> PLAINTIFF**

**GEDION KAIMENYI.....3<sup>RD</sup> PLAINTIFF**

**DORCAS MAKENA.....4<sup>TH</sup> PLAINTIFF**

**ALICE MUKIRI JOTHAM.....5<sup>TH</sup> PLAINTIFF**

**VERSUS**

**JANET KIRUGI M'RIMBERIA.....1<sup>ST</sup> DEFENDANT**

**MOSES MURITHI JOTHMA.....2<sup>ND</sup> DEFENDANT**

**KENYA WOMEN MICROFINANCE BAK PLC.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By an originating summons dated 22.3.2021 the applicants seeks the following orders:

- (i) *Whether the plaintiffs, the 1<sup>st</sup> and 2<sup>nd</sup> defendants are members of one family and heirs of the estate of Mugwika Rimberia alias M'Mugwika Rimberia*
- (ii) *Whether the said M'Mugwika Rimberia alias M'Mugwika M'Rimberia died on 1.11.1993.*
- (iii) *Whether L.R No. Nyaki/Mulathankari/243 belonged to and was in the name of Mugwika Rimberia alias M'Mugwika*

*M'Rimberia until his death on 11.11.1993.*

*(iv) Whether the suit land was ancestral land and whether the deceased was registered as a trustee (customary trust of the land in question to hold the same in trust for himself, the 1<sup>st</sup> and 2<sup>nd</sup> defendants and all the plaintiffs.*

*(v) Whether the plaintiffs and 2<sup>nd</sup> defendant were all born and raised by the deceased on the suitland and whether the plaintiffs have developed the suit land by construction of their homes and whether they earn a living therefrom.*

*(vi) Whether the demise of the registered owner of the suitland was transmitted to the 1<sup>st</sup> defendant via Meru H.C Succ 367 of 2011 and whether the registration of the suit land on 1.11.2012 in the name of the 1<sup>st</sup> defendant was done so as a trustee or as an absolute owner and proprietor of the suitland.*

*(vii) Whether the 1<sup>st</sup> defendant is in breach of the trust bestowed upon her when she agreed to charge the said family land to the 3<sup>rd</sup> defendant to secure or guarantee the repayment of a personal loan advanced by the 3<sup>rd</sup> defendant to the 2<sup>nd</sup> defendant.*

*(viii) Whether by using the suitland as security as aforesaid and without the express and written consent and authority of the plaintiffs, the 1<sup>st</sup> defendant acted as an absolute owner and ignored the proprietary interests of the plaintiffs over the suitland and therefore was in breach of the trust bestowed upon her.*

*(ix) Whether the 3<sup>rd</sup> defendant failed to conduct proper and due diligence to establish on the ground, whether the plaintiffs had settled, developed and depended on the suitland and that their consent was mandatory before the family land was offered as collateral to the 3<sup>d</sup> defendant.*

*(x) Whether the plaintiffs have any protectable or justiciable right or interest in the Suitland in view of the fact that the suitland is family and ancestral land.*

*(xi) Whether the 3<sup>rd</sup> defendant sought and obtained consent from the plaintiffs before accepting the Suitland as collateral for the personal loan advanced to the 2<sup>nd</sup> defendant.*

*(xii) Whether the charge over the suitland by the 3<sup>rd</sup> defendant is illegal, procedural and offends the interests of the plaintiffs over the suitland and whether the register of the suitland ought to be amended to show that the 1<sup>st</sup> defendant hold the said land in trust for herself and all her children in equal shares and also whether the plaintiff's suit succeeds.*

2. Alongside the originating summons was an application brought under certificate of urgency dated 22.2.2021 seeking the following orders:

*(a) That the application be certified urgent and it be heard ex parte in the first instance.*

*(b) That pending interpartes hearing of the application an order of inhibition be issued, inhibiting the registration of any dealings over L.R No. Nyaki/Mulathankari/243 and the land registrar at Meru be directed to register the inhibition so issued.*

*(c) That pending interpartes hearing of the application an order of temporary injunction be issued, restraining the 3<sup>rd</sup> defendant, its agents, workers auctioneers, assigns, contractors or any other person acting at the 3<sup>rd</sup> defendant's directions, contract or behest from selling by way of public auction or private treaty L.R No. Nyaki/Mulathankari/243.*

*(d) That pending the hearing and determination of the suit or until further orders of the court an order of inhibition be issued, restraining the 3<sup>rd</sup> defendant, its agents, workers, auctioneers, assigns, contractors or any other person acting at the 3<sup>rd</sup> defendant's directions contract or behest from selling by way of public auction or private treaty L.R Nyaki/Mulathankari/243.*

*(e) That pending the hearing and determination of the suit or until further orders of the court an order of temporary injunction be issued, restraining the 3<sup>rd</sup> defendant, its agents, workers, auctioneers, assigns, contractors or any other person acting at the 3<sup>rd</sup> defendant's directions, contract or behest form selling by way of public auction or private treaty L.R No. Nyaki/Mulathankari/243.*

*(f) Costs.*

3. The application is based on the following grounds:

*(i) The plaintiffs are children of Mugwika Rimberia alias M'Mugwika M'Rimberia who died on 11.11.1993.*

*(ii) The deceased was registered as the owner of L.R No. Nyaki/Mulathankari/243 on 18.12.1967 which was the only family and ancestral land. The deceased therefore held the said land as a trustee for himself and all his children and wife under the Kimeru customary trust laws.*

*(iii) Upon the demise of the original owner and trustee over L.R No. Nyaki/Mulathankari/243, a succession cause was filed at Meru High court being succ. Cause no. 367 of 2011 and the 1<sup>st</sup> defendant was registered as the owner of the said land, a trustee on behalf of the plaintiffs 1 and 2 defendants.*

(iv) *In breach of the trust bestowed upon her, the 1<sup>st</sup> defendant charged the suitland in favour of the 3<sup>rd</sup> defendant, to secure the repayment of a personal loan advanced to the 2<sup>nd</sup> defendant by the 3<sup>rd</sup> defendant. No consent and/or authority and/or permission was sought and obtained from the plaintiffs before the only family and ancestral land was offered as collateral to the 3<sup>rd</sup> defendant.*

(v) *That the 2<sup>nd</sup> defendant has defaulted in the repayment of his loan and the 3<sup>rd</sup> defendant has advertised the suit land for sale by public auction on 2.3.2021.*

(vi) *That unless the orders sought are granted, the plaintiff and their children shall be rendered homeless and destitute because once the hammer falls at the public auction, intended to take place on 2.3.2021, then the suit property shall be out of the reach of the plaintiffs.*

(vii) *That the plaintiffs and their children do not have any other land where they can live and eke a living from. The plaintiffs and their children all depend on the suit land as a home and a place to farm and earn a living therefrom.*

4. The application was certified urgent and interim orders issued on 24<sup>th</sup> February 2021 following whose service to the respondents entered an appearance on 9<sup>th</sup> March 2021. The 1<sup>st</sup> and 2<sup>nd</sup> respondents are not opposed to the motion.

5. The 3<sup>rd</sup> respondent opposed the application by a preliminary objection dated 26<sup>th</sup> April, 2021. Likewise the 3<sup>rd</sup> respondent filed a replying affidavit sworn on 9<sup>th</sup> March 2021 and attached annexures marked JKM 1-20 (a) & (b). Following leave 3<sup>rd</sup> defendant filed a further replying affidavit sworn on 23<sup>rd</sup> April 2021.

6. This court on 27<sup>th</sup> April 2021 gave directions that both the application dated 22.2.2021 and the 3<sup>rd</sup> defendants preliminary objection dated 26<sup>th</sup> April 2021 be prosecuted simultaneously by way of written submissions. In compliance the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed undated submissions on 26.7.2021 and 10<sup>th</sup> June 2021 respectively.

### **Background facts**

7. Parcel No. Nyaki/Mulathankari/243 initially was registered in the name of the late Mugwika Rimberia alias M'Mugwika M'Rimberia who passed on 11.11.1993. Subsequent to his death there was Meru High court succession cause no. 367 of 2011 whereby the 1<sup>st</sup> respondent was bequeathed the whole land by a grant dated 27<sup>th</sup> June 2012. The 1<sup>st</sup> respondent proceeded to register the property under her name as consented by other beneficiaries, guaranteed a loan and charged the property to the 3<sup>rd</sup> respondent, defaulted in repayment of the loan leading to issuance of statutory notices of sale. A suit was filed before the Chief Magistrates Court in Meru CMCC no. 216 of 2019 which debarred the exercise of statutory powers by the 3<sup>rd</sup> respondent pending issuance of requisite statutory notices.

8. The 3<sup>rd</sup> respondent subsequently regularized and gave a fresh notice for auction of the suit land on account of default on 17<sup>th</sup> October 2019.

9. Alfred Mwit Bundi herein the appellant in the Court of Appeal applied for revocation of the confirmed grant in Meru succession cause no. 367 of 2011 claiming to have been omitted in the cause though listed as one as per chief's letter dated 28.6.2011.

10. The succession court held the 1<sup>st</sup> respondent herein did not state she was to hold the property in trust for herself and the other beneficiaries and nor did the latter object and or claim any trusteeship during the confirmation of the grant.

11. It is also a fact that all parties herein were also parties in the application for revocation of grant to save to say the 2<sup>nd</sup> and 3<sup>rd</sup> respondents herein were merely joined as interested parties by Alfred Mwit Bundi on 11.11.2019 and hence were not initial dependents or beneficiaries to the estate as the bank only came into the picture on 1<sup>st</sup> March 2016 when the suit property was transmitted and registered in the name of the 1<sup>st</sup> respondent and was charged to it.

12. Further the court made a definite finding the 1<sup>st</sup> respondent herein failed to inform the 3<sup>rd</sup> respondent the land was an ancestral land occupied by her children and grandchildren at the time of the loan issuance.

13. Aggrieved by the said ruling Alfred Bundi has appealed to the Court of Appeal in Nyeri.

14. Given the foregoing facts the 3<sup>rd</sup> respondent has raised a preliminary objection to the application dated 27<sup>th</sup> April 2021 on the following grounds:

(i) *The plaintiffs applicants suit falls short of the doctrine of res-subjudice as there is an appeal on the same subject matter herein between the parties pending determination under Nyeri civil appeal no. 41 of 2021, Alfred Mwit Bundi vs Janet Kirungi M'Mugwika and 5 others.*

(ii) *That the plaintiff/applicants suit is filed offends section 6 of the Civil Procedure Act and the court lacks jurisdiction to grant the orders prayed for.*

(iii) *That the plaintiff/applicants suit is instituted against the 3<sup>rd</sup> defendant is vexatious and otherwise an abuse of the process of this court and ought to be struck out forthwith. The 3<sup>rd</sup> respondent relies on the following case law:*

- **Kenya National Commission on Human Rights vs Attorney General IEBC and 16 others (2020) eKLR.**
- **Rep vs Paul Kihara Kariuki AG and 2 others ex parte law society of Kenya 2020 eKLR.**
- **Kiama Wangai vs John N. Mugambi and another (2012) eKLR.**
- **Wendano Matuu co. Ltd and 4 others vs Stephen Ndambuki Muli and 12 others Registrar of companies (business registration services interested party (2021) eKLR**

15. It is the 3<sup>rd</sup> respondents view in its written submissions that the suit herein is both res subjudice and resjudicata.

The **Supreme Court of Kenya Independent Electoral & Boundaries commission vs Maina Kiai & 5 others 2017 eKLR** case, has held a party that seeks to invoke the doctrine of resjudicata must establish:

- (a) *The suit or issue was directly and substantially in issue in the former suit.*
- (b) *That former suit was between the same parties or parties under whom they or any of them claim.*
- (c) *Those parties were litigating under the same title.*
- (d) *The issue was heard and finally determined in the former.*
- (e) *The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.*

16. With regard to res subjudice, Section 6 of the Civil Procedure Act expressly provides that no court shall proceed with a trial of any suit or proceeding in which the matter in issue is also directly and substantially instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

17. It is admitted in the instant suit there was a succession cause involving the parties herein which is now pending before the Court of Appeal. It is also not in dispute there was another suit involving the parties herein though not all of them before the Chief Magistrates Court Meru though its outcome is not clarified herein.

18. The only exception in the instant suit and the lower court is that the appellant in the Court of Appeal has not been a party in both suits.

19. It is not in contention by all parties herein that the subject issue is L.R No. Nyaki/Mulathankari/243 in all the suits and parties herein are involved one way or the other but in different capacities.

20. The 3<sup>rd</sup> respondent submits the prayers raised in the originating summons are both res subjudice and res judicata while on the other hand the applicants submit the issues and prayers have not been determined by a court of competent jurisdiction.

21. The court is faced with a situation wherein there are three major issues all which are intertwined namely a succession dispute, a commercial dispute and a customary law trust suit claim but all spread in different courts at different stages of trial.

22. Regarding the instant suit, it is now trite law that customary trusts are overriding interests protectable under section 28 of the Land Registration Act 2012. The applicants originating summons is premised on the facts that the applicants are members of the deceased family are in possession and actual occupation of the suitland, with protectable customary law rights against the respondents herein.

23. My further understanding of the applicants' case is that even though the 1<sup>st</sup> respondent was registered as an absolute proprietor by transmission following a succession cause, the registration was subject to the applicants' overriding interests.

24. The Supreme Court of Kenya has now cleared the confusion on the issue of declaration of customary trust over registered land in **M'Inanga Kiebia vs Isaaya Theuri M'Lintari and another (2018) eKLR.**

25. In my considered view and looking at the circumstances of this case, there is no record that the issues of customary law trust raised in the originating summons have been conclusively heard and determined by a competent court and a decision rendered so as to find a claim that the suit herein is resjudicata or an abuse of the court process.

26. To my mind, the application before the High Court was simply whether or not Alfred Bundi was a beneficiary or dependant of his deceased grandparent in terms of section 26 or 29 of the Law of Succession Act even though he approached the court through an application for revocation of grant and brought on board the respondents herein as interested parties.

27. The High Court did not conduct any hearing on the matters of customary law trust as overriding interests and make definite findings, particularly on question no's 4 -12 of the originating summons, which in any event are intertwined with issues 1-3 thereof.

28. Turning to the issue of whether the suit herein is vexatious and or an abuse of the court process, given the issues raised in the originating summons, though cross-cutting with matters in the earlier cases, one cannot therefore say the applicants are irritants, out to annoy, lack bonafides, are malicious and have no iota of law supporting their claim as submitted by the 3<sup>rd</sup> respondent, in the attached caselaw.

29. The applicants have to my mind brought forth a customary claim as per kimeru customary law which this court under Article 2 (4) of the Constitution, Section 3 (2) of the Judicature Act and section 28 of the Land Registration Act is supposed to apply and be guided by it.

30. Faced with similar scenario in the case of **Kiama Wangai vs John N. Mugambi & another (2012) eKLR, Nguruman Ltd vs Jan Bonde Nielsen and another (2017) eKLR** and the Court of Appeal in **Kenya Commercial Bank Ltd vs Muiri Coffee Estate Ltd and 30 others 2013 eKLR**, the court stayed one of the pending suit till the other was heard and determined together. On my part I take the considered view that it would be in the interest of justice to stay the instant suits until the appeal is heard and determined.

31. Turning to the issue of the application dated 22.2.2021 the applicants are seeking inhibition and injunctive orders against the respondents over the suit premises pending hearing and determination of the originating summons. They rely on case law of **Nguruman Ltd vs Jan Bonde Nelsen & 2 others (2014) eKLR, Tabitha Wambui Muchemi vs Zipporah Njoki (2017) eKLR Esther Wanjiru Githatu vs Mary Wanjiru Githatu (2019) eKLR Rahab Njirika Ngugi vs Lucy Nyaguthi Ndirangu (2017) eKLR and Eunice Ngongo Wahome vs Joseph Kihara Theuri (2015) eKLR**.

32. On the other hand the 3<sup>rd</sup> respondent opposes the application relying on the case law of **Sceneries Ltd vs National Land commission (2017) eKLR, Benson Ngungi vs Francis Kabui Kinyanjui & others (1989) KLR 146, Zipporah Mwangi vs Zipporah Wanjiru Njoroge (2017) eKLR Re-estate of Josephat Magiri Mwongera (deceased) 2019 eKLR and Utetabi Africa adventures Ltd and another vs Christopher Michael Lockley (2017) eKLR**.

33. The bottom line is that there is an impending auction over the subject land on account of default by the 2<sup>nd</sup> respondent who is the principal debtor to the 3<sup>rd</sup> respondent over the 1<sup>st</sup> respondent parcel of land wherein she is a guarantor. On the other hand the applicants are alleging customary trust to oppose the auction sale.

34. Further, the applicants allege they have been in possession/occupation of the subject land prior to the registration of the property on account of transmission and extension of the loan to the 2<sup>nd</sup> respondent by the 3<sup>rd</sup> respondent and up to date.

35. **Section 68 (1) of the Land Registration Act** provides;

*“The court may make an order inhibiting for a particular time generally until a further order the registration of any land lease or charge”.*

36. This provision gives the court discretion to issue orders so as to preserve the property from that which would otherwise render a court order incapable of execution or to give an opportunity to hear and decide the matter.

37. Having reached a conclusion above to have this suit stayed in order for the Court of Appeal matter to be determined one way or the other, it is in the interest of justice to order status quo be maintained with no precipitate adverse action by the respondents herein over the subject property.

38. In similar circumstances the Court of Appeal in **Alice Karuru Kithinji vs Gideon Kithinji Limberia (1997) eKLR**, held there is always need to give a measure of protection over the suit property. I therefore order the status quo subsisting at the time of making this ruling to continue till the hearing and determination of the appeal. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 15<sup>TH</sup> DAY OF SEPTEMBER, 2021 IN PRESENCE OF:**

C/A: Kananu

Mr. Karanja for plaintiffs

1<sup>st</sup> and 2<sup>nd</sup> defendants in person

Mr. Kimaita for 3<sup>rd</sup> defendants

**HON. C.K. NZILI**

**ELC JUDGE**