



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. E25 OF 2020**

**FRANCISCA MUMBUA PETER** (*Suing as the administratrix of the*

*estates of MILKA WAVINYA KAKUI &*

**KAKUI MALII KIKETI**—*both deceased*) ..**PLAINTIFF/APPLICANT**

**VERSUS**

**1. KEVIN MULEI NGUMBI**

**2. STEPHEN KYALO NGUMBI**

**3. ERIC NDONYE NGUMBI** (*Sued in capacity of the administrators*

*of the Estate of PETER NGUMBI*

**MULEI-Deceased)**.....**DEFENDANT/RESPONDENT**

**R U L I N G**

1. By a Notice of Motion dated 10<sup>th</sup> November, 2020, the Plaintiff/Applicant sought for the following orders;

**a) Spent**

**b) Spent**

**c) That a temporary injunction restraining the Respondents, their relatives, agents, employees, servants and/or assigns or any other party from interfering with properties known as Machakos/Katheka-Kai “B” Block 4/146, 147, 148 and 149 pending hearing and determination of the suit against the Respondents.**

**d) That the costs be in the cause.**

2. The application is based on the grounds on the face of the Application together with the Supporting Affidavit of the Applicant sworn on 10<sup>th</sup> November, 2020 in which she averred that she was the administrator of the estate of the late Milka Wavinya Kakui and the late Kakui Malii Kiketi. That the two deceased persons were member numbers 169 and 24 respectively of Katheka-Kai Farmers’ Co-operative Society Limited and were owners of properties known as Machakos/Katheka-Kai “B” Block 4/146, 147, 148 and 149 respectively, having been allotted the same by the said Society. Further that the Respondents who are administrators of the Estate of the late Peter Ngumbi Mulei in Machakos HCSC No. 897 of 2010 maliciously, wrongfully and unjustifiably included the properties Machakos/Katheka-Kai “B” Block 4/146, 147, 148 and 149 as forming part of the estate of the late Peter Ngumbi Mulei, with intend to dispossess the Plaintiff and other beneficiaries of the estate of Milka Wavinya Kakui and Kakui Malii Kiketi (*both deceased*).

3. The Applicant further deposed that she attempted to have the suit properties removed from Machakos HCSC No. 897 of 2010, but vide the Ruling of the Probate Court dated 30<sup>th</sup> July, 2020, the court was of the view that since their claim touched on ownership of land, the Applicants ought to have moved this court first before going to seek revocation of grant in Machakos HCSC No. 897 of 2010. That the family of the late Milka Wavinya Kakui and Kakui Malii Kiketi resolved to sell the suit properties, and by Agreement dated 1<sup>st</sup> November, 2018 entered into a Sale Agreement with one Peter Wambua Muthoka, however, the Purchaser did not pay the entire purchase price having learned that the suit properties were included in the estate of the late Peter Ngumbi Mulei. That the Respondents are using the suit properties to graze their cattle and they should be restrained by this court, pending hearing of the suit.

4. The application is opposed. The 2<sup>nd</sup> Respondent swore a Replying Affidavit dated 2<sup>nd</sup> February, 2021 in which he deposed that he is one of the administrators of the estate of Peter Ngumbi Mulei and that the Applicant's claim of the suit properties is baseless. That the suit properties were acquired by the Respondents' father the late Peter Ngumbi Mulei in the year 2006, whereupon there was immediate occupation by the Respondent. That the claim is time barred. That the late Peter Ngumbi Mulei bought the suit properties from previous owners and that the offices of the Katheka-Kai Farmers Society oversaw the transfer upon payment of the requisite fees. That this ownership was confirmed vide a letter by the then Secretary of Katheka-Kai Farmers' Co-operative Society dated 17<sup>th</sup> November, 2006.

5. The Respondent further stated that they have been in occupation of the suit properties for over 15 years and have no intention of disposing off the same. That there is no evidence that the late Milkah Wavinya Kakui and Kakui Malii Kiketi owned the suit properties. That the late Peter Ngumbi Mulei fenced the suit property in the year 2006 and his use thereof was open and unquestioned; that there were objections filed in Succession Cause Number 897 of 2010 and that as late as 2016 the Applicant was not sure of the boundaries of the suit properties.

#### **APPLICANTS' SUBMISSIONS:**

6. The applicants filed their submissions dated 4<sup>th</sup> June, 2021 on 8<sup>th</sup> June, 2021. The Applicants reiterated the contents of their application and submitted that the Plaintiff had met the conditions for grant of temporary injunction. Counsel argued that the Applicant had met the three conditions of grant of injunction set out in the case of *Giella vs. Cassman Brown* [1973] EA 358. Further counsel contended that the Applicants had established a *prima facie* case with chances of success by proving that the late Milkah Wavinya Kakui and Kakui Malii Kiketi were member numbers 169 and 24 respectively of Katheka-Kai Farmers' Co-operative Society Limited and that the suit properties had been allotted to them.

7. Counsel argued that there was no evidence to show that the suit properties were sold by any person and no Sale Agreement was provided by the Respondents. They maintained that though the Defendants had annexed transfer forms to show that the suit properties were transferred to their late father by Abednego Nyamai Makau, they had no evidence to show how the properties were transferred to the said Abednego Nyamai Makau. They submitted that to prove ownership they had availed two letters from Katheka-Kai Farmers' Co-operative Society Limited dated 30<sup>th</sup> April, 2019 and 20<sup>th</sup> December, 2017 to confirm that the suit properties belonged to the Applicants' parents. They argued that the inclusion of the suit properties in the estate of the late Peter Ngumbi Mulei was wrongful and attempt to dispossess the Plaintiffs of their parent's land. They faulted the Respondents' claim of the suit property by the doctrine of adverse possession arguing that there is no evidence that the suit property was registered under any of the Acts listed in Section 37 of the Limitation of Actions Act Cap 22 Laws of Kenya.

8. Counsel placed reliance on the case of *Chevron (K) Ltd vs. Harrison Charo Wa Shutu* [2016] eKLR to argue that a claim for adverse possession can only be maintained against a registered owner of the land in question. The Applicants referred to the cases of *Sophie Wanjiku John v. Jane Mwhaki Kimani, Maweu v. Kiu Ranching & Farming Co-operative Society Ltd* [1985] eKLR 430 and *Stephen Abu Mukhobi v. Daniel Oria Odhiambo & Another* [2016] eKLR, all of which have been considered by this court.

9. On the question of whether the Applicants stand to suffer irreparable loss, counsel submitted that the Respondents continued in their wanton acts of waste, including grazing on the suit properties, and threatening to sell the said properties to unsuspecting 3<sup>rd</sup> parties. It was submitted for the Applicants that it is settled law that where a party acts in breach of the law, the breach should not be allowed to continue just because the loss arising from the breach can be compensated by damages. Counsel relied on the case of *Joseph Siro Mosioma v. Housing Finance Company of Kenya & 3 Others* [2008] eKLR, where it was held that damages are not and cannot be a substitute for the loss, which is occasioned by a clear breach of the law.

10. The applicants contended that the Defendants had trespassed on their parents' land, are grazing thereon and threatening to sell it to unsuspecting 3<sup>rd</sup> parties. That they have prevented the Plaintiffs who are the rightful owners from benefiting from the suit land and therefore the court should not encourage the Defendants' conduct. They argued that great mischief and prejudice will be occasioned to the Applicants if the injunction is not granted, and the Defendants do not stand to suffer any loss as they are merely trespassers.

#### **RESPONDENTS' SUBMISSIONS:**

11. The Respondents filed their submissions dated 6<sup>th</sup> June, 2021 on the 25<sup>th</sup> August, 2021. Counsel submitted that for an Applicant to be granted injunctive orders, they must demonstrate beyond peradventure that a right is about to be breached. Counsel argued that the Applicants had not demonstrated any right over the suit properties and that they had conceded that the Defendants were in occupation of the same.

12. Counsel argued that both parties had placed material before court to show that their respective ownership had been sanctioned by Katheka-Kai Co-operative Society. It was submitted that there was no material on record to link Kakui Kikeli and Milka Wavinya with the suit properties. That documents before court mentioned one Ringo M. Kakui as the apparent owner yet he was not the one suing. Counsel argued that annexure 6 by the Applicants which is alleged to be the register of Katheka-Kai Society does not show the names of Kakui Malii Kiketi and Milkah Wavinya Kakui and even then, the register does not indicate who owns what.

13. The Respondents submitted that they were in occupation since 2006 and availed documents to show that their acquisition of the suit properties were sanctioned by the Co-operative Society. The Respondents complained that the Applicants waited for over 14 years after their father had acquired the suit property and another 10 years since they sought for Grant of Letters of Administration to claim for the suit properties hence, they are guilty of laches and an injunction should not issue.

14. The Respondents placed reliance on the cases of *Oksana Investment Supplies Ltd. v. Alice Wanjiru Wamwea* [2019] eKLR and *Giella v. Cassman Brown* [1973] EA 358, both of which this court has considered. The Respondents' argued that the Applicants had not established a *prima facie* case, that since the value of the suit properties is ascertainable if the Plaintiff were to succeed, then the question of damages would be a matter of arithmetic. On the question of balance of balance of convenience, the Respondents argued that they were in occupation

and have been grazing their cattle on the suit land and therefore the balance of convenience tilted in their favour.

#### **ANALYSIS AND DETERMINATION:**

15. I have carefully considered the Application, the Affidavit in support, the Replying Affidavit and the parties' submissions as well as authorities cited by the parties. The only issue that arises for determination is whether the Applicants have met the threshold for grant of orders of temporary injunction.

16. The principles for grant of interlocutory injunctions are well settled. In the case of *Giella vs. Cassman Brown* [1973] E.A 358, the court stated that the following three conditions must be satisfied before grant of interlocutory injunctions;

***a. The Applicant must demonstrate that they have a prima facie case with a probability of success.***

***b. It must be demonstrated that the Applicant will suffer irreparable loss that may not be compensated by damages if the injunction is not granted.***

***c. If the court is in doubt, it will decide the application on the balance of convenience.***

17. A *prima facie* case was described in the case of *Mrao v. First American Bank of Kenya Ltd & Others* (2003) eKLR as follows:

***“a prima facie case in civil application includes but is not confined to a “genuine and arguable case.” It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

18. As to whether the Plaintiffs/Applicants have established a *prima facie* case with a probability of success, the Plaintiffs have argued that the suit properties belong to their late parents Milka Wavinya Kakui and Kakui Malii Kiketi who acquired the same by virtue of their membership of Katheka-Kai Farmers Co-operative Society. The Applicants attached two letters from Katheka-Kai Farmers' Co-operative Society Limited dated 30<sup>th</sup> April, 2019 and 20<sup>th</sup> December, 2017 respectively to the effect that the suit properties were allocated to the late Kakui Malii Kiketi and Milka Wavinya Kakui. I also note that the Defendant has a letter dated 17<sup>th</sup> November, 2016 from Katheka-Kai Farmers Co-operative Society Limited indicating that the late Peter Ngumbi Mulei is the owner of the suit properties. In addition, it appears that the said Co-operative Society sanctioned the transfer of the suit properties from one Abednego Nyamai Makau to the late Peter Ngumbi Mulei as shown by the transfer forms dated 16<sup>th</sup> November, 2006. The Defendants have alleged being in occupation of the suit property, a fact conceded to by the Plaintiffs, who contend that the same amounts to trespass.

19. As both parties claim ownership to the suit properties, having apparently obtained the same with the sanction of Katheka-Kai Farmers Co-operative Society Limited, without hearing the evidence, at this stage it is not clear who between the Plaintiffs and the Defendants owns the suit properties.

20. The Respondents have alleged to be in occupation of the suit property for over 16 years. The Applicants allege that the continued use of the suit land by the Defendants will result to irreparable injury and breach of the law should not be countenanced merely because the party in breach can compensate the opposite party in damages. As the Applicants are not in occupation of the suit property, I find that they have not established that they shall suffer irreparable loss and damage should the injunction be denied. Similarly, the fact that the Respondents are in occupation tilts the balance of convenience in their favour. However, as the question of ownership of the suit property is highly contested between the parties, at this stage, it is in the interests of justice that the suit property is preserved pending hearing and determination of this suit.

21. In the premises, this court directs that the *status quo* obtaining as of today be maintained pending the hearing and determination of this suit. For avoidance of doubt, the *status quo* herein means;

***a) That the Defendants/Respondents shall continue to be in occupation of the suit land and more specifically only use the suit land for purposes of grazing their livestock.***

***b) No party shall construct on or develop, dispose of, lease, charge or in any manner interfere with the current ownership of the suit properties.***

22. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED VIRTUALLY in MACHAKOS this 14<sup>th</sup> day of DECEMBER, 2021.**

**A. NYUKURI**

**JUDGE**