



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 22 OF 2019 (OS)**

**BONIFACE MUTWIRI KUNGANIA (Suing as a legal**

**Representative of the estate of M'KUNGANIA M'BAGINE**

**Alias SAMUEL KUNGANIA deceased)... PLAINTIFF/APPLICANT**

**VERSUS**

**GLADYS KATHUNI M'RINKANYA (Sued as the**

**Legal Representative of the estate of**

**RAIJI s/o GATAARU alias RAIJI GATAARU alias**

**M'RAIJI GATARU, deceased).....DEFENDANT/RESPONDENT**

**RULING**

1. This matter relates to the Notice of Motion dated 27/05/2019 brought under **Section 68 of the Land Registration Act, Section 3A of the Civil Procedure Act, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions**. The applicant seeks inhibition orders against L R No. Abogeta/Upper-Chure/517 to avoid it being transferred to 3<sup>rd</sup> parties pending the hearing and determination of the suit as well as costs.

2. The application is premised upon the grounds set out in its body and supporting affidavit of Boniface Mutwiri Kungania sworn on 28/05/2019. It is contended that the Suit Land is under the name of the late Raiji s/o Gataaru which forms part of his estate of which, the respondent has obtained grant of administration. The applicant contends that he has been in open and uninterrupted occupation of the Suit Land for over twelve (12) years and has acquired a legal entitlement to the same under the doctrine of adverse possession. That unless the inhibition orders are granted, the suit will be rendered nugatory.

3. This application was opposed vide the replying affidavit of Gladys Kathuni M'Rinkanya sworn on 2/07/2019. She deponed that pursuant to the judgment in Succession Cause No. 107 of 1998, the Suit Land is already under her name. That this matter is *res judicata* for in the said succession cause the same issues were raised and judgment was entered in her favour after due consideration of the *viva voce* evidence. Moreover, in the cause the applicant did not raise the issue of adverse possession but of the Suit Land being gifted to him. The applicant did not prefer an appeal but rushed to file this suit. As a result they have raised a notice of preliminary objection. Thus, the application ought to be dismissed with costs.

4. This matter was canvassed by way of written submissions. The applicant submitted that this matter is not *res judicata* for the succession court never dealt with the issue of adverse possession since it has no jurisdiction to adjudicate on neither were the issues the same. The purpose of the inhibition is to preserve the property pending the hearing and determination of the suit as the applicant avers that the Suit Land is at risk of being transferred to 3<sup>rd</sup> parties. He relied on the case of **Anne Njeri Mbugua (Suing as the legal rep. of Peter Mbugua Mukora v David Gathaiya (being sued as the legal rep. of Raphael Wairimu Mbugua [2017] eKLR** to support his claim.

5. The respondent submitted by reiterating what she had earlier stated.

6. The issue of determination is **whether to issue the inhibition orders**.

7. **Section 68 (1) of the Land Registration Act** states that:

**1. The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.**

8. Gikonyo J in the case of **Mwambeja Ranching Company Limited & another v Kenya National Capital Corporation Limited (Kenya) & 6 others [2015] eKLR** held as follows:

*“The case of Japhet Kaimenyi M’Ndatho v M’Ndatho M’mbwiria [2012] eKLR dealt with the threshold for granting orders of inhibition in a pointed manner as follows;*

*“In an application for orders of inhibition, in my understanding, the applicant has to satisfy the following conditions:-*

*a. That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservative orders of inhibition are issued.*

*b. That the refusal to grant orders of inhibition would render the applicant’s suit nugatory.*

*c. That the applicant has an arguable case.”*

9. The statutory law and jurisprudence referred to above indicates that before issuing the inhibition order, it needs to be established: whether or not the Suit Land is at risk of being disposed off; whether or not the refusal to grant the said order would render the plaintiff’s suit nugatory; and whether or not the plaintiff has an arguable case.

10. I have perused the judgment delivered 28/01/2019 in Succession Cause No. 107 of 1998 and it is evident that the applicant’s father, M’Kugania M’Bagine alias Samuel Kungania, who is now deceased, had set out to claim the suit land whereby the court rejected the claim. No appeal was preferred. That dispute appears to have been in the corridors of justice for a period of over twenty (20) years. Now, the applicant, being the legal representative of M’Kugania M’Bagine, who is now deceased, has come to claim adverse possession before this court. I find that the issue of adverse possession was not and could not have been a subject of litigation. It is only fair and just that the suit land be preserved until the case is heard and determined. In the circumstances, the application is allowed but costs to abide the outcome of the trial. The matter is to be heard on priority basis.

**DATED, SIGNED AND DELIVERED AT MERU THIS 30<sup>TH</sup> DAY OF APRIL, 2020**

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**

**ORDER**

The date of delivery of this ruling was given to the parties at the conclusion of the hearing and by a fresh notice by the Deputy Registrar. In light of the declaration of measures restricting court operations due to the *COVID-19 pandemic* and following the practice directions issued by his Lordship, the Chief Justice dated 17<sup>th</sup> March, 2020 and published in the Kenya Gazette of 17<sup>th</sup> April 2020 as Gazette Notice no.3137, this ruling has been delivered to the parties by electronic mail. They are deemed to have waived compliance with order 21 rule 1 of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court.

**HON. LUCY N. MBUGUA**

**ELC JUDGE**