



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KERUGOYA**

**ELC CASE NO. 22 OF 2019**

JOSEPH MWANGI GATIMU.....1<sup>ST</sup> APPLICANT

WACHIRA GATIMU.....2<sup>ND</sup> APPLICANT

MICHAEL WANJOHI GATIMU.....3<sup>RD</sup> APPLICANT

GRACE KAGUU KARANI.....4<sup>TH</sup> APPLICANT

LILIAN WANGITHI GATIMU.....5<sup>TH</sup> APPLICANT

BENSON KINYUA GATIMU.....6<sup>TH</sup> APPLICANT

DALMAS MACHARIA GATIMU.....7<sup>TH</sup> APPLICANT

**VERSUS**

JOSEPH KARIMI MAGANJO.....1<sup>ST</sup> RESPONDENT

MICHAEL KARUBIU MAGANJO.....2<sup>ND</sup> RESPONDENT

**(Suing as the Legal representatives of NELSON MAGANJO MUNYI (Deceased))**

**RULING**

The applicants moved this Court vide the Notice of Motion application dated 13<sup>th</sup> November 2019 seeking the following orders:

- (1) That the Originating Summons filed herein be dismissed for disclosing no reasonable cause of action against the respondents/defendants.***
- (2) That the costs of this application and the main suit be provided for both defendants.***

The application is supported by an affidavit sworn by Joseph Karimi Maganjo on 13<sup>th</sup> November 2019 and grounds apparent on the face of the application. The respondents who are plaintiff in this suit filed a replying affidavit sworn by Joseph Mwangi Gatimu on 14<sup>th</sup> January 2020 in opposition to the application. The firm of Magee Wa Magee instructed by the respondents also filed grounds of opposition on 20<sup>th</sup> November 2019.

**APPLICANTS CASE**

The 1<sup>st</sup> applicant in his affidavit stated that they are not the registered proprietors of land parcel No. MWERUA/MUKURE/1509 and that the land was registered in his father's name on 8<sup>th</sup> September 2005 through a High Court order in Case Number 131 of 1987 (Nyeri). The applicants also contend that they have not authorized the respondents to occupy the suit land as alleged in paragraph 10 of the supporting affidavit in the Originating Summons. The applicants also stated that the respondents have not disclosed that there is another parallel suit being High Court Succession Cause No. 378 of 2016 where the respondents are protestors. The applicant also stated that him and the 2<sup>nd</sup> applicant were appointed joint Administrators in regard to the suit land in the High Court Succession Cause No. 378 of 2016. They further

contend that the respondents filed the Originating Summons knowing that there was a succession cause relating to land parcel No. MWERUA/MUKURE/1509 pending determination of the protest by the respondents. They stated that the outcome of succession cause No. 378 of 2016 will fully decide whether the respondents have any claim on MWERUA/MUKURE/1509 or whether they are dependants or beneficiaries of the deceased's Estate.

### **RESPONDENTS CASE**

The respondents in their replying affidavit contend that the application dated 13<sup>th</sup> November 2019 lacks merit and is an abuse of the Court process, incompetent and bad in law. The respondents also stated that the respondents/applicants have been sued as legal representatives of the registered proprietor of L.R. MWERUA/MUKURE/1509. They further contend that the supporting affidavit sworn by Joseph Kirimo Maganjo confirms that indeed they have been in adverse possession of the suit land. The respondents further stated that the Succession Cause No. 378 of 2016 cannot determine the issue of adverse possession which is the subject of the cause herein. They stated that indeed the Succession Court stayed the said Succession Cause until the hearing and determination of the suit herein. They contend that the judgment of this Honourable Court is the one which will be presented in the Court handling the succession cause. They attached a copy of the order issued by the trial Court in Succession Cause No. 37 of 2016.

### **ANALYSIS AND DISPOSITION**

I have considered the affidavit evidence and the oral submissions by the counsels appearing for the parties. The term "**abuse of the process of the Court**" was discussed in the case of *Blue Shield Insurance Company Ltd Vs Joseph Mboya Oguttu (2009) e K.L.R* as follows:

*"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd Vs Muchina (1982) K.L.R. 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:*

*"The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading".*

*We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable".*

The respondent in this case thinks that the Succession Cause No. 378 of 2016 cannot determine the issue of adverse possession which is the subject of the present suit. He contends that the judgment of this Honourable Court is the one which shall be presented to the Court handling the succession cause and that the said Court has even issued a stay of proceedings pending the hearing and determination of this case. In the case of *PRISCILLA NDUBI & ANOTHER VS GERISHON GATOBU MBUI MERU HCCC SUCCESSION CAUSE NO. 720 OF 2013*, the Court was dealing with a similar dispute touching on a claim of ownership of land in respect of a deceased person and the Court held as follows:

*"Applying the test of law in Section 76 of the Law of Succession Act, the fact that there was an agreement between the deceased and the applicant for sale of the land is important to these proceedings. It seems also that consideration may have passed between the two parties. I am aware that this Court does not have jurisdiction to determine the validity or enforceability of the said agreement. Environment and Land does, it is the Court which is constitutionary mandated to determine such matter ..... where a question arises as to the identity; share of estate of any person claiming to be beneficially interested in, or of any condition or qualification attaching to, such share or estate which cannot at that stage be conveniently determined, the Court may, prior to confirming the grant, but subject to the provisions of Section 82 of the Act, by order appropriate and set aside the particular share or estate or the property comprising it to abide the determination of the question in proceedings under Order XXXVI, rule 1 of the Civil Procedure Rules".*

From the analysis in that decision, it is clear beyond any peradventure that jurisdiction to deal with claims of ownership in respect of the estates of a deceased person lies with the Environment and Land Court and not the Succession Court. The assertions by the applicants that there is a Succession Cause No. 378 of 2016 where the issues of ownership can effectually be heard and determined does not hold.

In view of the matters aforesaid, I find that the Notice of Motion dated 13<sup>th</sup> November 2019 lacks merit and the same is hereby dismissed with costs. It is so ordered.

**READ, DELIVERED and SIGNED in open Court at Kerugoya this 5<sup>th</sup> day of June, 2020.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:*

1. *Mr. Asimwe holding brief for Mr. Magee*
2. *1<sup>st</sup> Respondent, Joseph Karimi - present*
3. *2<sup>nd</sup> Respondent – absent*
4. *Mr. Mbogo, Court clerk – present.*