



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 153 OF 2017

**ESTHER KAMATHI MWIMBI (Suing as the administratrix of the
estate of ROMANO MWIMBI).....PLAINTIFF**

VERSUS

ZAVERIO MITHIKA.....DEFENDANT

JUDGMENT

1. This suit was instituted by the plaintiff by way of a plaint dated 15th May 2017 against the defendant where she seeks the following orders:

a) *A permanent injunction restraining the defendant and his family members, relatives, agents, servants, employees, representatives and/or anyone else acting at his behest, from entering into trespassing onto, cultivating on and/or whatsoever interfering with the plaintiff's actual, exclusive, uninterrupted and undisturbed possession, cultivation, development, user and enjoyment of land parcel No. 1249 measuring 11.91 acres situated in Muthatene village within Antuamburi Adjudication Section.*

b) *Costs of the suit plus interest thereon at court rates.*

2. Through his statement of defence dated 4/4/2019 the defendant denied the allegations made by the plaintiff and put her to strict proof thereof.

3. The plaintiff's late husband was one Romano Mwimbi who was a brother of Peter Kimandiu. The history of the land dispute herein is aptly captured in the ***Court of appeal case no 28 of 2015*** at Nyeri regarding parcels numbers 1196, 1249 and 2286, particularly paragraph 3 and 4 thereof. Peter Kimandiu was the Ex-parte Applicant, while Zaverio Mithika (the current defendant) was the 1st interested party in the case ***Meru Judicial Review Case no. 22 of 2010*** which was heard by Judge P. Njoroge and the suit was dismissed. In that case, parcel number 1249 (now being claimed by the plaintiff) was one of the suit parcels mentioned in that matter.

4. Thereafter, Peter Kimandiu lodged the appeal where in a judgment dated and delivered on 2/3/2016 in ***Nyeri Court of Appeal Civil Appeal No. 28 of 2015*** it was ordered that the dispute in the A/R Objection Case be heard afresh. This decision is what triggered the hearing and determination of the Objection case no. 176 in respect of parcels no. 1196, 1249 and 2286 afresh culminating in the decision of 25.11.2016. It is imperative to note that another ***Judicial Review suit no.7 of 2017*** was filed in this court by Zaverio Mithika, the current defendant, where he was challenging the decision of 25.11.2016 in the objection case. I handled the matter where by I dismissed the Judicial Review suit on 23.1.2018.

5. The plaintiff has pleaded that her husband is the recorded owner of the parcel of land no.1249 measuring 11.91 acres. She contends that on 10.5.2017, defendant accompanied by others confronted the plaintiff threatening to evict her and her children and intended to forcibly evict them, yet the defendant has no interest in the Suit Land since he has never bought or otherwise acquired it or any portion thereof.

6. The matter proceeded to hearing and the plaintiff, **PW1 Esther Kamathi Mwimbi** adopted her statement and relied on her list of documents dated 15/5/2017 as her evidence. She reiterated what she has stated in her pleadings. She added that the defendant may appeal on the decision of JR Case No. 7 of 2017 but he should not involve the Suit Land parcel no. 1249.

7. **DW1 Zaverio Mithika** is the defendant and he adopted his statement as his evidence and he relied on his list of documents dated 5/3/2019. He stated that the Suit Land is what has been litigated upon. He confirmed that he does not stay on the Suit Land but affirmed that it was bequeathed to his father who left it for him.

8. The plaintiff submitted that the defendant has failed to show that he has any legal or protectable interest in the Suit Land. Thus, the plaintiff and her children stand to suffer irreparable loss and damage which cannot be adequately atoned by an award of pecuniary damages as her husband is the registered owner of the Suit Land. She relied on the cases of **H.C.C No. 62 of 2010 Mary Kaburo M’Njuki v M’Chabari Mitaru** and **Thomas Mungiria & 9 others v Joseph Mutuma & 4 others (2012) eKLR**. The defence side did not file any submissions.

9. The issue for determination is *whether to grant the permanent injunction sought by the plaintiff or not?*

10. A permanent injunction is one that requires a party to do or refrain from a particular act. The traditional guiding principles are set out in the case of **Giella v Cassman Brown (1973) EA 358** which are: (1) *To establish a prima facie case with high chance of success;* (2) *demonstrate irreparable injury;* and (3) *in case of doubts balance of convenience lie.*

11. In **Halsbury’s Laws of England 4th Edition at page 533** paragraph 946 it is stated as follows:-

“----- but every injunction, whether restrictive or mandatory, ought to be granted with care and caution, and no more care or caution is required in the case of a mandatory injunction than a restrictive injunction”.

12. The land dispute of which the suit land no,1249 is part of seems to have started years back. There was even a committee case in 1968! This issue went all the way to the Court of Appeal which ordered that the matter be heard afresh in **Nyeri Civil Appeal No. 28 of 2015**. The objection was heard afresh and determined on 25/11/2016. The objection was dismissed and it was established that the parcels in question including the Suit Land belonged to the respondents, who are Peter Kimandiu M’Twamwari and Romano Mwimbi.

13. As a result of those objection proceedings the case **ELC Judicial Review No. 7 of 2017** was filed and the same was dismissed. From the documents adduced by the defendant it shows that he has appealed on the said decision in **Civil Appeal No. 44 of 2018**. Furthermore, he has filed an application in the Court of Appeal under certificate of urgency **Civil Appeal No. 44 of 2018** in Nyeri seeking to stay these proceedings. The application has been filed but no order has been issued stopping this court from continuing with the proceedings. I am therefore inclined to proceed and make a determination on the matter.

14. **The question which I now pose is “which law governs the dispute at hand?”**. The court of appeal in the case **no 28 of 2015** determined that the dispute was to be remitted back to the Land Adjudication officer for hearing and determination in accordance with the relevant laws, which law was determined to be **The Land Consolidation Act Cap 283 Laws of Kenya**.

15. The objection proceedings in case number 176 must have been conducted under section 26 of the land consolidation Act. Subsection (3) thereof provides that;

“No appeal shall lie against any decision by the Adjudication Officer to dismiss an objection or order rectification or to award compensation in lieu of rectification, as the case may be.....”,

16. Sub-section 4 thereof provides that;

“.....After the expiration of sixty days from the date of the certificate mentioned in section 25, or on the determination of all objections in accordance with section 26, of this Act, whichever shall be the later, the Adjudication Register shall be final. (emphasize added)”.

17. Thus the dispute resolution mechanism comes to a close after the decision is given pursuant to section 26 of the Act. It follows that the dispute is no longer in the arena of the Land Consolidation Act.

18. In the case of **Arithi Self – Help grazing group thro’ The Chairman, Secretary and Treasurer Vs The Land Adjudication Officer and 2 others Meru ELC petition 28 of 2015**, I emphasized the importance of the adjudication process where I stated that:

“Adjudication is a very important process and ought to be given a chance to be finalized so that the community members can have identifiable rights and interests in land.....”

19. In the present case, though adjudication process is complete in terms of section 26 of the Land Consolidation Act, the registration of such rights and interests are yet to take place in terms of section 24 of the Land Registration Act.

20. I consider the process running from the time the adjudication register is finalized and forwarded to the Chief Land Registrar through the Director of Adjudication to the time the land is registered to be a **GREY AREA**, where parties affected by the adjudication process are thrown into **LIMBO**. During this grey period, the dispute resolution mechanism provided under the adjudication statutes are no longer applicable since the rights and interest in the land are taken to have been ascertained in line with the preamble of the statutes (mainly the land Consolidation Act and the Land Adjudication Act). On the other hand, the land is yet to be registered hence the statutes governing registered land cannot be invoked. This situation does not mean that during this period of uncertainty, there is peace and tranquility. On the contrary, conflicts of great magnitude erupt or persist taking the form of boundary disputes, succession, fraud, invasions, disputes arising out of purchase and all other manner of disputes. The problem is compounded by the fact that the period in question is indefinite. It is a common phenomenon for the process of issuance of title deeds after adjudication to take even decades and this region has not been spared.

21. The current dispute, having arisen on 10.5.2017 after the decision in the objection case falls under this grey period. The courts have a duty to determine matters taking into account the nature and extent of the disputes. In particular, the courts have a duty to ensure that the

decisions made by entities established by the statutes like the once concerned with adjudication processes are observed, enforced, respected and fulfilled.

22. Coming back to this case, it is a situation where the plaintiff has no title deed. The suit land apparently belongs to her deceased husband. The decision of the land adjudication officer dated 25.11.2016 determined that the suit parcels belong to the respondents who are Peter Kimandiu M'Twomwari and Romano Mwimbi. This court has no mandate to vary or set aside that decision.

23. It also emerged during the trial that plaintiff is the one in occupation of the suit land. On this point, defendant had testified as follows; ***“Kamathi (plaintiff) is the one utilizing the suit land. I stay on another land but not that suit land”.***

24. Plaintiff Exhibit- 3, is a confirmation of registration from Ministry of Lands and Physical planning which indicates that the land parcel no. 1249 measuring 11.9 is registered in the name of Romano Mwimbi (deceased). The defendant therefore has no basis of interfering with plaintiff's rights on the suit land.

25. From the foregoing analysis, I do find that plaintiff is entitled to the prayers sought in the plaint.

26. **Final orders**

1) A permanent injunction is hereby issued restraining the defendant and his family members, relatives agents, servants, employees, representatives and/or anyone else acting at his behest, from entering into, trespassing onto, cultivating on and/or whatsoever interfering with the plaintiff's actual exclusive, uninterrupted and undisturbed possession, cultivation, development, user and enjoyment of land parcel no. 1249, measuring about 11.91 acres, situated in Muthatene village within Antuamburi Adjudication section.

2) Defendant is condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 13TH DAY OF NOVEMBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriithi for plaintiff

Ms. Njenga for defendant

Plaintiff

Defendant

HON. LUCY. N. MBUGUA

ELC JUDGE