



Njuguna & 2 others v Njau (As the Personal Representative of the Estate of Njau Kibirii – Deceased) & another; Kariuki (Interested Party) (Environment & Land Case 27 of 2017 & 49 of 2007 (Consolidated)) [2024] KEELC 366 (KLR) (30 January 2024) (Ruling)

Neutral citation: [2024] KEELC 366 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 27 OF 2017 & 49 OF 2007 (CONSOLIDATED)
BM EBOSO, J
JANUARY 30, 2024

BETWEEN

FRANCIS NDUNGU NJUGUNA PLAINTIFF

AND

DANIEL NDUNGU NJAU (AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF NJAU KIBIRII – DECEASED) DEFENDANT

AND

PAULINA GACAMBI KARIUKI INTERESTED PARTY

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 49 OF 2007

BETWEEN

PAULINA GACAMBI KARIUKI 1ST PLAINTIFF

MARIA NJERI KARIUKI 2ND PLAINTIFF

AND

DANIEL NDUNGU NJAU (AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF NJAU KIBIRII – DECEASED) 1ST DEFENDANT

FRANCIS NDUNGU NJUGUNA 2ND DEFENDANT



RULING

1. Falling for determination in this ruling is the further amended notice of motion dated 9/3/2023, brought by Maria Njeri Kariuki [the applicant]. Through the motion, the applicant seeks the following orders: (i) an order removing the prohibitory order placed on land parcel number Githunguri/Kimathi/173; (ii) an order removing the restriction placed on land parcel number Githunguri/Kimathi/173 on 18/9/2003; (iii) an order directing the defendant (sic) to immediately partition land parcel number Githunguri/Kimathi /173 and execute transfer documents in respect of the land in accordance with the order made by this court on 28/6/2019; (iv) an order directing the OCS, Githunguri Police Station, to provide security during the partitioning exercise of land parcel number Githunguri/Kimathi/173; and (v) an order providing for costs of the application.
2. The primary claim in the lead file was initiated in the High Court at Nairobi through a Plaint dated 26/4/1990 by the plaintiff against Njau Kibirii. The defendant filed a defence and counterclaim. The pleadings were subsequently amended following the demise of Njau Kibirii. The suit was subsequently consolidated with Nairobi High Court Environment & Land Case No. 49 of 2007 (OS) vide a court order issued on 26/11/2010.
3. Subsequent to filing ELC No. 27 of 2017 (formerly Nairobi HCCC No. 2018 of 1990), the plaintiff obtained a prohibitory order and registered it against the land register of land parcel number Githunguri/Kimathi/173 [hereinafter referred to as “the suit property”] on 9/10/1990, pending the hearing and determination of the suit. The suit was subsequently consolidated with High Court E & L Case No. 49 of 2007. The two consolidated suits were later transferred to Thika ELC. The consolidated suits were subsequently heard and determined through a Judgment delivered on 28/6/2019. Against the above background, the applicant, Maria Njeri Kariuki, brought the application that is the subject of this ruling.
4. The case of the applicant is that, land parcel number Githunguri/Kimathi/173 was the subject matter of High Court E & L Case No. 49 of 2007 (OS) which was consolidated with the present suit. The two consolidated suits were concluded on 28/6/2019 and a decree was issued on 29/10/2019. During pendency of one of the suits, the court issued a prohibitory order in favour of the plaintiff, forbidding any dealings in land parcel number Githunguri/Kimathi/173. In addition, on or about 18/9/2003, a restriction was registered against the title in respect of the suit land pursuant to a letter by the Kiambu District Commissioner. The applicant contends that the defendant [sic] has not commenced the process of partitioning the suit land to effect transfers in line with the order and decree issued by the court on 28/6/2019 because the prohibitory order and the restriction placed on the suit land have not been removed. She wants this court to issue orders removing the prohibition and the restriction. The applicant contends that the respondents will not suffer any prejudice if the orders sought are granted.
5. The plaintiff in the lead file opposes the application through his replying affidavit sworn on 20/3/2023. The plaintiff argues that it would not be prudent to remove the prohibitory orders placed on the suit property given that he has already initiated an appeal process against the Judgment in this suit. He adds that the appeal has high chances of success and that any dealings in the suit land will render the appeal nugatory. The plaintiff urges the court to instead make an order of stay of execution of the Judgment delivered on 28/6/2019. The plaintiff adds that his advocates are in the process of filing a record of appeal in the Court of Appeal, adding that it is in the interest of justice that the Judgment delivered on 28/6/2019 should be stayed.



6. The application was canvassed through written submissions dated 14/7/2023, filed by M/s Mitiambo & Company Advocates. The plaintiff opposed the application through written submissions dated 18/7/2023, filed through M/s Gachoka Mwangi & Company Advocates. I have considered the application, the response to the application and the parties' respective submissions. The single question to be answered in this ruling is whether a proper case has been made for grant of the post-judgment orders that are sought in the further amended notice of motion dated 9/3/2023.
7. Judgment in the two consolidated suits was rendered by Gacheru J on 28/6/2019. The court made the following verbatim finding in relation to Mary Njeri Kariuki (the applicant) who was one of the two plaintiffs in ELC Case No 49 of 2007 (O.S)

“However, the court finds that Maria Njeri Kariuki has been in possession of the portion of land she is utilizing by virtue of being a child of Paulina Gacambi Kariuki. Since her mother's estate has been found to have obtained ownership by virtue of adverse possession, the court finds that Maria Njeri's claim cannot stand. She is entitled to inherit from the estate of her mother just like the other siblings”
8. This court proceeded to issue the following verbatim disposal order in relation to Mary Njeri Kariuki;

“(v) However, Maria Njeri Kariuki is not entitled to be declared as an owner of 2 acres from the suit property by virtue of adverse possession. She can only inherit from the estate of Paulina Gachambi Kariuki just like the other siblings.”
9. It is therefore clear from the findings and disposal orders of the court that the applicant in the further amended notice of motion under consideration was adjudged not to have a cause of action in ELC Case No.49 of 2007 (O.S). Consequently, she cannot purport to bring a post-judgment motion to enforce the decree of the court on the platform of this suit. The proper party to bring the enforcement motion for the reliefs that the applicant is seeking is Paulina Gacamba Kariuki by herself or through her duly personal representatives.
10. Secondly, the dispute in this suit was heard and determined. At this point, the jurisdiction of this court in this suit is restricted to enforcement and stay proceedings. The court cannot use the two case files as a platform on which to vacate the restriction that was registered on the parcel register on 7/9/2003 at the behest of the District Commissioner. Proceedings relating to removal of that specific restriction ought to be initiated through a fresh cause because removal of the restriction was neither sought nor granted in the two suits. Indeed, this court does not know the circumstances under which the District Commissioner applied for registration of the restriction.
11. For the above reasons, it is my finding that the further amended notice of motion dated 9/3/2023 is incompetent and misconceived. The same is struck out on the above grounds. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 30TH DAY OF JANUARY 2024

B M EBOSO

JUDGE

In the presence of:

Mitiambo for the Applicant



Githui for the Respondent

Court Assistant: Hinga

