



**REPUBLIC OF KENYA**

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

**ELC. NO.153 OF 2017**

**ESTHER KAMATHI MWIMBI (Suing As The Administratrix  
of the estate of Romano Mwimbi) Deceased....PLAINITFF**

**VERSUS**

**ZAVERIO MITHIKA.....DEFENDANT**

**RULING**

There are two pending applications in this matter. The first one is dated 15:05:17 and is filed by the Plaintiff while the second one is dated 18:07:17 and is filed by the defendant.

I have found it necessary to deal with the two applications simultaneously.

**Application dated 15:05:17**, The prayers here in are;

- 1) Spent.
- 2) That pending inter-partes hearing of the application, a temporary injunction be issued restraining the defendant/respondent and his family members , relatives, agents, servants, employees , representatives, workers and/or whatsoever interfering with the Plaintiffs/applicants '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.
- 3) The OCS, Mikinduri Police Station be empowered to enforce the order so given.
- 4) That pending hearing and determination of the suit or until further court orders, a temporary injunction be issued restraining the defendant/respondent and his family members, relatives, agents, servants, employees, representative, workers and/or anyone else acting at his behest, from entering into, trespassing onto, cultivating on and/or whatsoever interfering with the plaintiffs/applicant's actual exclusive, uninterrupted and undisturbed possession, cultivation, development, use and enjoyment of land parcel No. 1249, measuring about 11.91 acres situated in Muthatene village within Antuamburi Adjudication Section.
- 5) That costs of the application be provided for.

The grounds in support of the application are:

- 1) That the Plaintiffs/Applicant's late husband is the registered owner of the Suitland.

2) That on or about 10:05:2017 the Defendant/ Respondent accompanied by his family members and other cronies, confronted the Plaintiff/Applicant and her children on the suit land threatening and intending to forcibly evict them therefrom the suit land so that they can plant thereon.

3) That the Plaintiff /Applicant and her children were saved by some good neighbors who responded to their distress call and assisted them to repulse the afore-said aggressors who vowed to seek reinforcement and return to evict them forcibly. The Plaintiff/Applicant is being targeted because she is a vulnerable, susceptible and is a defenseless widow.

Plaintiff ESTHER KAMATHI MWIMBI has also sworn an affidavit of 15. 05.2017 where she states as follows;

1) That she has limited grant over the estate of her late husband, Romano Mwimbi and the statutory consent to file this case, copies of which are annexed as “EKM1” and “EKM”.

2) That Plaintiff’s late husband is the recorded/ registered owner of land parcel No. 1249, measuring about 11.91 acres situated in Muthatene village, as per the confirmation letter marked “EKM”.

3) That vide a judgment dated & delivered on 02.03.2016 in Nyeri Court of Appeal Civil Appeal No. 28 of 2015: Peter Kimandiu Vs. Zaverio Mithika (the defendant herein) & 4 other, it was ordered that the A/R objection case No. 176 filed by the Defendant/Respondent and others claiming the suit land and 2 other parcels of land be heard afresh, as per the Judgment annexed as “EKM4”.

4) That through Nyeri Court of Appeal Civil Application No. 45 of 2015 Peter Kimandiu vs. Zaverio Mithika (the Defendant/Respondent herein) & 4 others, Peter Kimandiu had sought an injunction on behalf of himself, myself and others in respect of the suit land and 2 other parcels of land, and the Court of Appeal ordered maintenance of status quo pending the outcome of the a fore stated appeal, as per a Ruling dated 21:10:2015 annexed hereto and marked “EKM5”.

5) That the afore-said A/R Objection case was heard afresh and dismissed on 25:11:2016. The defendant/respondent and his co-objectors in that A/R Objection case did not appeal against the said dismissal to the minister in charge of land under Section 29 of the Land Adjudication Act. (Annexed hereto and marked “EKM6” is a copy of that A/R objection proceedings and decision).

6) That later, the register and maps were taken to Nairobi for preparation and issuance of title deeds.

7) That on or about 10:05:2017 the defendant accompanied by his family members and other cronies, confronted plaintiff and her children on the suit land, threatening and intending to forcibly evict them therefrom so that they could plant thereon during the rainy season. Plaintiff claims that her family has planted food crops and trees like bananas. Miringa, Miuri, Miathanduku, Miuti etc.

8) That Applicant and her children were saved by some good neighbors who responded to their distress call and assisted them to repulse the afore-said aggressors who vowed to seek reinforcement and return to evict them forcibly.

9) That at Mikinduri Police Station, plaintiff was advised to obtain a Court order for enforcement.

When this application was filed on 15:05:17, the Court gave Interim orders in terms of prayer 2, 3 and 4 and directed matter to be heard on 12:06:17.

On 12. 06.17, the hearing of the application was extended to 19:07:17and defendant was given 14 days within which to file and serve their response. This order was not complied with as Respondent only filed the Replying Affidavit on 19:07:17.

Counsel for plaintiff applied to have the affidavit of defendant filed on 19:07:17 (the one opposing the application of 15:05:17) expunged from the records and this application was allowed.

The application of 15.5.2017 was argued orally with Plaintiff side averring that they were relying on the grounds in the application.

The defence side state that that parcel No. 1249 Antuamburi adjudication section is a subject matter in this suit, and was still a subject matter in the Court of appeal case, and that now there is a suit Judicial Review No. 7 of 2017 filed by the present defendant in respect of the same land.

Defendant avers that Plaintiff did not disclose the pleadings and orders given in Judicial Review 7/17 in the plaint. The Court was urged to look at proceeding in Judicial Review 7 /17 in dismissing the application.

### **Application filed on 19.07.17**

The Notice of Motion dated 18:07:17 seeks orders:-

- 1) That there be stay of this suit and/or proceedings herein to await the outcome of the High Court Judicial Review No. 7 of 2017 between the same parties which was previously instituted.
- 2) That costs be borne by the Respondent.

The application is based on the grounds:-

- a) That the matter in issue herein is also directly and substantially in issue in High Court Judicial Review No. 7 of 2017 previously instituted.
- b) That the proceedings herein are between the same parties or parties under whom they or any of them claim.
- c) That the parties in this suit and in Judicial Review No. 7 of 2017 are litigating under the same title.
- d) That there is pending Judicial Review No. 7 of 2017 before this Court over the same issues.

In support of this Application is the Affidavit of ZAVERIO MITHIKA, defendant herein sworn on 18:07:17 where he states that;-

- 1) That on the 6<sup>th</sup> day of February, 2017, he filed Judicial Review Case No. 7 of 2017 as is evident from annexure "ZMI" , a copy of the pleadings.
- 2) That defendant obtained pending the determination of the suit, an order of stay of implementation and or execution of the decision of the District Land Adjudication and Settlement Officer Tigania East /West District (DLASO) dated 25:11:2006 as per annexure "ZM2".
- 3) That the suit land under which the Judicial Review is premised are parcels No. 1196, **1249** and 2286 Antuamburi Adjudication Section.
- 4) That the suit herein also deals with parcel No. **1249** Antuamburi Adjudication Section.
- 5) That the Interested Party in Judicial Review No. 7 of 2017 is one Peter Kimandiu M'twamwari is the brother-in-law to Esther Kamathi Mwimbi (plaintiff here in ) or the brother to the husband of Esther Kamathi Mwimbi ( deceased).
- 6) That these are parties who are litigating under the same title.

7) That the issue pertaining to these proceedings are directly and/or substantially in issue in Judicial Review No. 7 of 2017.

8) That the decision leading to the institution of these two suits is the same, court of Appeal decision of 2.3.2016.

9) That the decision which is being challenged herein dated 25.11.2016 is the very decision that the Respondent in the case is riding on.

10) That it is therefore necessary to have a stay of this suit as this will go a long way to avert a conflict of decisions, and that this shall also save on judicial time.

The Court was alerted of the existence of this application on the very date it was filed (19:07:17). The Court gave directions that Plaintiff was to respond to this application (of 18.7.2017) within 7 days (filing and serving a Response). The Court also directed the parties to file Submissions.

A perusal of the file does not show that such a response was filed, nor were Submissions filed.

### **Determination**

Despite the fact that the affidavit of defendant in response to the application of 15:05:17 was expunged, and that no response was filed in respect of the application of 19:07:17. , and even in absence of any Submissions herein, I have managed to write the ruling.

From the Court of appeal Judgment No. 28 of 2015, it is apparent that a Misc App. (J.R) No. 22 of 2010 had been filed in Meru High Court where by the Court had on 21.11.11 declined to grant Judicial Review orders of certiorari to remove and quash the Land Adjudication Officer's decision touching on parcels Nos. 1196, 1249 and 2286.

The Court of appeal had upset the lower Court's decision and had granted the orders of certiorari and quashed the Land Adjudication Officer's decision of 22:1:10 in respect of parcel No. 1196, 1249 and 2286 in Antuamburi Adjudication Section. The Court of appeal further stated as follows:-

**“The dispute shall be remitted back to the Land Adjudication Officer for hearing and determination in accordance with the law”**

The case was heard afresh in objection case No. 176 for parcels of land No. 1196, 1249 and 2286. **A ruling was delivered on 25.11.16.**

The present defendant moved to this Court in the Judicial Review No. 7 of 2017 where he obtained the following orders on 14:03:17.

**1) That leave be and is hereby granted to the applicant to apply for an order of Judicial Review in the nature of Certiorari to bring up and quash the decision of the District Land Adjudication and Settlement Officer, Tigania East/West District dated 25.11.2016 over Objection No. 176 regarding land parcels No. 1196, 1249 and 2286 Antuamburi Adjudication Section”.**

**2) That leave be and is hereby granted to the applicant to apply for an order of Judicial Review in the nature of prohibition to prohibit the District Land Adjudication and Settlement Officer Tigania East/West District from in any way implementing the decision dated 25:11:16 vide objection No. 176 regarding land parcel's No. 1196, 1249 and 2286 Antuamburi Adjudication Section.**

**3) That the leave granted to apply for orders of Certiorari and prohibition do operate as stay until the main motion is heard and determined.**

**4) That the Motion be filed and served for hearing on 14:3:2017.**

The present matter was filed on 15:5:17. The prayers sought are pegged on the finalization of the A/R Objection No. 176 vide the decision of 25.11.2016.

Plaintiff was not a party to the earlier proceedings, however, the land she is claiming parcel No. 1249 is certainly a subject matter in Judicial Review case No. 7 /2017.

There being an order of stay of the DLASO'S decision of 25.11.16 in the Judicial Review case, It follows that the orders sought in the application of 15:02:17 would be in conflict with the orders in the Judicial Review matter (7/2017).

I also note that in the Judicial Review No. 7 /2017, directions have already been given on the hearing of the matter, where by the case is at the stage of Submissions.

I therefore find that these proceedings should await the finalization of the Judicial Review.

In the circumstances, I proceed to grant orders as follows:

- 1) The application of 15.5.17 is hereby dismissed with costs to defendant.**
- 2) Any Interim Orders given in respect of the application dated 15.5.2017 are hereby vacated.**
- 3) The application of 18:7:17 is allowed such that an order of stay of these proceedings is granted to await the outcome in the Judicial Review No. 7 of 2017.**
- 4) No orders as to costs in the application of 18.7.2017.**

**DELIVERED, DATED AND SIGNED IN OPEN COURT AT MERU THIS 13<sup>TH</sup> DAY OF NOVEMBER, 2017 IN THE PRESENCE OF:-**

CA: Janet/Haway

Carlpeters Mbaabu for Plaintiff

Miss Njega for Defendant

**Hon. L. N. MBUGUA**

**ELC JUDGE**