



**Kagio v Muthiga & 2 others (Sued as the Administrators and Legal Representatives of the Estate of Stephen Muthiga alias Muthiga Ndugura alias Muthiga Ndubura (Deceased)) & another (Environment & Land Case 627 of 2014) [2015] KEELC 850 (KLR) (24 February 2015) (Ruling)**

*Macharia Kagio v Muchai Muthiga & 3 others [2015] eKLR*

Neutral citation: [2015] KEELC 850 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 627 OF 2014  
LN GACHERU, J  
FEBRUARY 24, 2015**

**BETWEEN**

**MACHARIA KAGIO ..... PLAINTIFF**

**AND**

**MUCHAI MUTHIGA, STEPHEN MUTHIGA MWAURA AND MWIRARIA  
MWAURA (SUED AS THE ADMINISTRATORS AND LEGAL  
REPRESENTATIVES OF THE ESTATE OF STEPHEN MUTHIGA  
ALIAS MUTHIGA NDUGURA ALIAS MUTHIGA NDUBURA  
(DECEASED)) ..... 1<sup>ST</sup> DEFENDANT**

**MUCHAI MUTHIGA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed an application dated 28/4/2014, seeking orders that:
  1. Spent
  2. Spent
  3. That pending the hearing and determination of the Originating Summons, an interim injunction be issued restraining the Defendants by themselves and through their agents, employees and assigns from selling, alienating, dealing in, transferring, charging, mortgaging, tendering as security, indemnity or guarantee, entering into and or remaining in, and or in any other manner whatsoever claiming or laying claim to, and or in any other manner interfering with the Plaintiff's possession and proprietary rights of and over property known as L.R. No.



6845/170 measuring approximately 2.499 Hectares (formerly Farm No. 54 Githunguri Njiru Farm (1966) Limited).

4. Directions be given on the hearing of the Originating Summons herein filed as deemed fit and just by the Court.
5. Costs be provided for the Plaintiff.
2. The application is premised on grounds outlined on the application and supported by an affidavit sworn by the Plaintiff. He deposes that he together with his wife purchased the suit property in 1986 from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants wherein they took possession and developed it. Subsequently, that the said Defendants introduced them to Githunguri Njiru Farm (1966) Limited whereby the property they had purchased was hived off from a larger parcel and their names entered in the records awaiting issuance of title.
3. It is deposed by the Plaintiff that unbeknown to them, the Defendants filed a Succession Cause No, 64 of 2012at the Githunguri Chief Magistrates' Court and included the suit property as part of the estate of the deceased and thereafter proceeded to distribute the same. The Plaintiff deposes that the inclusion of the property as part of the estate and subsequent distribution was unlawful for reasons that: having sold the same, the property no longer existed for distribution by the 1<sup>st</sup> Defendant; the Magistrates' Court lacked jurisdiction to distribute an estate worth millions of shillings; there is no basis or justification for disposing them the property. The Plaintiff also deposed that he had been in possession of the suit property since 1986 and therefore had acquired overriding interest over the property thus any interest the Defendants may have had was extinguished by operation of the law.
4. The Plaintiff urged the court to grant the orders sought in the application deposing that the Defendants have expressed their intention to evict them from the property. In support of the application, the Plaintiff annexed a copy of a letter dated 3/4/1986, addressed to the Chairman of Githunguri Njiru Ltd signed by the representatives of the deceased expressing their consent to sell the property. Also annexed were two letters by Githunguri Njiru Limited dated 20/3/2001 and 6/2/2014 stating that the suit property is jointly owned by the Plaintiff and his wife. A copy of the Certificate of Conformation of Grant showing the distribution of the estate including the suit property was annexed to the affidavit, as well as a letter of demand from the Defendants' advocates addressed to the Plaintiff dated 17/12/2013.
5. The application was opposed by the Defendants by a Replying Affidavit sworn by Mwiraria Mwaura Muthiga on 19/6/2014. He deposed that as administrator of the estate of the deceased, they were not aware of the allegations of sale made by the Plaintiff. The deponent stated that the succession cause was properly filed and that the suit property was lawfully included as part of the deceased's estate. It was his deposition that the deceased died in 1983 and therefore it would be unlawful for any person to purport to in any manner interfere with the property of the deceased including selling the suit property. The deponent stated that they only came to know of strangers laying claim over the property after they commenced the process of transfer upon attaining a confirmation of grant.
6. The deponent stated that Githunguri Farm Limited during the processing of the transfer, they were asked to pay a total of Kshs. 283,000/- to facilitate the processing of the title and that at no time were they notified by the officials therein about the Plaintiff's claim. The deponent referred to the letter annexed to the Plaintiff's affidavit purporting to have been written by the beneficiaries of the estate. He deposed that as at the date of the said letter, the representatives herein had no capacity to sell the property. The deponent contended that the Plaintiff was perpetrating illegality by taking possession of the deceased's property unlawfully.



7. The Plaintiff swore a Supplementary Affidavit on 15/7/2014, in response to the Defendants' reply. The Plaintiff reiterated that he purchased the property from the Defendants at a consideration of Kshs. 78,000/-. He outlined that Kshs. 9,000/- was paid upon execution of the agreement and Kshs. 69,000/- paid up on 24/4/1986, as mutually agreed by both parties. To that effect, the Plaintiff annexed a copy of a handwritten agreement dated 22/4/1986 with the names of the Defendants as the vendors, together with names and signatures of four witnesses. The Plaintiff also annexed a copy of a Barclays Bank Cheque dated 23/4/1986 in favour of Joseph Muthiga of Kshs. 60,000/- The Plaintiff maintained that at all times the Defendants knew that the property in dispute was registered in the name of the deceased and that their intention was to sell to him and therefore, the Defendants could not now purport to run away from it.
8. The application was canvassed by way of written submissions. Submissions by counsel for the Plaintiff were filed on 27/10/2014, wherein counsel submitted that the Plaintiff had demonstrated his interest over the suit property by virtue of purchase and therefore his interest ought to be protected notwithstanding the provisions of Section 82(b)(ii) *Law of Succession Act*, which can be interpreted in favour of the bonafide purchaser such as the Plaintiff wherein the sale before issuance of letters of administration can be upheld.
9. Submissions were filed by counsel for the Defendants dated 28/10/2014, wherein counsel recapped the Defendants' depositions that only a legal representative duly authorized by a grant could have dealt with the property of the deceased. In the circumstances, counsel submitted, that prima facie, the property belongs to the administrators who hold the same in trust for the beneficiaries.
10. The dispute between the parties is the ownership of the suit property. The undisputed facts is that the owner of the plot is the father of the Defendants and that he passed away in 1983. Further that he died before title to the property was processed and issued and to date, title is still yet to be processed. The disputed facts are that the Plaintiff purchased the property in 1986 from the Defendants who agreed to sale the plot to him at a consideration of Kshs. 78,000/- . The Plaintiff annexed two handwritten agreements executed by the Defendants indicating their consent to sale the plot to the Plaintiff and also acknowledging receipt of the purchase price. The Plaintiff claims to have been in possession of the property since the date of purchase and therefore the Defendants' inclusion of the suit plot as part of their father's estate and proceeding to prosecute the same is unlawful. The Defendants on their part deny the claim that they sold the plot to the Plaintiff. It is their contention that at the time of the sale, they did not have legal capacity to transact since they had not obtained letters of administration.
11. This is court is alive to the provisions of Section 45 of the *Law of Succession Act* that no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person, except as authorized by the Act. On the other hand, the Plaintiff claims to be a bona fide purchaser. He also thrusts the claim for ownership thereof by virtue of operation of the law. It is my finding that there are clearly competing interests that the court must adjudicate upon trial. Additionally, what constitutes adverse possession is a question of fact and degree and depends on the circumstances of the case See Joseph Mutafari Situma v Nicholas Makhanu Cherongo Kisumu, Civil Appeal 351 of 2002 [2007] eKLR.
12. Having now considered the pleadings generally the written submissions and the annexures thereto and in the interest of justice, I hereby enter an order of Status Quo to the effect that the Defendants shall not to interfere with the Plaintiff's possession or in any way alienate the suit property pending the hearing and determination of the suit, or until further orders of the court. Costs of the application shall be in the cause.

It is so ordered.



**DATED, SIGNED AND DELIVERED THIS 24TH DAY OF FEBRUARY, 2015**

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mr Obwayo for the Plaintiff/Applicant

Mr.Ndungu for the Defendants

Kamau: Court Clerk

**24. 2.2015**

