



Gwaka wa Utheri Mwitikiria Investments Utawala Limited (Formerly Mwitikiria Investments Company) v Wachu & 2 others; Kamau & 14 others (Applicant) (Environment & Land Case E010 of 2021) [2024] KEELC 746 (KLR) (19 February 2024) (Ruling)

Neutral citation: [2024] KEELC 746 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E010 OF 2021
CA OCHIENG, J
FEBRUARY 19, 2024
IN THE MATTER OF LIMITATIONS OF ACTIONS ACT, CAP 22, LAWS OF KENYA
AND
IN THE MATTER OF THE CLAIM FOR TITLE TO THE LAND BY ADVERSE POSSESSION OVER L.R. NO. 7340/59 NOW KNOWN AS L.R. NO. 28611 SITUATED IN MAVOKO MUNICIPALITY WITHIN MACHAKOS COUNTY

BETWEEN

GWAKA WA UTHERI MWITIKIRIA INVESTMENTS UTAWALA LIMITED (FORMERLY MWITIKIRIA INVESTMENTS COMPANY) PLAINTIFF

AND

GRACE WACHU 1ST DEFENDANT

ESTHER WAMBU 2ND DEFENDANT

DAVID NG'ANG'A (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF NDINGURI KARUGIA (DECEASED)) 3RD DEFENDANT

AND

SIMON NGIGI KAMAU APPLICANT

SAMWEL MACHIRA MUIGAI APPLICANT

FREDRICK GICHUHI NJENGA APPLICANT

JOSEPH KINUTHIA APPLICANT

ELILEEN W KINUTHIA APPLICANT

NELSON MURITU NJENGA APPLICANT

KENNETH NJENGA MUNGAI APPLICANT



SAMWEL NGUGI MUNGAI	APPLICANT
HENRY NJOROGE NJONJO	APPLICANT
LUKE MUCHIRA NYAGA	APPLICANT
ROBERT KUNGU MUIRURI	APPLICANT
SARAH WANJIKU KAMAU	APPLICANT
DAVID NGANGA NJENGA	APPLICANT
JANE GATHONI WANGETHA	APPLICANT
STEPHEN NJIHIA MBUGUA	APPLICANT

RULING

1. What is before court for determination is the Intended Interested Parties' Notice of Motion Application dated the 26th June, 2023 where they seek the following Orders:
 1. Spent
 2. That pending the inter parte hearing of this Application, this Honourable Court be pleased to issue a temporary injunction against the Plaintiff, its agents, or any such person occupying any part of that parcel of land known as LR No. 7340/50 now known as LRNo.28641 situated inMavoko MunicipalitywithinMachakos Countyrestraining it/ them from carrying any form of construction or conducting any form of activities on the said land. The Officer Commanding Utawala Police Station be directed to enforce this Order.
 3. That upon hearing of this Application, this Honourable Court be pleased to issue a temporary injunction against the Plaintiff, its agents, or any such person occupying any part of that parcel of land known as LR No. 7340/50 now known asLR No. 28641 situated inMavokoMunicipalitywithinMachakos Countyrestraining it/them from carrying any form of construction or conducting any form of activities on the said land until the pending suit is heard and determined. The OCS Utawala Police Station does enforce these Orders.
 4. That the Intended Interested Parties/Applicants be enjoined in the suit as Interested Parties.
 5. That Cost of the Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Simon Ngigi Kamauwhere he deposes that on diverse date between 2009 and 2014, the Applicants bought different portions of land parcel number LR No. 7340/59 Now known as LR No. 28641 from Hannah Gathoni Gichuri (deceased) who was the then its registered proprietor after petitioning for Letters of Administration for the Estate of Ndinguri Karugia (deceased). Further, that while they were processing the title deeds for their respective portions of the suit land, the Grant issued to Hannah Gathoni Gichuri (deceased) was revoked. He claims the Applicants incurred millions of shillings to procure relevant consents to have the land subdivided including pay land rates and survey fees. He states that people identifying themselves as members of the Plaintiff have invaded the suit land and are currently building permanent structures thereon. He contends that though the Court had directed parties herein to maintain status quo, the Plaintiff through its alleged members have continued to develop the suit land in complete disregard of the said orders. He insists that there are many people with interest on the suit land and though the dispute herein has been reported at Embakasi Police Station,



they have failed to act. He avers that the suit land was subject to litigation in Nairobi ELC Case No. 554 of 2014 and the same was concluded with a consent Judgment between the parties thereto, whereby, pursuant to the said Judgment, the Applicants were to get various portions of the suit land. Further, that the Applicants have not been able to enjoy the fruits of their Judgment following the revocation of the Grant issued to Hannah Gathoni Gichuri (deceased) in Succession Cause No. 224 of 2006. He reiterates that the Applicants' have a legal right to the suit land.

3. The Plaintiff opposed the instant Application by filing a Replying Affidavit sworn by its director, Stanley Ritho Mwathi where he deposes that the Applicants' have failed to demonstrate any identifiable stake and/or interest in the suit land, hence the application fails below the threshold of the orders sought which are incapable of being granted. He highlights anomalies in the various Sale Agreements dated the 25th July, 2012, 25th August, 2012 and 2nd May, 2011 which were annexed by the Intended Interested Parties' to their Supporting Affidavit and insists that the Applicants' redress lies with the persons to whom they allegedly paid monies to and not in the proceedings herein. He contends that gleaning from the aforementioned agreements, none of the Applicants' herein have been in possession of the suit land, have no stake therein and cannot therefore suffer any prejudice. He reiterates that the instant Application is an abuse of the court process and is a wastage of judicial time in that prayers (2) and (3) of the said Application have already and/or conclusively been dealt with by this court *vide* its Ruling dated the 27th March, 2023. He states that in March, 1993, one Herman Gichuri Ndinguri, a son to Ndinguri Karagia (in whose name the suit land is registered), sold to the Plaintiff the said land. Further, that the Plaintiff paid the full purchase price, took possession thereof and subdivided the said land. He insists that the Plaintiff through its members have been in physical possession of the suit land from 1993 and many of the members have established their dwelling houses thereon, awaiting their titles.
4. The Applicants' filed a Further Affidavit sworn by Simon Ngigi Kamau where he reiterated his averments as per the Supporting Affidavit and insisted that the Judgment in ELC Case No. 554 of 2014 is still in force and establishes their stake in these proceedings. Further, that as bona fide purchasers' for value, they have on several occasions attempted to get their titles to the respective purchased portions but have been unsuccessful. He insists that from 2009, he has been visiting the suit land and only a small portion is occupied.
5. The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and rivaling submissions, the following are the issues for determination:- Whether the Applicants' should be joined in these proceedings as Interested Parties. Whether the Applicants' are entitled to orders of interlocutory injunction pending the outcome of the suit.
7. The Applicants' in their submissions contended that they should be joined in these proceedings as Interested Parties as they have demonstrated their direct interest in the substratum of this suit. Further, that they have presented copies of Sale Agreements indicating they separately bought different parts of the suit land. They further submitted that the Judgment in ELC Case No. 554 of 2014 crystallizes their interest on the suit land. They reiterated that they will be affected by the decision of this Court, if decided in favour of the Plaintiff. They further submitted that the Plaintiff was selling portions of the suit land to members of the public hence injunctive orders should issue. To support their averments, they have relied on the following decisions: *Judicial Service Commission v Speaker of the National Assembly & Another* (2013) eKLR; *Florence Nafula Ayodi & 5 Others v Jonathan Ayodi*



Ligure (2021) eKLR; Mrao Limited v First American Bank of Kenya Limited & 2 Others (2003) eKLR and Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR.

8. The Plaintiff in its submissions contended that there is no indication that the Intended Interested Parties' paid the purchase price. Further, that many of the attached Sale Agreements were unexecuted. It argued that none of the Applicants' have been in possession of the suit land. It insisted that the Applicants' have failed to demonstrate their interest in the substratum of the suit. It averred that, from the documents presented, it is not clear who the Applicants' purchased the suit land from. Further, if they purchased the whole land or portions of the land and whether the purported holder of the Power of Attorney was registered, as by law. It further insisted that it is the Plaintiff that has been in possession of the suit land and the Applicants' have not met the threshold on injunction to warrant the orders sought. To support its arguments, it relied on the following decisions: Francis Kariuki Muruatetu & Another v Republic & 5 Others (2016) eKLR; Francis Mwangi Mugo v David Kamau Gachago (2017) eKLR; Marigat Group Ranch & 3 others v Wesley Chepkoiimet & 19 Others (2014) eKLR; Giella v Cassman Brown and Florence Nafula Ayodi & 5 others v Jonathan Ayodi Ligure v John Tabalya Mukite & another; Benson Girenge Kidiavai & 67 others (Applicants/Intended Interested Parties) [2021] eKLR.
9. On definition of an Interested Party, Black's Law Dictionary, 9th Edition, states *inter alia*:
A party who has a recognizable stake (and therefore standing) in a matter.”
10. On joinder of a party to proceedings, Order 1 Rule 10(2) of the Civil Procedure Rules provides that: -
“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
11. In the case of Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others (2015) eKLR the Court defined an Interested Party as follows:-
“(An) interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause.”
12. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, also known as the Mutunga Rules defines an Interested Party as follows:-
“A person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.”



13. While in the case of *Francis Karioko Muruatetu & another v Republic & 5 others* [2016] eKLR (Petition No. 15 of 2015), the Supreme Court provided parameters to be considered for joinder of an Interested Party and stated that:-

"From the foregoing legal provisions, and from the case law, the following elements emerge as applicable where a party seeks to be enjoined in proceedings as an interested party:

One must move the Court by way of a formal application. Enjoinment is not as of right, but is at the discretion of the Court; hence, sufficient grounds must be laid before the Court, on the basis of the following elements:

- i. The personal interest or stake that the party has in the matter must be set out in the application. The interest must be clearly identifiable and must be proximate enough, to stand apart from anything that is merely peripheral.
- ii. The prejudice to be suffered by the intended interested party in case of non-joinder, must also be demonstrated to the satisfaction of the Court. It must also be clearly outlined and not something remote.
- iii. Lastly, a party must, in its application, set out the case and/ or submissions it intends to make before the Court, and demonstrate the relevance of those submissions. It should also demonstrate that these submissions are not merely a replication of what the other parties will be making before the Court."

14. On perusal of the pleadings herein, I note the Plaintiff filed its Originating Summons dated the 8th March, 2021 seeking to be declared owner of land parcel number LR 7340/59 (now known as LR No. 28641), hereinafter referred to as the 'suit land', by way of adverse possession. The Plaintiff contemporaneously filed a Notice of Motion Application dated the 8th March, 2021, where it sought injunctive orders restraining the Defendants' from the suit land. Further, on the 30th September, 2021, the parties compromised the said application and agreed to maintain status quo pending the outcome of the suit. The Applicants' herein have sought joinder in this suit including orders of injunction pending the outcome of the suit. The Defendants' did not oppose the instant Application. From the annexures in the Supporting Affidavit, I note the Applicants' claim on diverse dates between 2009 and 2014, they bought different portions' of the suit land from Hannah Gathoni Gichuri (deceased) who was the then its registered proprietor after she had petitioned for Letters of Administration for the Estate of Ndinguri Karugia (deceased). They explained that as they were processing the title deeds for their respective portions of the suit land, the Grant issued to Hannah Gathoni Gichuri (deceased) was revoked. The Plaintiff on the other hand also claims to have bought the suit land from Herman Gichuri Ndinguri who was the son Ndinguri Karugia, the registered owner. I note both the Applicants' and Plaintiff claim to be in possession of the suit land. From this analysis alone, it is evident that the main reason for the intended Interested Parties' quest to be joined to these proceedings is to protect their rights as previous purchasers' of the suit land.
15. Based on the facts as presented and relying on the legal provisions I have quoted while associating myself with the cited decisions, it is my considered view that the Intended Interested Parties' indeed have a stake in these proceedings and their involvement herein is necessary to enable the court effectually and completely adjudicate upon as well as settle all questions in dispute. Further, they will be affected by any decision from the suit herein. I opine that the Plaintiff although vehemently opposed to their joinder, has failed to demonstrate the prejudice its members stand to suffer if the Applicants' were joined as Interested Parties.



16. As to whether the Applicants' are entitled to orders of injunction pending the outcome of the suit. In line with the principles established in the case of *Giella vs Cassman Brown & Company* (1973) EA 358 as well as the description of a *prima facie* case as provided in the case of *Mrao Ltd Vs First American Bank of Kenya & 2 Others* (2003) KLR 125, I will proceed to establish whether the Applicants have demonstrated a *prima facie* case to warrant the orders of interlocutory injunction as sought.
17. I note on 30th September, 2021, the Plaintiff and the Defendants' while dealing with the Plaintiff's Application for injunction, had agreed to maintain the obtaining status quo in respect to the suit land. The Applicants' now seek orders of injunction claiming the Plaintiff is selling the suit land to third parties and have continued construction thereon despite the status quo order.
18. Looking at the documents presented, I note that the Applicants' were indeed sold for the suit land by Hannah Gathoni Gichuri. However, the Grant issued to Hannah Gathoni Gichuri which enabled her sell the land to the Applicants' was revoked in 2017 in High Court Succession Cause No.224 of 2006 wherein the court directed the suit land to revert back to the deceased Estate (Ndinguri Karagia). It is my considered view that since there are competing interests in respect to the suit land noting that the dispute herein has previously been litigated in court, it would be important if this matter was set down for hearing to establish the true owner of the said land. I opine that granting an injunction would be tantamount to issuing eviction orders against the Plaintiff.
19. Based on the facts as presented, at this juncture I find that the Applicants have not established a *prima facie* case to warrant the orders sought against the Plaintiff. In line with the findings in *Nguruman Limited v Jan Bonde Nielsen* (2014) eKLR, I will not deal with the other two limbs on injunction.
20. It is against the foregoing that I find the Notice of Motion dated the 26th June, 2023 partially successful. I will allow only prayer No. 4 on joinder of the Applicants as Interested Parties. I direct that the Interested Parties do file and serve their Defences within twenty one (21) days from the date hereon.
21. I further direct that the Orders of obtaining status quo issued on 21st September, 2021 be and is hereby maintained where no party should dispose or continue with further construction on the suit land pending the outcome of the suit.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 19TH DAY OF FEBRUARY, 2024

CHRISTINE OCHIENG

JUDGE

