



Koinange & another v Wanjohi & 8 others (Environment & Land Case E013 of 2020) [2024] KEELC 1334 (KLR) (14 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1334 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE E013 OF 2020
FM NJOROGE, J
MARCH 14, 2024**

BETWEEN

DAVID NJUNU KOINANGE 1ST PLAINTIFF

EDDAH WANJIRU MBIYU 2ND PLAINTIFF

AND

EDWARD KIBE WANJOHI 1ST DEFENDANT

PETER MWANGI KAHETE 2ND DEFENDANT

PHILIP LINOI SIMPILI 3RD DEFENDANT

SAMSON KONENE NKURUNA 4TH DEFENDANT

LEMONTOI OLE DIKIR 5TH DEFENDANT

DENIS SANARE NKURUNA 6TH DEFENDANT

JOSPHAT MPOE 7TH DEFENDANT

JOSEPH MPOE 8TH DEFENDANT

MOHAMED RANA 9TH DEFENDANT

RULING

1. The first application dated 3/3/2023 filed by the firm of Geoffrey Otieno & Co., Advocates for the 9th defendant seeks that the entire suit against the 9th defendant be struck out with costs. His application is supported by his sworn affidavit dated 3/3/2023 and his sworn supplementary affidavit dated 12/4/2023. The grounds upon which the said application is made are that the 9th defendant was improperly joined to the suit and that no reasonable cause of action has been disclosed against him. The 9th defendant avers that he is not a trespasser on the suit land, for the reason that he is employed



as a Farm Manager for a portion of the suit land. He avers that vide a Judgment of the High Court given on 7/5/2020 in Nairobi HC Succession Cause No. 527 of 1981 – Re Estate of Mbiyu Koinage – Deceased, the estate of Paul Mbatia Mbiyu Koinange (deceased) is entitled to 278.5 acres in LR No. 8669/3 – Mau Narok. He further asserts that he was appointed as manager vide a letter dated 1/12/2020 by Mrs. Eliza Mbatia, the widow to the late Paul Mbatia, who at the time of the said appointment had a Special Power of Attorney donated by her husband. For those reasons he states, he cannot be considered an intermeddler or even as conducting irregular activities on the suit land. He further states that contrary to the assertion by the plaintiffs that the grant of letters to the estate of Paul Mbiyu Koinange were issued to Susan Wairimu Mwangi and Loise Njeri Mbatia in Kiambu Succession Cause No E134 of 2022, they were actually issued to Eliza Mbatia, his employer, in Nairobi HC Succession Cause No E3230 of 2022 on 31/1/2023. He avers that Susan Wairimu Mwangi was found not to have proved any marriage between her and the late Paul Mbatia Mbiyu Koinange while Eliza Mbatia had been declared the sole wife, and so she had capacity to employ him. He avers that he has every right to be on the suit land and to execute his duties thereon.

2. The replying affidavit of the 2nd defendant dated 4/4/2023 was filed in opposition to the 9th defendant's application dated 3/3/2023. In it the deponent avers that Eliza Mbatia is not a beneficiary of and thus lacks the mandate to manage the affairs of, the estate of the late Mbiyu Koinange and that she lacks capacity to appoint the 9th defendant to manage the assets of the estate; that the grant of letters of administration to the late Paul's estate were issued to Susan Wairimu Mwangi and his daughter Loise Njeri Mbatia; that in any event any power of attorney donated to the said Eliza expired with the demise of the donor, and so the 9th defendant lacks capacity to handle the assets of the estate; that the 9th defendant has colluded with the 7th and 8th defendants to invade the suit land and lease out the land to third parties and keeping the administrators from the farm thus denying the estate its entitlement to income.
3. The 9th defendant's submissions on his application were filed on 12/4/2023. I have considered those submissions. I have perused the court record and I have not found any submissions filed on behalf of the respondent.
4. From the start of my analysis, I find that the 9th applicant's application is unwarranted for two reasons. First, if he is an employee managing the land, he would be well versed to explain at the hearing which principal he serves and the basis on which he has been appointed and on that ground alone, I find that he is a competent party to the present suit. Further on that ground it is clear that his purported employer's capacity to handle the Estate assets is stringently disputed by the plaintiffs. Secondly, if he is actually a trespasser, he should be retained in the proceedings so that he may face judgment. It is not the function of this court to make final orders affecting the determination of the main suit at an interlocutory stage save in very limited instances under which the 9th defendant's application does not qualify. For those two obvious reasons, his application lacks merit and it is for dismissal with costs.
5. The second application dated 11/4/2023 has been filed by Kanyi Ngure Advocates on behalf of the 7th and 8th defendants. It seeks the following orders:
 1. That the honourable court be pleased to issue an Order compelling the Chief Land Registrar, Nairobi to furnish to the applicant's advocates being Kanyi Ngure & Co. Advocates and/or to furnish before court a certified extract copy of the Title Grant Number I.R 14607 being LR No. 8669/3 in Mau Narok, Nakuru District delineated on Survey Plan Number 67506 measuring approximately 4,296 acres and the said certified extract copy of title be furnished within fourteen (14) days of service of the order hereof upon the Chief Land Registrar, Nairobi.



2. That the plaintiffs' suit as filed be struck out for the plaintiffs have no locus standi to agitate over issues of ownership, trespass to land and/or invasion of the suit parcel described as Title Grant Number I.R 14607 being LR No. 8669/3 in Mau Narok, Nakuru District delineated on Survey Plan Number 67506 measuring approximately 4,296 acres.
3. That once the plaintiffs' suit is struck out, judgment be entered for the 7th & 8th defendants as prayed in the counterclaim dated and filed 11/4/2023 with costs of this application and the entire suit being awarded to the 7th & 8th defendants.

In The Alternative to Prayers 2 & 3 herein above:

4. That pending the hearing and determination of the case herein, a temporary injunction order be issued against the plaintiff/respondents restraining the plaintiffs or their servants/agents from entering, constructing, remaining, taking up, evicting, leasing out, renting out and/or interfering with the 7th & 8th defendants' quiet possession and occupation of the title Number IR 43067 being LR No. 8669/3 in Mau Narok, Nakuru District delineated on Survey Plan Number 56590 measuring 800 acres registered in the names of the Late Kikenyi Ole Mpoe (deceased) who was the father to the 7th & 8th defendants.
5. That in any event costs of this application be awarded to the 7th & 8th defendants.
6. In brief the grounds raised in the application by the 7th and 8th defendants reveal that their main contentions contained in their suit against the plaintiffs are premised on the allegation that the main parcel known as LR NO 8663/3- Mau Narok (IR No 14607) was not owned by the late Mbiyu Koinange but by a firm known as Impulse Developers Co Ltd (herein after "Impulse") who acquired it from the Settlement Fund Trustees as late as 22/5/2006. They also contend that they have been utilizing and leasing out about 1500 acres of the parent parcel for a period of 12 years since the SFT transferred the same to Impulse, which firm needs be joined to the suit to face the 7th and 8th defendant's claim for adverse possession against it.
7. The full details contained in the applicants' grounds are that the applicants (7th and 8th defendants) claim that they have an interest in 800 acres known by the reference LR NO 8663/3- Mau Narok (IR No 43067) carved out of the main parcel LR NO 8663/3- Mau Narok (IR No 14607) which measured about 4296 acres; they state that they have been residing on that parcel since birth. They also aver that the plaintiffs lack any interest in that main parcel as it is registered in the name of Impulse who acquired the same from the Settlement Fund Trustees on 22/5/2006. The further ground for stating that the plaintiffs lack interest in the main parcel of land is that the plaintiffs have not stated in their claim that the company belonged to the estate of the late Mbiyu Koinange which the plaintiffs represent; that notwithstanding, the plaintiffs have attached to their initial plaint a copy of extract of title showing that the main parcel is owned by the said Impulse Developers Ltd yet in the Succession Cause No 527 Of 1981 Re Estate Of Mbiyu Koinange the said company is not described as part of the Estate of the late Mbiyu Koinange; consequently, say the 7th and 8th defendants, the plaintiffs are claiming ownership of the main parcel without exhibiting any documents of ownership whatsoever held in the name of the late Mbiyu Koinange. The applicants state they have been utilizing and leasing out about 1500 acres of the parent parcel for a period of 12 years since the SFT transferred the same to Impulse. That firm, according to the applicants, needs be joined to the suit as proprietor to face the 7th and 8th defendant's claim for adverse possession against it. They thus term the plaintiffs' suit against them an abuse of the court process and grossly incompetent. The applicants also state that they have a prima facie case warranting issuance of orders of temporary injunction against the plaintiffs to restrain them from interfering with the parcel No. LR NO 8663/3- Mau Narok (IR No 43067) measuring 800 acres which they assert belongs to the estate of their father, Kikenyi Ole Mpoe.



8. In respect of their prayer compelling the Chief Land Registrar to furnish them with a certified extract of a grant to title no LR NO 8663/3- Mau Narok (IR No 14607), they state that the grant whose copy they are in possession of names Impulse (and not the estate of the deceased Mbiyu Koinange) as owner hence there is need to verify the current registered owner of the subject parcel. Once they get to know the registered owner they will be in a position to move forward and prosecute their application which seeks to strike out the plaintiff's suit for want of locus standi and to enable their filing of a claim for adverse possession against him or her (that last statement was made in their further supporting affidavit). They aver that their applications to the Chief Land Registrar have failed to yield any fruit and so this court ought to intervene.
9. The application is supported by the sworn affidavit of Josphat Munke Mpoe and Joseph Kakore Mpoe dated 11/4/2023 and also their further supporting affidavit dated 19/5/2023.
10. The application dated 11/4/2023 was opposed by way of the 2nd plaintiff's sworn replying affidavit dated 23/5/2023. In the response the deponent stated as follows: the suit land was sold to the late Mbiyu Koinange by the SFT; in June 2005 the family of the late Mbiyu resolved to sell the land and that decision was sanctioned by a court order in HC Succession Cause 527 of 1981 dated 26/10/2005. She exhibited that order in her affidavit. Since the estate was indebted to SFT on account of the purchase price for the suit property, Impulse Developers Co. Ltd. were persuaded by the Administrators, and they agreed, to pay the outstanding amounts to the SFT on behalf of the estate upon which the administrators executed an assignment transferring the beneficial interest of the estate to Impulse. Consequently, Impulse sued the Estate for specific performance but later withdrew its claim leaving the Estate's counterclaim for rescission pending, which is currently NBI ELC 224 of 2013, and which was stayed in July 2013 to await determination of the succession cause. Later the succession court cancelled the transfer to Impulse and ordered re-registration in the name of Estate of Mbiyu Koinange. Impulse's appeal against that order of High Court was rejected by the Court of Appeal which referred the matter back for distribution among all beneficiaries identified by the High Court, which court had also set aside 800 acres for sale to offset debts of the state; that the 7th and 8th defendant's family came to the land when their elder brother was employed as a farm manager by the administrators and they have never made any claim to the land throughout the proceedings in Succession Cause No 527 Of 1981 despite being aware of the suit, and a member of the larger Mpoe family indeed took up the role of witness for the Estate. The deponent believes the documents exhibited by the applicants are forgeries that need investigation or forensic examination to establish their origin. As such she adds that the issue of ownership of the suit land is res judicata.
11. The 7th and 8th defendants filed their submissions on their application dated 11/4/23 on 20/7/23. The 2nd plaintiff filed submissions on the same application on 26/9/23. I have considered those submissions in preparing this ruling.
12. The first request of the applicants in the application dated 11/4/2023 is that the Chief Land Registrar, Nairobi be compelled to furnish to the applicant's advocates being Kanyi Ngure & Co. Advocates and/or to furnish before court a certified extract copy of the Title Grant Number I.R 14607 being LR No. 8669/3 in Mau Narok, Nakuru District. The revealed purposed of obtaining such an extract depict the applicants as only pursuing their own self-interest through the application. They simply want evidence. The Chief Land Registrar is the custodian of all land records relating to registration of land in Kenya. If the applicants were aggrieved by her inaction they ought to have sought public law remedy, for that grievance may, if supported by sufficient evidence, amount to a public officer either failing or neglecting to execute her duties. Further, in so far as the 7th and 8th defendants intend to use such evidence acquired by court order to further their claim against the plaintiffs or Impulse, such an application made by them within this suit is also not apt, more so for the reason that the suit is filed in an



adversarial setting and the court should not be perceived to be wading into the controversies between the parties or to be aiding one party in acquisition of ammunition vide which to annihilate the other's case. The court must always be and be seen to be neutral in any dispute brought before it and therefore such orders as would taint its image as an unbiased adjudicator and impair public confidence in its work, even where that loss of image and confidence were to be purely in terms of public perception and not reflect any reality, should not issue.

13. Concerning the plaintiffs' request that the suit as filed be struck out on the ground that the plaintiffs have no locus standi to agitate over issues of ownership, trespass to land and/or invasion of the suit parcel described as Title Grant Number I.R 14607 - LR No. 8669/3 and that judgment be entered for the 7th & 8th defendants as prayed in the counterclaim dated and filed on 11/4/2023, the plaintiffs have filed a very detailed sworn affidavit explaining why the land may be still registered in Impulse's name in the copies of ancient documents held by the 7th and 8th defendants. These are matters for verification at the hearing of the main suit which can not be resolved in an interlocutory application. To buttress this point, the plaintiffs have attempted to turn the tables on the 7th and 8th defendants by labelling their documents as forgeries in need of criminal investigation. It is the trial of those allegations that both sides in the application have raised: the challenge to authenticity of documents and the impugning of oral evidence of witnesses, that will occur at the main hearing and which the court will determine with finality at the end of the suit. This court is not inclined to have them disposed of at an interlocutory application. That prayer too must therefore fail.
14. The next prayer of the 7th and 8th defendants' motion seeks that a temporary injunction order be issued against the plaintiffs/respondents restraining them from entering, constructing, remaining, taking up, evicting, leasing out, renting out and/or interfering with the 7th & 8th defendants' quiet possession and occupation of the title Number IR 43067 being LR No. 8669/3 in Mau Narok, Nakuru District delineated on Survey Plan Number 56590 measuring 800 acres allegedly registered in the names of the Late Kikenyi Ole Mpoe (deceased) who was the father to the 7th & 8th defendants. However, having read the entire application and the related affidavits, I do not find for one moment that the 7th and 8th defendants possess any prima facie case against the plaintiffs. There is evidence that the succession cause has been pending for ages and it may be one of the oldest in our justice system, yet I do not find a shred of evidence that the 7th and 8th defendants ever raised any objection to the Estate's claim at that forum, or that they have ever claimed, prior to the lodging of this suit, that they were somehow else entitled to any land hived out of the main parcel. The affidavit of Raphael Mpapai Mpoe dated 18/6/2013 filed in Succession Cause 527 of 1981 on 18/7/2023 is sufficient to raise reasonable concern as to why the 7th and 8th defendants, who are kin to the deponent Raphael, have waited this long to raise such serious claims with regard to land within the main parcel. Further, I have not seen any response by the said defendants to the allegations raised by the 2nd defendant in paragraph 18 of her affidavit dated 23/5/23, to the effect that their family only came to the land by virtue of an employment contract their elder brother had with the administrators as a Farm Manager. It is for those reasons that I find that the 7th and 8th defendant's application dated 11/4/2023 lacks merit.
15. In the upshot I make the following orders:
 - a. The application dated 3/3/23 is dismissed with costs to the plaintiffs only;
 - b. The application dated 11/4/2023 is dismissed with costs to the plaintiffs only;
 - c. Parties shall comply with Order 11 of the Civil Procedure Rules by filing and service of their respective trial bundles, the plaintiffs within the first 30 days and the defendants within the following 30 days and this matter shall be mentioned on 22nd May 2023 before the ELC Judge sitting at Nakuru for directions as to hearing.



DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT ON THIS 14TH DAY OF MARCH 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

