



**Omar & 449 others (Suing on their Own Behalf and on Behalf of 445 Persons Residing on a Portion of Land Reference No. 5908 /8 (Original No. 5908/5/3), Njiru) v Kirima & Kirima (Sued as Administrators of the Estate of Gerishon Kamau Kirima) & 4 others (Environment & Land Petition E025 of 2023) [2024] KEELC 3399 (KLR) (18 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3399 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND PETITION E025 OF 2023**

**LN MBUGUA, J  
APRIL 18, 2024**

**BETWEEN**

**MOHAMED OSMAN OMAR ..... 1<sup>ST</sup> PETITIONER  
BONIFACE NDEGE KIRIGIA ..... 2<sup>ND</sup> PETITIONER  
KHADAR IBRAHIM ADOW ..... 3<sup>RD</sup> PETITIONER  
NASEIBA IBRAHIM ALI ..... 4<sup>TH</sup> PETITIONER  
EDIN ADAN ALIO & 445 OTHERS ..... 5<sup>TH</sup> PETITIONER  
SUING ON THEIR OWN BEHALF AND ON BEHALF OF 445 PERSONS  
RESIDING ON A PORTION OF LAND REFERENCE NO. 5908 /8 (ORIGINAL  
NO. 5908/5/3), NJIRU**

**AND**

**TERESIAH WAIRIMU KIRIMA & ANNE WANGARI KIRIMA (SUED  
AS ADMINISTRATORS OF THE ESTATE OF GERISHON KAMAU  
KIRIMA) ..... 1<sup>ST</sup> RESPONDENT  
BERNADO VICEZO DE MASI (SUED AS ADMINISTRATORS OF THE ESTATE  
OF DOMINICO DE MASI) ..... 2<sup>ND</sup> RESPONDENT  
THE CHIEF LAND REGISTRAR, NAIROBI ..... 3<sup>RD</sup> RESPONDENT  
DIRECTOR OF SURVEY ..... 4<sup>TH</sup> RESPONDENT  
THE ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**



## RULING

1. This suit was filed by way of a Petition dated 6.12.2023 whereby the petitioners claim 18.48 Ha. part of land parcel 5908 (suit land) by way of adverse possession, having occupied the said land continuously and without interruption for a period of over 13 years.
2. The petition was filed contemporaneously with a Notice of Motion Application dated 6.12.2023 which is for determination before me. The petitioners seek a conservatory order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from interfering with their quiet possession, occupation and ownership of the suit parcel and they also pray for an order maintaining the status quo prevailing over the suit property by preventing any dealings on the suit property.
3. The application is premised on grounds on its face and on the supporting affidavits of Boniface Ndege Kirigia, Zuber Abdikadir Kiriga, Isaac Abdille and Mohammed Abdi all sworn on 6.12.2023. The deponents aver that together with 450 other Petitioners, they occupy approximately 18.48 Ha forming part of parcel LR no 5908/8 and that they have made massive cultural, economic and social developments thereon and have lived there for more than 13 years.
4. That sometime in October 2023, they learnt from the media of a decision rendered by the court in the case; *Obade & 299 others & 10 others v Kirima & 60 others* [2023] KEELC 20868 (KLR) in which the ownership of the suit property was determined to belong to the estate of Gerishon Kamau Kirima, where the court gave occupants of the suit parcel a grace period of upto 31.12.2023 to vacate the suit property and give possession thereof to the estate of Gerishon Kirima through its administrators.
5. That they further learnt through the media that a new suit has been filed by the 2<sup>nd</sup> Respondent claiming ownership of the suit property thus further convoluting the matter.
6. They contend that both the decision of the court and the new case filed by the 2<sup>nd</sup> Respondent claiming ownership of the subject property came as a surprise to them since they had never been involved in the proceedings which affected them and their proprietary rights over the suit property, and that since the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have ownership documents and survey plans, then it is only the 3<sup>rd</sup> and 4<sup>th</sup> respondents as custodians of government records who can clarify as to who the true owner of the parcel is.
7. They aver that they are apprehensive that unless restrained, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents will immediately embark on forceful degrading evictions whereby, over 450 families (Petitioners) shall be left to suffer substantial loss.
8. The 1<sup>st</sup> Respondent is opposed to the application vide the Replying Affidavit sworn on 22.2.2024 by Anne Wangari Kirima. She avers that the issue of legal ownership of the suit parcel was determined in Nairobi ELC 1257/2014 consolidated with ELC 850/14, 509 of 2014, 1496 OF 2013, 1318 of 2013 and 252 of 2011 *John Obade and 299 Others v Teresia Wairimu Kirima and Another*, thus the issues raised herein are *res judicata*.
9. She argues that the orders sought herein seek to stay and or vary the orders issued in the aforementioned judgment which directed that all illegal occupants on parcels LR no 6825/2 and 5908/8 do vacate those lands on or before 31.12.2023 or face eviction.
10. She contends that the application is an abuse of the court process and is meant to mask the Petitioners illegal activities and a claim for constitutional protection can only arise from the existence of a legally



valid and legitimate right to the subject property and the same must abide by the 1<sup>st</sup> Respondent's own right to property under Article 40 of the Constitution.

11. She also contends that the application and petition are defective for seeking the remedy of adverse possession whose claims have a laid out procedure under the Limitation of Actions Act.
12. The 2<sup>nd</sup> - 5<sup>th</sup> Respondents did not file responses to the application. Further, no submissions were filed by any parties herein as directed by the court on 29.1.2024.
13. I have considered all the arguments raised in the application and the response filed thereof. The issue for determination is whether the Petitioners have established grounds for grant of conservatory orders.
14. In the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* eKLR, the court had this to say on matters "conservatory orders";

"...Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as 'the prospects of irreparable harm' occurring during the pendency of a case; or 'high probability of success' in the applicants case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes and priority levels attributable to the relevant causes".

15. The principles for grant of conservatory orders were also outlined in the case of Board of Management of Uhuru Secondary School v City County Director of Education & 2 Others [2015] eKLR as follows:

- a. a. The need for the Applicant to demonstrate an arguable prima facie case with a likelihood of success and to show in the absence of the conservatory orders, he is likely to suffer prejudice.
- b. Whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of a specific right or freedom in the bill of rights.
- c. The Court should consider whether, if an interim conservatory order is not granted, the Petition or its substratum will be rendered nugatory.
- d. Whether public interest will be served or prejudiced by a decision to exercise discretion to grant or deny a conservatory order".

Also see - Kenya Small Scale Farmers Forum v Cabinet Secretary Ministry of Education, Science and Technology & 5 others [2015] eKLR.

16. The court in the case Obade & 299 others & 10 others v Kirima & 60 others [2023] KEELC 20868 (KLR) has already determined that the occupation of the suit property is unlawful. It matters not whether the said parcel is now contested by a new entrant; the 2<sup>nd</sup> Respondent. The bottom line is that this court cannot purport to interrogate the question of ownership of the suit parcel when the other judgment remains valid.
17. Thus bearing in mind public interest and constitutional values, there is no basis upon which this court would make a rendition whose import is to vary a decision of another court of concurrent jurisdiction.
18. At this juncture, I must raise a point of concern relating to the identity of the petitioners: who are these petitioners. In the minutes dated 27.11.2023, the person's appointed as officials are Mohamed Osman Omar, Boniface Ndege Kirigia, Khadar Ibrahim Adow, Naseiba Ibrahim Ali, Edin Adan Alio.



Only the first two have been captured in the Notice of Motion Application. The identity of the 3<sup>rd</sup> - 5<sup>th</sup> Applicants in the application has not been explained.

19. It is also worthy to note that several lists of the claimants have been availed by the petitioners, which are;
  - a. First list containing 1-450 persons without particulars of identity like signatures and ID cards. As such, that list has no probative value.
  - b. Another list of 90 members who were in attendance when minutes of 27.11.2023 were taken. They have signatures and ID cards. However they are only 90 yet the claimants should be 450 (5 applicants and 445 others.)
  - c. Yet another list contains 324 persons which has names of claimants, plot numbers, signatures but not everyone has appended their signatures.
20. In essence, the identity of the claimants in this petition is unknown!
21. Finally, I take cognizance that there was an avalanche of cases filed after delivery of the judgment in the case ELC 1257 of 2014 (consolidated with others), whereby there are competing claims over the suit parcel. One of such cases is ELC L 187 of 2023 where the plaintiff therein (De Masi) is the 2<sup>nd</sup> Respondent herein sued alongside the administrators of the estate of Kirima and others by over 445 other persons. Granting any orders at this stage would only convolute the matter further.
22. In light of the foregoing analysis, I find that the Petitioner's application must fail. The same is hereby dismissed with costs to the 1<sup>st</sup> Respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF APRIL, 2024 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Rao holding brief for Dr. Ojiambo for Ann Wangari Kirima (1<sup>st</sup> Respondent)

Mwenesi and Onduso for Teresia Wairimu (1<sup>st</sup> Respondent)

Court assistant: Eddel

