



**Mweti v Kinyumu & 2 others (Environmental and Land Originating
Summons E004 of 2023) [2024] KEELC 4303 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E004 OF 2023**

LG KIMANI, J

MAY 23, 2024

**N THE MATTER OF: SECTION 38 OF THE LIMITATION OF ACTIONS ACT
AND ORDER 37 OF RULES 7 AND 14 OF THE CIVIL PROCEDURE RULES**

-AND-

IN THE MATTER OF ACQUISITION OF TITLE BY ADVERSE POSSESSION

-AND-

IN THE MATTER OF LAND PARCEL NUMBER NZAMBANI/KYANIKA/485

BETWEEN

JANEFER MWETHYA MWETI APPLICANT

AND

CHARLES MUTUA KINYUMU 1ST RESPONDENT

KALEYKE KINYUMU 2ND RESPONDENT

COSMAS MBUA KINYUMU 3RD RESPONDENT

RULING

1. The Notice of Motion dated 25th September 2023 filed by the Plaintiff/Applicant seeks the following orders:
 1. Spent.
Spent
 3. That this honourable court be pleased to order that pending the hearing and determination of this suit, the Defendants/Respondents by themselves and/or agents, servants or anyone acting under their instructions be restrained by way of temporary injunction from any acts of trespass,



interference or threats of wasting, damaging or alienating any portion and property on the land parcel title number Nzambani/Kyanika/485 belonging to the Plaintiff/Applicant.

4. That the costs of this application be borne by the Respondents.
2. The affidavit in support of the application was sworn by the Plaintiff/Applicant, who deposed that she is the widow to the late Patrick Mwaniki Kinyumu who died on 21.6.2023 and with whom she had established a matrimonial home on Land Parcel Number Nzambani/Kyanika/485 measuring approximately 24 acres.
3. The suit property is registered in the name of the late Joshua Kinyumu who was the father to her late husband and he passed away in the year 1989. She deposed that her late husband was given the suit land in 1986 while his father was still alive. The Plaintiff avers that their occupation of the suit land was continuous, peaceful and uninterrupted, until the Respondents' recent interruption.
4. The Respondents are the siblings to her late husband and her in-laws who live on different parcels of land given by their late father Joshua Kinyumu namely Land Parcels Mulango/Wikililye/44, Mulango/Wikililye/16 and Mulango/Wikililye/31.
5. The Applicant deposed that in May 2023 the Respondents, without her consent entered into the suit property and dug a grave and buried the 2nd Respondent's deceased son. Further, the respondents have cut down trees, started moulding blocks/bricks on the land and are now threatening to build a permanent house.
6. She states that the respondents have taken advantage of the passing on of her husband to try and forcefully grab the suit property to evict her and her children, which they have known as home and lived for over 36 years. She deposed that her family lives in constant fear of continued loss of their property and they stand to suffer irreparable loss if orders sought are not granted.
7. The applicant states that she has acquired adverse possession rights over the suit land, which are capable of protection by the honourable court.

The 1st Respondent's Replying affidavit

8. The 1st Respondent swore a replying affidavit in response to the application and the substantive originating summons terming the same as frivolous, vexatious and scandalous and only meant to prejudice, embarrass and delay the process of the administration of the Estate of the late Joshua Mbua Kinyumu in Kitui CM Succession Case No. 142 of 2015, which is pending conclusion.
9. He is the firstborn of the late Joshua Kinyumu, who died on 19th September 1987 and left among other properties, the suit land Parcel Number Nzambani/Kyanika/485, which he had allocated to 4 of his children before his death namely; Mutua Kinyumu (the first respondent), Kalekye Kinyumu, Mbua Kinyumu and Mwaniki Kinyumu (Deceased and husband to the Plaintiff/Applicant). He stated that he has been in possession of his portion since 1978, where he has planted forest trees, coconut trees, banana trees, Napier grass and other plants. The 2nd and 3rd respondents have done the same.
10. The 1st Respondent deposed that the Plaintiff has not occupied the land alone to the exclusion of the other siblings and that the right forum to prosecute her claim should be in the succession cause.
11. The 1st respondent is of the view that the orders sought in the application are incapable of being granted as the respondents are currently in possession of the suit land and stand to suffer irreparable loss of a lifetime which will amount to an eviction before the main suit is heard.



The 2nd Respondent's Replying Affidavit

12. The 2nd Respondent filed her response to the application and also deposed that this application and suit are only meant to impede the finalization of the administration of the estate of Joshua Mbua Kinyumu(Deceased), which is pending conclusion.
13. She also stated that she is certain that the applicant and her late brother were not living together as husband and wife at the time of his death and that she only came to the suit land after he had already passed away to deprive the respondents of their rightful inheritance.
14. She therefore states that adverse possession does not apply as the title deed is in the name of a deceased person and succession proceedings are still underway and the applicant has no ascertainable rights capable of enforcement by this Court.
15. She further stated that this court has no jurisdiction to determine the rights of beneficiaries of the estate of deceased persons and that the application ought to be dismissed with costs.

The 3rd Respondent's Replying affidavit

16. The 3rd Respondent also swore an affidavit in response to the substantive originating summons and the instant application, stating that the suit land is part of the Estate of the late Joshua Mbua Kinyumu which is the subject of Kitui Chief Magistrates' Succession Case No. 142 of 2015, which is pending conclusion.
17. He deposed that his late father left behind among other properties, the suit land Parcel Number Nzambani/Kyanika/485. He denied that the Plaintiff/Applicant has been living on the suit land to the exclusion of all the Defendants/respondents.
18. The 3rd respondent deposed that she is the estranged wife to his late brother Mwaniki Kinyumu and that they moved to Nairobi in 1983 till 1986 when she came back to Kitui, their ancestral home.
19. The suit land was allocated to 4 children of their deceased father before his death and he was allocated a portion of the land in the year 1984 he immediately took possession of his portion, as he awaited the conclusion of the succession case concerning his father's estate.
20. That the Plaintiff and her deceased brother Mwaniki Kinyumu were also allocated their portion. The 3rd Respondent therefore contends that since the Plaintiff is on the suit land by her marriage to their brother Mwaniki Kinyumu, the right forum to prosecute her claim should be in the succession cause.
21. It is further deposed that the Applicant left his brother in the early 1990s and only returned upon learning of his demise on 21st June 2023.
22. That the 2nd Respondent was allowed to bury her son in the said suit land by a court order dated 18th May 2023, pursuant to the ruling of the court issued in Kitui CM Succession cause 142 of 2015.
23. The 3rd respondent is of the view that the orders sought in the application are incapable of being granted as the respondents are currently in possession of the suit land and stand to suffer irreparable loss of a lifetime which will amount to an eviction before the main suit is heard.

The Plaintiff/Applicant's Submissions.

24. Counsel for the Plaintiff/Applicant submitted that together with her late husband Patrick Mwaniki Kinyumu, they lived on the suit Land Parcel Nzambani/Kyanika/485 measuring 24 acres and that



- the developments on the suit parcel were done on a specific portion of the land as evidenced by the photographs annexed. She denied being estranged from her husband.
25. In keeping with the principles in the case of *Giella v Cassman Brown & Co.*, their submission is that the Applicant has a *prima facie* case that has a probability of success, relying on the holding in the cases of *Mrao Ltd v. First American Bank of Kenya Ltd & 2 others* (2003) eKLR and the case of *Nguruman Limited v. Jan Bonde Nielson & 2 others* (2014) eKLR where the courts held that a *prima facie* case is a genuine and arguable case and the applicant must show a clear and unmistakable right to be protected. They also relied on the provisions of Article 40 on property rights.
 26. It is the Plaintiff/Applicant's submission that their case is uncontroverted that she started living on the suit property in 1986 when the late Joshua Kinyumu gave them a portion of the suit property.
 27. Further, the 2nd Respondent has managed to enter the suit land and erect a house within one and a half months after the Applicant's husband's passing in June of 2023. That at the time of instituting these proceedings, the Defendant/Respondents had entered into the suit land, cut down trees started moulding blocks/Bricks on the land and was threatening to build a permanent house on the land.
 28. As regards the succession case Kitui CM Succession No.142 of 2015, the Applicant submits that she was never involved in the proceedings and was not privy to the court order allowing the 2nd Respondent to bury her deceased son on the suit property.
 29. Be that as it may, the Applicant submits that there is no justification for the 2nd Respondent to bury her son on her portion of the suit property when all the respondents were gifted their portions of land by their father. It is their case that the applicant's free use and quiet enjoyment of her parcel of land has been curtailed by the illegal acts of trespass by the respondents and thus Counsel urged the court to find that a *prima facie* case has indeed been established by the Applicant.
 30. On the element of irreparable injury, counsel submitted that the suit property is at risk of being wasted away and further that it is a source of livelihood for herself and her children which she stands to lose.
 31. It was submitted that no amount of damages would bring back an honest person's hard work to put up a home and leave an inheritance for his/her children.
 32. Regarding the element of the balance of convenience, the Applicant cited and relied on the case of *Beatrice Wathanu Waitaka v. Kenya Women Microfinance Limited & Another* (2019) eKLR where the court held that the court should take whichever course appears to carry a lower risk of injustice and the case of *George Orango Orago v. George Liewa Jagalo* (2010) eKLR where the court held that the purpose of an injunction is to conserve or preserve the subject property pending determination of a suit concerning the property.
 33. The Applicant's case is that the balance of convenience in the event of withholding the injunction exceeds that of the Respondents in case they are restrained and urge the court to allow the application as prayed.

The Defendants/Respondents' submissions.

34. Counsel for the defendants/Respondents submitted that this court does not have the jurisdiction to entertain this application and the entire suit and relied on the case of the *Owners of the Motor Vessel "Lilian S" Caltex Oil(Kenya) Ltd* (1989), stating that questions of inheritance are best dealt with by the succession court.



35. The Respondents submit that the Applicant has not established a prima facie case as her claim is not premised in adverse possession as she claims but rather on dependency on the estate of the late Joshua Mbuu Kinyumu.
36. Secondly, they submit that the applicant has not demonstrated that irreparable injury has been occasioned if the order of a temporary injunction is not granted and they relied on its definition as was given by the Court in the case of *Kipchirchir Kogo v Frank Kimeli Tenei* (2018) eKLR.
37. They also submitted that the balance of convenience tilts in favour of the Respondents and interim orders are incapable of being granted at this interim stage because the Respondents are in possession of the suit property just as the Applicant is. Noting that the court has not had an opportunity to interrogate the entire suit on its merits, they submit that granting the injunction would amount to evicting the Respondents before the main suit is heard.
38. The respondents therefore submit that the applicant has not met the criteria for grant of orders of temporary injunction and prays that the application be dismissed with costs to the Respondents.

Analysis and Determination

39. Order 40 Rule 1 of the *Civil Procedure Rules* provides for the grant of temporary injunctions and states that;

Cases in which temporary injunction may be granted [Order 40, rule 1]

Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
- b.

the court may by order grant a temporary injunction to restrain such act or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

40. The case of *Giella v Cassman Brown & Company Limited* (1973) E A 358 is the standard test that a Court will subject an application for grant of a temporary injunction. In that case, the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction: -

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

41. The definition of a prima facie case was explained in the case that the Applicant cited; *Mrao Ltd. -v- First Americal Bank of Kenya Limited and 2 others* (2003) eKLR, where the Court of Appeal expressed thus;

“In civil cases, a *prima facie* is a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently



been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."

42. The Applicant also cited and relied upon the Court of Appeal's holding in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR where the court held that:

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini-trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed."

43. The parties agree that the suit property Land Parcel Number Nzambani/Kyanika/485 measuring approximately 24 acres belonged to and is registered in the name of the Respondents' father Joshua Kinyumu (Deceased) as per the certificate of official search dated 22nd September 2023. The Plaintiff/Applicant claims that she is the widow to the late Patrick Mwaniki Kinyumu, a son of the deceased owner, with whom she had established a matrimonial home on the suit Land while the Respondents are the siblings to her late husband.
44. The Applicant deposed that in May 2023 the Respondents, without her consent entered into the suit property and dug a grave and buried the 2nd Respondent's deceased son.
45. The Respondents on their part state that the suit land was allocated to 4 children of their deceased father before his death including the applicant's husband and they have all occupied their respective portions. They also claim that the Estate of the late Joshua Mbua Kinyumu is the subject of Kitui Chief Magistrates' Succession Case No. 142 of 2015, which is pending conclusion.
46. The Respondents challenge this Court's jurisdiction to hear and determine this suit while the suit land is the subject of a succession cause.
47. The Court has looked at the Originating Summons herein and noted that there is nothing to indicate that the Respondents are or have been sued as the personal representatives of their father's estate. The title of the Originating Summons and the content thereof and all the pleadings, as they stand, show that all Respondents are sued in their personal capacity.
48. The *Law of Succession Act* CAP 160 Laws of Kenya at Section 79 provides that the property of a deceased person is to vest in the personal representative and states that:

"The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any



limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

49. Order 3 Rule 7 of the [Civil Procedure Rules](#) provides as follows: -

“No claim by or against an executor or administrator, as such, shall be joined with claims by or against him personally, unless the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator, or are such as he was entitled to, or liable for, jointly with the deceased person whom he represents.”

50. The law is that only the personal representative of an estate of a deceased person can represent claims over the estate of the deceased person in that capacity and not their own individual capacity. In [Trouistik Union International and Ingrid Ursula Heinz V Jane Mbuyu & Another](#) [1993] eKLR. The Court of Appeal made the following observations in respect of a person’s legal capacity to undertake legal proceedings on behalf of a deceased person;

“To determine who may agitate by suit any cause of action vested in him at the time of his death, one must turn to section 82 (a) of the [Law of Succession Act](#). That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all-inclusive answer.”

51. The Court in the case of [Abdirashid Adan Hassan v Estate of W H E Edgley](#) [2022] eKLR held as follows in a case where there was nothing in the evidence to show that the estate of the Deceased person had a legal representative:

“...no evidence was tabled to show that there is a legal representative of the Defendant as contemplated by Section 2 of the [Civil Procedure Act](#).

Section 2 of the [Civil Procedure Act](#) defines legal representative as follows: -“means a person who in law represents the estate of a deceased person, and where a party sues or is sued in a representative character the person on who the estate devolves on the death of the party so suing or sued”.

One cannot make a claim against the estate of a deceased person. A suit against the estate of the deceased requires an application for a grant in order to have *locus standi*. In the case of [Julian Adoyo Ongunga v Francis Kiberenge Abano](#) Civil Appeal No. 119 of 2015, Justice A. Mrima stated as follows: -

“The impact of a party without *locus standi* can be equated to that of a court acting without jurisdiction. Since it amounts to null and void proceedings. It is also worth noting that the issue of *locus standi* becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties.”



52. The holding of the Court of Appeal in the case of *Rajesh Pranjivan Chudasama versus Saitesh Pranjivan Chudasama* [2014] eKLR, was as follows;
- “..... in our view the position in law as regards *locus standi* in succession matters is well settled. A litigant is clothed with *locus standi* upon obtaining a limited or a full grant of letters of administration in cases of intestate succession.”
53. The other issue raised by the Respondents is whether the applicant ought to have brought this claim for adverse possession over land that is still the subject of a succession case. The court has considered a similar case where the applicant sought orders of adverse possession over land that was still subject to succession proceedings and Oguttu Mboya J in *Saju v Baker & 2 others* (Environment and Land Case Civil Suit E008 of 2023) [2023] KEELC 21837 (KLR) (23 November 2023) (Ruling) held as follows:
- “To surmise, the Plaintiff’s suit herein, which constitutes yet another avenue for seeking to procure and obtain title to the suit property on the basis of (sic) adverse possession, whilst still holding Grant of probate pertaining to the suit property amounts to an abuse of the due process of the court.”
54. In the Court’s view, the Plaintiff/Applicant has not demonstrated a *prima facie* case with a probability of success by showing a clear and unmistakable right to be protected which is directly threatened by the acts of the Respondents and which she seeks to be restrained.
55. The second element is that the applicant must demonstrate that they would otherwise suffer irreparable injury if the injunction is not granted as was held by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [Supra]. The Applicant has not evidenced any attempt by the respondents to evict her from the suit property. The respondents recognize her as their sister-in-law who has a right to possess part of the suit land as the wife to their late brother Mwaniki Kinyumu. In the Court’s view, the applicant has not demonstrated that she would otherwise suffer irreparable injury.
56. From the foregoing, the court finds that the Notice of Motion dated 25th September 2023 lacks merit and the same is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI ON THIS 23RD DAY OF MAY, 2024.

HON. L. G. KIMANI, JUDGE

ENVIRONMENT & LAND COURT, KITUI

Ruling read in open court and virtually in the presence of-

J. Musyoki Court Assistant

Ms. Makau holding brief for Mutia for the Applicant

Nduva for 1st & 3rd Respondents

N/A for 2nd Respondent

