



Kogi (Legal representative of the Estate of the Late Wallace Kogi Mwaura - Deceased) & another v Mburu (Legal representative and/or administrator to the Estate of the Late Miriam Muthoni Mburu - Deceased) & another (Environment & Land Case E094 of 2024) [2025] KEELC 661 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E094 OF 2024**

**JM ONYANGO, J
FEBRUARY 20, 2025**

BETWEEN

**JOSEPH WANYIRI KOGI (LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE WALLACE KOGI MWAURA - DECEASED) 1ST PLAINTIFF
PAUL KARANJA MWAURA 2ND PLAINTIFF**

AND

**TIRUS KAMAU MBURU (LEGAL REPRESENTATIVE AND/OR ADMINISTRATOR TO THE ESTATE OF THE LATE MIRIAM MUTHONI MBURU - DECEASED) 1ST DEFENDANT
SALOME WAMBOI GITAU 2ND DEFENDANT**

RULING

1. What is coming up for determination is the 1st and 2nd Plaintiffs’ Notice of Motion application dated 7/6/2024 and the 1st and 2nd Defendants’ Preliminary Objection (P.O) dated 18/7/2024.
2. The Plaintiffs initiated this suit through a Plaint dated 7/6/2024. Together with the Plaint, they filed the Notice of Motion application dated 7/6/2024, through which they seek the following reliefs:
 - i. Spent
 - ii. That the honourable court be pleased to issue an order of temporary injunction restraining the Defendants by themselves, their servants, their agents, employees or whomsoever from subdividing L.R No. Gatamaiyu/ Kamuchege/415 into sub-divisions, from further sub-dividing the suit lands, from selling, from transferring, from disposing, from constructing, from trespassing into the plaintiffs’ 5 acres and 3 acres respectively forming part of the larger L.R



No. Gatamaiyu/Kamuchege/415 pending the hearing and determination of this application and/or until further orders of the court.

- iii. That the honourable court be pleased to issue an order of temporary injunction restraining the defendants by themselves, their servants, their agents, employees or whomsoever from sub-dividing L.R No. Gatamaiyu/ Kamuchege/415 into sub-divisions, from further subdividing the suit lands, from selling, from transferring, from disposing, from constructing, from trespassing into the plaintiffs' 5 acres and 3 acres respectively, from charging, from re-transferring, from gifting, from purporting to act under the sub-division of L.R No. Gatamaiyu/Kamuchege/415 into L.R No. Gatamaiyu/Kamuchege/2027-2031 and/or in any other manner whatsoever from interfering with and/or having any dealings with the plaintiffs' 5 acres and 3 acres respectively forming part of the larger L.R No. Gatamaiyu/ Kamuchege/415 pending the hearing and determination of this suit and/or until further orders of the court.
 - iv. That costs of the application be in the cause.
3. The Plaintiffs' case is that Land Parcel Number Gatamaiyu/ Kamuchege/415 (hereinafter referred to as the "suit property") measuring 10.4 acres originally belonged to Wallace Kogi Mwaura (the 1st Plaintiff's deceased father) and the 2nd Plaintiff who had purchased 5 acres and 3 acres respectively from one David Muhu in 1958. The Plaintiffs contend that the abovementioned parcels were consolidated together with a 2-acre portion belonging to their late father and Zipporah Njeri Mwaura (deceased) to form Land Parcel Number Gatamaiyu/Kamuchege/415. The same was registered in the name of Zipporah Njeri Mwaura to hold in trust on behalf of Wallace Kogi Mwaura (deceased) and the 1st Plaintiff, who were her sons. The Plaintiffs faults the late Zipporah Njeri Mwaura (deceased) for willing away the suit property to third parties, through a will dated 30/11/1988, given that the property neither belonged to her nor her late husband's estate.
 4. The Plaintiffs state that pursuant to the said will, the suit property has been subdivided into Land Parcel Numbers Gatamaiyu/Kamuchege 2027 to 2031. The Plaintiffs further state that it is therefore necessary that the subdivisions be cancelled, reversed and/or vacated and that the suit property be reinstated into the estate of Zipporah Njeri Mwaura (deceased) for purposes of adjudication of the Plaintiffs' claim.
 5. The 1st and 2nd Defendants oppose the application through a replying affidavit sworn by the 1st Defendant on 18/7/2024 and the P.O dated 18/7/2024. The Defendants depone that Zipporah Njeri Mwaura (deceased) was the legal and only registered owner of the suit property. They deny the Plaintiffs' claim that Zipporah Njeri Mwaura (deceased) and her late husband held the suit property in trust for the Plaintiffs. The Defendants assert that Wallace Kogi Mwaura (deceased) and the 2nd Plaintiff neither purchased nor paid any purchase price for the suit property. The Defendants fault the Plaintiffs for the changing narrative in their pleadings in the various suits filed across different courts. The Defendants argue that Zipporah Njeri Mwaura (deceased) being the legal owner of the suit property had every right to will it away as she did.
 6. The Defendants aver that upon delivery of Judgment in Nairobi High Court Succession Cause No. 3002 "A" of 2003, the Plaintiffs moved the Court of Appeal vide Civil Application No. 178 of 2018(UR 146/2018) seeking stay of execution of the said judgment and injunctive reliefs over the suit land. The said application was dismissed paving way for execution of the judgment of the High Court.
 7. The Defendants add that they then moved the High Court in the succession suit to lift the caution placed on the suit property by Wallace Kogi Mwaura (deceased). Upon the court hearing all the parties on merit, it directed the Land Registrar, Kiambu District to lift the caution. The Defendants argue



that distribution and subdivision of the suit property was done lawfully and with the knowledge of the Plaintiffs.

8. The P.O dated 18/7/2024 opposes the Plaintiff and the Plaintiffs' Notice of Motion application dated 7/6/2024 on the following grounds:
 - i. That the application and suit herein in time bad and is ripe for dismissal by the operation for the Limitation of Actions Act cap 22 of the Laws of Kenya.
 - ii. That the applicants are engaged in forum shopping, having filed Githunguri MCELC No. 18 of 2019 among other related suits, which mirrors the pleadings herein in both the interim reliefs sought and the main prayers, which suit the Plaintiffs withdrew upon the honourable court failing to grant them the reliefs sought, and have filed herein. (sic)
 - iii. That the defendants have effectively completed the administration of the estate of the late Zipporah Njeri within the meaning of Section 83 of the Law of Succession Act, Cap 160 of the Laws of Kenya.
 - iv. That the suit property herein is situated in Githunguri within Kiambu District where there exist the Environment and Land court both in Githunguri and Kiambu and this court lacks jurisdiction by virtue of its geographical location.
 - v. That the application and suit herein is thus hopeless, an abuse of the court process and a waste of judicial time, and ought to be dismissed with costs to the Defendants.
9. The court directed that the application and the P.O be canvassed through written submissions. The Plaintiffs complied with the said directions by filing written submissions dated 2/10/2024. The 1st and 2nd Defendants had not filed their submissions at the time of writing this ruling, despite being directed to file the same within 3 days from 21/1/2025.
10. Having carefully considered the two applications, the response thereto and the Plaintiffs' submissions, I am of the view that the issues for determination are as follows:
 - i. Whether the 1st and 2nd Defendants' P.O is merited.
 - ii. Whether the Plaintiffs have met the threshold for grant of the injunctive orders.

Whether the 1st and 2nd Defendants' P.O is merited.

11. A Preliminary Objection was defined in the celebrated case of Mukisa Biscuits Manufacturing Co. Ltd v West end Distributors Ltd (1969) E.A. 696, Sir Charles Newbold as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct...”

12. Further, in the case of Oraro v Mbaja [2005] KLR 141 the court stated that:

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary



Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

13. The Defendants contend that the suit is time-barred and ought to be dismissed pursuant to the Law of Limitations Act, Cap 22 of the Laws of Kenya. In response the Plaintiffs depone that Section 20 of the *Limitation of Actions Act* states that:

- “(1) None of the periods of limitation prescribed by the Act apply to an action by a beneficiary under a trust, which is an action:
- a. in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or
 - b. to recover from the trustee trust property or the proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.”

14. The Plaintiffs rely on the decisions in the cases of Samson M’itwamwari Mumiira vs Jackson Kibeteru & Another [2007] eKLR and Ndiwa Chesebe vs John Chesebe Sikuku[2022]eKLR in support of their submission. The court is in agreement with the Plaintiffs that the suit is not time-barred given that it falls within the ambit of Section 20 of the *Limitation of Actions Act*.

15. The Defendants contend that this court lacks geographical jurisdiction to determine this suit given that the suit property is located in Githunguri within Kiambu County. In terms of geographical jurisdiction, the Environment and Land Court at Thika has jurisdiction to deal with cases relating to all the properties situated in Kiambu County. This court therefore finds that the P.O dated 18/7/2024 is unmerited. It is therefore dismissed.

Whether the Plaintiffs have met the threshold for grant of the injunctive orders

16. The principles guiding the grant of an interlocutory injunction were discussed in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 others (2014) eKLR where the Court of Appeal held that:

“...these are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”



17. To answer the question what constitutes a prima facie case, the Court of Appeal in the above case 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.”

18. The Plaintiffs claim that they are the lawful owners of the suit property having purchased the same and registered it in their late mother’s name, Zipporah Njeri Mwaura(deceased) to hold in trust for them. The Plaintiffs contend that Zipporah Njeri Mwaura(deceased) unlawfully willed away the suit property to third parties and as a result, the suit property was subdivided into Land Parcel Numbers Gatamaiyu/Kamuchege 2027 to 2031. From the above, it is clear that the Plaintiffs have a prima facie case.

19. The second factor that the Plaintiffs must establish is that they stand to suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction. The Halsbury’s Laws of England 3rd Edition, Volume 21, paragraph 739, page 352 explains what irreparable injury is in the following words:-

“By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question.

In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is “irreparable harm”? Robert Sharpe, in ‘Injunctions and Specific Performance,’ [Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Canada Law Book, 1992), P 2-27] states that ‘irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case.’”

20. No evidence was tendered to show that the Plaintiffs are in possession of the suit property, therefore the court will assume that they are not. From the pleadings and submissions, it emerges that the proceedings in Nairobi High Court Succession Cause No. 3002 “A” of 2023 have already been concluded. However, the Plaintiffs are apprehensive that the suit property may be transferred to third parties and as a result they will suffer irreparable loss. The court is of the view that whatever loss that



may be suffered by the Plaintiffs can be compensated by an award of damages upon valuation of the suit property.

21. Given the above circumstances, the court takes the view that the present application is one to be disposed of based on a balance of convenience. The balance of convenience favours maintaining the obtaining status quo in terms of registration and occupancy of the suit property for a period of 12 months.
22. The Plaintiffs are expected to prosecute their claim and procure a determination within 12 months. Consequently, the application dated 7/6/2024 is disposed of as follows:
 - a. Pending the hearing and determination of this suit, there shall be no dealings in the land register relating to Land Parcel Gatamaiyu/Kamuchege/415 or its subdivisions thereof being Land Parcel Numbers Gatamaiyu/ Kamuchege/2027 to 2031.
 - b. Unless extended by the court, the above status quo orders shall expire after 12 months from today.
 - c. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 20TH DAY OF FEBRUARY 2025.

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J. M ONYANGO

JUDGE

In the presence of :

Mr Arusei for the Plaintiffs/Applicants

Mr Madegwa for the Defendant /Respondents

Court Assistant: Hinga

