



Kimathi v Mugo (Environmental and Land Originating Summons E002 of 2023) [2024] KEELC 5498 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023**

CK YANO, J

JULY 25, 2024

BETWEEN

PHIDES IGOKI KIMATHI PLAINTIFF

AND

CHRISTOPHER KARIUKI MUGO RESPONDENT

RULING

1. By a notice of motion dated 17th November, 2023 brought under Section 3, 3A and 63 (e) of the [Civil Procedure Act](#), Order 40 Rule 1 of the Civil Procedure Rules 2010 and Section 68 (1) of the [Land Registration Act](#) 2010 and all other enabling provisions of the Law, the plaintiff/applicant seeks for orders that:-
 1. Spent.
 2. That pending the inter parties hearing of this application, an order of temporary injunction do issue restraining the defendant/respondent whether by himself or through his brothers, children, relatives, agents, servants, assigns or anybody else acting at his behest from evicting or harassing the plaintiff/applicant or in any other way interfering with the plaintiff's/Applicant's peaceful use and occupation of a portion of land measuring five (5) acres in L.R No. Meru South/Kamwimbi "A" 1943.
 3. That pending the interparties hearing of this application the Honourable court be pleased to order stay and/or suspend the proceedings of the suit filed in the Chief Magistrate's Court at Chuka vide ELC Case No. E039 of 2023.
 4. That pending the interparties hearing of this application an order of inhibition do issue restraining the registration of the dealings in respect of L.R No. Meru South/Kamwimbi "A" 1943.



5. That pending the hearing and determination of this application and the main suit an order of temporary injunction do issue restraining the defendant/respondent, whether by himself or through his brothers, children, relatives, agents, assigns or anybody else acting at his behest from evicting or harassing the plaintiff or in any other way interfering with the portion of land measuring five (5) acres in LR No. Meru South/Kamwimbi "A" 1943.
 6. That pending the hearing and determination of this application and the main suit the Honourable court be pleased to order stay and/or suspend Chief Magistrate's Court at Chuka vide ELC No. E039 of 2023.
 7. That pending the hearing and determination of this application and the main suit an order of inhibition do issue restraining the registration of dealings in respect of L.R No. Meru South/Kamwimbi "A" 1943.
 8. That costs of this application be provided for.
2. The application is based on the ground set out on the face of the application and supported by the affidavit dated 17th November, 2023 sworn by Phides Igoki Kimathi. The applicant deponed that she was married to one Dedan Kimathi Nkou (now deceased) in the year 1995 and found him living in a portion of land measuring five (5) acres contained on LR No. Meru South/Kamwimbi "A" 1943 measuring 3.18 Ha now registered under the name of Christopher Kariuki Mugo, the defendant/respondent herein.
 3. The Applicant avers that her and her family have all their entire lives occupied and utilized a portion measuring approximately five (5) acres of the said land and that all her four children were born and raised up on the said portion of land.
 4. The Applicant states that their occupation and utilization of the said portion was within the knowledge of the defendant. That when her husband passed on she buried him on the said parcel of land without any interruption or objection from the defendant/respondent.
 5. The Applicant states that their occupation of the said portion can be traced back to 1995 when she got married to her late husband. That the applicant and her children occupy and utilize a portion measuring approximately five (5) acres within the main land to the exclusion of the defendant.
 6. The Applicant avers that she together with her late husband planted trees, including gravaria, mango, yembesi, pawpaw, lemon, nappier grass and ¼ an acre has miraa plantation. That they have also erected four temporary houses on the parcel of land where she has lived with her four children and the eldest is now 29 years old.
 7. The Applicant states that she also reared cows, goats and chicken on the portion of land measuring approximately five (5) acres of the main land. That their occupation of the said portion has been open, exclusive and uninterrupted.
 8. The Applicant avers that she is now more than twenty-eight (28) years old since she got married to Dedan Kimathi who passed on in 2016 and left them occupying the said piece of land. That her and her family have never known any other place they call home other than the portion of land measuring approximately five (5) acres contained within Meru South/Kamwimbi "A" 1943.
 9. The Applicant states that when her late husband passed on, his body was buried on the said portion of land and the defendant/respondent was well aware and never objected. That she has become entitled to five (5) acres of the land reference No. Meru South/Kamwimbi "A" 1943 under the doctrine of adverse possession.



10. The Applicant avers that the defendant/Respondent has filed in Chuka CM's Court ELC Case No.E029 of 2023 seeking to evict her and her children from where they have been and all that long and have started acts of destruction thereof. The Applicant has annexed a copy of the plaint marked "FKM 1." The applicant states that there is a great danger if the defendant/respondent is not stopped, he may deal and or interfere with the said portion to her detriment. That it is only fair and just that pending the hearing and determination of this suit, the proceedings in the *Chief Magistrate's Court Vide Case No. ELC E039 of 2023* by stayed.
11. The Applicant states that it is also fair and just if an order of inhibition is issued restraining the registration of any dealings in respect of LR Meru South/Kamwimbi "A" 1943.
12. The applicant prays for the orders sought to be granted for preservation of the suit property, particularly the portion of five (5) acres in which she has been in occupation pending the hearing and determination of the substantive suit.
13. The Applicant avers that the application is instituted with a view to advance the cause of justice, fairness and equity. That she is advised by her advocate that the defendant's title to a portion measuring approximately five (5) acres in LR No. Meru South/Kamwimbi "A" 1943 has been extinguished by operation of Law.
14. In opposing the application, the respondent filed a replying affidavit dated 8th February, 2024 wherein he contends that the main suit and the instant application are subjudice CMC ELC Case No. E039 of 2023 and an affront to the provisions of section 6 of the *Civil Procedure Act*. That by dint of the above, the main suit and the instant application ought to be dismissed with costs to the defendant/respondent or in the alternative the instant suit be stayed pending the hearing and determination of CMC ELC Case No. E039 of 2023.
15. The respondent avers that the main suit and the instant application is premised under the doctrine of adverse possession which cannot apply granted that the defendant/respondent became the registered proprietor of LR No. Meru South/Kamwimbi "A" 1943 (hereinafter the suit land) on 24th May, 2017. The respondent has annexed copies of a title deed, the register and official search of the suit land marked CKM 1(a) (b) and (c).
16. The respondent further avers that the entire period of adjudication does not count on a claim under adverse possession granted that ownership of properties in an adjudication section crystalize when a person is given title deed. That if the plaintiff/applicant had any interest over the suit land, she ought to have raised an objection either during committee hearings, arbitration board hearings, AR objections and finally appeal to the minister which she never did and as such she has and she had no claim over the suit land. The respondent has annexed copies of land committee proceedings, Arbitration board hearing and AR Objections marked CKM 2 (a) (b) & (c).
17. The respondent contends that the plaintiff/applicant was claiming the suit land through her late husband, a son of Elias Nkou Ntiba with whom the respondent had several disputes during the adjudication of Kamwimbi "A" Adjudication Section as it was then whereupon the father-in-law of the plaintiff/applicant lost and he had to give vacant possession of the suit land. That for no good reason nor excuse, the plaintiff/applicant adamantly refused to give vacant possession of the suit land and join her father-in-law in LR. Meru South/Kamwimbi "A"/241. The respondent has annexed a copy of the Register and official search of LR. Meru South/Kamwimbi "A"/241 marked CKM 3 (a) & (b).
18. The respondent avers that there is no property in a dead body and the interment of the plaintiff's/applicant's husband on the suit land and during the adjudication of Kamwimbi "A" Adjudication Section did not confer any interest in the suit land to the plaintiff/applicant.



19. The respondent states that the contents of paragraphs 1 & 2 of the supporting affidavit raises no canvassed issues between the plaintiff and the defendant save as to qualify that in 1995 when the plaintiff was married to Dedan Kimathi Nkou, LR. Meru South/Kamwimbi "A"/1943 (the suit land) was still under adjudication.
20. The respondent avers that the father-in-law of the plaintiff during adjudication with his entire family including his son one Dedan Kimathi Nkou, the husband of the plaintiff/applicant, were living on a piece of land that the defendant/respondent had a claim over, to wit the suit land. That the Adjudication of Kamwimbi "A" Adjudication Section commenced in or around 1992 and they had numerus disputes over the suit land during the various stages of the adjudication process and at the time the register was published under Section 29 of the Land Adjudication Act and the respondent was recorded as the owner of the suit land.
21. The respondent avers that on 24th May, 2017, the Chief Land Registrar gave directions and issued a title deed of the suit land to him. That the applicant occupies about ¼ acre of the suit land after the respondent entered and asserted himself on the suit land after no person, including the applicant, appealed to the minister and in particular also after Elias Nkou Ntiba, father-in-law of the applicant with his entire family save for the applicant moved to their family and or ancestral land LR. Meru South/Kamwimbi 'A'/241.
22. The respondent states that in response to the contents of paragraph 3 & 4 of the supporting affidavit, he avers that the applicant entered the land after marriage in or around 1995 but the children were born on the land during the demarcation and adjudication of KAMWIMBI 'A' Adjudication Section. That however, it is misplacement of facts for the applicant to contend that she occupies 5 acres when she only occupies about ¼ an acre comprising of the homestead and that the acreage of 5 acres is a figment of the applicant's imagination.
23. The respondent avers in response to the contents of paragraph 5 of the supporting affidavit, that the occupation and use of the suit land by the applicant and her children was under the blessings of the applicant's father-in-law who lost the land to him after full adjudication process of Kamwimbi 'A' Adjudication Section as it was then.
24. The respondent further avers in response to the contents of paragraph 6 of the supporting affidavit that the applicant buried her late husband, Dedan Kimathi Nkou on the suit land and he did not object because Dedan Kimathi Nkou died during adjudication of Kamwimbi 'A' Adjudication Section, and that the applicant's father-in-law had raised an objection claiming the land to be his and as such he had no pedestal upon which to oppose the burial of Dedan Kimathi on the suit land for his interest thereon had not crystalized.
25. The respondent states in response to the contents of paragraph 7 of the supporting affidavit that if the applicant started living on the suit land in or around 1995, the process of adjudication of the then Kamwimbi 'A' Adjudication Section had just commenced and rights of individuals had not been ascertained and in any case the applicant was in the land courtesy of her father-in-law, Elias Nkou Ntiba who after protracted dispute, the said Nkou lost his claim over the suit land and as a consequence he moved from the suit land with his family save from the applicant and her children.
26. In response to the contents of paragraph 8 of the supporting affidavit the respondent contends that it is ambiguous and a figment of imagination on the part of the applicant to contend that she and her family utilize 5 acres of the land suit land when the truth of the matter is that the applicant and her children occupy less than ¼ acre comprising of the homestead and particularly also after the applicant re-entered the land after the respondent was registered with the land on 24th May, 2017.



27. The respondent avers that it is completely untrue on the part of the applicant to contend at paragraph 9 of the supporting affidavit that she and her husband had planted trees on the suit when all the trees on the suit land including those named by the applicant were either planted by him or his adversary one, Elias Nkou Ntiba the father-in-law of the applicant.
28. The respondent admitted that the applicant has semi-permanent houses on the suit land that were constructed by her late husband and other siblings of Dedan Kimathi during the adjudication process and when he won against Nkou, the said Nkou, his wife and children vacated the suit land but the applicant and her children stay put for no justifiable cause.
29. The respondent admitted that the applicant has domestic animals on the suit land but added that she does not cultivate 5 acres out of the suit land and if anything the most she could have occupied is ¼ acre. That it is not denied as contended in paragraph 12 of the supporting affidavit that the applicant's occupation was open but not exclusive during the adjudication period, however, when he got registered with the suit land, he first wrote a demand letter seeking for vacant possession by the applicant and further, executed his threat by filing CMCC ELC Case No. E039 of 2023.
30. The respondent states that he has no reason to doubt that the applicant had been married to Dedan Kimathi for 28 years or thereabout but avers that the marriage did not shake or affect ownership of the suit land during adjudication or after adjudication.
31. The respondent states that it is a misstatement of facts by the applicant to aver that she and her family have known no other place to call home when it is an open secret that she refused to relocate with her father-in-law when her father-in-law lost to him during the adjudication process of 1943/Kamwimbi 'A' Adjudication Section as it was then.
32. The respondent avers that he could not object the burial of Dedan Kimathi on the suit land granted that the suit land was in an adjudication area and he could not claim the same to be his and secondly there is no property in a dead body and as such the burial of Dedan Kimathi did not affect ownership of the suit land during demarcation or after registration.
33. The respondent states that the applicant has not met the threshold of claiming the suit land or a portion thereof under the doctrine of adverse possession and in particular regarding the 12 years statutory period which started running after he got registered with the suit land and not earlier.
34. The respondent admitted that he has filed CMCC ELC Case No. E039 of 2023 in bid to have the applicant give vacant possession of his land and particularly noting that he is now the sole registered proprietor of the suit land save that he has not committed any act of destruction and if anything he was preparing to plant.
35. The respondent further avers that the presence of the applicant on the suit land is to his dissatisfaction and detriment and that the applicant cannot be protected by law to remain on private property. That contrary to the contention and prayers of the applicant in paragraph 20 of the supporting affidavit, it is this suit that should be stayed and or dismissed rather than CMCC ELC Case No. E039 of 2023 granted that the instant suit is an affront to the provisions of Section 6 of the *Civil Procedure Act* which prohibits the subjudice principle.
36. The respondent states that placing an inhibition order against his land will amount to interfering with defensibility or sanctity of title as protected under Section 24, 25 and 26 of LRA No. 3 of 2012 and particularly noting that the applicant has no known interest capable of protecting under the law over the suit land.



37. The respondent further states that the orders sought are not necessary and if anything, they are meant to place an encumbrance over free property by a person who has no known interest over the suit land capable of protection under the law. That the law is double edged, that what is good for the goose is good for the gander and therefore it is in the interest of justice that the orders sought should not be granted so that he can enjoy the rights and privileges appurtenant to being registered with the suit land.
38. The respondent avers that the applicant having failed to meet the threshold of her claim under the doctrine of adverse possession, his title to the land is intact with no encumbrance whatsoever.
39. The court gave directions on 27th February, 2024 that the application be canvassed by way of written submissions which have been duly filed. The Applicant filed her submissions dated 27th March, 2024 through the firm of Ojwang Sombe & Co. Advocates while the respondent filed his submissions dated 17th April, 2024 through the firm of M/S I.C Mugo & Co. Advocates.
40. The Applicant submitted on the guiding principles for granting of temporary injunction as set out in the case of Giella versus Cassman Brown 1973 EA 358.
41. The Applicant also relied on the case of Mrao versus First American Bank of Kenya Limited & 2 Others (2003) KLR 125 on whether she had made out a prima facie case with probability of success.
42. The applicant submitted that she has been staying on the parcel of land since she was married back in the year 1995 by her late husband. That once she was married, they settled on the parcel of land and were blessed with 4 children who she raised on the parcel of land without any interruptions from anyone including the Defendant/Respondent and the same has not been disputed by the Defendant/Respondent or has any contrary evidence been adduced.
43. The applicant submitted that she had demonstrated that she has an arguable case against the Defendant/Respondent.
44. The applicant further submitted that she has also demonstrated that irreparable injury will be occasioned to them if an order of temporary injunction is not granted. The Applicant relied on the case of Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (2018) eKLR.
45. The Applicant submitted that she has settled and extensively developed on 5 acres from the mainland and that it is not in dispute that the Defendant/Respondent is the registered owner of the whole of the land parcel Meru South/Kamwimbi 'A'/1943. That the Plaintiff/Applicant has settled on the parcel of land for more than 28 years and developed the 5 acres by erecting houses, planted trees including guava trees, mango, pawpaw, lemons, napier grass among other plants, and reared various animals on the same portion. That her children who were born and raised on the said 5 acres also live on the said parcel of land.
46. The Plaintiff/Applicant further submitted that she is apprehensive that if the temporary injunction order is not granted, she will incur irreparable loss bearing in mind that she has no other place to call home or to go to.
47. The Applicant submitted that the balance of convenience tilts in their favour and relied on Pius Kipchirchir Kogo Vs. Frank Kimeli Tenai (Supra), Paul Gitonga Wanjau Vs. Gathuthis Tea Factory Company Ltd & 2 Others (2016) EKLR; Samuel Kihamba Vs. Mary Mbaisi (2015) EKLR and Maweu Vs. Liu Ranching & Farming Cooperative Society (1985)eKLR.
48. On whether or not to grant stay of proceedings the applicant submitted that the decision is discretionary and this Court has powers to stay proceedings before the lower court and that the jurisdiction is derived from Order 42 Rule 6 (1) of the Civil Procedure Rules.



49. The Applicant relied on the cases of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 and *David Morton Silverstein Vs. Atsango Chesoni* (2002) eKLR.
50. It is the Applicant's submission that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit. That the threshold for such proof is beyond reasonable doubt. The applicant submitted that the justification for stay of proceedings in this case is to avoid parallel decisions in same matter.
51. On whether inhibition order should be granted, the Applicant relied on Section 68 of the [Land Registration Act](#), Section 3A of the [Civil Procedure Act](#) and Order 40 Rule 1 of the Civil Procedure Rules which is the enabling provision for grant of an injunction. The applicant also relied on the case of *Panari Enterprises Limited Vs. Luvodi & 2 Others* (2014) eKLR.
52. The respondent identified 5 issues for determination in the instant application. The first issue for determination is whether the instant application and the main suit ELC No. E002 of 2023 is sub-judice viz a viz CMC ELC Case No. E039 of 2023. The respondent submitted to the affirmative.
53. It is the respondent's submission that the principle of sub-judice is set out in Section 6 of the [Civil Procedure Act](#) and is meant to avoid multiplicity of suit with same subject matter and the same litigants when the former suit is not determined and the practice and the law is that a suit that is filed like the instant one when there is another one addressing the same issues should be struck out with costs. That in other cases, the court will order stay of the latter suit pending the hearing and determination of the former suit.
54. The respondent submitted that in the instant case they are praying that ELC Case No. E002 of 2023 be dismissed or struck out with costs for offending the rule of sub-judice. The respondent cited Section 6 of the [Civil Procedure Act](#), and relied on the case of *Kenya national Commission on Human Rights versus Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested parties)* (2020) eKLR. That the prayers sought in this suit and application can be heard and determined in CMC ELC Case No. E039 of 2023. The respondent also relied on the Environment and Land Court at Nairobi ELC Case No. E246 of 2021 (2022) eKLR.
55. It is the respondent's submission that an inhibition order should not be issued although an inhibition order is a temporary relief meant to preserve the suit land pending the hearing and determination of an application or hearing of the main suit. The respondent submitted that if the plaintiff herein had not infringed the principle of sub-judice as propounded in Section 6 of the [Civil Procedure Act](#), he would have no objection to an inhibition order being issued for the purpose of preservation of the suit land pending the hearing and determination of the instant suit.
56. The respondent lastly submitted on the issue of interim injunction pending the hearing and determination of the instant application and the main suit. It is the respondent's submission that it is a misrepresentation of facts for the plaintiff to aver that she is in occupation of 5.00 acres out of the suit land LR. Meru South Kamwimbi 'A'/1943. The respondent submitted that he has consistently deposed in his replying affidavit that the plaintiff does not occupy more than 1 ¼ of an acre of the suit land, comprised of homestead, cowshed and goat pen. That the plaintiff is trying to allocate herself land which she does not occupy through pleadings.
57. The respondent submitted that seeking interim orders of injunction restraining the defendant from evicting or interfering with the plaintiff occupation of a 5.00 acres of the suit land LR. Meru South Kamwimbi 'A'/1943 is misleading. That the plaintiff cannot be evicted from land that she does not occupy, as she only occupies a ¼ of an acre.



58. The respondent relied on the case of Giella Vs. Cassman Brown to demonstrate that the applicant must have a prima facie case with a likelihood of success, that the applicant must demonstrate to the court the loss she is likely to suffer that cannot be compensated by way of damages and thirdly, the court if not clear on the 1st and 2nd grounds, will determine the application on the balance of convenience.
59. The respondent submitted the prayer for interim injunction should and must fail.

Analysis & Determination

60. I have considered the application and the response filed as well as the submissions made. There are only four main issues for determination: -
- i. Whether the instant suit is sub-judice.
 - ii. Whether the applicant is entitled to interim orders of injunction.
 - iii. Whether the applicant is entitled to orders of stay and/or suspend the proceedings of the suit filed in the Chief Magistrate's Court at Chuka vide ELC Case No. E039 of 2023.
 - iv. Whether the court should grant orders of inhibition to the applicant.

Whether the instant suit is sub-judice.

61. The defendant has pleaded in his replying affidavit that the instant suit and the main suit are sub-judice vis-à-vis CMC ELC Case No. E039 of 2023 and is an affront to the provisions of Section 6 of the *Civil Procedure Act*. That the main suit and the instant application is premised under the doctrine of adverse possession which cannot apply, granted that the defendant/respondent became the registered proprietor of L.R. Meru South/Kamwimbi 'A'/1943 on 24th May, 2017.
62. The provisions of Section 6 of the *Civil Procedure Act* provides as follows: -
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.”
63. The Supreme Court of Kenya in Kenya National Commission on Human Rights Vs. Attorney General; Independent Electoral & Boundaries Commission & 16 Others (Interested Parties) had occasion to pronounce itself on the subject of sub-judice. It aptly stated: -

“67] The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties or the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that



one suit was instituted before the other; that both suits are pending courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

64. I find that there having been no argument in rebuttal put forward by the applicant that indeed there is a pending matter that is directly and substantially in issue with the present suit before the Court between the same parties, this matter is therefore sub-judice. I find that where the test of res sub judice is established or met, the marginal notes in Section 6 of the *Civil Procedure Act* stipulates that the latter suit would be stayed until the earlier suit is heard or determined. Whereas there can be no justification in having the two cases being heard parallel to each other as that would not only be an affront to the sub judice rule but would also be in violation of the overriding objective of the *Civil Procedure Act* which require under Section 1B that there be an “efficient use of the available judicial and administrative resources,” it must be appreciated that this suit is a claim for adverse possession which can only be dealt with in this court and not the Magistrate’s Court.
65. Since this suit and the instant application are premised under the doctrine of adverse possession which, in my view, cannot be granted by the Magistrate’s court, it is my opinion that the two suits should be consolidated and heard together before this court. Section 18 of the *Civil Procedure Act* gives this Court power, of its own motion, to withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter try or dispose of the same.
66. In the result, I make the following orders: -
- a. The Notice of Motion dated 17th November 2023 is dismissed with costs to the respondent.
 - b. Chuka CMC ELC Case No. E039 of 2023 is withdrawn and transferred to this court for trial and disposal.
 - c. Upon prayer (b) above, Chuka CMC ELC Case No. E039 of 2023 to be consolidated with ELC Case No. E002 of 2023 (OS).
 - d. The lead file shall be the case that was filed first, i.e Chuka CMC ELC Case No. E039 of 2023.
67. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 25TH JULY, 2024.

In the presence of:

Court Assistant – Kiruja

Ms. Ochola for Plaintiff/Applicant

I.C Mugo for Defendant/Respondent

C.K YANO,

JUDGE

