



**Irungu & another v Kamau & another (Land Case E013 of 2024)
[2024] KEELC 6898 (KLR) (17 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6898 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
LAND CASE E013 OF 2024
LN GACHERU, J
OCTOBER 17, 2024**

BETWEEN

PATRICIA WAMAITHA IRUNGU 1ST PLAINTIFF

HUMPREY IRUNGU GATHUNGU 2ND PLAINTIFF

AND

STEPHEN MBUGO KAMAU 1ST DEFENDANT

ANTHONY GATHUNGU KAMAU 2ND DEFENDANT

RULING

1. The Matter for determination is the Notice of Motion Application dated 15th April, 2024, brought under Certificate of Urgency and which is anchored on Order 40 Rules 1, 2 and 3 and Order 50 Rule 1 of the Civil Procedure Rules, as read together with Sections 1A, 1B and 3A of the [Civil Procedure Act](#), wherein the Plaintiffs/Applicants have sought for the following Orders:
 - a. That the Court be pleased to grant an order of temporary injunction ex-parte restraining the Defendants/Respondents either by themselves, nominated agents, servants and/or anyone claiming and/or acting under the said Defendants /Respondents, from subdividing, selling, disposing off, transferring, leasing alienating, clogging and/or in any other manner interfering with the Plaintiffs/Applicants rights and/or interests therein over half of the property No LOC.10/KAHUTI/87, whatsoever pending the hearing and determination of the instant Application.
 - b. That the Court be pleased to grant an order of temporary injunction ex-parte restraining the Defendants/Respondents either by themselves, nominated agents, servants and/or anyone claiming and/or acting under the said Defendants/ Respondents, from subdividing, selling, disposing off, transferring, leasing alienating, clogging and/or in any other manner interfering



with the Plaintiffs/Applicants rights and/or interests therein over half of the property no LOC.10/KAHUTI/87, whatsoever pending the hearing and determination of the main suit.

- c. That the Court be pleased to grant an order of temporary injunction ex-parte restraining the Defendants/Respondents either by themselves, nominated agents, servants and/or anyone claiming and/or acting under the said Defendants/ Respondents, from interfering with the Plaintiffs/Applicants possession and use of its premises on LOC.10/KAHUTI/87, (hereinafter the suit property) pending the hearing and determination of the main suit.
 - d. That the Defendants/Respondents bear the costs of this Application.
2. The Application is premised on the grounds stated thereof and on the Supporting Affidavit of Patricia Wamaitha Irungu (the 1st Plaintiff/Applicant), sworn on 15th April, 2024, wherein she averred that the Plaintiff/ Applicants purchased half of land parcel No. LOC.10/KAHUTI/87 (the suit property), from the original registered owner namely, Charles Kamau Gathungu, for the full purchase price of Kshs.3400/=, (three thousand five hundred), and they took possession of the said parcel of land in year 1987.
 3. She further averred that the said purchase price was paid to the registered proprietor/vendor in the presence of the following witnesses: Mary Karuana Gathungu (wife To The Seller); Florence Wanjiru Kamau (daughter To The Seller); Fr. Paul Kahinga; Geoffrey Gathanu Kamau (brother To The Seller, Now Deceased); And Rosemary Wanjiru (wife To Geoffrey Gathanu Kamau).
 4. She deposed that since 1987, the Plaintiffs/Applicants have carried out developments on the suit land including establishing their family home thereon and carrying farming activities such as coffee farming.
 5. It was the Plaintiffs/Applicants' further contention that the said Charles Kamau Gathungu, died in year 1991, and was survived by his wife/widow Mary Karuana Gathungu. That upon the death of Charles Kamau Gathungu, the deceased's family filed Succession Cause No. 1059 of 1991, before the High Court of Kenya at Nairobi, in which proceedings a Certificate of Confirmation of Grant was issued on 14th July 1992, to Mary Karuana Gathungu.
 6. Further, that their interests as purchasers of half of the suit land was not the subject of adjudication in the said Succession Cause No. 1059 of 1991. Further, that the Estate of Charles Kamau Gathungu, became the subject of other Succession proceedings namely, Summons for Revocation or Annulment of Grant dated 11th September, 2020, and a Certificate of Confirmation of Grant dated 1st November 2021, through which Stephen Mbugo Kamau, Florence Wanjiru Kamau And Anthony Gathungu Kamau , were appointed as Administrators and Administratrix of the said estate.
 7. The Plaintiffs/Applicants contended that going by the mode of distribution of the deceased's estate captured in the Certificate of Confirmation of Grant dated 1st November 2021, the Administrators and Administratrix of the deceased's estate intend to subdivide the suit land into three (3) portions in total disregard of the Applicants' interests on the said land.
 8. The Applicants further contended that they have resided on the suit property for about 36 years, and that they stand to suffer irreparable harm if the reliefs sought in the instant Application are not granted because the Defendants/ Respondents are in the process of alienating the suit property.

The Defendants/respondents' Response

9. The Defendants/Respondents opposed the instant Notice of Motion Application through the Replying Affidavit of Anthony Gathungu Kamau, the 2nd Defendant/Respondent dated 12th June, 2024. He affirmed that their father was Charles Kamau Gathungu, who was the original registered



- proprietor of the suit land. However, the Plaintiffs/Applicants failed to attach any evidence verifying that the amount of Kshs. 3,400/=, was the mutually-agreed full purchase price for half of the suit land as claimed.
10. He further contended that the Applicants failed to enclose any Sale Agreement attesting to their alleged purchase of the suit land. Further, that due to the absence of the any documents to support the purported sale of the suit land, then the said alleged transaction fails the test set out under Section 3(3) (a) and (b) of the *Law of Contract Act*.
 11. The Deponent further averred that the Applicants entered into the suit property after being given 0.8 of Acre of the said land by the Respondents' father namely, Charles Kamau Gathungu (deceased).
 12. The Defendants/Respondents refuted having any intention to dispossess the Applicants of that section of the suit land measuring 0.8 Acre, which parcel of land they affirmed is currently occupied by the Applicants. It was their further contention that the Surveyor undertook a Survey of the suit property for the purposes of subdivision, and the said survey exercise considered the 0.8 of an Acre, which is under the Applicants' occupation.
 13. The Respondents further averred that they were appointed as Administrators of their father's estate alongside their sister Florence Wanjiru Kamau, pursuant to the provisions of Sections 82 and 83 of the *Law of Succession Act*. Further, that all three (3) Administrators are well aware of the Applicants interest in the suit land, and have every intention of transferring 0.8 of an Acre, of the suit property to the Applicants in fulfillment of their late father's wishes.
 14. The Defendants/Respondents urged the Court Not to grant the Applicants the injunctive reliefs sought, as that would clog the Certificate of Confirmation of Grant dated 14th July, 1992, as rectified on 1st November, 2021. Further that Section 83 of the *Law of Succession Act*, requires that a full and accurate account of the completed administration to be rendered within six (6) months, that the said process is currently ongoing, and will be interrupted if the Applicants are allowed the Injunctive Orders sought herein.
 15. The instant Notice of Motion Applicant was canvassed by way of written submissions.

The Plaintiffs/applicants' Written Submissions

16. The Plaintiffs/Applicants filed their written submissions dated 9th August, 2024, through the Law Firm of K.N. MBURU & ASSOCIATES ADVOCATE, and relied on the cases of *Giella V Cassman Brown & Co. Ltd (1973) E.A. 358*; and, *Nguruman Limited V Jan Bonde Nielsen & 2 Others, (CA NO. 77 of 2012)*, regarding the parameters governing the grant on injunctions.
17. On the question as to what constitutes a "prima facie case" reliance was placed in the holding of the Court in the cases of *CMC Motors Group Limited, CMC Holdings Limited and Evans Kageche Boro (Civil Appeal No. 295 of 2001 - Nakuru)*; *Mrao V First American Bank of Kenya Ltd & 2 others [2003] eKLR*; and, *Kenya Commercial Finance Co. Ltd V Afraha Education Society (2001) Vol. 1 EA 86*.
18. On the issue of what constitutes irreparable damage that cannot be adequately compensation for in damages, the Plaintiffs/Applicants relied on the decision of the Court in the case of *Pius Kipchirchir Kogo V Frank Kimeli Tenai (2018)*. Further reliance was sought in the holding of the Court in the case of *Kenlab Cons. Ltd V New Gatitu Service Station Ltd & Another (1990) eKLR*.
19. The Defendants/Respondents did not file written submissions; therefore, the Court will rely on their Replying Affidavit on record, as sworn by Anthony Gathungu Kamau, the 2nd Defendant/Respondent herein.



20. The court has considered the pleadings herein, the written submissions by the Plaintiffs/Applicants and finds the issues for determination are;
 - I. Whether the Plaintiffs/Applicants are entitled to the Orders sought.
 - II. Who shall bear the costs of the Application.

Whether the Plaintiffs/ Applicants are entitled to the Orders sought?

21. The instant Application was filed alongside a Plaint wherein the Plaintiffs/Applicants contended that the Defendants/Respondents only objection to the instant Application concerns the acreage claimed by the Plaintiffs/ Applicants in respect of the suit land.
22. The Applicants averred that they purchased half of the suit property from the original registered owner, who is the Respondents' father (now deceased). On their part, the Respondents contended that they are aware that the Plaintiffs/Applicants are entitled to 0.8 of an Acre, out of the suit property. Further, that the Applicants are occupying 0.8 of an Acre, of the said land, consequent to the transaction entered into between them and his father
23. The Respondents further contended that at the end of the sub-division exercise, which is currently ongoing, 0.8 of an Acre, out of the suit property will be transferred to the Plaintiffs/ Applicants in line with the wishes of his late father.
24. Further the Defendants/Respondents averred that they are co-administrators of the estate of their father Charles Kamau Gathungu, together with their sister Florence Wanjiru Kamau.
25. The Court has perused a copy of the Certificate of Confirmation of Grant on record dated 14th July 1992, and which was Rectified on 1st November 2021, and has observed that indeed the third co-administrator therein namely Florence Wanjiru Kamau, is expressed to be entitled to a 25% share of the properties belonging to the estate of the deceased enumerated therein, including the suit property.
26. The said Florence Wanjiru Kamau, is not a party to these proceedings because she was not sued by the Plaintiffs/Applicants. The Defendants/Respondents, for their part, did not raise the issue of the non-joinder of the said Florence in these proceedings.
27. Section 82 of the Succession Act, stipulates inter alia as follows:

“Personal Representatives shall, subject only to any limitation imposed by their grant, have the following powers—(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;”
28. Further, Order 31, Rule 2 of the Civil Procedure Rules provides as follows:

“Where there are several trustees, executors or administrators, they shall all be made parties to a suit against one or more of them.”



29. Interpreting the meaning and import of Order 31, Rule 2 of the Civil Procedure Rules, the Court in the case of Joram Kaberia Vs District Land Adjudication and Settlement Officer Igembe South District & 2 others [2018] eKLR, proclaimed as follows:

“It would appear that though the rule provided for joinder of all trustees, executors or administrators to a suit commenced against them, where a suit is commenced by trustees, executors or administrators they must all be enjoined as parties.”

30. From the above decision of the Court, it is evident that Order 31, Rule 2 of the Civil Procedure Rules was purposely designed to take care of situations such as the instant Application before this Court.

31. Further, in the case of Kibiri Vs Kibunja (Sued as the Personal Representative of the Estate of Walter Kibunja Kiruri - Deceased) (Environmental and Land Originating Summons E021 of 2022) [2024] KEELC 5093 (KLR) (4 July 2024) (Judgment), the Court declared as follows:

“The co-administrators are in respect of the grant issued over the estate of Walter Kibunja Kiruri(deceased), and the two administrators are supposed to administer the estate jointly. Thus, any suit brought on behalf of the estate should be brought and defended by the joint administrators. Indeed, Order 31 Rule 2 of the Civil Procedure Rules, provides that where there are several trustees, executors or administrators, they shall be made parties to the suit against one or more of them. This provision of law is couched in a mandatory terms, and thus must be adhered to.”

32. It is trite that parties are bound by their pleadings., and the Court of Appeal in the case of Independent Electoral & Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR, cited with approval the decision of the Supreme Court of Nigeria in the case of Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 as follows:

“.....it is now(settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”

33. Moreover, in the case of Raffaella Adiyakhiso Ntotoi vs Robert Obrian Lenguro [2012] eKLR, the Court cited with approval the decision of the Court in the case of The Attorney General-Vs-Kenya School of Flying Ltd Civil Suit 215 of 1999, and held as follows:

“As the plaintiff’s application and/or suit stands now without amendment it has no chance of success for failure to have the suit brought in joint names of the administrators unless there is only one surviving administrator and for which this court finds that there was no evidence that the 2nd administrator was not alive or was out of the country.”

34. The Respondents did not seek for the striking out or dismissal of the main suit and the Application herein on grounds of failure to join their sister Florence Wanjiru Kamau, who is a co-administrator of their late father’s estate, to the instant proceedings. The Respondents, in their Replying Affidavit opposed this Application on grounds of the acreage claimed by the Plaintiff/Applicants, and also for



the reasons that it would interfere with the Statutory timelines stipulated under Section 83 of the Succession Act.

35. Be that as it may, the Court cannot overlook or disregard the mandatory provisions of Order 31, Rule 2 of the Civil Procedure Rules, notwithstanding the fact that the Respondents did not raise the issue of non-joinder of their co-administrator to the proceedings. The Plaintiffs/Applicants, on the other hand, have not offered any explanation for the failure to enjoin the third co-administrator of the deceased's estate to this suit and Application.
36. Although the Court is satisfied that the Plaintiffs/Applicants have been on the suit property for long, and have established a prima facie case having demonstrated that they are in occupation of the suit property, it cannot entertain the claim before it due to non-joinder of the third administrator of the estate of the deceased Charles Kamau Gathungu.
37. Consequently, this court finds and holds that the Plaintiffs/Applicant's Application dated 15th April, 2024, is incompetent for non-joinder of Co-Administrator of the deceased's estate, and thus it is hereby struck out entirely with no orders as to costs.
38. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A, THIS 17TH DAY OF OCTOBER, 2024.

L. GACHERU

JUDGE

17/10/2024.

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Mr Kariuki H/B M/s Ndungu for Plaintiffs/Applicants

Mr Gitau H/B Mwangi for 1st & 2nd Defendants/Respondents

L. GACHERU

JUDGE

17/10/2024.

