



Gituma & another v Manene & another (Being Sued as the Legal Representatives and Administrators of the Estate of Manene Tumanga) (Environment & Land Case E017 of 2022) [2023] KEELC 53 (KLR) (18 January 2023) (Ruling)

Neutral citation: [2023] KEELC 53 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E017 OF 2022
CK NZILI, J
JANUARY 18, 2023**

BETWEEN

DAVID MUNENE GITUMA 1ST PLAINTIFF

JAMES KINOTI KIRIINYA 2ND PLAINTIFF

AND

IBRAHIM MUTEA MANENE 1ST DEFENDANT

JUDAH MUNGATIA MANENE 2ND DEFENDANT

**BEING SUED AS THE LEGAL REPRESENTATIVES AND ADMINISTRATORS
OF THE ESTATE OF MANENE TUMANGA**

RULING

1. The plaintiff/applicants by an application dated October 31, 2022 urges the court to issue prohibitory orders against any transactions by the defendant or the Deputy Registrar over LR No Abothuguchi/Mariene/597 hereinafter the suit property, pending the hearing and determination of this application. The application is based on the reasons on its face and a supporting affidavit of David Munene Gituma sworn on the even date.
2. The applicants claim before this court is the originating summons dated October 31, 2022 seeking to be declared entitled to the suit property by virtue of adverse possession.
3. The applicants aver that the defendants have illegally included the suit property in the succession cause purporting to transfer and or distribute it yet the applicants have lived therein since the 1950's where they have established a homestead. Therefore, if the property is dealt with and transferred, they will be rendered homeless, destitute and landless.



4. The application is opposed through a replying affidavit by Ibrahim Mutea Manene sworn on November 16, 2022. The defendants averred that their late father became registered as the proprietor in 1965 as part of the ancestral family land situated at Kirindine area unlike the plaintiffs whose family land is situated at Kairebi area. That the plaintiff's father prior to his death had filed several cases at the land disputes tribunal, an objection at Githongo Court Succession Cause No 58 of 2018 and Githongo ELC Case No 1 of 2022. They annexed copies of the search, register, application for letters of administration and protest, pleadings in ELC case judgment thereof and an OB report showing that the entry into and remaining on the land by the applicants has been resisted throughout as annexures marked IMM 1 (a), (b), (c) - IMM 7 respectively.
5. With leave of court, parties were to file written submissions by November 24, 2022. The applicants submitted that they have made up a *prima facie* case; that they stand to suffer irreparable injury if the orders sought are not granted and that the balance of convenience tilts in their favour. Reliance was placed on *Samuel Njeru Daniel vs James Njeru Thiga & others* (2017) eKLR, *Mrao Ltd vs First American Bank Ltd & 2 others*, *Robert Ochanda Abuya vs KPLC Ltd* (2021) eKLR, *Nguruman Ltd vs Jan Bonde Nielsen & 2 others* (2014) eKLR, *Pius Kipchirchir Kogo vs Frank Kimeli Tenai* (2018) eKLR, *SKEK Cosmetics Ltd vs Family Bank Ltd & another* (2020) eKLR, *IM vs SMK & 4 others* (2022) eKLR.
6. Accompanying the written submissions, the applicant sneaked in a further affidavit which was filed without leave of court. The same shall not be considered for purposes of this ruling.
7. On the other hand, the respondent relying on *Giella vs Cassman Brown Co Ltd* (1933) 358 and *Mrao Ltd vs First American Bank of Kenya Ltd & 2 others* (2003) eKLR, submitted that the application does not meet the threshold since the land is registered in the name of their deceased father and the applicants have come to court with unclean hand.
8. The court has gone through the pleadings, the application, the response and the written submissions. At issue is whether to grant an order of prohibition against any transactions over the suit property at the interlocutory stage of this suit.
9. A prohibitory order is in the nature of injunction. For a party to be entitled to a prohibitory order, he must establish a *prima facie* case with a probability of success at the hearing. A *prima facie* case was defined in *Mrao Ltd (supra)* as a case in which on the material presented before court, the court would conclude that there exists a right which has apparently been infringed by the opposite party to call for a rebuttal or an explanation from the latter. The court said that such a right must be backed by evidence of such infringement and with a probability of success upon trial.
10. In *Nguruman Ltd (supra)*, the court held that the burden to prove a *prima facie* case rests with the applicant to show a clear and an unmistakable right to be protected which is directly threatened by an act sought to be restrained, that the invasion of the right has to be material and substantive with an urgent necessity to prevent the irreparable damage that may result from the invasion.
11. Further the court held that in considering whether a *prima facie* case has been established, the court does not hold a minitrial and must only examine the merits of the case closely. Rather, all what the court has to do is to see on the face of it that the person applying for an injunction has a right which has been threatened without necessarily establishing title but if he has a fair and *bonafide* question to raise as is the existence of the right which he alleges on a preponderance of probabilities.
12. Additionally, the court held that at an interlocutory stage, the three pillars on which rest the foundations of any injunction are to be applied separate, distinctly and logically, hurdles which must be surmounted sequentially.



13. The court has looked at the material placed before it by both parties. The applicants allege that they are entitled to the suitland by way of adverse possession whereas the defendants on the other hand raise a defence that the alleged trespass to the land has been violent, resisted and the issues herein were fully determined in previous litigations in Githongo PMCC ELC No 1 of 2020. Further the defendants have also alluded to the fact that the grant was confirmed after the protest by the plaintiffs herein was dismissed.
14. Based on the material before the court, I find no prima facie case made for a prohibitory order to issue. The applicants have not produced any evidence in the nature of developments and loss that they are likely to suffer which cannot be compensated by way of damages. There must be more than speculative injury, unfounded fear or apprehension before the court can issue prohibitory reliefs as held in Nguruman (*supra*).
15. Similarly given the previous litigation, the balance of convenience tilts in not granting such orders at this stage.
16. The notice of motion dated October 31, 2022 stands dismissed with costs. Parties to comply with Order 11 of the Civil Procedure Rules and list the suit for hearing.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT

THIS 18TH DAY OF JANUARY, 2023

In presence of:

C/A: Kananu

Mukaburu for defendant

Mwangi for plaintiff

HON. C.K. NZILI

ELC JUDGE

ELC E017 OF 2022 (OS) - RULING	0
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