



Njage & 24 others v Kirege (Sued as Legal Representative/Administrator of the Estate of Kirege Kirungia - Deceased) (Environment & Land Case E016 of 2022) [2023] KEELC 292 (KLR) (17 January 2023) (Ruling)

Neutral citation: [2023] KEELC 292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE E016 OF 2022
A KANIARU, J
JANUARY 17, 2023**

BETWEEN

MUGO MICHAEL NJAGE & & 24 OTHERS PLAINTIFF

AND

ALFRED M.N. KIREGE DEFENDANT

**SUED AS LEGAL REPRESENTATIVE/ADMINISTRATOR OF THE ESTATE OF
KIREGE KIRUNGIA - DECEASED**

RULING

1. Before the court is a notice of motion dated April 13, 2022 and filed on 20.4.2022. It is expressed to be brought under section 68 of the [Land Registration Act, 2012](#) and section 3A of the [Civil Procedure Act](#), (cap 21, laws of Kenya.).

Application

2. The application is filed by the applicants who seek to be issued with an order of inhibition to be registered on land parcel Evuvore/Evuvore/17 pending hearing and determination of the suit. The applicants are the plaintiffs in the suit while the respondent is the defendant.
3. The application is anchored on grounds that the respondent has obtained a Certificate of Confirmation of grant and has included land parcel Evuvore/Evuvore/17 in Succession Cause No 35 of 2019 as part of the deceased estate. The deceased is Kirege Kirungia. It was said that unless the order of inhibition is issued, there is a likelihood that the land would be alienated and the suit would be rendered nugatory. According to the applicants, it is in the interest of justice that the land be inhibited in order to preserve it pending hearing and determination of the suit.



4. Accompanying the application is a supporting affidavit sworn by Mugo Michael Njage, the 1st applicant. He stated that he had filed the suit in his capacity as a representative of 24 members of the Mururi clan. He deposed that in 1975, the clan had appointed Nyaga Gichindano and Kirege Kirungia to be their representatives during the land adjudication dispute involving several parcels of land including the subject land, Evuvore/Evuvore/17. He alleged that the said land was registered in the names of the two representatives to hold in trust for the Mururi clan and further that they were allocated land parcels Evuvore/Evuvore/30, 497 and 18 respectively in their individual capacities.
5. It was claimed that the representatives had died before determining the trust in respect of the subject parcel of land in favour of the members of clan. According to the applicants, the respondent had taken out grant of letters of administration in respect of the estate of the deceased in Siakago Succ No 35 of 2019 where he was said to have included the subject parcel of land as part of the deceased estate. The applicants deposed that they were apprehensive that the respondent would alienate and transfer the land in execution of the grant, hence rendering the suit nugatory. They averred that unless the orders of inhibition are granted to preserve the suit land, then the bonafide owners would suffer irreparable loss and damage. They further averred that it was in the interest of justice that the order for inhibition be granted to preserve the suit land pending hearing and determination of the suit.

Response

6. The respondent opposed the application by way of replying affidavit dated 10.5.2022 filed in court on even date. He objected to the issuance of orders of inhibition for the reason that he would be disinherited. He further denied any blood relationship between his father and the applicants. He alleged that his father had never been sued with regard to the subject matter up until his demise. According to him, the subject parcel of land was registered in his father's name and that of Nyaga Gichindano as absolute proprietors and not as trustees. He said that the copy of search did not reflect any trust. He further said that the certificate of grant issued to him was genuinely awarded and contended that the applicants had challenged him in the succession court seeking deletion of the subject property from the succession cause. But their application had been dismissed and costs awarded to him. It was his case that the concept of trust and representation did not exist and he urged the court to dismiss the application with costs.

Submissions

7. The application was canvassed by way of written submissions. The respondent filed his submissions first. The said submissions were filed on 29.6.2022. He reiterated the averments in the replying affidavit and submitted that the 1st registration was indefeasible in law save for overriding interest as provided for under section 26(1) of the *Land Registration Act*. He further submitted that the entries on the register and the official searches did not reflect any trust. It was said that the issue of representation had ended at the appeal stage. According to him, three of the applicants reside on the land but were doing so against the provisions of the law of succession. Further, it was argued that the rest of the plaintiffs were not physically on the land and were lying to the court.
8. The respondent reiterated that the subject land was vested in the registered owners exclusively to the benefit of their beneficiaries and termed the application as trifle, flivorous and fallacious. He contended that he had demonstrated that no trust existed on the land and as such an inhibition on the title would be injurious to him and his siblings. He urged the court to dismiss the application and maintain the status quo.



9. The applicants on their part filed their submissions on 4.10.2022. They gave a summary of each case as presented by the parties and identified only one issue for determination by the court, which was whether they were entitled to an order of inhibition to preserve the status on the land.
10. They relied on the provisions of section 68(1) of the *Land Registration Act*. The applicants further relied on the case of *Japhet Kaimenyi M'ndatbo v M'ndatbo M'mbwiria* [2012] eKLR where the court outlined conditions to be met for grant of an order of inhibition as follows;
 - a) That the suit property is at the risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.
 - b) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
 - c) That the applicant has arguable case.
11. The applicants were of the view that they had satisfied the said conditions for the reason that they were at risk of alienation from the suit property as the two deceased had died before determining the trust in respect to the land. They submitted that the land had been included as part of the estate of Kirege Kirungia and was set to be distributed to the dependants and beneficiaries of the estate. They further argued that the orders of inhibition should be granted to prevent the land from being subdivided among the said beneficiaries. It was said that failure to grant the orders of inhibition would render the proceedings nugatory and an abuse of the court process. According to the applicants, their claim on trust cannot be ascertained at this stage but by production of evidence during trial.
12. The applicants argued that the lower risk injustice favors the respondent who was said to already have a certificate of confirmation of grant and was ready to distribute the estate of his late father. The applicants relied on the case of *Bashir Yusuf & another v Tatalei Kiptenai* [2020] eKLR which cited with approval the case of *Films Rover International & others v Cannons Films Sales Ltd* [1986] 3 ALL ER 772 where it was held that an order of inhibition will serve the greater interest by preserving the suit land while the parties proprietary interests are determined. The applicants urged the court to allow the application with costs.

Analysis And Determination

13. I have considered the application, the response, the submissions by the parties and the court record in general. The only issue that commends itself for my determination is whether the order of inhibition as sought ought to be granted. An order for inhibition serves to preserve the subject matter pending hearing and determination of a suit. In essence, it ensures that there are no dealings on the land as the parties litigate their respective cases.
14. The law governing inhibitions is section 68 of the *Land Registration Act* of 2012, which provides as follows
 - (1) The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.
 - (2) A copy of the inhibition under the seal of the court, with particulars of the land, lease or charge affected, shall be sent to the Registrar, who shall register it in the appropriate register.
 - (3) An inhibition shall not bind or affect the land, lease or charge until it has been registered. when there is good reason to preserve, or stay the registration of dealings, with respect to a particular parcel of land for a temporary period.



15. The conditions to be met for grant of an order of inhibition were well stated in the case of *Geoffrey Kiania Kamwara v Mwikamba Kagembe* [2021] eKLR where it was stated thus:
- “In granting such an order the Court will consider if the land in dispute is
1. Likely to be alienated or transferred thus making it un-available by the time the trial is concluded,
 2. Whether the applicant has an arguable case
 3. And whether the refusal to grant the order it will render the suit nugatory.
 4. The prejudice that may be occasioned to any party to the suit”
16. Similar conditions were also set out in the case of *Rosemary Wanjiku Njigi v Nancy Munjiru Ngige* [2013] eKLR, where LN Gacheru, J cited with approval the decision of Makau, J in *Japhet Kaimenyi M'ndatbo v M'ndatbo M'mbwiria* [2012] eKLR where the necessary requirements were stated as follows:-
- a. That the suit property is at risk of being disposed of or alienated or transferred to the detriment of the applicant unless preservatory orders of inhibition are issued.
 - b) That the refusal to grant orders of inhibition would render the applicant's suit nugatory.
 - c) The applicant has an arguable case.
17. The applicants must therefore satisfy the above mentioned conditions to warrant grant of an order of inhibition. The applicants' case is that they appointed Nyaga Gichindano and Kirege Kirungia as their representatives during the land adjudication dispute. They alleged that the land was registered in the joint names of the two to hold in trust for the Mururi clan but that the two allocated themselves several land parcels being Evuvore/Evuvore/30, 49, 17 and 18. They argued that the two had died before determining the trust to the respective members and that the land had now been made part of the estate of Kirege Kirungia in Siakago Succ No 35 of 2019. They expressed fears that the respondent was likely to alienate and transfer the land before determination of the suit, hence rendering it nugatory.
18. The respondent case was simple: That the land belonged to their deceased father in his capacity as registered owner and not as a trustee. He argued that his father owned the land together with Nyaga Gichindano. According to him, the applicants were only interested in disinheriting the beneficiaries yet they had no blood relations with the deceased.
19. As set out above, it is trite to consider whether the grounds for warrant of an inhibition have been met by the applicants. The first condition is whether the land is at risk of being alienated or transferred, thus making it un-available by the time the trial is concluded. The applicants have argued that the land has now been included as part of the estate of Kirege Karungia and the grant to his estate is already confirmed. The respondent on his part has insisted that the land belongs to his late father for the benefit of his beneficiaries. He has reiterated that the law protects the sanctity of title and to him there is no trust whatsoever registered against the title.
20. From the arguments advanced by the applicants, it is indeed true that the contested parcel is already part of the confirmed grant to the estate of the late Kirege Karungia. A confirmed grant has been attached as evidence of this. The said respondent has clearly and unequivocally averred that the land is for the benefit of the beneficiaries of his late father's estate. As per the confirmed grant attached, the land has already been alienated on paper to the various beneficiaries of the estate of the deceased Kirege Karungia



and if an order for inhibition is not granted, the said persons will proceed to utilize the land or even transfer it to third parties.

21. On whether the applicant has an arguable case, what amounts to an arguable case in my view is whether the same raises bonafide grounds. Even a single ground suffices. The same need not succeed but the case should not be frivolous. The applicants' case is one on ownership of land by virtue of trust. The said trust is not registered against the title but has to be proven by way of evidence by the parties during the trial. However, I have come across an affidavit alleged to have been sworn by Nyaga Gichiandano in the year 1986. In the said affidavit, he avers that he has been appointed by members of Mururi clan to represent them in Land Case No 291/85. He goes ahead to state that he shall not treat the subject parcels as his own but as property belonging to the clan. Among the parcels listed therein is Evuvore/Evuvore/17 which is the contested parcel herein. That evidence alone is what I would treat as forming an arguable case. Though it may not succeed, at least at this juncture, the same is enough to warrant allowing of an order for inhibition as the parties ventilate the merits of the case.
22. The other issue for consideration is whether the refusal to grant the order will render the suit nugatory. I have already said that the land has already been distributed to the beneficiaries on paper via the confirmed grant to the estate of Kirigi Karungia. The said subject parcel will without doubt be distributed to the said beneficiaries who will each acquire title and exercise their rights as owners as envisaged under the law. The subject parcel will indeed be rendered nugatory before determination of this suit unless an order of inhibition is granted.
23. Lastly, this court has to consider what prejudice will be occasioned to either party if the orders of inhibition are not granted. The applicants are seeking orders of inhibition to preserve the property as they ventilate their case. This court has a duty to balance the interest of both parties before granting the prayer sought. This is for the simple reason that the same prevents an owner of land from dealing with the land in any manner pending determination of the case.
24. In that regard, assuming the applicants are successful in their case, I am of the view that they will suffer great prejudice and injustice being that the suit property is already distributed to the deceased's beneficiaries through the confirmed grant. That property can be easily alienated and disposed of to beneficiaries at any moment. Even worse, the same can be transferred to third parties during the pendency of this suit. The respondent on the other hand, already has the property within his reach. The same is registered in their late father's name jointly with Nyaga Gichindano. In the event this court is inclined to grant an order of the inhibition and the applicants fail in their case no much prejudice will be suffered by the respondent or the beneficiaries. In the circumstances, I find that the risk to be suffered by the applicants is of course greater compared to the risk that the respondent would suffer if the order of inhibition is not granted.
25. This court finds that preserving the property will best balance the interest of both parties. The court therefore grants an order of inhibition in respect of the suit parcel of land - Evuvore/Evuvore/17 - pending hearing and determination of the suit. As for costs the same shall be in the cause.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 17TH DAY OF JANUARY, 2023.

In the presence of M/s Mwinja for plaintiff/applicants and Defendant/respondent in person.

Court Assistant: Leadys

AK KANIARU

JUDGE

