



REPUBLIC OF KENYA



**KENYA LAW**

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**Muviwa & another v Musyoka & 5 others (Environment & Land Case  
E006 of 2022) [2023] KEELC 15910 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15910 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITUI  
ENVIRONMENT & LAND CASE E006 OF 2022  
LG KIMANI, J  
FEBRUARY 23, 2023**

**BETWEEN**

**MALOMBE MUWIWA ..... 1<sup>ST</sup> APPLICANT**

**MAITHYA MUWIWA ..... 2<sup>ND</sup> APPLICANT**

**AND**

**MARTHA MUSYOKA ..... 1<sup>ST</sup> RESPONDENT**

**PETER NDAMBU ..... 2<sup>ND</sup> RESPONDENT**

**MUTINDA MUNYAO ..... 3<sup>RD</sup> RESPONDENT**

**NDELEVA MUSYOKA ..... 4<sup>TH</sup> RESPONDENT**

**DAVID MBUVI ..... 5<sup>TH</sup> RESPONDENT**

**KIMANZI KILIKU ..... 6<sup>TH</sup> RESPONDENT**

**RULING**

1. The Notice of Motion dated 26<sup>th</sup> October 2022, seeking for the following ORDERS THAT:
  1. Spent.
  2. Spent
  3. Pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the Respondents whether by themselves, representatives, agents or assigns from trespassing or interfering in whichever manner with all of that land known as LR No Mutonguni/Kauwi/2150 (hereinafter referred to as the 'suit property')
  4. Spent



5. Pending the hearing and determination of this suit, an order do issue compelling the Land Registrar Kitui to remove any caution, restrictions and inhibitions registered against the suit property.
  6. Spent
  7. Pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the District Surveyor Kitui from demarcating the suit property MUTONGUNI/KAUWI/2150.
  8. Any other order/relief the Court may deem fit.
  9. Costs of this application be in the cause
2. The grounds in support of the application are contained in the supporting affidavits where the applicants stated that they inherited the property known as LR. No. Mutonguni/Kauwi/2150 from their deceased father's estate in 1974. That their father was a co-beneficiary of the late Mzee Kiliku's estate together with his seven (7) brothers and their father had already died at the time of the distribution of his father's estate. The Applicants claim that they inherited their father's share of their late grandfather's estate in accordance with the provisions of the *Law of Succession Act*.
  3. According to the Applicants, one of their uncles was dissatisfied with the distribution of Mzee Kiliku's estate and sought to disinherit them of their share. They state that they had been enjoying quiet possession of the suit property until sometime in 2019 when they received a letter from the District Land Surveyor stating that he intended to visit their property in order to sub-divide it among the respondents. They claim that they are in danger of being disinherited from the only home that they have known all their lives.
  4. In the Applicants view, the respondents will not be prejudiced should the orders sought herein be granted since they already have a share of the late Mzee Kiliku's estate. They state that the respondents have already begun trespassing onto the suit property and are even cultivating it.
  5. The Application is supported by the affidavit off the 1<sup>st</sup> Applicant, who stated that he and his brother are the registered proprietors of the suit property and his uncle, being dissatisfied with the distribution, wants to make sure that they are evicted from the home they have known all their lives. The 1<sup>st</sup> Applicant deposed that if the respondents are not restrained from interfering with the enjoyment of their ancestral land, they shall be rendered destitute and homeless.

### **The Respondent's Case**

6. Peter Ndambu, the 2<sup>nd</sup> respondent swore a replying affidavit in response to the application on his behalf and on behalf of all the other respondents and deposed that the subject parcel of land Mutonguni/Kauwi/2150 has always been the property of their extended family to which the Applicants belong. That during the adjudication process, the applicants secretly caused the same to be registered in their sole names by excluding their father, Muviwa Kiliku and their fathers who were living on the same land as members of the same extended family.
7. According to the 2<sup>nd</sup> respondent, their fathers lodged claims before the Land Adjudication officers upon learning of the fraud that the Applicants had committed, and that several verdicts were passed that the land be shared equally amongst the eight sons of the late Kiliku (Deceased). Being dissatisfied with this finding, the applicants filed a judicial review case seeking to quash the decision in the Minister's Appeal which was dismissed. The applicants appealed against this decision at the Court of Appeal, which appeal was also dismissed. Further, the applicants filed a fresh suit being Machakos



ELC Petition 23 of 2020 to stop the implementation of the Minister's Appeal which was transferred to Kitui and became Kitui Elc Case 14 of 2021 and was withdrawn on 13<sup>th</sup> July, 2021.

8. The 2<sup>nd</sup> Respondent therefore states that the applicants are opposing the decision in the Minister's Appeal without legal basis and that the application should be dismissed.

### **The Applicants' Further Affidavit**

9. The 1<sup>st</sup> Applicant swore a further Affidavit and denied any fraud on their part. According to the 1<sup>st</sup> applicant, one Dominic Musyoka Kithuva acting on behalf of Kithuva Kiliku, Mulwa Kiliku and Kimanzi Kiliku fraudulently called the Clan elders members on 25<sup>th</sup> June 1983 to re-demarcate all the Kiliku's sons' parcels which he claims was illegal. He claims that Dominic Musyoka Kithuva acting on behalf of Kithuva Kiliku, his father, filed an objection No.367/83 to the District Lands Adjudicator's Officer and the clan elders' decision was found to be fraudulent.
10. The 1<sup>st</sup> Applicant deposed that despite the fact that Kithuva Kiliku was given 60 days to appeal the Kitui District Lands Adjudicator's decision, he failed to do so within time as required and that they later filed Appeal 217 of 1987, 4 years later, which was out of time.
11. According to the Applicants, the suit property was one of seven properties from the Kiliku family land and that the re-demarcation should not have affected only this one parcel of land but all the other seven respondents' parcels.
12. The Applicants contend that this Application is not in any way related to the Appeal filed in the Court of Appeal against the decision in the judicial review as it is a completely different issue of adverse possession.

### **Applicants' submissions**

13. Counsel for the Applicants filed written submissions and stated that there was gross miscarriage of justice that emanates from betrayal and greed within a family. According to the applicants, the late Mzee Kiliku, their grandfather had land in Kauwi where he lived with his children. His land was subdivided among his seven (7) sons and they inherited the same after their father, one of the sons of Kiliku (Deceased) passed away.
14. The Applicants reiterated that an objection was filed to implement the decision of the clan elders by Musyoka Kithuva, one of the sons but the objection was dismissed. That he was given 60 days to appeal and failed to do so. They contend that the appeal was marred by irregularities where the appellants led the District Commissioner to believe that the family only had one portion of land Mutonguni/Kauwi/2150. They claim that their evidence was not taken into account which led to the decision that the said parcel would be distributed equally among the 8 sons of Mzee Kiliku.
15. The Applicants filed judicial review application No. 48 of 2005 at the High Court in Nairobi but it was dismissed. They then appealed to the Court of Appeal in Civil Appeal No. 251 of 2006 but the same was dismissed. They then filed ELC Petition No.14 of 2021 which they withdrew in order to settle out of court with clan elders.
16. The Applicants cited section 35(5) of the *Law of Succession Act* and submitted that they are entitled to inherit from their father's share of his grandfather's estate. They relied on the case of in Re Estate of Florence Mukami Kinyua(Deceased) (2022) eKLR.
17. It was also the applicants' submission that the respondents misled the District Commissioner into thinking that the entire family only had one parcel of land in order to disinherit them and quoted



Section 35(4) of the [Evidence Act](#) and the case of Halima Haji Sarah vs Multiple Haurliers (E.A) Limited & Another (2022) eKLR on material non-disclosure.

18. Thirdly, the applicants submitted that the court has powers to declare the applicants as the legal owners of the suit property by dint of Article 48 on access to justice. They relied on the case of Aspire Limited v Zedka Technical Services Limited & 2 others (2022) eKLR where the court held that the Plaintiff's title be restored in its records.

### **Respondents' written submissions**

19. The Respondents submitted that the entire application is bad in law for violating the doctrine of res-judicata and ought to be struck out. Their version of the facts is that the suit property, Mutonguni/Kauwi/2150 is family land and that during the land adjudication process, the Applicants secretly caused the same to be registered on their sole names excluding their father, Muviwa Kiliku and their seven (7) uncles who were all living on the same land. The dispute was litigated up to the Minister's Appeal where it was determined that the subject property be shared equally amongst the eight (8) sons of Kiliku (Deceased).
20. The applicants then filed Misc Application No.48 of 2005 which was dismissed and they appealed to the Court of Appeal in Nairobi Civil Appeal 251 of 2006 which was also dismissed. The Applicants proceeded to file Machakos ELC Petition 23 of 2020 which was transferred to Kitui as ELC 14 of 2021 which they later withdrew.
21. The respondents cited Section 7 of the [Civil Procedure Act](#) and Section 28 of the [Environment and Land Court Act](#) on the doctrine of res-judicata. In the case of IEBC v Maina Kiai & 5 others (2017) eKLR were the terms constituting a matter that is res-judicata were broken down. According to the Respondents, the subject matter and the parties in the previous litigation and the current suit are the same and that all the rights of the parties regarding the suit land were determined by impartial tribunals and courts.

### **Analysis and Determination**

22. The Respondents have raised an objection on the ground that the suit offends the doctrine of res-judicata and it is important to deal with that issue first before proceeding with the suit.
23. The test for determining the application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the [Civil Procedure Act](#). It provides as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- “(a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.



- (c) Those parties were litigating under the same title.
  - (d) The issue was heard and finally determined in the former suit.
  - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
25. The Originating Summons seeks orders of adverse possession on the suit land claiming that they have been in possession for a period of over 62 years. It is not in dispute that the dispute relating to the suit land was the subject of land adjudication which went all the way to the Minister’s Appeal in Appeal Case No. 217 of 1987. It was determined that the suit property, Mutonguni/Kauwi/2150 was to be shared equally among the eight sons of Kiliku, the original proprietor and family patriarch who is father to the Respondents and grandfather to the Applicants herein.
26. The decision in the Minister’s Appeal, was challenged by the Applicants herein through Judicial Review Miscellaneous Application No.18 of 2005 at the High Court in Nairobi, which was dismissed. The Applicants appealed this judgment to the Court of Appeal in Nairobi as Civil Appeal 251 of 2006 where the Court did not see reason enough to interfere with the High Court decision and dismissed the appeal. The Applicants did not stop there, they filed a Petition at the ELC in Machakos which was transferred to Kitui and became ELC 14 of 2021 and was withdrawn on 13<sup>th</sup> July, 2022.
27. Having regard to the elements for testing whether a matter is res-judicata as stated in the case of IEBC vs Maina Kiai Case (Supra), the court looks into the question of whether “The suit or issue was directly and substantially in issue in the former suit.” The court has looked at the pleadings herein and the proceedings and judgement in the case before the Minister Appeal No. 217 of 1987. The appeal related to land parcel number 2150 which is the same parcel of land as the one before this court as LR MUTONGUNI/KAUWI/2150. The appellant in the said appeal to the Minister claimed that the parties to the appeal were all dependants of Kiliku through his two wives. When Kiliku died the clan council divided the land into eight equal portions among the eight sons of Kiliku. The Respondents in the appeal who were grandsons of Kiliku, Malombe and Munyiwa started using their father’s portion of the land but later extended their occupation to other people’s portions. When survey was done they had surveyed the land in their names.
28. On the other hand, respondents (applicants in this case) stated that the land belonged to their father Muviwa and he acquired it in 1964. He stated that when the survey came the land was surveyed in their names. He further stated the land in issue was not inherited but that his father won the land through court cases.
29. From the totality of the claims by the parties to this suit claims and what is stated in the affidavits filed by the applicants and the Respondents herein I come to the conclusion that the issues arising in the adjudication proceedings and those in the present suit are for the ascertainment of the interests of the applicants in the suit land vis-à-vis the rights of the respondents. In my view the issues heard and determined in the minister’s appeal are substantially the issues for determination in this suit. The issues are substantially the same as the issues in this suit.
30. The second test is whether the suit is between the same parties, or between parties under whom they or any of them claim. The applicants herein were the respondents in the appeal to the Minister while the respondents herein were not parties to the said appeal. None of the parties herein have clearly explained who the respondents herein are in relation to the suit parcel of land. The Appellants in the Appeal to the Minister was Kithuva Kiliku and Brothers. The respondents herein have indicated that the suit land is family land and that their fathers were Ngungu Kiliku, Mbuvi, Kiliku, Ndambu Kiliku, Munyao



Kiliku, Kithuva Kiliku, and Kimanzi Kiliku. None of fathers are parties to this suit. The relationship between the respondents herein and the Appellants in the Appeal to the Minister has not been shown and unless this is clarified the objection raised by the respondent based on res judicata has not proved and must fail.

31. Having considered the merit of the Notice of Motion application dated 26<sup>th</sup> October 2022 and find the following issues arise for determination:
  - a. Whether the Plaintiff/Applicant's Application has met the threshold established for grant of orders of injunction as prayed
  - b. What orders should the court make?
  - c. Who shall bear the cost of the Application?

**Whether the Plaintiff/Applicant's Application has met the threshold established for grant of orders of injunction as prayed**

32. The application herein is brought under Order 40 of the Civil Procedure Rules and Section 1A, 1B and 3A of the *Civil Procedure Act*. Section 63 (c ) of the *Civil Procedure Act* provides for the courts power to grant temporary injunctions and states that;

“In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.”

33. Order 40 Rule 1 of the Civil Procedure Rules provides for cases in which temporary injunctions may be granted and states as follows;

“Where in any suit it is proved by affidavit or otherwise—

- a. that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, or wrongfully sold in execution of a decree; or.....the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

34. Further, the conditions set for consideration in granting an injunction are now well settled in the case of *Giella vs Cassman Brown & Company Limited (1973) E A 358*, where the court expressed itself on the conditions that a party must satisfy for the court to grant an interlocutory injunction:-

“First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience.”

35. Have the Applicants established a prima facie case with a probability of success? A prima facie case was explained as follows in the case of *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3*



others [2015] eKLR, the Court of Appeal detailed what probability of success means when it stated that:

“In *Habib Bank Ag Zurich V. Eugene Marion Yakub*, Ca No. 43 OF 1982 this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:

“Probability of success means the court is only to gauge the strength of the Plaintiff’s case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.”

The court further stated

“A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed.”

Yet again in *AGIP (K) LTD V. Vora* [2000] 2 EA 285, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:

36. It is noted that even as the applicants claim a right of adverse possession over the suit property, they also state that the suit land is registered in their name. According to the certificate of official search dated 3<sup>rd</sup> October, 2022, the proprietors of the land are the applicants Malombe Muviwa and Maithya Muviwa. The search further shows that on the same date as proprietorship was registered in favour of the applicants, a restriction was placed against the title stating that “Except under the order of the Chief Land Registrar on dealings should be registered until the appeal before the Minister has been finalized”.

37. A claim for adverse possession is made under Section 38 of the [Limitation of Actions Act](#) which provides that:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in section 37 of this Act (registered land), or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.”

38. In the case of *Wambugu Vs Njuguna* (1983) KLR 173, the Court of Appeal held as follows:

“In order to acquire by the statute of limitations title to land which has a known owner, that owner must have lost his rights to the land either by being dispossessed of it or by having discontinued his possession of it. Dispossession of the proprietor that defeats his title are acts which are inconsistent with his enjoyment of the soil for the purpose of which he intended to use it. The proper way of assessing proof of adverse possession would then be whether or not the title holder has been dispossessed or has discontinued his possession for the statutory period and not whether or not the claimant has proved that he has been in possession of the requisite number of years.”

39. Thus in order to acquire title to land through adverse possession there has to be a known owner of the land and the owner must have lost his rights either by being dispossessed of it or by having discontinued his possession of it. In the present case there was no known owner of the land since as at the time the applicants are shown to have been noted as proprietors on 17<sup>th</sup> November, 1989 the issue of determination and ascertainment of ownership of rights of the land was still pending before the



Minister. Further, it has not been shown that the respondents were at any given known owners of the suit land or were in possession of the same and were thus subsequently dispossessed by the applicants.

40. Ascertainment of rights and interest in the land was determined after the appeal to the Minister was heard and a decision made. The said determination of rights was made in proceedings under the [Land Adjudication Act](#) and the Ministers decision stated that;

“Appeal was allowed.

The parcel land No. 2150 to be subdivided equally among the eight sons of Kiliku namely Muviwa Kiliku, Ngungu Kiliku, Mbuvi, Kiliku, Mulwa Kiliku, Ndambu Kiliku, Munyao Kiliku, Kithuva Kiliku, and Kimanzi Kiliku.”

41. As stated earlier, the judgement in the appeal was challenged through judicial review in the High Court and the Court of Appeal but the said challenge was unsuccessful. as the same was dismissed. In the circumstances the decision of the Minister stands. The said appeal was brought under the provisions of section 29 of the [Land Adjudication Act](#) which states as follows;

- (1) Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by -
  - (a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and
  - (b) sending a copy of the appeal to the Director of Land Adjudication, and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.
- (2) The Minister shall cause copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar.”

42. The above section is very clear that the Minister determines the appeal and makes such order as he thinks just and the order made is final. The Minister then causes copies of the order to be sent to the Director of Land Adjudication and to the Chief Land Registrar. Section 27 of the [Land Adjudication Act](#) provides for what happens between the time objections under section 26 are determined and the time appeals to the Minister are heard and determined and the same states that;

“When all objections have been determined and the time for appeal under section 29 of this Act has expired, the adjudication officer shall send the adjudication register to the Director of Land Adjudication together with particulars of all determinations of objections and the Director shall—

- (a) alter the duplicate adjudication register accordingly; and then certify on the adjudication register and on the duplicate adjudication register that it has become final subject to the outstanding appeals; and
- (c) forward the adjudication register to the Chief Land Registrar together with a list of the appeals.



43. Section 28 of the Act provides for action by the by Chief Land Registrar

“Upon receiving the adjudication register under section 27 of this Act, the Chief Land Registrar shall cause registrations to be effected in accordance with the adjudication register: Provided that, where the land is affected by an appeal under section 29 of this Act, a restriction shall be made and registered in respect of that land expressed to endure until the determination of the appeal, and on such determination the register shall if necessary be altered in accordance with the determination.”

45. Section 29 (3) of the Act provides for what happens when the appeals have been determined. In that case the Director of Land Adjudication shall—

- “(a) alter the duplicate adjudication register to conform with the determinations; and
- (b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”

46. The Land adjudication process set out above is the process by which all

existing rights and interests in any particular parcel or area of land falling within an adjudication area are finally and authoritatively ascertained. Under section 10 of the [Land Adjudication Act](#) the land adjudication officer has jurisdiction in all claims made under the Act relating to interests in land in the adjudication area, with power to determine any question that needs to be determined in connection with such claims.

47. If there are any disputes during the process of adjudication, they are taken through the dispute resolution process culminating in objections under section 26 and Appeal to the Minister under section 29 of the Act. In the case of Haro Yonda Juaje v Sadaka Dzenzo Mbauro & another [2014] eKLR the court stated as follows in relation to disputes determined under the [Land Adjudication Act](#);

“The ascertainment of rights of individuals under the [Land Adjudication Act](#) was meant to deal with the claims that may arise later under the doctrine of adverse possession. Indeed, the elaborate procedures set out in the said Act on how the rights of people over customary land were to be ascertained to the settlement of the disputes by various bodies during the adjudication process was meant to avoid future claims under the doctrine of adverse possession, specifically where one claims that the land he is occupying is his ancestral land.”

48. From the foregoing I do find that prima facie the rights to the suit land were heard and determined in the adjudication proceedings culminating in the decision of the Minister in appeal No. 217 of 1987. The said decision was challenged up to the Court of Appeal and was not set aside. In the circumstances the applicant has not shown a prima facie case with a probability of success. The restriction placed against the title to the suit land is properly grounded in law as shown under section 27 of the [Land Adjudication Act](#). I therefore find no reason to grant the orders sought.

#### **Final order**

49. The application dated 26<sup>th</sup> October 2022 is hereby dismissed with costs.

**DELIVERED, DATED AND SIGNED AT KITUI THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2023.**



**HON. L. G. KIMANI**

**ENVIRONMENT AND LAND COURT JUDGE**

Ruling read in open court in the presence of-

Musyoki Court Assistant

Mwathi holding brief for Auta Nyakundi Advocate for the Applicants

J. K. Mwalimu for the Respondents

