



**M'Mukindia (Suing as the legal representative of the Estate of Solomon Mukindia) v Ibutu & 6 others (Environment & Land Case E021 of 2022) [2023] KEELC 828 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 828 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT MERU**  
**ENVIRONMENT & LAND CASE E021 OF 2022**  
**CK NZILI, J**  
**FEBRUARY 15, 2023**

**BETWEEN**

**NAHASHON MUGIRA M'MUKINDIA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SOLOMON MUKINDIA). PLAINTIFF**

**AND**

**M'MARETE IBUTU ..... 1<sup>ST</sup> DEFENDANT**  
**JOSEPH MUTHURI ..... 2<sup>ND</sup> DEFENDANT**  
**M'NKANATA M'IKIUGU ..... 3<sup>RD</sup> DEFENDANT**  
**MATIRI RUBARA ..... 4<sup>TH</sup> DEFENDANT**  
**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER IMENTI NORTH DISTRICT ..... 5<sup>TH</sup> DEFENDANT**  
**MERU DISTRICT LAND REGISTRAR ..... 6<sup>TH</sup> DEFENDANT**  
**ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. The court is asked to grant a restriction and a temporary injunction against the respondents stopping any dealings or transactions regarding LR No. Abothuguchi/Mariene/398 and its resultant subdivisions namely LR No. Abothuguchi/Mariene/425, 428, 429, 810 and 811 pending the hearing and determination of the suit. The reasons as contained in the supporting affidavit by Nahashon Mugira M'Mukindia sworn on November 8, 2022 are that the applicant is a legal representative of the estate of the deceased and the owner of the suit land measuring approximately 850 acres; that the 1<sup>st</sup> – 5<sup>th</sup> respondents colluded in 1965 and recently subdivided the initial land and registered new parcels of land under their names; the changes are only discovered in 2011 as per the searches; due to the



- applicant's sickness there was no follow up with Meru CMCC Misc. Application No. 9 of 2019 which had ordered for the 6<sup>th</sup> & 8<sup>th</sup> respondents to supply him with the original documents of adjudication. Despite the order, further subdivisions occurred as per the official certificate of search; a charge was also registered by the 2<sup>nd</sup> respondent against LR No. 425 and that title deeds for the area are likely to be issued. The applicant attached copies of the grant, official search, medical notes, the order and an official search after the order was issued as annexures marked NM 1-6<sup>th</sup> respectively.
2. The 2<sup>nd</sup> defendant in reply to the application averred that the suit was resjudicata in view of PMCC 28 of 2017 at Githongo Law courts; that the claim was time barred; the title deeds were obtained after a successful probate cause; that he has been on the land since 1960; the land is already developed with no interference by the applicant or the deceased and lastly, that the process of adjudication and registration was finalized 60 years ago. He attached a copy of the order in the Misc. Application as annexed JM "1" and the plaint in the previous suit as JM "2". The 5<sup>th</sup> defendant opposed the application through an undated and unfiled replying affidavit. The rest of the respondents did not file any replying affidavit.
  3. The primary documents in this suit are the plaint dated November 8, 2022. The plaintiff averred that there was fraud on the part of the 6<sup>th</sup>, 7<sup>th</sup>, & 8<sup>th</sup> defendants in the manner the suit property was subdivided, transferred and registered. This was alleged to have occurred in 1960 but only discovered in 2011. The applicant averred that he obtained an order for the 6-7<sup>th</sup> defendants to supply to him the adjudication register and the record of existing rights in order to establish when the changes occurred in 2011.
  4. In their defense dated December 5, 2022, the 6<sup>th</sup>-7<sup>th</sup> defendants admitted that the initial Parcel No. 398 was recorded in the name of the plaintiff's late father. They denied any alleged collusion or fraud in the issuance of the new subdivisions and or the excision of new parcel numbers. On the contrary, the 6<sup>th</sup>-7<sup>th</sup> defendants averred that the plaintiff if at all aggrieved by the subdivisions should have filed an objection within 60 days and or an appeal to the Minister in line with sections 26-29 of the [Land Adjudication Act](#) hence the plaintiff failed to exhaust the internal dispute resolution procedures therein.
  5. For a party to be entitled to a temporary injunction and or a restriction the law requires that a prima facie case be established with a probability of success; that there be a demonstration of irreparable loss and damage which may not be compensated by way of damages and the balance of convenient must tilt in favour of granting the orders. As to restrictions, section 76 of the [Land Registration Act](#) grants the court the powers to issue restrictions pending the occurrence of an event.
  6. While expounding on the above principles, the court in [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#) [2003] KLR, held that a *prima facie* case is established if based on the material before court a right has been infringed which calls for a rebuttal from the opposite side. In [Nguruman Ltd v Jan Bonde Nielsen](#) [2014] eKLR, the court held that in establishing whether there is a *prima facie* case the court does not hold a mini-trial but considers the material before it to establish if it is in the interest of justice to grant the reliefs sought. As to what amounts to irreparable loss and damages, the court in [Said Ahmed v Manasseh Denga & another](#) [2019] eKLR held that on whether or not damages can be an adequate remedy, a party should not be allowed to maintain an advantageous position which he has gained by flouting the law simply because he is able to pay for it.
  7. In the case of [Joseph Siro Mosioma v HFCK & others](#) [2018], the court held that damages were not an automatic remedy and that damages could not be substituted for the loss which had been occasioned by a clear breach of the law given a party could not be condemned to take damages in lieu of his crystallized right, which could be protected by an order of injunction.



8. In demonstrating what irreparable damages were, the court in *Family Bank Ltd v Tassis Enterprises Ltd and 2 others* [2021] eKLR cited with approval *Nguruman (supra)* where the court held a party must demonstrate irreparable injury if the temporary injunction was not granted which cannot be remedied by way of damages in the absence of an injunction.
9. The burden therefore is on the applicant to demonstrate the three pillars of injunction by the nature and extent of the injury. Mere speculation or fear of loss does not suffice. There must be more than an unfounded fear or apprehension on the part of the applicant. The court went on to state that the equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury which must be actual, substantial and demonstratable.
10. Applying the foregoing case law to the facts herein, the applicant attached official certificate of searches which indicate that the alleged changes to the initial title to the land occurred on March 21, 2013. There is evidence that the court made an order on October 1, 2019 for the supply of the initial adjudication records L.R No. 428 was registered on September 9, 2021 and the title closed for subdivisions on 6.11.2021, whereas for LR No. 425, registration occurred on October 30, 2000 and a charge registered on December 15, 2019. The applicant has not attached any title deed or registration of the mother title in favor of either himself or his late father allegedly registered or recorded in early 1960s.
11. Similarly, the applicant has availed no evidence that his late father ever lodged a complaint with the Director of Land Adjudication or the Chief Land Registrar, complaining of any changes to his adjudication land records.
12. Though an order was made for the issuance of the adjudication register in 2019, there is no evidence that the applicant served the order to the relevant offices and was denied access to the said information in line with article 35 of the *Constitution*, following which perhaps he took any remedial action in line with the *Access to Information Act*.
13. On those reasons alone, I find that there is no *prima facie* case established with a probability of success at the hearing.
14. In the case of *Nguruman (supra)*, it was held that the three pillars of injunction must be established conjunctively and if the 1<sup>st</sup> one is not surmounted, the others need not be considered. In this suit, the temporary injunction is also directed at the Hon. Attorney General and some state organs. Under sections 16A of the *Government Proceedings Act* as read together with Order 29 of the *Civil Procedure Rules* there can be no injunction against the government.
15. Given the foregoing reasons, I find the application lacking merits. The same is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT**

**THIS 15<sup>TH</sup> DAY OF FEBRUARY, 2023**

**In presence of:**

**C/A: Kananu**

**Miss Thuo for plaintiff**

**Mr. Gikunda Anampiu for 2<sup>nd</sup>, 3<sup>rd</sup> & 5<sup>th</sup> Respondents**

**HON. C.K. NZILI**

**ELC JUDGE**

