



Ernestine (Suing as Co-Administrator of the Estate of Richard Mutunga Mailu) v Malombe & another (Environment & Land Case E003 of 2023) [2023] KEELC 19110 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E003 OF 2023**

LG KIMANI, J

JULY 28, 2023

BETWEEN

JENNIFER CINDY ERNESTINE (SUING AS CO-ADMINISTRATOR OF THE ESTATE OF RICHARD MUTUNGA MAILU) PLAINTIFF

AND

BEATRICE NZAMBI MALOMBE 1ST DEFENDANT

JEMIMA SYOVINYA MALOMBE 2ND DEFENDANT

RULING

1. The Plaintiff filed the Notice of Motion dated March 15, 2023 under Certificate of Urgency seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to issue a temporary injunction restraining the Defendants by themselves or through their servants, agents and/or assigns from trespassing into, selling, charging, disposing off, alienating, interfering, intermeddling or dealing in any other way with Land Parcel Number Kyangwithya/Misewani/626 or any sub-divisions thereof pending the hearing and determination of the suit herein.
 4. That an order do issue directing the Defendants to immediately deposit into court for safekeeping the original Title Deed in respect of Land Parcel Number Kyangwithya/Misewani/626 or any sub-divisions thereof pending the hearing and the determination of this suit.



5. That this Honourable Court be pleased to order the OCS Kyangwithya Police Station or the nearest police station to supervise by himself or through his officers, to ensure compliance of this court's orders.
 6. That this Honourable Court be pleased to give any other relief that this Honourable Court deems fit.
 7. That costs of this application be borne by the defendants.
2. The grounds in support of the application appear on the face of it and in the supporting affidavit. The Applicant claims that her husband Richard Mutunga Mailu (Deceased) was the rightful and beneficial owner of a $\frac{1}{4}$ acre out of Land Parcel Number Kyangwithya/Misewani/626, (hereinafter referred to as the "suit land) having purchased it for a sum of Ksh.450,000 on 9th of November 2007 from Julia Matani Malombe (now deceased). The said Julia Malombe is said to have been a beneficiary of the estate of her husband Malombe Mwanga (Deceased) the registered owner of the suit land. The Applicant states that she took possession of the land and planted trees and she has been in continuous, uninterrupted occupation of the same until the Defendants encroached/trespassed into the land and cut down trees without the Applicant's permission or consent.
 3. Further, the Applicant states that efforts to have the suit property sub-divided and transferred to her husband or herself have not borne fruit since the seller Julia Matani Malombe died before this could be done while the Respondents who are the deceased's daughter and granddaughter have refused to effect the transfer. She also claims that she has established that the Defendants are attempting to sell the suit property to third parties.
 4. The Applicant states that she obtained letters of administration to the estate of the late Richard Mutunga Mailu in Succession Cause No. E155 of 2020 on 17th February 2021 and the same were confirmed vesting the suit property to herself absolutely.

The Respondent's Case

5. The Respondents filed Grounds of Opposition dated April 5, 2023 and a joint replying affidavit opposing the application on grounds that it is ill-advised, misconceived, frivolous and vexatious and as no legal basis. They claim that they are not legal representatives of the deceased estate and cannot be liable in this suit. They further state that the Defendants have no locus standi to pass the title to the land to the Applicant as it is not in their name.
6. The Respondents also stated that they are the daughter and granddaughter of the late Malombe Mwanga and late Julius Matani Malombe who owned the whole of Land Parcel Number Kyangwithya/Misewani/626. They acknowledged that indeed Julia Matani Malombe sold a quarter acre of the suit land to Richard Mutunga Mailu (Deceased) but he did not occupy it and it remained vacant as they also did not utilize it.
7. They stated that Julia Matani Malombe (Deceased) passed on before completion of succession of the Estate of Malombe Mwanga (Deceased) and the matter is still pending in court. The Respondents state that since they are not the legal representatives of the deceased's estate and the suit property title is not in their name, they have no locus standi to pass title to the Applicant.



The Applicant's Submissions

8. Counsel for the Applicant submitted that the Respondents have at paragraph 4 of the replying affidavit admitted that a quarter of the suit land rightly belongs to the Applicant and that they have not challenged the application herein but chose to dispute their joinder in the suit.
9. On whether the Respondents are rightly joined, the Applicant's submission is that it is actually the Defendants in their individual capacities who have interfered with the Plaintiff's right of use and enjoyment of the subject property and that the averments of the application remain unchallenged.
10. The Applicant submitted that she has established a *prima facie* case since the Respondents have admitted that the suit property belongs to her and has not advanced any evidence that the Plaintiff is not in actual possession of the suit property. Counsel submitted that any interference with the suit property will render the suit nugatory as they relied on the cases of *Mrao Ltd vs First American Bank of Kenya Ltd* (2003) eKLR.
11. Regarding the second requirement of whether the Applicant will suffer irreparable harm if the injunction order is not granted, counsel submitted that the illegal act of cutting down trees and the danger that the property may be illegally disposed of to an innocent purchaser for value without notice is real while the Defendants may not be able to compensate the Plaintiff adequately since they are not persons of defined means. She relied on the case of *Pius Kipchircir Kogo vs Frank Kimeli Tenai* (2018) eKLR on the meaning of irreparable harm.
12. Counsel submitted that the balance of convenience tilts in their favour since the Applicant has produced a sale agreement. She relied on the case of *Albanus Harrison Mutemwah v Tekela Laibali Waiya & Another* (2020) eKLR.

The Respondents' Submissions

13. Counsel for the Respondents submitted that the Applicant was guilty of inter-meddling with the estate of a deceased person by buying the subject land when the seller, Julia Matani had not acquired letters of administration to the estate of her late husband, Mwanga Malombe (Deceased). Counsel relied on the case of *Virginia Mwari Thurania vs Purity Nkirote Thurania* (2017) eKLR and stated that the sale agreement is therefore null and void ab initio.
14. The Respondents denied interfering with the quiet and peaceful possession of the Plaintiff's property and reiterated that they are not rightly joined in this application since they are not owners of the land and neither do they possess letters of administration.
15. Counsel further, submitted that the Applicant has not satisfied the conditions for grant of injunctive orders because they have not come to court with clean hands by virtue of an illegal sale agreement. They also stated that the Applicant cannot suffer irreparable harm since Respondents have never been in possession of the land and have not acquired letters of administration to the estate of the deceased and lack the requisite locus standi. They relied on the case of *Trouistik Union International & Another v Jane Mbeyu & Another* (2008) 1KLR(G7F)730.

Analysis and Determination

16. The law governing the granting of interlocutory injunction is set out under Order 40 (1) (a) and (b) of the *Civil Procedure Rules, 2010* which provides that: -

“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 [Rev. 2012] Civil Procedure CAP. 21 [Subsidiary] C17 – 165;
- (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, 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.”

17. The conditions for consideration in granting an injunction were settled in the celebrated case of Giella v Cassman Brown & Company Limited (1973) E A 358, where the court expressed itself on the condition’s that a party must satisfy for the court to grant an interlocutory injunction as follows: -

“Firstly, 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.”

18. This position has been reiterated in numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited versus Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014) eKLR where the Court of Appeal held that;

“in an interlocutory injunction application the Applicant has to satisfy the triple requirements to a, establishes his case only at a *prima facie* level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

19. The first requirement is that the Plaintiff/Applicant must establish a *prima facie* case. The meaning of a *prima facie* case was explained in the case of In Mrao Ltd. –vs- First Americal Bank of Kenya Limited and 2 others (2003) eKLR, which the Plaintiff/Applicant relied on;

“In civil cases, a *prima facie* is a case in which on the material presented to the Court, a tribunal property directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”



20. The Court of Appeal in the further stated that:

“We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a *prima facie* case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

21. The Applicant attached to her supporting affidavit a certificate of official search on land parcel Kyangwithya/misewani/989 and none for the suit land Parcel Number Kyangwithya/Misewani/626. The search attached does not show who owns the land but shows that the title was closed upon subdivision on 27th October 2011 and new numbers 1888 and 1889 were issued.

22. The Respondents have denied committing any acts of trespass on the subject property, and further, have stated that they do not have the locus standi to have been enjoined in this suit since the title to the suit land is in the name of Mwanga Malombe (Deceased) and they are not the legal representatives of his estate.

23. In the case of Alfred Njau and Others ..Vs.. City Council of Nairobi (1982) KAR 229, the Court also held that;-

“the term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings.”

24. In determining whether the Applicant has established a *prima facie* case with a probability of success, the court has considered the claim as set out in the plaint. The Plaintiff seeks a number of prayers. She seeks to be declared the sole rightful legal owner of 1/4 acre of land parcel number Kyangwithya/Misewani/626 or in the alternative as owner through adverse possession.

25. The Applicant further prays for a permanent injunction against the Defendants restraining them from in any way interfering with the suit land and an order appointing a government surveyor to carry out survey work and sub-division the land and to exercise 1/4 acre in her favour. She further seeks for the Officer Commanding Station Kitui/Kyangwithya to supervise the survey work.

26. The Applicant prays for an order directing the Deputy Registrar to execute transfer documents to the claimed land in her favour and a further order directing the Registrar of lands to cancel the existing title to the suit land in her favour and that the Registrar of lands to dispense with production of original documents for the transfer and registration of the title over the 1/4-acre land forming part of the land parcel number Kyangwithya/Misewani/626.

27. The question raised by the Respondents is whether the Applicants have shown that *prima facie*, the Court can grant the above orders in their favour or as against the Respondents herein. In the Courts view it is doubtful that with the evidence on record the orders prayed in the suit are available to the Plaintiff as against the Defendants for the reason that the Plaintiff has not shown who the registered owner of the suit land is by producing either a title deed or certificate of official search. Further, even if as confirmed by both parties the suit land is registered in the name of the deceased Malombe Mwanga, the



Plaintiff has not shown that the defendants can be held responsible for completion of the transaction of sale of the suit land between the deceased Julia Matani Malombe and Richard Mutunga Mailu also deceased. This is for the reason that the Respondents are not administrators of the estate of the said Malombe Mwanga and at the time of the transaction the registered owner of the suit land Malombe Mwanga was already deceased.

28. All the prayers sought in the plaint relate to the suit land and it has been agreed the said land belongs to the deceased Mwanga Malombe. Though the court has observed that there is no proof in the form of the title deed and/or certificate of official search that indeed the land was owned by the deceased it has been admitted by both parties that the said land is indeed registered in the name of the deceased. If the court were to take that as the factual position, then the court must consider the law that governs the property of a deceased person and whether the Defendants can be held responsible for the said property or transactions relating to it.
29. The property of a deceased person is governed under the Law of Succession Act CAP 160 Laws of Kenya. Section 79 provides that the property of a deceased person is to vest in the personal representative and states that:

“The executor or administrator to whom representation has been granted shall be the personal representative of the deceased for all purposes of that grant, and, subject to any limitation imposed by the grant, all the property of the deceased shall vest in him as personal representative.”

30. Powers of the personal representatives of the estate of a deceased person are provided for under Section 82 of the Law of Succession Act that:

“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;
- B. to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best.

Provided that

- I. Any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and
- II. no immovable property shall be sold before confirmation of the grant;

31. From the foregoing provisions of the law only the personal representative of an estate of a deceased person can deal with the deceased property and in any event he/she cannot sell immovable property before confirmation of grant. Yet in the present case it has been shown that the suit land was sold by Julia Malombe at a time when she had not obtained letters of administration to the estate of the registered owner.



32. On the face of the facts provided it will be safe for the court to find that the transaction between the said seller and the purchaser could amount to intermeddling with the property of the deceased owner of the land in contravention of Section 45 of the Law of Succession Act which provides that:

“Except so far as expressly authorized by this Act, by any other written law, or by a grant of representation under this Act, no person shall, for any purpose, take possession or dispose of, or otherwise intermeddle with, any free property of a deceased person

1. Any person who contravenes the provisions of this section shall-

- A. be guilty of an offence and liable to a fine not exceeding ten thousand shillings or to a term of imprisonment not exceeding one year or to both such fine and imprisonment; and
- B. be answerable to the rightful executor or administrator, to the extent of the assets with which he has intermeddled after deducting any payments made in the due course of administration.”

33. The orders sought by the Applicant could also amount to further intermeddling with the estate of the deceased who at the moment the court is informed that no person appointed as personal representative. Section 83 provides for duties of personal representatives one of which is under subsection d) is:

“to ascertain and pay, out of the estate of the deceased, all his debts;”

34. The case of Trouistik Union International & another v Jane Mbeyu & Another [1993] eKLR addressed the question of personal representatives as provided under section 82 of the Law of Succession Act and states that:

“That section confers that power on personal representatives and on them alone. As to who are personal representatives within the contemplation of the Act, section 3, the interpretative section, provides an all inclusive answer. It says “personal representative means executor or administrator of a deceased person”. It is common ground that the deceased in this case died intestate. Therefore, the only person who can answer the description of a personal representative, is the administrator of the estate of the deceased. The next enquiry must answer the question, who is an administrator within the true meaning and intendment of the Act? section 3 says “administrator means a person to whom a grant of letters of administration has been made under this Act.”

35. It is thus the courts view that the Applicants have not shown a *prima facie* case with a probability of success to warrant issuance of the orders sought. Having found no *prima facie* case with a probability of success, it is not necessary to consider the other factors for grant of orders of injunction.
36. The court finds that the Application dated March 15, 2023 lacks merit and the same is hereby dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 28TH DAY OF JULY, 2023.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE - KITUI

Ruling read in open court and virtually in the presence of-



Musyoki: Court Assistant

M/S Small holding brief for Wanyonyi for the Applicant

No attendance for the Advocate for the Respondent.

The 1st Respondent Beatrice Malombe present

