



Kioko & another (Suing as administrators and legal representative of the Estate of the Late Charles Muli Nzonzo) v Kimweli & 11 others (Environment & Land Case E060 of 2021) [2023] KEELC 16618 (KLR) (27 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E060 OF 2021
CA OCHIENG, J
MARCH 27, 2023**

BETWEEN

**SAMUEL MULI KIOKO 1ST PLAINTIFF
FREDRICK MUINDE MULI 2ND PLAINTIFF
SUING AS ADMINISTRATORS AND LEGAL REPRESENTATIVE OF THE
ESTATE OF THE LATE CHARLES MULI NZONZO**

AND

**PIUS KITHOME KIMWELI 1ST DEFENDANT
JOSEPH MUTISO KIMWELI 2ND DEFENDANT
TAVITHA KIMWELI 3RD DEFENDANT
DANIEL MUTUKU MBEVI 4TH DEFENDANT
BRYAN KISAINGU MUTINDA 5TH DEFENDANT
BERNARD MUSA KISAINGU 6TH DEFENDANT
COLLINS KIVILA MUTINDA 7TH DEFENDANT
SYLVIA MUTHONI KAMOTHO 8TH DEFENDANT
KITONGI INVESTMENT LIMITED 9TH DEFENDANT
THE DISTRICT LAND REGISTRAR, MACHAKOS 10TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 11TH DEFENDANT
NGELANI RANCHING UNIT (SUED THROUGH ITS CHAIRMAN,
SECRETARY AND TREASURER) 12TH DEFENDANT**



RULING

1. What is before court for determination is the plaintiffs' notice of motion application dated the June 2, 2021 where they seek the following orders:-
 - i. Spent.
 - ii. Spent.
 - iii. Pending the hearing and determination of the main suit, a temporary injunction be issued restraining the 1st to 9th Respondents either by themselves, their servants and/or agents from disposing, accessing, entering and/or interfering with the Applicants' quiet possession of the suit property being plot No. 22B or in any other manner endangering the Applicants' occupation of the suit property.
 - iv. The OCS, Athi River Police Station be ordered to implement the order restraining the 1st and 9th Respondents and their agents, assigns or servants from trespassing, disposing or in any way interfering with Plot No. 22B.
 - v. Costs of the Application be awarded.
2. The application is premised on the grounds on the face of it and the supporting affidavit of Samuel Kioko Muli where he deposes that on the 1st June, 2021, the 5th to 8th Respondents unlawfully and without an order of court demolished houses and building establishments on the Plot 22B hereinafter referred to as the 'suit property', which belonged to them. He contends that the 1st to 8th Respondents have maliciously caused the arrest of their family members unjustifiably aimed at defeating their rights to the said suit property. He explains that on or about the 2nd July, 2009, and by an agreement of even date, Plot No. 22 was divided into two parcels known as Plot No. 22A and Plot No. 22B and shared between the Plaintiffs' late father, Charles Muli Nzonzo and the late Kimweli Kalama's family. Further, that Plot No. 22 was subsequently surveyed following which the late Charles Muli Nzonzo was allocated Plot No. 22A measuring 31.5 acres while the 1st -3rd Defendants father, the late Kimweli Kalama was allocated Plot No. 22B measuring 38.5 acres. He claims by the time of the said survey and subdivision, the late Kimweli Kalama's family had already settled and developed Plot No. 22A and therefore they entered into an agreement with the late Charles Muli Nzonzo in good faith on 2nd July, 2009 in which the two Plots were interchanged with the late Charles Muli Nzonzo being allocated Plot No. 22B and the family of the late Kimweli Kalama Plot No. 22A in order to avoid demolition of otherwise established structures on the said Plot No. 22A. He avers that the family of the late Kimweli Kalama comprising the 1st to 3rd Defendants have since retained their Plot No. 22A but breached the agreement dated 2nd July, 2009 by interfering with the ownership of Plot No. 22B by purporting to allocate themselves portions from the suit property as well as dispose of some portions to third parties, namely the 4th to 9th Defendants. He states that the 1st Defendant has maliciously erected and/or incited the 2nd to 9th Defendants to construct fences along their purportedly purchased parcels out of Plot No. 22B thereby blocking the Plaintiffs' access to the suit property. Further, on or about the year 2014, Plot No. 22B was irregularly subdivided by the 1st to 3rd Defendants through the 10th and 11th Defendants and titles unlawfully issued on 31st December, 2014. He reiterates that Plot No. 22B, was divided into four parcels of land namely LR No. 8914/150, No. 8914/66, No. 8914/67 and No. 8914/100 respectively. He insists that the said subdivisions allocated the four parcels as follows: LR No. 8914/150



to the 2nd Defendant, LR No. 8914/66 to 2nd Defendant and Katweli Kimweli (deceased widow of Kimweli Kalama and mother to the 1st to 3rd Defendants), LR No. 8914/67 to the 3rd Defendant and LR No. 8914/100 to the Katweli Kimweli (deceased widow of Kimweli Kalama and mother to the 1st to 3rd Defendants). Further, that there were subsequent unlawful subdivisions and transfer of portions out of the Plot No. 22B yielding different title numbers claimed by the 1st to 9th Defendants and other third parties respectively. He states that the 11th Defendant unlawfully and without due legal process issued Title Deeds in respect of LR No. 8914/150 to the 2nd Defendant, LR No. 8914/66 to 2nd Defendant and Katweli Kimweli (deceased widow of Kimweli Kalama and mother to the 1st to 3rd Defendants), LR No. 8914/67 to the 3rd Defendant and LR No. 8914/100 to the Katweli Kimweli (deceased widow of Kimweli Kalama and mother to the 1st to 3rd Defendants). Further, that on 11th June, 2018, the 11th Defendant further caused or permitted unlawful subdivision of the suit property to purportedly allot a parcel comprising 19.93 Hectares therefrom to 5th-8th Defendants described as LR No. 8914/254. He claims the 1st to 9th Defendants colluded and/or misrepresented information to the 10th and 11th Defendants who unlawfully, unprocedurally and irregularly permitted the transfer and/or issued Title Deeds to the portions out of the suit property in the names, other than the Plaintiffs who are their lawful proprietors. Further, the 5th to 8th Defendants have trespassed, interfered and unlawfully occupied the suit property by erecting fences and structures as well as limiting the Plaintiffs' enjoyment of the suit properties. He reiterates that the 5th to 8th Defendants have intensified their efforts and moved to unlawfully threaten dispossession and demolition of the Plaintiffs' well-established structures and dwelling houses on the suit property through a purported Order of court dated 23rd April, 2021 whose source and authenticity is questionable and which does not specifically refer to the Applicants. Further, that the 1st to 9th Defendants have purported to possess title documents in respect of the suit properties which were unprocedurally and unlawfully procured through fraudulent misrepresentation. He contends that the purported title documents were issued through concealment of material facts, collusion and or fraudulent misrepresentation to or between the 1st to 9th Defendants and the 10th and 11th Defendants respectively. He reaffirms that the title documents that the 1st to 9th Defendant/Respondents claim to have are therefore a nullity in law.

3. The 1st Defendant opposed the instant Application by filing a Replying Affidavit where he denies that his deceased father on or about 2nd July, 2009, entered into an agreement with the Applicants' father to subdivide Plot No. 22 into Plot No. 22A and Plot No. 22B which was to be shared between the Applicants' deceased father and his late father. He denies that the Applicants' deceased father Charles Muli Nzomo and his late father Kimweli Kalama interchanged Plot 22A and Plot 22B. He insists that the Applicants' claim is statute barred. He contends that he has not maliciously caused the arrest of the Applicants nor threatened them. He denies evicting the Applicants from the suit property and insists that if any of the Respondents have commenced eviction against the Applicants, then they are justified since the Applicants are not lawful owners of the suit property. He explains that the 10th Respondent is registered as owner of LR No. 8914 situated at Syokimau, while the 4th Respondent was the beneficial owner of LR No. 8914/22/C by dint of ownership certificate number NRU-0073 issued by the 10th Respondent on 7th September, 2010. He states that on 16th March, 2011, the 4th Respondent and the 9th Respondent entered into an agreement of sale of land parcel number 8914/22/C and title was issued in 2018. Further, that the suit property was transferred to the 5th to 8th Respondents as beneficiaries of the estate of Boniface Kisaingu Mutinda (deceased) who was the absolute owner of the 9th Respondent.
4. The 4th Defendant opposed the application by filing a Replying Affidavit where he deposes that he is unaware of any houses or buildings on the suit property that were demolished. He denies trespassing on the suit property and erecting any fence thereon or inciting other Defendants or anyone else to erect any wall on the said land. He contends that he did not subdivide Plot No. 22B and no Certificate of Title



was issued to him. He avers that the Plaintiffs have not brought any evidence to support their allegations that there were structures on the suit property. He avers that the suit property initially belonged to the 10th Defendant who reallocated it, therefore it has all the information concerning it. He states that the Plaintiffs do not have a title to the suit property and have not exhibited any documents to confer a right or ownership of the said suit property. He insists that the 1st, 2nd, 3rd, 5th, 6th, 7th and 8th Defendants have their respective Certificates of Title and are legal owners of their property. Further, no tangible/substantive evidence of fraud or misrepresentation in the issuance of the respective Certificates of Title has been placed before court.

5. The 5th Defendant opposed the instant Application by filing a Replying Affidavit where he deposes that they are bona fide purchasers of the suit property with titles which carries absolute proof of ownership. He contends that the suit property was purchased by Kitongi Investment Ltd from Boniface Kisaingu Mutinda (deceased). He explains that pursuant to the Grant issued in his Estate, the property was to be divided between the children. He confirms that title to the suit property was issued in 2018. Further, that the suit property was transferred to the 5th to 8th Respondents in their capacity as beneficiaries of the Estate of Boniface Kisaingu Mutinda (deceased). He claims there has never been any issue as far as all the aforementioned transactions are concerned and there is no evidence of fraud or illegality. He reiterates that the suit property was purchased from the registered proprietors. Further, that there are no grounds to impeach the title. He contends that the 3rd to 8th Respondents are in possession of the suit property. Further, that there is an existing Court Order which is enforceable unless set aside by the court as there is no effort to set aside, review or appeal the said Order in 48 of 2021. He avers that the survey maps accompanying the title shows clear demarcation of the title.

The Application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the Plaintiffs are entitled to orders of interlocutory injunction restraining the Defendants from interfering with the suit property pending the outcome of the suit.
7. The Plaintiffs in their submissions contend that they have established a prima facie case to warrant the orders of injunction as sought. They submit that the Defendants jointly and severally used a forged and unauthentic order of court dated 23rd April, 2021 to evict them from the suit properties. They argue that the initial agreement of 2nd July, 2009 between the parties for the division of Plot No. 22 into the two parcels known as Plot No. 22A and Plot No. 22B was never at any time waived, rescinded or reviewed by the parties thereto. Further, that their parcel of land is properly Plot No. 22B while the 1st – 3rd Respondents' parcel of land is property Plot No. 22A and it was legally impermissible for the 1st – 3rd Defendants to sell Plot No. 22B to the 4th – 9th Defendants. They further submit that the pending suit has a high chances of success and if this injunction is not granted, the Respondents, who have unlawfully taken possession, evicted them and have been continually disposing off the suit property to render the main suit academic. The Applicants submit that they stand to suffer irreparable loss if the temporary injunction order is not granted.
8. To buttress their averments, they have relied on the following decisions: *Giella vs. Cassman Brown* [1973] E.A 358; *Diamond Trust Bank Kenya Ltd vs. Said Hamad Shamisi & 2 others* [2015] eKLR; *Marple Brooks Projects Company Limited & Another v I & M Bank Limited* [2019] eKLR; *Nguruman Ltd v. Jan Bonde Nielsen & 2 others*, [2014] eKLR ; *Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others* [2003] KLR; *Kibiwott Arap Tarus v. John Kipkemboi Rono & others* [2021] eKLR; *Pius*



Kipchirchir Kogo v Frank Kimeli Tenai (2018) eKLR and Haji Omari v Edward Njuguna Kang'ethe [2022] eKLR.

9. The 1st, 5th, 6th, 7th and 9th Defendants in their submissions reiterate their averments as per the Replying Affidavit and contend that the Plaintiffs have not established a prima facie case to warrant the orders of injunction. They insist that the Plaintiffs have not produced the alleged agreement dated the 2nd July, 2009. Further, that as far as they are concerned there is no valid Agreement. They argue that they hold Certificates of Title and relied on sections 25 and 26 of the Land Registration Act as well as article 40 of the Constitution. They insist that the Plaintiffs have never challenged the validity of the titles which were issued in 2018. They reiterate that the Plaintiffs have no rights on the suit property hence will not suffer any irreparable harm. Further, that they can adequately be compensated by way of damages if, in the unlikely event the suit succeeds. They reaffirm that the balance of convenience tilts in their favour as the current owners of the suit property are the 5th to 8th Defendants. They claim the Plaintiffs have not come to court with clean hands hence not entitled to orders of injunction which is an equitable remedy. Further, that they have trespassed and taken illegal possession of the suit property to the exclusion of the Defendants. They sought for costs of the instant Application. To buttress their averments, they have relied on the following decisions: Giella v Cassman Brown [1973] E.A 358; Nguruman Ltd v Jan Bonde Nielsen & 2 Others, [2014] eKLR; Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR; Pius Kipchirchir Kogo v Francis Kimeli Tenai [2018] eKLR; Kenleb Cons Ltd v New Gatitu Service Station Ltd & Another [1990] eKLR; Morjaria & 2 others v Kabate & 4 others (Environment & Land Case 85 of 2018 [2022] KEELC 14559 (KLR) (3 November 2022) (Ruling) and Margaret Njeri Wachira v Eliud Waweru Njenga [2018] eKLR.
10. As to whether the Plaintiffs have established a prima facie case with a probability of success at the trial, I wish to rely on the principles established in the case of Giella v Cassman Brown & Company [1973] EA 358 as well as the definition of a prima facie case as stated in the case of Mrao Ltd v First American Bank of Kenya & 2 Others [2003] KLR 125. The Plaintiffs claim their family and the family of the 1st to 3rd Defendants jointly shared Plot No. 22 which was later surveyed and divided into Plot 22A and 22B respectively. They explain that the said plots were interchanged as one party had developed another party's portion but the 1st to 3rd Defendants representing the Estate of the owner of one parcel of the said land reneged on the arrangement reduced to an Agreement dated the 2nd July, 2009 and commenced selling the Plaintiffs' portion of land. The Defendants deny the Plaintiffs averments and insist that they have not demonstrated any proprietary rights over the suit properties. I have had a chance to peruse the various annexures herein, I note there seems to have been a dispute over the suit property between the Plaintiffs' and the family of the 1st to 3rd Defendants. It is not in dispute that Plot No. 22B, was divided into four parcels of land namely LR No. 8914/150, No. 8914/66, No. 8914/67 and No. 8914/100 respectively. Further, that the subdivisions allocated the four parcels as follows: LR No. 8914/150 to the 2nd Defendant, LR No. 8914/66 to 2nd Defendant and Katweli Kimweli (deceased widow of Kimweli Kalama and mother to the 1st to 3rd Defendants), LR No. 8914/67 to the 3rd Defendant and LR No. 8914/100 to the Katweli Kimweli (deceased widow of Kimweli Kalama and mother to the 1st to 3rd Defendants). I note the Plaintiffs claim that there were subsequent unlawful subdivisions and transfer of portions out of the Plot No. 22B yielding different title numbers claimed by the 1st to 9th Defendants and other third parties respectively. The Plaintiffs further claim that the 5th to 8th Defendants have intensified their efforts and moved to unlawfully threaten dispossession and demolition of their well-established structures and dwelling houses on the suit property. I note as per annexure 'A' in the Applicants' affidavit, there was indeed a dispute between the Plaintiffs as well as the 1st to 3rd Defendants' families. The 1st to 3rd Defendants have not denied that Plot 22B was divided and yielded the aforementioned parcels of land. Further, that they are the ones who disposed off the



said parcels to third parties being the 4th to 9th Defendants. The Defendants contend that they have acquired respective titles to their portions of land and deny knowledge that the Plaintiffs were on the suit properties. However, I note the 5th Defendant annexed a copy of an order of the Court dated the April 23, 2021 emanating from Machakos ELC 48 of 2021 but from the Court file, this Court takes judicial notice of the fact that upon investigations, the DCI Athi River vide its letter dated the August 22, 2022 addressed to this Court, confirmed that the alleged Court Order which was used by the Applicants therein being Brian Kisaingu Mutinda, Collins Kivila Mutinda, Sylvia Muthoni Kamotho and Bernard Musa Kisaingu, to evict Joseph Munguti Muli and Winfred Kanin with their families, did not emanate from this Court. Further, I note the Applicants therein are the 5th, 6th, 7th and 8th Defendants' herein. The 4th to 9th Defendants have not confirmed if they were aware of the Plaintiffs presence on the suit property at the point of purchase. Based on the facts before me, I find that the Plaintiffs have indeed established a prima facie case to warrant the orders of injunction as sought.

11. As to whether the Plaintiffs will suffer irreparable harm which cannot be compensated by way of damages. The Plaintiffs claim to have resided on the suit property being Plot 22B which was owned by their late father. They have provided a background of the suit property and confirmed that the same has been severally subdivided and now owned by various Defendants. The Defendants have denied that the Plaintiffs were on the suit property and as noted above, some of the Defendants used a fake Court Order to evict the Plaintiffs from the said suit property. Insofar as the Defendants have titles to the suit property, it is trite that knowing the root of that title is key.
12. In the case of *Case of Nguruman Ltd v Jan Bonde Nielsen & 2 Others* [2014] eKLR, it was held that:

“...the applicant must establish that he ‘might otherwise’ suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”
13. In relying on the decision cited above and based on the circumstances at hand, I find that the Plaintiffs alleged injuries are not speculative as they have demonstrated that the Defendants have proceeded to evict them using a forged Court Order with some of the Defendants continuing to dispose of the resultant subdivisions to third parties.
14. On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that the same tilts in favour of the Plaintiffs and on the need to preserve the suit property.
15. In the foregoing, I find that the Plaintiffs' Notice of Motion Application dated the June 2, 2021 merited. However, since the Plaintiffs had already been evicted from the suit property using a forged Court Order, I will proceed to make the following orders:
 - a. Pending the hearing and determination of the main suit, no party should be allowed to access nor develop the suit property being Plot No. 22B or the resultant titles emanating therefrom being LR No. 8914/150, No. 8914/66, No. 8914/67 and No. 8914/100 respectively or others.



- b. Pending the hearing and determination of this suit, the Land Registrar, Machakos be and is hereby directed to register an inhibition order on land parcel numbers LR No. 8914/150, No. 8914/66, No. 8914/67 and No. 8914/100 or any other resultant subdivisions therefrom.
- c. The OCS, Athi River Police Station to ensure compliance with Order No. (a) above.
- d. Costs of the Application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 27TH DAY OF MARCH, 2023

CHRISTINE OCHIENG

JUDGE

