



Kikwau & 29 others (Suing on their behalf and on behalf of all persons with structures and developments on LR No 209/11388) v Mathare United Traders & Farmers Limited (Environment & Land Case E194 of 2022) [2023] KEELC 16488 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16488 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E194 OF 2022**

AA OMOLLO, J

MARCH 23, 2023

N THE MATTER OF L.R NO. 209/11388

AND

**IN THE MATTER OF SECTION 37 & 38 OF THE LIMITATION OF
ACTIONS ACT (CHAPTER 22 OF THE LAWS OF KENYA)**

BETWEEN

**DANIEL MAKAU KIKWAU & 29 OTHERS PLAINTIFF
SUING ON THEIR BEHALF AND ON BEHALF OF ALL PERSONS WITH
STRUCTURES AND DEVELOPMENTS ON LR NO 209/11388**

AND

MATHARE UNITED TRADERS & FARMERS LIMITED DEFENDANT

RULING

1. The plaintiffs moved the court vide the Notice of Motion application dated May 31, 2022 seeking the following orders;
 - 1) Spent
 - 2) That a temporary injunction be issued restraining the defendant, its servants, employees, agents or any person claiming interest through it from evicting the plaintiffs from the parcel of land known as LR No 209/11388 (the suit land) or from demolishing or fencing in the plaintiffs' buildings or interfering with the plaintiffs' possession of the same or alienating, transferring, disposing off or dealing with the suit land in any manner whatsoever pending hearing and determination of this application.



- 3) That a temporary injunction be issued restraining the defendant, its servants, employees, agents or any person claiming interest through it from evicting the plaintiffs from the parcel of land known as LR No 209/11388 (the suit land) or from demolishing or fencing in the plaintiffs' buildings or interfering with the plaintiffs' possession of the same or alienating, transferring, disposing off or dealing with the suit land in any manner whatsoever pending hearing and determination of the main suit.
2. The application is supported by the following grounds listed on its face;
 - a) That the plaintiffs have occupied the suit land since 1978 and have constructed dwelling houses herein.
 - b) That the defendant has threatened to forcefully evict the plaintiffs by use of any means necessary to demolish the plaintiffs' buildings and evict the plaintiffs including the use of a gang of hooligans.
 - c) The plaintiffs have a prima facie case by virtue of their continuous open uninterrupted and occupation of the suit land.
 - d) The plaintiffs will suffer irreparable loss unless the defendant is restrained from evicting them.
 - e) It is in the interest of justice to grant orders sought.
3. The application was further supported by the affidavit of Lucy Nyambura Thuita sworn on behalf of the Plaintiffs. She deposed *inter alia* that the Plaintiffs have been in occupation of the suit premises LR 209/11288 since 1978 and have put up structures under the assumption that the land belonged to the government or City Council of Nairobi. That in 1978 and 1999 a group of rough looking young men came to the land to serve them notice on behalf of the defendant requiring that the Plaintiffs immediately vacate the land. She deposed that despite threats by the Defendant's representatives, the plaintiffs stayed put. That they are advised by their advocates that they have acquired prescriptive rights by way of adverse possession. That there is danger the defendant will use all means to illegally evict them and their families hence need for the preservative orders.
4. The Defendant in opposing the application filed a notice of preliminary objection dated October 3, 2022. The PO listed the following;
 - 1) That none of the "Thirty (30) so called "plaintiffs" was a Defendant Judgment Debtor in this land case No ELC 614 of 1998, and in the Decree - Holder's judgment of October 1, 2018 and the Subsequent Issuance of the Decree and Eviction Warrants for Eviction of the Defendants from ten (10) plots only, on Land Parcel No LR 209/11358 being Land Parcel Nos LR 209/11358/141, 142, 143, 144, 145, 146 (151), 147, 148, 149 & 150, which were the subject-matter of the said judgment delivered on October 1, 2018.
 - 2) The "plaintiffs" have not produced any evidence to prove that they were in occupation of only the ten (10) plots on LR 209/11358/141 to 150, inclusive; and that they are not in occupation of any or any other inch of the rest of the 20 acres with more than 200 sub-plots all of which have got Title Deeds and Deed Plans; and none of the "30 Plaintiffs," have not any Title to any of the over 200 titles which belong to other people who are share-holders of the company.



- 3) The provisions of Section 37 and 38 of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya does not apply where the so called plaintiffs are not in Exclusive possession of Ten (10) plot on LR 209/11358/141, 142, 143, 144, 145, 146 (151), 147, 148, 149 and 150 which were the subject- matter of the ELC court case No 614 of 1998, delivered of any of the Ten (10) plots the subject matter of the said suit land parcel.
- 4) That it is now more than four (4) years ever since the judgment in ELC 614 of 1998 was delivered and the decree issued thereafter on October 1, 2018 and no appeal has been filed in the Court of Appeal by any person against that judgment and/or an Application for Review of the judgment filed in the ELC Court at Milimani within the time allowed by law, and the plaintiffs therefore have no “locus standi” in this matter, and are not only busy bodies, but are also total strangers to the case (ELC 614 of 1998) whose decree is being executed, with the sole intention of frustrating the course of justice in a case they are not part to, and the Originating Summons dated May 31, 2022, is frivolous and vexatious, and is an abuse of the due process of the court, merely meant to interfere with the smooth course of Justice, and deny the Defendant/Decree-Holder in ELC No 614 of 1998, enjoyment of the fruits of her judgment, which she has been crying for, for over twenty- four (24) years now, and the same should be struck out from record and dismissed with costs on the higher scale.
- 5) That the “plaintiffs” had filed a parallel suit by way of “Objection Proceedings” in this court as “Objectors”, Daniel Makau Kikwau & 29 Others –versus- Mathare United Traders & Farmers Ltd dated May 31, 2022, which was dismissed with costs on July 26, 2022, as it was meant to be Approbating an reprobating, without disclosing its existence because, all the prayers therein are “word-for-word,” with this Originating Summons which was meant to “blow both Hot and Cold,” and was a “Trial and Error” Exercise which was attempting to apply here, and if they failed here, they would try there, and on, and so on, which is not allowed in law, as there is no good faith in the whole exercise, and should not be allowed in a court of law and justice, as it clearly an abuse of the due process of the court.
- 6) That the law demands that a Litigant must disclose to the court in all his pleadings, the full disclosure of all material facts and the existence of the dismissal objection proceedings in ELC 614 of 1998, has not been disclosed in this application when it was filed on May 31, 2022, more than two (2) months after it was filed on ELC No 614 of 1998, on May 31, 2022, which had been dismissed with costs on July 26, 2022.
- 7) That the “plaintiffs” are guilty of interfering with the court of Justice in a concluded case which is not allowed by the Law.
- 8) That this is a fit and proper case for dismissal with costs the higher scale, since there is no “locus standi” and/or cause of action or it all, against the plaintiff/ decree-holders in ELC No 614 of 1998 at all, in favour of strangers in the suit.



5. The Plaintiffs filed written submissions in support of the application and against the preliminary objection. The Plaintiffs aver that on the basis that the Respondent/Defendant did not file any affidavit in reply means the facts set out have not been denied. They cited the case of Embu ELC 54 of 2021 *Faustina Njeru v Kimunye Tea Factory Ltd* which had a similar situation and the learned judge held thus;

“ 35. Further in the case of Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited [2010] KLR the court held as follows: -

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavits. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.”

36. From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.”

6. The Plaintiffs submitted on the preliminary objection stating the grounds relied on were all factual and needed affidavit evidence and annexures to prove. They added that the Preliminary Objection did not meet the threshold definition set in the case of *Mukhisa Biscuit Manufacturers Co Ltd v West End Distributors Ltd* [1969] EA 696.

7. That the Defendant’s attempt to plead the principle of res judicata at sub judice does not come out clearly and is undermined by the Preliminary Objection which stated that the Plaintiffs were not parties to ELC 614 of 1998. The Plaintiffs also denied being served with the objection proceedings that were allegedly dismissed.

8. Mr Evan T Gaturu learned Counsel for the Defendant orally submitted that they filed the Preliminary Objection because the plaintiffs are not parties in the case from which the eviction order was issued. Counsel wondered why they wanted to be provided with dismissal orders in their objection when those orders were issued in their presence. That the plaintiffs cannot use this case to stay execution in another case being ELC 614 of 1998. He urged the court to dismiss the suit with costs on a higher scale.

9. In the eight (8) paragraphed preliminary objection, the Defendant urged the court to dismiss the current suit because the ten plots listed in the plaint were the subject matter in ELC 614 of 1998. The sort of evidence the defendant wanted the Plaintiffs to provide an answer to ground 2 & 3 of the Preliminary Objection to prove exclusive possession can only be provided during the hearing of this case and not at an interlocutory stage.



10. In ground 1 & 4, the Defendant pleaded that the plaintiffs are strangers to ELC 614 of 1998. In which case, the law required them to execute the decree as against the persons named in that order/decre. The Plaintiffs can and should be evicted if the Defendant laid a basis that the Plaintiffs fell under the category of people who could have brought their claim through the defendants in ELC 614 of 1998 as anticipated in explanation 6 of Section 7 of the Civil Procedure Act which states thus;

“Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

11. The defendant also pleaded in paragraph 5 & 6 of the PO that the Plaintiffs had filed a parallel suit by way of objection proceedings which is similar word for word to present suit and which action the defendant termed as trial and error, try here and there which action is not allowed in law. That the plaintiffs ought to have disclosed the dismissal of their objection in the current suit. In replying to this averment, the Plaintiffs stated that if the objection proceedings were filed under order 22 rule 51 of the Civil Procedure Rules, the same cannot aid the Defendant as the provisions were taken out by a 3rd party not a party to suit who has legal interest in a property being sold in a property being sold in execution.

12. Unfortunately, those objections proceedings were not availed to this court to enable the court make a determination whether this would make the current suit res judicata. I will therefore say nothing about the so called objection proceedings. However, for the remainder of the grounds analysed, I find that they do not meet the threshold that would cause this court to strike out the suit at this preliminary stage.

13. Turning to the merit of the application for orders of temporary injunction, I note the same was not opposed. Further, the Defendant confirmed that the plaintiffs were not parties in ELC 614 of 1998. Granting the orders does not amount to staying the decree since there is nothing stopping the Defendant from evicting the defendants listed in their decree.

14. It would go against the tenets of natural justice of condemning the plaintiffs unheard by executing a decree not directed at them. The plaintiffs annexed some receipts and photographs of structures which they say belong to them. The Defendant did not contest these facts set out in the affidavit sworn by Lucy Nyambura Thuita which makes a prima facie case for the plaintiffs.

15. Under the heading of irreparable loss, the plaintiffs pleaded that they live in these structures. If they are evicted which then turn out to be wrongful eviction in the event they are the successful parties, the loss of home and livelihood cannot be compensated by an award of damages. In explaining suffering irreparable harm, the court in Agnes Nyang'anyi Omwamba v Samuel Bosire Nyaruna [2022] eKLR stated;

“...it means that the result of the actions of the adverse party of left unattended to by a Court order halting them will be such that the other party is not likely to be compensated by damages. Put differently, the payment of money in form of damages will not put the injured party back into the position he should have been had the actions of the adverse party not taken place. Thus, it is not enough to should a prima facie case. The applicant must demonstrate that the effect of the actions of the Respondent is so grievous that when all is said and done, he will not be in the same position as he was originally.”



16. In conclusion, I find that the application dated May 31, 2022 is merited and allow it in terms of prayer 3 of the motion. The notice of Preliminary Objection dated October 3, 2022 is dismissed. Costs of the Preliminary Objection and the application shall abide the winner of this suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2023

A. OMOLLO

JUDGE

In the presence

Mr Gaturu for the Defendant

Mr Gichigi for the Plaintiffs

