



**Abukar v Khalif & 4 others (Environment & Land Case
E014 of 2023) [2023] KEELC 17728 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E014 OF 2023**

A NYUKURI, J

MAY 31, 2023

BETWEEN

LIBAN MOHAMED ABUKAR APPLICANT

AND

YUNIS KHALIF 1ST RESPONDENT

ABBAS KHALIF 2ND RESPONDENT

JAT'TANI HALLOW 3RD RESPONDENT

JARSO KANCHORA 4TH RESPONDENT

LAND REGISTRAR MACHAKOS 5TH RESPONDENT

RULING

Introduction

1. Before court is a Notice of Motion dated February 23, 2023 filed by the Plaintiff seeking the following orders;
 - a. Spent.
 - b. Spent.
 - c. Pending the hearing and determination of this suit interpartes an interim injunction be and is hereby granted restraining the Defendant/Respondents herein, their agents, personal representatives and or servants from in any way taking possession, trespassing, transferring and or in any way dealing with the property land Reference No 337/1928 Land Survey Plan No 184187 and the grant is registered as IR 77008/1 situated in Mavoko.



- d. An order be and is hereby directed to the OCS Mavoko Police Station to enforce the order restraining the Defendant/Respondents herein, their agents, personal representatives and or servants from in any way taking possession, trespassing, transferring and or in any way dealing with the property land Reference No 337/1928, Land Survey Plan No 184187 and the grant is registered as IR No 77008/1 situated in Mavoko.
 - e. Cost of this application.
2. The application is premised on the affidavit sworn on February 23, 2023 by Liban Mohamed Abukar, the Plaintiff in this matter. The Applicant's case is that he is the registered proprietor of Land Reference No 337/1928, Land Survey Plan No 184187 and the grant is registered as IR No 77008/1 situated at Mavoko (suit property). He stated that he purchased the suit property from Philip Mulwa alias Philip Kivuva Mulwa on April 6, 2009 and the same was transferred to him on April 8, 2009. It was his averment that he has religiously paid rent and rates of the suit property and has been in possession of the same.
 3. He further averred that he had found out that the Defendants have invaded the suit property claiming it is theirs. Further that after going to pay the rates on February 10, 2023, he realized that the records showed that the Defendants were the owners. He stated that he was apprehensive of being deprived of his property as the Defendants had began constructing on the suit property. He stated that he stood to suffer irreparable loss and damage if the orders sought are not granted as the property was in danger of being sold to third parties. He attached a copy of title, a copy of sale agreement, transfer instrument, rates clearance certificate, rates payment receipts, invoice for payment of rates, a copy of a police report OB and photographs of the structures by the Defendants.
 4. The application is opposed. Jarso Kanchora, the 4th Respondent filed a replying affidavit sworn on April 4, 2020 opposing the application. It was his case that the Defendants are not the proper parties to be sued herein as they sold and transferred the suit property in 2021. He maintained that the suit property does not exist as the same was sold by the Defendants and the same was subdivided by the current owners into seventy-four plots.
 5. The 4th Respondent also averred that the 1st to 4th Respondents were the first allottees of the suit property and were issued with a letter of allotment dated December 8, 1998. He stated that on December 15, 2017, they made an application and were issued with a lease for the suit property and thereafter they obtained title on June 8, 2018 and sold the same on November 8, 2021 to Binaya Homes Limited. He maintained that he has been paying rates to the County Government of Machakos. He stated that he was aware that the new owners of the suit property had subdivided the same into 74 plots. He maintained that the Plaintiff has never been in possession of the suit property as they have been in possession of the same since they were allotted.
 6. He averred that the Plaintiff has not stated how Philip Mulwa got the suit property and that the ownership of this land is under investigation by the DCI.

Analysis and Determination

7. I have considered the application and the response thereto and the issue that arise for determination is whether the Applicant has met the threshold for grant of interlocutory injunction.
8. Order 40 Rule 1 of the *Civil Procedure Rules 2010* provides that where property which is subject of a dispute is at risk of being wasted, damaged, alienated, disposed or removed in circumstances that may lead to the likelihood of the Plaintiff being obstructed or delayed in execution of a decree that may



eventually be passed against the Defendant, the court has jurisdiction to grant a temporary injunction to restrain the Defendant from committing such acts that may eventually prejudice the Plaintiff.

9. Principles for grant of a temporary injunction are now well settled. An Applicant for a temporary injunction must establish the following elements;
 - a. That they have established a prima facie case with chances of success;
 - b. That if the temporary injunction is not granted, they stand to suffer irreparable damage that may not be compensated in damages; and
 - c. Where the court is in doubt on (b), it ought to determine the application on a balance of convenience. (See *Giella v Cassman Brown* [1973] 358 EA).

10. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* CA No 77 of 2012 [2014] eKLR, the Court of Appeal held as follows;

"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) allay 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."

11. A prima facie case was described in the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR as follows;

In civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

12. Essentially, a prima facie case is an arguable case that demonstrates that the claimant's rights have apparently been infringed. In the instant suit, the Plaintiff's claim is that he is the registered proprietor of the suit property which he purchased from one Philip Mulwa the previous owner, on April 6, 2009. The Plaintiff gave a clear history of how he acquired the suit property by purchase showing that the acquisition was lawful. He produced the sale agreement, evidence of payment of consideration, rates and rent clearance, duly executed transfer document, application for registration, payment of stamp duty and title.

13. The 4th Respondent in response alleges to have been the ones together with the 1st to 3rd Defendants, who were allegedly allotted the suit property in 1998 and that they applied in 2017 for the lease. He also alleges to have sold the land to Binaya Homes Limited on November 8, 2021 and alleged that he was aware that Binaya Homes Limited subdivided the suit property into 74 plots.

14. I have considered the sale agreement by the Defendants which is at pages 22 to 34 of their bundle in respect of the replying affidavit. While the same does not have pages 2 and 3 of the agreement as it states from page 1 and proceeds to page 4 upto page 14, it does not have the consideration amount and how the same was paid. In addition, the Defendants claimed to have sold the land to Binaya Homes Limited and that they know that the purchaser has subdivided the suit property into 74 plots; but no



- evidence to that effect was provided. A land transaction involving consideration of Kshs 42 million as alleged by the Defendants would have other evidence besides a sale agreement, including evidence of payment of consideration, transfer instrument and payment of stamp duty. None of such evidence was produced by the Defendants.
15. The Defendants allege to have been allotted the suit property in 1998. The letter of allotment produced by the Defendants show that on the date of the allotment, the land was already registered as LR No 337/1928 Athi River Township. The letter of allotment is incomplete being a one paged document and not signed. Besides, even the attached lease is a one page document that is not signed. In addition, there is no evidence of acceptance in regard to the letter of allotment. Comparing the documents of ownership by the Plaintiff in regard to his claim, I note that the Plaintiff has been forthright on when and how he acquired the suit property but the Defendants' documents are doubtful for being unsigned, and incomplete, and in my considered view, at a prima facie level, do to demonstrate ownership.
 16. In the premises, I am satisfied that the Plaintiff has established a prima facie case with chances of success.
 17. On whether the Plaintiff stands to suffer irreparable damage, the Plaintiff states that the Defendant may sell the land to third parties if not restrained. He attached photographs showing construction in progress. The Defendants did not deny that they had began constructing on the suit property. It is therefore clear that if they continue with the construction, they may alter the character of the subject matter and therefore that will result in irreparable damage to the Plaintiff to the extent that damages may not be sufficient compensation; in the event they succeed in this matter.
 18. On the question of balance of convenience, the Plaintiff has shown to be the registered proprietor since 2009 and that he has been in possession. In the premises, the balance of convenience tilts in favour of granting the orders of temporary injunction.
 19. The upshot is that the Plaintiff's application dated February 23, 2023 is merited and the same is allowed in the following terms;
 - a. An order be and is hereby issued that pending the hearing and determination of this suit interpartes an interim injunction be and is hereby granted restraining the Defendant/ Respondents herein, their agents, personal representatives and or servants from in any way taking possession, trespassing, transferring and or in any way dealing with the property Land Reference No 337/1928, Land Survey Plan No 184187 and the grant is registered as IR 77008/1 situated in Mavoko.
 - b. An order be and is hereby directed to the OCS Mavoko Police Station to enforce the order restraining the Defendant/Respondents herein, their agents, personal representatives and or servants from in any way taking possession, trespassing, transferring and/or in any way dealing with the property land Reference No 337/1928, Land Survey Plan No 184187 and the grant is registered as IR No 77008/1 situated in Mavoko.
 - c. Costs of the application shall be borne by the Respondents.
 20. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;



No appearance for the Plaintiff

No appearance for the Defendants

Josephine – Court Assistant

