



**Mae v Mahendani & 2 others (Environment & Land Case
50 of 2022) [2023] KEELC 17997 (KLR) (13 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17997 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 50 OF 2022**

**MAO ODENY, J
JUNE 13, 2023**

BETWEEN

MATHIAS MUSINDA MAE PLAINTIFF

AND

MARIAM OMAR MAHENDANI 1ST DEFENDANT

MALIKIA OMAR MAHENDANI 2ND DEFENDANT

ANZUN OMAR MAHENDANI 3RD DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated August 22, 2022 by the Plaintiff/Applicant seeking the following orders;
 - a) Spent
 - b) Spent.
 - c) That pending hearing and disposal of the main suit this Honourable Court be pleased to issue a temporary injunction restraining the Respondents by themselves, their employees, servants/ agents or any other person claiming through them otherwise any other person from interfering, meddling, dealing and/or in any way or manner trespassing onto the applicant's portion measuring 6 acres within Plot No RL 332 Kwachocha.
 - d. That costs be provided for.



Plaintiff/applicant's Case

2. The application was supported by the affidavit sworn by Mathias Musinda Mae, the Applicant, who deponed that he purchased the suit premises vide a sale agreement dated April 5, 2007 from Salim Mohamed Omar and Amina Mohamed Omar and upon execution of the sale agreement, he took possession of the premises.
3. He also deponed that prior to subdivision of the entire 12 acres to his two rival polygamous families to 6 acres each, the suit premises constituted of a complex of 3 titles namely, portion nos 361, 138 and 332 Kwachocha. According to him, the entire southern portion which he purchased was fully within plot No 332, Kwachocha while the Northern portion comprised partly of portion Nos 361, 138 and 332 Kwachocha.
4. It was the Applicant's evidence that on or about September 12, 2021, the Respondent assembled building materials and dug trenches for purposes of constructing permanent structures on his portion and further that on August 21, 2022 the Respondents moved to the suit premises and cleared the same and continued with the construction. He further asserted that efforts to have the Respondents demolish a perimeter wall constructed across an access road have failed in view of the new developments.

Defendant/respondents' case.

5. The Defendant/ Respondents filed a Replying Affidavit sworn by Malkia Omar Mahendani on October 11, 2022 where she deponed that the subject matter of the suit as alleged by the Plaintiff is a parcel/s of land identified as portion numbers 361, 138 and 332 Malindi registered in the name of Mariam Binti Salim and that one of the purported sellers Amina Mohamed Omar swore an affidavit stating she is neither aware nor does she recognize the sale.
6. According to them, the said Amina Mohamed Omar wrote a demand letter to the Plaintiff/ Applicant demanding he ceases his trespass on the suit property. She also deposed that as per the Certificate of postal search dated April 12, 2007, the registered owner of the suit property was Mariam Binti Salim which is contrary to the agreement purporting one Abubakar Mohamed Faki to be the registered owner and Salim Mohamed Omar and Amina Mohamed Omar as his representatives.
7. It was her evidence that the Defendant/ Respondents have been in continuous occupation of the suit property and that the Plaintiff never took possession of the same since the alleged purchase.

Applicant's Submissions.

8. Counsel submitted on the issues for determination on application for grant of interlocutory injunctions and stated that the Applicant has established a prima facie case with a probability of success by virtue of the sale agreement dated April 5, 2007.
9. Counsel further submitted that the Applicant is the rightful owner of the suit property and that the same is not contested by the Respondents as per the consent dated April 17, 2017 hence the Applicant has acquired indefeasible title and if the construction is allowed to continue the Applicant will suffer irreparable loss.
10. Counsel relied on the Giella Casman Brown case and urged the court to find that the Applicant has a prima facie case with a probability of success.



Defendant/respondents' submissions

11. Counsel submitted that the alleged sale agreement relied on by the Applicant was unexecuted by one of the alleged vendors being Salim Mohamed Omar. On whether the Applicant has established a prima facie case counsel relied on the definition of what amounts to a prima facie case as was explained in the case of *Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others*. He submitted that the Applicant has raised claims that he is the indefeasible owner of the suit premises but has failed to substantiate the same as he has neither produced a title deed, nor lease document.
12. Counsel relied on the case of *Alfred Ndogi Mata vs Helen Siemeko Adede (2005) eKLR* and submitted that the Applicant has failed to prove allegations of sale and ownership of the suit land.
13. On whether the Applicant will suffer irreparable injury which cannot be compensated by damages, counsel submitted that the Applicant has not demonstrated the loss or injury that he will suffer if an order of injunction is not granted and urged the court to dismiss the application with costs.

Analysis and Determination.

14. The issue for determination is whether the Applicants has met the threshold for grant of interlocutory injunction as was laid down in the case of *Giella v Cassman Brown & Co Ltd [1973] EA 358* 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.'
15. The Plaintiff/Applicant produced a copy of a sale agreement of the suit premises between himself and Salim Mohamed Omar and Amina Mohamed Omar and stated that he took possession upon execution of the sale agreement. The Applicant further explained that the entire southern portion which he purchased was fully within plot No 332, Kwachocha while the Northern portion comprised partly of portion Nos 361, 138 and 332 Kwachocha.
16. It was the Respondents' case that the said Amina Mohamed Omar wrote a demand letter to the Plaintiff/ Applicant to cease trespassing on the suit property and further that as per the Certificate of postal search dated April 12, 2007, the registered owner of the suit property is Mariam Binti Salim which is contrary to the agreement with Abubakar Mohamed Faki as the registered owner and Salim Mohamed Omar and Amina Mohamed Omar as his representatives.
17. The Defendants/ Respondents assert that they have been in continuous occupation of the suit property and that the Plaintiff never took possession of the same since the alleged purchase.
18. This case has a convoluted history, from the High Court in respect of a Succession Cause, National Land Commission Report, a case in the Chief Magistrates which was struck of due to lack of pecuniary jurisdiction. It is therefore the Plaintiff's word against the Defendants'
19. From the material placed before this court, it is not clear what portion of the suit property the Applicant is in occupation of and what relationship existed between the Defendants and the persons that sold to him the said parcel of land. The Plaintiff claims that he was put into possession and also states that he has sold several portions which he subdivided into 50 by 100ft. The Defendants also claim that they are in possession of the suit land.



20. I have also perused the certificate of postal search which indicates that the suit land is registered in the name of Mariam Binti Salim and not Abubakar Mohamed Faki whom the Plaintiff claimed to have bought the suit land through his representatives Salim Mohamed Omar and Amina Mohamed Omar
21. The only order that the court can grant is that parties to maintain status quo pending the hearing and determination of ownership rights. The status quo is as at the filing of the suit. Each party to bear their own costs

DATED, SIGNED AND DELIVERED AT MALINDI THIS 13TH DAY OF JUNE 2023.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

