



REPUBLIC OF KENYA



**Orina v Jairo & 3 others (Environment and Land Appeal
E014 of 2022) [2023] KEELC 18107 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA
ENVIRONMENT AND LAND APPEAL E014 OF 2022**

JM KAMAU, J

JUNE 13, 2023

BETWEEN

JUSTUS ONGERA ORINA APPELLANT

AND

EBISIBA NYABOKE JAIRO 1ST RESPONDENT

THE COUNTY LAND SURVEYOR, NYAMIRA 2ND RESPONDENT

THE LAND REGISTRAR, NYAMIRA 3RD RESPONDENT

THE HON. ATTORNEY GENERAL 4TH RESPONDENT

*(Interlocutory Appeal from the Ruling and Order of the Magistrate's
Court at Nyamira by Hon. M.C. Nyigei – PM delivered on the 26th
day of October, 2022 in Nyamira CMC ELC Case No. E43 of 2021)*

JUDGMENT

1. The Plaintiff filed a suit in the Chief Magistrate's Court, Nyamira against the 3 defendants for: -
 - a. A Declaration that the creation of land parcel No. Mwangori Settlement Scheme/1206 by the 1st, 2nd and 3rd defendants and its superimposition on the Registry Map of the plaintiff's parcel of land No. Mwangori Settlement Scheme/50 is illegal, irregular and fraudulent, hence null and void.
 - b. A mandatory injunction compelling the 1st and 2nd defendants to cancel land parcel No. Mwangori Settlement Scheme/1206 and of land No. Mwangori Settlement Scheme/50 as per the Registry Index Map amendments of 15/06/06.
 - c. Damages for trespass and a permanent injunction to restrain the 1st, 2nd and 3rd defendants from ever stepping on the plaintiff's parcel of land registration No. Mwangori Settlement



Scheme/50 and from interfering with its position, shape and size in the Registry Index Map without the plaintiff's prior written permission.

- d. Costs and interest.
2. His claim is based on his averments that he is the registered proprietor of land parcel No. Mwangori Settlement Scheme/50 measuring approximately 1.7 Hectares in which he has been in actual use and occupation for more than 40 years. He avers that the defendants superimposed parcel No. Mwangori Settlement Scheme/1206 on his parcel of land aforesaid on the Registry Index Map thereby altering the scale, size, dimensions and shape of the plaintiff's parcel of land with a view of diminishing the size of his parcel of land. The latter i.e. Mwangori Settlement Scheme/1206 is now registered in the name of the defendant. This, he claims is not only illegal but also irregular and a product of fraud and the same should be nullified. The plaintiff on 9/12/2021 amended the suit to include the honourable Attorney General as the 4th defendant. The 1st defendant filed a statement of Defence on 17/01/2022 denying the plaintiff's claim and averring that LR. NO. Mwangori Settlement Scheme/1206 is rightfully hers and that the same neighbours the plaintiff's Mwangori Settlement Scheme/50 and that it is the plaintiff who has constantly encroached onto the 1st defendant's Mwangori Settlement Scheme/1206.
3. She also says that there existed Keroka PMCC No. 007 of 2020 over the same subject matter which was withdrawn when the Land Registrar and County Surveyor's Reports were being awaited by the court. On 17/12/2021, the Plaintiff filed an Application under certificate of urgency seeking for the following orders: -
 1. The instant Application be certified as urgent and the same be heard *ex-parte* in the first instance.
 2. Pending the hearing and determination of this Application, the honourable court be pleased to issue an interim injunction restraining the 1st, 2nd and 3rd respondents, its servant or agents constructing, trespassing or otherwise howsoever manner from interfering with the subject matter land parcel No. Mwangori Settlement Scheme/50.
 3. Pending the Hearing and determination of the main suit, the honorable court be pleased to issue a temporary injunction restraining the 1st, 2nd and 3rd Respondents, its servant or agents from entering, alienating, constructing and/or otherwise howsoever manner from interfering with land parcel No. Mwangori Settlement Scheme/50.
 4. That the plaintiff/applicant be granted leave to enjoin the Attorney General as the 4th defendant in the suit.
 5. That this honorable court be pleased to grant leave to the plaintiff to amend his Plaintiff accordingly upon granting prayers (4) above.
 6. That the annexed draft Amended Plaintiff herein be deemed as duly filed subject to payment of the requisite court fees.
 7. The costs of the Application be provided for.
4. The Grounds upon which the same was anchored were: -
 - a. The plaintiff/applicant is the registered owner of all that piece of land known as Mwangori Settlement Scheme/50 measuring approximately 1.7 Hectares.



- b. That the plaintiff/applicant has been in actual use and occupation of the suit land parcel No. Mwangori Settlement Scheme/50 for a period of more than 40 years now without any interruption from his bounding neighbours problem whatsoever with all my neighbours.
 - c. That the defendants/respondents have forcefully entered onto the applicants land and the 3rd defendant/respondent has caused to be established a non-existent boundary on the applicant's land in favour of the 1st defendant without the applicant's consent and further destroyed the applicant's trees and fence, in effect dispossessing the plaintiff/applicant herein and with intent to change the nature and character of the suit land.
 - d. The plaintiff/applicant stands to suffer irreparable loss in the event that orders of temporary injunction are not granted.
 - e. The balance of convenience tilts towards granting the temporary injunction.
5. The Application was not opposed and after inviting the parties to canvass the said Application the honourable Nyigei, Principal Magistrate went ahead to rule that no prima facie case with a probability of success had been established since the plaintiff/applicant did not attach any document to prove his ownership to L.R. Mwangori Settlement Scheme/50. The court also found that the plaintiff did not show that irreparable injury would ensue should the temporary injunction not be granted and that if the 1st defendant's parcel of land has already been superimposed on his, then there is nothing to protect. The harm has already been suffered. However, the court went ahead to allow the prayer of amendment of the Plaint to accommodate the Honourable the Attorney General as 4th defendant.
6. It is against this background that an Appeal was preferred with the following grounds: -
1. The Learned Magistrate erred in law by misdirecting himself fundamentally in holding that the appellant failed to establish a prima facie case with probability of success.
 2. The Learned Magistrate misapprehended the material facts placed before her by the appellant hence arrived at wrong decision.
 3. The Learned Magistrate erred in law and misdirected herself fundamentally in rejecting matters of fact which were not controverted.
 4. The Learned Magistrate in law and fact by failing to take into account relevant matters instead took into account irrelevant matters hence arrived at a wrong decision.
 5. The Learned Magistrate misdirected himself fundamentally in rejecting the appellant's application as a result allowed the respondents to continue perpetuating an illegality.
 6. The finding of the Magistrate is plainly wrong.
7. As a precautionary step on 18/12/2022, the plaintiff, now appellant, filed an Application for an Interim injunction restraining the Respondents from constructing, trespassing or otherwise in whatsoever manner from interfering with the subject matter land parcel No. Mwangori Settlement Scheme/50 until the hearing of this Appeal. This court on 23/02/2023 cautiously observed that the giving of reasons in the Ruling would pre-empt the outcome of the Appeal and issues of trial in the lower court. An order was made to have both Titles deposited in the lower court within 48 hours to avoid the changing of hands of the Titles or either.
8. Coming now to the Appeal at hand, the least that the Appellant should have done is to tender in evidence a copy of the Title Deed for the suit property in his name and/or the certificate of official search in regard to the suit property which would have confirmed that the property is registered in his



name as the proprietor thereof. Under section 24(a) of the *Land Registration Act*, 2012, the registration of a person as the proprietor of land vests in that person the absolute ownership of that land together with all rights and privileges associated with that status. Section 26(1) of the said Act provides that the certificate of Title issued by the Land Registrar upon registration to a purchaser of land upon transfer shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner thereof..... As the absolute proprietor of the suit property, the Appellant is entitled to enjoy rights and privileges associated with such ownership which includes exclusive use, possession and enjoyment thereof without interference by any third party.

9. The plaintiff therefore failed to demonstrate that he is the registered owner of the parcel of land known as L.R. NO. Mwongori Settlement Scheme/50 and the court cannot assume so. This court therefore finds it very difficult to grant the temporary injunction sought by the plaintiff. The Appeal is therefore dismissed with costs.

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

MUGO KAMAU

JUDGE

In the Presence of:-

Ms. Nyaenya for the Appellant

Mr. Kimaiyo holding brief for Mr. Ogari for the 1st Respondent

Ms. Opiyo for the 2nd, 3rd & 4th Respondent

