



**Muna v Muchiri (Environment & Land Case E010 of 2022)
[2023] KEELC 19137 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19137 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE E010 OF 2022**

JM ONYANGO, J

JULY 26, 2023

BETWEEN

PETER MWANGI MUNA APPLICANT

AND

NATHAN MUREITHI MUCHIRI RESPONDENT

RULING

1. The Defendant/ Applicant filed an application dated 1st March, 2023 seeking an order of temporary injunction to restrain the Plaintiff/Respondent by himself his servants and/or agents from trespassing, entering, ploughing, damaging, wasting, alienating, transferring or in any or other way interfering with the Defendant/Applicant's use, possession, occupation and ownership of land parcel number Ngeria/kesses Block 5 (bayete)/10 measuring 2.83 Hectares pending the hearing of the main suit.
2. The application is based on the six grounds set out in the Notice of Motion and the Defendant's supporting affidavit sworn on the 1st day of March, 2023. In the said affidavit, the Defendant has averred that he is the registered owner of land parcel number land and he has annexed a copy of the title deed. He avers that the plaintiff has without any colour of right entered upon the Defendant's land without the defendant's consent.
3. It is his further contention that the Plaintiff has purported to file this suit against him yet he had earlier on been evicted from the suit land. He adds that since an eviction order was issued in Eldoret CMCC No. 1280 of 2004 against the plaintiff's predecessor, the suit is *res judicata* and the plaintiff is estopped from bringing another claim over the same subject matter. He complains that the plaintiff's illegal activities on the land which include construction of a structure have caused him loss and damage. The defendant contends that the plaintiff has no locus standi as the Limited Grant issued to him in Eldoret CM Succession Cause No. 262 of 2021 was limited to prosecuting Eldoret CMCC Case No.384 of 1990 and the same has lapsed.



4. In opposing the application, the Plaintiff filed a Replying affidavit sworn on the 14th April, 2023. He referred to the defendant's Replying affidavit in support of the Originating Summons in which he deponed that the plaintiff had moved into the suit land in 2009 and not recently as intimated in the affidavit in support of the application for injunction.
5. He denies that his father was ever evicted from the suit land save for period between December 2007 and 2008 when members of the Kikuyu tribe were displaced from their homes owing to post-election violence. He avers that that the judgment in Eldoret CMCC Case No.1280 of 2004 which was delivered on 14th January 2005 could not be executed owing to the provisions of section 4(4) of the Limitation of Actions Act which bars the execution of a decree after the expiry of 12 years.
6. He depones that by obtaining title to L.R No. Ngeria/kesses Block 5 (bayete)/10 the defendant circumvented the orders of the court in Eldoret CMCC No. 384 of 1980 which barred him and other members of Bayete Farmers Cooperative Society Limited from evicting the plaintiff's grandfather and 8 others from the suit land. The Plaintiff and his group instead filed Eldoret CMCC No. 1280 of 2004 against the Plaintiff's father Jimmy Mureithia Muchiri and obtained an eviction order. He argues that the said suit was *res judicata* and that his father had no locus standi to be sued as he had not taken out a grant of letters of administration in respect of his late father Nathan Muriithia who was the original owner of the suit land.
7. He avers that apart from taking out a limited grant to pursue his rights through Eldoret CMCC Case No.384 of 1980, he has instituted this Originating Summons in his own right in order to be declared as the owner of the suit land as he has resided thereon for more than 12 years. He is of the view that since the defendant chose to sue his father after his grandfather had been declared the owner of the suit land, he should also treat the plaintiff as an independent person from his father and any orders he may have obtained against his father should not be executed against the plaintiff.
8. He deposes that they have been in occupation of the suit property for a cumulative period of 55 years and they have established their homes thereon and planted maize and other crops. He claims that plaintiff obtained his title illegally as the title was never surrendered. He is of the view that the suit should be set down for hearing so that the parties can ventilate their claims.
9. In response to the Replying affidavit, the Defendant filed a Further Replying Affidavit in which he reiterates that the plaintiff lacks locus standi. He depones that the orders issued on 8th February, 2007 related to Jimmy Muchiri Mureithia who was the plaintiff's father and they are therefore binding on the plaintiff. He contends that time stopped running when CMCC No. 1280 of 2004 was filed and that the orders issued therein are still valid. He maintains that the Plaintiff claims through his father and grandfather who had no right over his land. It is his contention that the Plaintiff cannot make a claim for adverse possession yet he claims that the defendant's title is illegal.
10. The application was disposed of by way of written submissions and both parties filed their submissions which I have considered.

The following issues fall for determination:

- i. Whether the plaintiff has locus standi to institute this suit.
 - ii. Whether the suit is *res judicata*
 - iii. Whether the defendant is entitled to an order of temporary injunction
11. Dr. Chebii learned counsel for the Defendant submitted that the plaintiff lacks the locus standi to institute this case as the Limited Grant which he seeks to rely on was limited for purposes of prosecuting



or defending Eldoret CMCC Case No.384 of 1990 and the same has since lapsed. It is his contention that the plaintiff's father through whom he claims was evicted pursuant to an eviction order in Eldoret CMCC No. 1280 of 2004.

12. On the other hand, Mr. Murgor learned counsel for the Plaintiff contended that the Plaintiff instituted this suit in his own capacity and not as the administrator of the estate of his late father and that he is entitled to claim the suit land by way of adverse possession as he has stayed thereon for a period of more than 12 years. He has pointed out that the Plaintiff has not obtained a grant in respect of the estate of his late father Jimmy Muchiri who was sued in Eldoret CMCC No. 1280 of 2004.
13. To the extent that he is claiming the suit property by virtue of his occupation thereof for a period of more than 12 years, the plaintiff does not require a grant of letters of administration in respect of this late father's estate. He would however have to prove that his claim to the suit property is indeed separate and distinct from that of his late father and grandfather and this can only be done at a full hearing.
14. The second issue is whether the suit is *res judicata*. The doctrine of *res judicata* is set out in Section 7 of the [Civil Procedure Act](#) as follows:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

15. The Court of Appeal in the case of [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR set out the elements that that court needs to consider when determining the issue of *res judicata*. The court stated that;

“Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The subject matter or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

16. In order to make a finding that the suit herein is *res judicata*, the court would have to be satisfied that all the above elements have been met.
17. Perhaps it would have been useful for the Defendant to annex the pleadings and judgment in the said suit to enable the court appreciate the issues that were in dispute in the said suit and see whether they are different from the issues raised herein so as to arrive at a conclusive finding on whether the matter



is *res judicata*. In the absence of all the material facts, the court is unable to arrive at the finding that the suit is *res judicata*.

18. Having said that, from the orders dated 14th January 2005 and 8th February 2007 annexed to the defendant's affidavit it would appear that the Plaintiff sued the Defendant's father Jimmy Muchiri Mureithia in Eldoret CMCC No. 1280 of 2004 in respect of the suit land and obtained an eviction order the against him.
19. Although the Plaintiff denies that they were evicted from the suit land, it is clear that the court issued an eviction order against the plaintiff's father. Since the Plaintiff's father never appealed against the said judgment the same is still valid and binding. In the premises I am constrained to agree with counsel for the defendant that the Plaintiff cannot circumvent the said orders. The court will however make a conclusive finding after considering the evidence in totality.
20. Moving on to the issue as to whether the Defendant is entitled to the order of injunction, it is trite that in order to be entitled to an injunction, one must meet the conditions set out in the case of *Giella v Cassman Brown & Company Ltd* 1973 EA 358 which are as follows:

“First, the applicant must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”
21. In the case of *Mrao v First American Bank of Kenya Limited* (2003) eKLR Bosire JA (as he then was) stated as follows:

“A prima facie case is one which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”
22. It is not in dispute that the Defendant is the registered owner of the suit land. As correctly submitted by Counsel for the Defendant, the Defendant's title must be taken as prima facie evidence that the Defendant is the absolute proprietor of the suit land.
23. On the material placed before the court I am persuaded that the Applicant has established a prima facie case with a probability of success.
24. The Plaintiff however claims that he is entitled to the same by virtue of adverse possession having been in occupation thereof for a period of more than 12 years. I must however be careful not to determine the suit prematurely. In the case of *Mbuthia Vs Jimba Credit Finance Corporation Ltd* (1988) eKLR the court held that;

“In an application for interlocutory injunctions, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases.”



25. Similarly, the court in the case of *Edwin Kamau Munuu Vs Barclays Bank of Kenya Ltd* NBI HCCC No 1118 of 2002, the court held that;

“In an interlocutory application, the court is not required to determine the very issues which will be canvassed at the trial with finality. All the court is entitled at this stage is whether the Applicant is entitled to an injunction sought on the usual criteria.”

26. I will now consider if the defendant is likely to suffer irreparable loss. In his supporting affidavit, the defendant has averred that owing to the plaintiff's illegal occupation of his land, he has suffered loss and damage. Even though the Defendant has not specified the loss he stands to suffer no doubt his inability to use his land cannot be gainsaid.

27. On the other hand, the plaintiff claims that him and his family has been in occupation of the suit property for more than 12 years and that they have their homes thereon. They have planted maize and other crops on a portion of the suit property. He has annexed photos of the homes. In the circumstances there is no doubt that the plaintiff would suffer a greater loss if an injunction is issued before the suit is heard and determined.

28. With regard to the balance of convenience, the court in the case of *Nawaz Manji & 4 Others v Vandeeep Sagoo & 8 Others* (2017) eKLR stated as follows:

“The court should issue an injunction where the balance of convenience is in favour of the plaintiff and not where the balance is in favour of the opposite party. The meaning of balance of convenience in favour of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiffs would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than that which is likely to arise from granting it”.

29. The facts presented in this case are such that the application has to be determined on a balance of convenience. In the case of *Virginia Edith Wambui Vs Joash Ochieng Ougo* Civil Appeal No. 3 of 1987 eKLR, the Court of Appeal held that;

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

30. In view of the foregoing and guided by the above-mentioned authorities and so as to preserve the subject matter, the order that commends itself is that the *status quo* shall be maintained pending the hearing and determination of this suit.

31. The costs of the application shall be in the cause.

32. The parties shall comply with Order 11 within 14 days so that the suit can be set down for hearing without further delay.



DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JULY 2023.

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J.M ONYANGO

JUDGE

