



**Kimondiu & 3 others v Makenzi & another (Environment & Land Case
E084 of 2022) [2023] KEELC 19066 (KLR) (24 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19066 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E084 OF 2022**

CA OCHIENG, J

JULY 24, 2023

BETWEEN

**ALPHONCE MUTISYA KIMONDIU 1ST PLAINTIFF
PAUL MWOLOLO NZUKI 2ND PLAINTIFF
KIOKO MULI 3RD PLAINTIFF
KITHITO NDOLO 4TH PLAINTIFF**

AND

**BENSON NZIOKA MAKENZI 1ST DEFENDANT
LAND REGISTRAR, MACHAKOS 2ND DEFENDANT**

RULING

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the November 17, 2022 where they seek the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That this Honourable Court do issue a temporary injunction restraining the 1st Defendant/ Respondent either by himself, his agents or any other person claiming under him from evicting, alienating, sub dividing and/or in any other manner whatsoever from interfering with the suit land known as Muviti /kaani/780 measuring approximately 4.5 Ha pending the hearing and determination of the main suit.
 5. That costs of this application be provided for.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Alphonse Mutisya Kimondiu where he deposes that the Applicants are dependants of the late Ikuvi Mulela who initially occupied land parcel number Muviti/Kaani/780 hereinafter referred to as the 'suit land' which was unsurveyed by the time of his death. He avers that the 1st Respondent has fraudulently caused the suit land to be registered in his name while he was to hold the same in trust for himself and the dependants of the late Ikuvi Mulela. Further, he proceeded to file a suit against Makau Nzuki who is also a dependant of the deceased vide Machakos CMCC No 326 of 2006 and obtained eviction orders. He contends that together with other Applicants, they have been in occupation and possession of the suit land and carried out farming activities thereon. Further, that they have constructive interest over the suit land. He argues that if the orders sought are not granted, they stand to suffer irreparable loss.
3. The 1st Defendant opposed the instant Application and filed a Replying Affidavit where he confirms being the bona fide registered proprietor of the suit land. He explains that his registration as proprietor of the suit land was procedural and he acquired his Title Deed properly. Further, that the allegation by the Applicants that he caused the suit land to be registered in his name fraudulently is without basis and factually incorrect. He insists that he acquired the suit land as a first registration since he was the one in occupation of the area when it was declared an adjudication section, having bought out and/or compensated his uncles in the year 1980 who then relocated to Makueni. He contends that during the adjudication process, none of the Applicants raised any objection regarding his registration as the proprietor of the suit land. Further, that there was a window for persons dissatisfied with the particulars and/or manner of registration to raise issues and/or objection before the adjudication was finalized, register closed and Title Deed issued. He avers that the only person in occupation of the suit land is Makau Nzuki whom he has litigated with over it, in Machakos CMCC No 326 of 2006 Benson Nzioka Makenzi Vs Makau Nzuki. Further, that the said proceedings culminated in a Judgment delivered on January 8, 2008 where the said Makau Nzuki was ordered to vacate the suit land. He states that Makau Nzuki subsequently had the aforesaid Judgment set aside and the suit heard a fresh culminating in a Judgment delivered on April 9, 2014 where he was ordered to vacate the suit land or eviction orders were to issue. He further explains that Makau Nzuki applied for stay of execution but the Application was dismissed on October 4, 2017. Further, that Makau Nzuki filed an application in Machakos ELC Misc No 23 of 2018 Makau Nzuki Vs Benson Nzioka Makenzi seeking stay of execution and leave to Appeal out of time but the said Application was also dismissed. He reiterates that the instant suit and present Application is a disguised Appeal against orders of eviction and the Applicants are merely pawns and/or proxies of Makau Nzuki. He reaffirms that the Applicants lack capacity to institute this suit on behalf of the deceased since they are not administrators of Ikuvi Mulela. Further, that the Applicants have not met the requisite threshold for the grant of injunctive relief since they have not demonstrated any nexus between the suit land and themselves. He argues that the instant suit is statute barred and res judicata.

The Application was canvassed by way of written submissions.

Analysis and Determination

4. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the Plaintiffs are entitled to orders of interlocutory injunction restraining the 1st Defendant or his agents from interfering with the suit land pending the outcome of this suit.
5. The Plaintiffs in their submission have reiterated their averments and contend that they have established a prima facie case with a probability of success. They aver that the 1st Defendant has infringed upon their rights by registering himself as the absolute proprietor of the suit land instead of



holding it in trust for the family of Ikuvi Mulela. They claim to have been in occupation of the suit land, constructed permanent houses and have been undertaking farming activities thereon. They insist that the 1st Defendant fraudulently got registered as the owner of the suit land. Further, that they stand to suffer irreparable loss which cannot be compensated by way of damages and the balance of convenience tilts in their favour as against the 1st Defendant. To support their averments, they have relied on the following decisions: *Naftali Ruthi Kinyua Vs Thuita Gachure & Another* (2015) eKLR which cited in approval *Giella Vs Cassman Brown Co Ltd* (1973) EA 358; *Mrao Limited Vs First American Bank of Kenya Ltd & 2 Others* Civil Appeal No 39 of 2002; *Family Bank Limited V Tassels Enterprises Limited & 2 Others* (2021) eKLR which cited in approval *Nguruman Limited Vs Jan Bonde Nielsen & 2 Others* (2014) eKLR and *Pius Kipchirchir Kogo V Frank Kimeli Tenai* (2018) eKLR.

6. The 1st Defendant in his submissions reiterated his averments as per the Replying Affidavit and insists this is a disguised Appeal against the orders of eviction against Makau Nzuki. He avers that the Plaintiffs have not demonstrated a prima facie case against him as before the government survey, Ikuvi Mulela did not have any registrable interest on the suit land. Further, that this suit is statute barred and res judicata.
7. On whether the Plaintiffs have established a prima facie case with a probability of success at the trial, I will rely on the principles as enunciated in the case of *Giella Vs Cassman Brown & Company* (1973) EA 358 including the description of a prima facie case as outlined in the case of *Mrao Ltd Vs First American Bank of Kenya & 2 Others* (2003) KLR 125.
8. The Plaintiffs claim they are the dependants of the late Ikuvi Mulela who initially occupied the suit land. They contend that the 1st Defendant fraudulently caused the suit land to be registered in his name while he was to hold the same in trust for himself and for the dependants of the late Ikuvi Mulela. They explain that the 1st Defendant filed a suit against Makau Nzuki who is one of the dependants of Ikuvi Mulela vide Machakos CMCC No 326 of 2006 and obtained eviction orders. They insist that they have been in occupation and possession of the suit land and carried out farming activities thereon. Further, that they have constructive interest over the suit land. The 1st Defendant vehemently opposed the instant Application and explained that he is the bona fide registered proprietor of the suit land and acquired his registration procedurally. He denies having acquired the suit land fraudulently and contends that he got it through first registration since he was the one in occupation of the area when it was declared an adjudication section. Further, that he compensated his uncles for the suit land in 1980 and they relocated to Makeni. He argues that during the adjudication process, none of the Plaintiffs raised any objection regarding his registration as the proprietor of the suit land before the register was closed and Title Deed issued. Further, that the only person in occupation of the suit land is Makau Nzuki whom he has litigated with over the said suit land in Machakos CMCC No 326 of 2006 Benson Nzioka Makenzi Vs Makau Nzuki and Machakos ELC Misc No 23 of 2018 Makau Nzuki Vs Benson Nzioka Makenzi wherein eviction orders were issued and a stay of execution denied. He insists that the instant suit and present Application is a disguised Appeal against orders of eviction and the Applicants are merely pawns and/or proxies of Makau Nzuki. Further, that the Plaintiffs lack capacity to institute this suit on behalf of the deceased since they are not administrators of Ikuvi Mulela. He insists that the Plaintiffs have not demonstrated any nexus between the suit land and themselves. Further, that the instant suit is statute barred and res judicata.
9. On perusal of documents presented by the respective parties, I note the 1st Defendant is indeed the registered proprietor of the suit land and there is no indication he is holding it in trust for any party. From the photographs presented by the Plaintiffs except for one house and vegetation, there is no indication in the said photographs if there are other persons residing on the suit land nor cultivating it. I have further perused the Ruling and Judgments presented in the two aforementioned suits and I note the suit land has actually been litigated upon and the 1st Defendant declared as its owner. Further, there



is no indication that the said decisions were overturned on Appeal. Insofar as the Plaintiffs claim they are dependants of Ikuvi Mulela who owned the suit land, they have not provided any documentation to prove the same. Further, I note they admit at paragraph 8 of their Plaint that the 1st Defendant indeed intends to evict Makau Nzuki who is in occupation of the suit land. At this juncture, I opine that it would be improper to restrain a registered proprietor of land whose ownership has been upheld by the courts of competent jurisdiction, from the said land.

10. Based on the facts as presented while associating myself with the decisions cited above, I find that the Plaintiffs have not established a prima facie case to warrant the orders of temporary injunction as sought against the 1st Defendant. Further, in relying on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court of Appeal reaffirmed that where a party has failed to prove a *prima facie* case, the court need not proceed to make a determination of the other two limbs on injunction, I will hence decline to do so.
11. It is against the foregoing, that I find the Notice of Motion Application November 17, 2022 unmerited and will dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 24TH DAY OF JULY, 2023

CHRISTINE OCHIENG

JUDGE

