



REPUBLIC OF KENYA



Kaguthi Kibabu Limited v Omondi & 6 others (Environment & Land Case E020 of 2022) [2023] KEELC 19904 (KLR) (20 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19904 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E020 OF 2022
CA OCHIENG, J
SEPTEMBER 20, 2023**

BETWEEN

KAGUTHI KIBABU LIMITED PLAINTIFF

AND

HESBON OMONDI 1ST DEFENDANT

JIRMA REGINA MIDINA 2ND DEFENDANT

ALI FATUMA IBRAHIM 3RD DEFENDANT

OSMAN KHALI MOHAMED 4TH DEFENDANT

SHUKRI ISSACK 5TH DEFENDANT

JAMES YANDEW OKOTH 6TH DEFENDANT

ZAHRA RASHID HILLOW 7TH DEFENDANT

RULING

1. What is before court for determination is the Plaintiff's Notice of Motion Application dated the 2nd March, 2022 where it seeks the following Orders:-
 1. Spent
 2. That the Defendants/Respondents by themselves, their agents, servants and or officers and or otherwise be restrained by an Order of temporary injunction from entering into, encroaching or interfering in any way with the Plaintiff's property Title Number LR 20170 situate in Mavoko, Machakos County pending the hearing and determination of this Application inter-partes.



3. That the Defendants/Respondents by themselves, their agents, servants and or officers and or otherwise be restrained by an Order of temporary injunction from entering into, encroaching or interfering in any way with the Plaintiff's property Title Number LR 20170 situate in Mavoko, Machakos County pending the hearing and determination of this suit.
 4. That the OCS Mlolongo and the In-Charge Mlolongo Administration Police Camp do ensure compliance with the injunction.
 5. That the 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 its director ROBERT KAGUTHI, where he deposes that the Plaintiff herein is the sole registered proprietor of all that parcel of land known as title number LR No. 20170 situated in Mavoko, hereinafter referred to as the 'suit land'. He explains that the Plaintiff acquired the suit land through a transfer which was registered and endorsed on the title on 5th October, 2011. He avers that the suit land is delineated on Land Survey Plan number 2088853 which is deposited in the Survey Records Office at Nairobi. Further, that the Plaintiff has been paying land rates to the County Government of Machakos as well as rent to the Ministry of Lands with respect to the suit land. He claims the Plaintiff discovered that the Defendants are encroaching and planning to invade the suit land by digging and dumping construction material as well as putting up structures thereon. He states that on the 23rd September, 2021, the Plaintiff notified the Defendants, through the Daily Nation Newspaper page 36, to stop the illegal invasion and vacate the suit land but it was in vain. Further, the communication was copied to the County Administration and the Kenya Police Service in charge of the area the suit land is located. He reiterates that the Plaintiff is apprehensive that the Defendants, unless restrained, will perpetrate illegal activities on the suit land. He insists that the Defendants will not suffer any prejudice if the orders sought are granted.
3. The Defendants opposed the instant Application by filing a Replying Affidavit sworn by the 5th Defendant JAMES NYANDEW OKOTH where he confirms that all the Defendants have their plots on LR No. 25693 and not the suit land. He contends that the instant Application is vexatious, frivolous and an abuse of the court process. He explains that there is no parcel of land known as LR No. 20170 as described by the Plaintiff and that the plot he purchased from Lakeview Investment Limited was excised from LR No. 25693, where he currently resides with his family. He states that he is a stranger to the suit land. Further, that Deed Plan for the suit land is non-existent and that the Plaintiff is seeking to fraudulently acquire LR No. 25693 by alleging that the suit land is LR No. 20170. He explains that Lakeview Investments Limited from whom he bought his plot, purchased LR No. 25693 from Dr. Ian Magara Bwosiemo and Brenda Kwamboka Manwa vide a Sale Agreement dated the 18th February, 2010. He is aware that Joseph Kaguthi has in the past laid claim of ownership of LR No. 25693 alleging it is actually LR No. 20170 which allegations necessitated Lakeview Investments Limited to institute proceedings in Machakos ELC No. 14 of 2018 against the said Mr. Joseph Kaguthi & Others. Further, the Plaintiff through its agents have since 2018 unsuccessfully attempted to trespass on LR No. 25693 and recently placed placards adjacent to the perimeter wall fence, which had been erected by Lakeview Investments Limited alleging the suit land belongs to it and was not for sale. He insists that the legal and beneficial owner of LR No. 25693 is Lakeview Investment Limited which purchased the same land for valuable consideration vide a Sale Agreement dated the 18th February, 2010 which fact was in his knowledge at the time of purchasing his plot. He reiterates that the instant suit is res judicata since the issue of ownership of LR No. 20170 was substantially in issue in Machakos ELC No. 14 of 2018 where the Plaintiff through his representative Joseph Kaguthi was a party. He reaffirms that the said Joseph Kaguthi who is alleged to have been at one time the registered owner of LR No. 20170 before he allegedly transferred it to the Plaintiff has sworn an affidavit in Machakos ELC No. 14 of



2018 stating that he did not own property known as LR No. 20170 (wrongly misspelt as LR. No. 21070). Further, that the purported transfer of the suit land by Joseph Kaguthi to the Plaintiff herein is questionable, tainted with fraud and the Plaintiff is hence not entitled to the equitable remedy of injunction. He reiterates that he is an innocent purchaser for value without notice. Further, that the Court is *functus officio* as far as the instant suit is concerned more so in respect to LR No. 25693. He contends that the Plaintiff has not attached any rates payments receipts to corroborate its allegations that it pays rates for LR No. 20170.

4. The Plaintiff filed a Further Affidavit reiterating its averments and insisting that the Certificate of Title in its possession is prima facie evidence that it is the absolute and indefeasible owner of the land. Further, that the said Certificate of Title was first issued by the Commissioner of Lands on 14th November, 1996 as a first allotment. It insists that the Defendants have not produced any document of title to the alleged land known as LR No. 25693 and hence there is no proof the said parcel of land exists. It contends that the Defendants are squatting on its land. It states that ELC No. 14 of 2018 relates to a different parcel of land as opposed to the suit land.
5. The Defendants filed a further Replying Affidavit reiterating the averments of their initial Replying Affidavit.
6. The Application was canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of interlocutory injunction pending the outcome of this suit.
8. The Plaintiff in its submissions reiterated its averments as per the respective Affidavits and invited the Court to intervene and protect its interest by barring the Defendants from unlawful occupation of the suit land. To support its averments, it relied on Sections 26(1) and 43(2) of the Land Registration Act as well as the following decision: Gitwanyi Investment Ltd Vs Tajmall Limited and 3 Others (2006) eKLR.
9. The Defendants in their submissions relied on averments in their respective Affidavits and aver that it is only the Director of Surveys and the Land Registrar that can authenticate the allegations of the Plaintiff, and particularly whether the Land claimed by the Plaintiff is LR No. 20170 and not 25693. They insist that the Plaintiff has no cause of action against them as they are innocent purchasers without knowledge of the Plaintiff's purported interest in the suit land. They argue that the Plaintiff's application does not meet the principle in Giella Vs Cassman Brown. They contend that they have been in occupation of the suit land for more than five (5) years, erected permanent structures thereon and granting an injunction would be tantamount to evicting them from the suit land. Further, that the Court is yet to determine whether the suit land is LR No. 20170 or LR No. 25693.
10. In line with the principles established in the case of Giella Vs Cassman Brown & Company (1973) EA 358 as well as the description of a prima facie case as provided in the case of Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125, I will proceed to establish whether the Plaintiff has demonstrated a *prima facie* case to warrant the orders of interlocutory injunction as sought.
11. The Plaintiff claims to be owner of LR No. 20170 and has annexed a Certificate of Title to that effect. It explains that it acquired the suit land through a transfer which was registered and endorsed on the title on 5th October, 2011. It contends that the Defendants are encroaching and planning to invade the suit land by digging and dumping construction material as well as putting up structures thereon.



The Defendants deny trespassing on the suit land and confirm that they all have their plots on LR No. 25693, and not the suit land. They explain that there is no parcel of land known as LR No. 20170 but insist that they purchased their plots from Lakeview Investments Limited which plots were excised from LR No. 25693. They claim that the Plaintiff is seeking to fraudulently acquire LR No. 25693 by alleging that the suit land is LR No. 20170. They provided a background of their plots and explain that Lakeview Investments Limited from whom they bought their plots, purchased LR No. 25693 from Dr. Ian Magara Bwosiemo and Brenda Kwamboka Manwa vide a Sale Agreement dated the 18th February, 2010 which was annexed to the Replying Affidavit. It emerged that one Joseph Kaguthi had in the past laid claim of ownership of LR No. 25693 alleging it is actually LR No. 20170 which allegations necessitated Lakeview Investments Limited to institute proceedings in Machakos ELC No. 14 of 2018 against the said Mr. Joseph Kaguthi & Others.

12. Looking at the documents presented, I note that Joseph Kaguthi transferred the suit land to the Plaintiff on 5th October, 2011. Further, there was indeed a suit being ELC 14 of 2018 where Lakeview Investments Ltd had sued Joseph Kaguthi among other parties and the fulcrum of the dispute therein revolved around ownership of land parcel number 20170 or 25693. I note the said case is yet to be determined. From the averments of the respective parties herein, it seems LR No. 20170 and 25693 are in the same location. Further, from the photographs presented by the Plaintiff, which show buildings, it is evident that the Defendants are already in occupation of the suit land. Since the person who transferred the suit land to the Plaintiff was fully aware of the dispute, I opine that the Plaintiff was well aware of the presence of the Defendants on the land and cannot claim they only recently attempted to trespass thereon and should be restrained therefrom. The Plaintiff has not denied that the said Joseph Kaguthi who is alleged to have been at one time the registered owner of LR No. 20170 before he allegedly transferred it to it, swore an Affidavit in Machakos ELC No. 14 of 2018 confirming he did not own property known as LR No. 20170 (wrongly misspelt as LR. No. 21070). It is my considered view that since there are competing titles to the suit land noting that the dispute herein has previously been litigated in court, it would be important if this matter was set down for hearing to establish the true owner of the suit land. I opine that granting an injunction would be tantamount to issuing eviction orders.
13. Based on the facts as presented, at this juncture I find that the Plaintiff has not established a *prima facie* case to warrant the orders as sought against the Defendants.
14. It is against the foregoing that I find the Notice of Motion dated the 2nd March, 2022 unmerited and will disallow it.
15. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF SEPTEMBER, 2023.

CHRISTINE OCHIENG

JUDGE

