



REPUBLIC OF KENYA



**Gathumbi v Gargar & 3 others (Environment & Land Case E050 of 2023)
[2023] KEELC 21830 (KLR) (28 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E050 OF 2023
CA OCHIENG, J
NOVEMBER 28, 2023**

BETWEEN

SYLVIA WAIRIMU GATHUMBI PLAINTIFF

AND

AHMED IBRAHIM SALAH GARGAR 1ST DEFENDANT

KENNEDY MUSYOKA 2ND DEFENDANT

BISMARCK KIMANZI 3RD DEFENDANT

FREDRICK ODHIAMBO 4TH DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion application dated the 7th June, 2023 where she seeks the following Orders:
 1. Spent.
 2. That this Honourable Court be pleased to issue orders of temporary injunction pending inter parte hearing restraining the Defendants/Respondents by themselves, their servants, agents and/or any person acting under them from entering into, sub dividing, remaining in the possession of, constructing, disposing, alienating, developing, occupying and/or in any way dealing with the Applicants property Title No. (IR. 247769) I.R. 337/1932 in Machakos County pending hearing and determination of this application.
 3. That this Honourable Court be pleased to issue orders of temporary injunction pending inter parte hearing restraining the Defendants/Respondents by themselves, their servants, agents and/or any person acting under them from entering into, sub dividing, remaining in the possession of, constructing, disposing, alienating, developing, occupying and/or in any way



dealing with the Applicants property Title No. (IR. 247769) L.R. 337/1932 in Machakos County pending hearing and determination of this suit.

4. That the Officer Commanding Police Station in Athi River do ensure compliance with the orders issued.
 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 Sylvia Wairimu Gathumbi where she deposes that she is the registered owner of LR. No. 337/1932 (IR. 247769) Machakos hereinafter referred to as the 'suit land'. She explains that she was allocated the suit land vide a Letter of Allotment issued on the 14th January, 1997 and later granted a Certificate of Title dated the 4th June, 2021. She claims the Defendants have invaded the suit land, erected a perimeter wall, built illegal structures thereon and her efforts to remove them have been futile. She contends that she held talks with the Defendants and showed them all her documents including the Allotment Letter, Official Search, Deed Plan, Lease, Payment Receipts, Certificate of Title and Land Rates invoice with a view to proving the root of her title. She insists she adhered to all the processes leading to the issuance of her Certificate of Title. She avers that she has been warned not to set foot on the suit land. She reiterates that she has been unable to access the suit land as the Defendants have employed goons to guard it. She reaffirms that unless the Defendants are restrained, she will be dispossessed from her land and will suffer irreparable loss including damage.
3. The 1st, 3rd and 4th Defendants opposed the instant application and filed a replying affidavit sworn by Bismark Kimanzi, the 3rd Defendant herein, where he deposes that he has authority to swear the affidavit on behalf of the 1st and 4th Defendants. He explains that the late Pius Musembi Kivundu was the registered owner of the suit land and transferred it to Francis Kivundu Mukonzi. Further, that sometime in the year 2014, together with the 1st, 2nd and 4th Defendants, they purchased the said land from the late Pius Musembi Kivundu. He avers that upon payment of the full purchase price, the suit land was transferred to them as joint tenants in equal shares, on 7th September, 2017. He states that together with the 1st and 4th Defendants, they have been paying rates and as at 19th July, 2023, they were issued with a Certificate of Clearance by the County Government of Machakos. He insists that together with the 1st and 4th Defendants, they have been in occupation of the suit land since 2014, and carried massive developments thereon without any interruption from the Plaintiff or any other person claiming on her behalf. He reiterates that the Plaintiff has not established a *prima facie* case and the balance of convenience does not tilt in her favour since they are currently residing on the suit land and will stand prejudiced if the orders sought are granted.
4. The Plaintiff filed a further affidavit wherein she highlights the Court proceedings and sought for the Respondent's affidavit to be expunged from record as it was filed without leave. She argues that a Search dated the 9th September, 2017 filed by the Defendants, cannot be relied upon in a claim for ownership of land. Further, that they have no Lease to the suit land and their Deed Plan appears altered. She avers that the purported Sale Agreement is doubted as it was signed on 10th February, 2014 and it was not stamped at the Land Registry to ensure compliance. Further, there is no proof that the deceased vendor was paid nor receipts provided to demonstrate land rates were paid. She explains that on 15th September, 2023, she conducted a search at the Lands' Registry Nairobi and she was issued with a current search Certificate and a Lease. She insists that there are no developments on the suit land and the photographs annexed to the replying affidavit were taken elsewhere to convince the court of the said developments. She reaffirms that the Defendants do not reside on the suit land and that she has established a *prima facie* case.
5. The application was canvassed by way of written submissions.



Analysis and Determination

6. I have considered the instant Notice of Motion application, respective affidavits including rivalling submissions and the only issue for determination is whether the Plaintiff is entitled to orders of interlocutory injunction restraining the Defendants from the suit land, pending outcome of the suit.
7. The Plaintiff in her submissions reiterated her averments as per the two affidavits and contended that she had established a prima face with a probability of success. She highlighted the anomalies in the Defendants' Deed Plan and insisted it appears altered. She argued that the Defendants did not undertake a search before entering into a Sale Agreement with the vendor. She explained that her concrete beacons including temporary house were demolished and for her safety, she opted not to reside on the suit land. Further, that the Defendants are in the process of subdividing the suit land and selling to unsuspecting clients. She further submitted that the Defendants invaded her land in July, 2022 and commenced constructing a permanent house thereon but only stopped briefly when she filed a suit. To support her averments, she relied on the following decisions: *Giella v Cassman Brown*; *Munyu Maina V Hiram Gathitha Maina* (2013) eKLR and *Robert Mugo wa Karanja v EcoBank (K) Ltd & Another* (2019) eKLR.
8. The Defendants in their submissions insisted that the Plaintiff has not established a *prima facie* case and aver that the suit land was sold to them by Pius Musembi Kivundu in the year 2014. They submitted that they have demonstrated how they acquired the suit land and challenged the Plaintiff on why since 1997 she had never taken possession of the said suit land. They contended that in the interest of justice, injunctive orders should not be issued so that parties can be given a chance to demonstrate authenticity of their respective titles. They also submitted that they will suffer irreparable loss if the Court grants the orders of injunction as sought as they have extensively developed the suit land. To support their arguments, they relied on the following decision: *Charles Alex Njoroge v National Bank of Kenya Ltd & 2 others* HCCC No. 173 of 2014.
9. The Plaintiff has sought orders of injunction to restrain the Defendants from interfering with the suit land, which fact is opposed by the Defendants. The principles for granting of interlocutory injunction is well established in the case of *Giella v Cassman Brown & Co Ltd* (1973) E.A. 356, while in the case of *Mrao Ltd v First American Bank Ltd & 2 Others*, (2003) KLR 125 the court provided an elaborate description of what a *prima facie* case should entail. The Plaintiff claims she is the registered proprietor of the suit land and annexed various documents including a Certificate of Title to that effect. She avers that the Defendants have invaded the suit land and commenced construction of certain permanent structures thereon. Further, that they have commenced subdivision of the suit land and intend to sell the land to unsuspecting third parties. The Defendants in their response insist that they purchased the suit land in 2014 from one Pius Musembi and also annexed various documents including a Certificate of Title to that effect. The Plaintiff has challenged the Defendants' Deed Plan and insisted that they have annexed photographs taken elsewhere so as to influence the court.
10. Looking at the documents presented by both parties, I note the Plaintiff was issued with a Letter of Allotment dated the 14th January, 1997 and obtained her Certificate of Title on the 4th June, 2021. I further note that the Transfer to Pius Musembi Kivundu is dated the 17th July, 1998 while the one to the Defendants as joint tenants in equal shares is dated the 2nd September, 2017. The Plaintiff insists that the Defendants documents are not authentic while the Defendants insist they are the ones in possession of the suit land and extensively developed it. Insofar as I find that the Plaintiff has raised triable issues and established a prima face case that warrant the court's determination, I however note that there are two competing titles to the suit land. Further, I note it is actually the Defendants in occupation of the suit land as the Plaintiff has admitted that she is not in possession thereon. I opine that the issues on



validity of Defendants' title raised by the Plaintiff are best determined in a full trial where each party will present their documents and demonstrate how they acquired the suit land. In the case of Nairobi Civil Appeal 151 of 2011 *Invesco Assurance Co Ltd v MW (Minor suing thro' next friend and mother (HW))* [2016] eKLR the Court held that:

“A conservatory order is a judicial remedy granted by the court by way of an undertaking that no action of any kind is taken to preserve the subject until the motion of the suit is heard. It is an order of status quo for the preservation of the subject matter.”

11. Based on the facts before me, at this juncture, noting that there are two competing titles, I opine that an order of status quo pending outcome of the suit, would be most suitable.
12. In the foregoing, I direct that the obtaining status quo be maintained where no party should put up any further developments on the suit land nor transfer it to third parties pending the outcome of this suit.
13. The upshot of this is that the Notice of Motion Application dated the 7th June, 2023 is partially successful but will not make any order as to costs.

DATED SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 28TH DAY OF NOVEMBER, 2023

CHRISTINE OCHIENG

JUDGE

