



**Adeti Limited v Kamau & 2 others (Environment & Land Case
E106 of 2023) [2023] KEELC 21542 (KLR) (14 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21542 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E106 OF 2023
AA OMOLLO, J
NOVEMBER 14, 2023**

BETWEEN

ADETI LIMITED PLAINTIFF

AND

JAMES MWANIKI KAMAU 1ST DEFENDANT

EVANS KAMAU 2ND DEFENDANT

CHIEF LAND REGISTER 3RD DEFENDANT

RULING

1. The 1st and 2nd Defendants filed a preliminary objection dated 1 April 8, 2023 on the grounds that the court has no jurisdiction to hear and determine this matter as the subject property's current market value is less than Kshs.20,000,000 and the court's pecuniary jurisdiction is to hear and determine suits whose subject matter has an open market value of Kshs.20,000,001.00/ and above.
2. The Plaintiff filed a notice of motion dated March 14, 2023 seeking for the following orders;
 - a. Spent.
 - b. Spent
 - c. That pending the hearing and final determination of this suit, an Order of Interlocutory Injunction is hereby issued wholly restraining the 1st and the 2nd defendants, their agents and, employees, or any other person acting on their directions from ever entering, accessing, dealing in, trespassing into, invading and breaking into and or while thereon evicting the Plaintiff's workers or demolishing the buildings, gates and perimeter walls or in any other way interfering with the Plaintiff's quiet possession of the suit property known as Title No. Nairobi Block 105/4988 situated at Utawala Estate in the Embakasi area within Nairobi County.



- d. That the Officer Commanding Embakasi Police Station do ensure compliance with the Orders of this Honorable Court.
 - e. That the Honourable Court grants any other or additional Orders that it deems fit in the circumstances to protect the Plaintiff and secure the interest of justice.
 - f. That the costs of this application be provided for.
3. The Motion was supported by an affidavit sworn on March 14, 2023 and supplementary affidavit sworn on June 2, 2023 which was also in response to the filed preliminary objection, both sworn by Aldrin Ojiambo, the Director of the Plaintiff. The Plaintiff stated that it was registered as the proprietor of Nairobi Block 105/4988 measuring approximately 0.1997 hectares situated in Utawala Estate, Embakasi area within Nairobi County (herein after referred to as “the suit property”).
 4. The Plaintiff stated that prior to the registration and vacant possession of the suit property, it erected a perimeter wall with an electric fence, a workshop together with a workers' house sometime in 2009 and has retained quiet possession since 2009.
 5. The Plaintiff averred that the 1st defendant through a corrupt scheme purported to acquire a recent and parallel title of the suit property and the 2nd Defendant has threatened to invade and evict its workers disregarding the prior title held by the Plaintiff which has never been contested in any Court and or canceled as confirmed by a green card search issued by the 3rd Defendant on August 4, 2022.
 6. The Plaintiff further stated that the 1st and 2nd Defendants sent their agents and goons to the suit property on 11th of March 2023 where they left a threateningly inauspicious alert that they will forcefully evict the Plaintiff any time. They explained that the suit property was previously owned by Embakasi Ranching Company Limited (ERCL) under a larger property known as Nairobi Block 105 which was then subdivided in 1994 giving rise to Titles 4985 to 5128 including that of the suit property.
 7. The Plaintiff averred that it held a share in Embakasi Ranching Company Limited (ERCL) and was allotted property number Nairobi Block 105/4988 under certificate 012498 for the consideration of Ksh.1,000,000 and upon subdivision of the Nairobi Block/ 105, the Government of the Republic of Kenya granted ERCL a Lease registered on 12/4/2012 and issued it with a Certificate of Lease. That further, ERCL transferred the suit property to the Plaintiff under the transfer of lease dated 31/ 5/2012 and registered on 22/6/2012 and Certificate of Lease over the same was issued to it on 22/6/2012.
 8. The Plaintiff stated that in 2015 they applied for a bank facility to be secured by the suit property but was informed that there was an inhibition Order issued in Nairobi HCCC No.395/2011 stopping all dealings in the suit property, a suit where the Plaintiff was not a party. The Plaintiff further stated that in a ruling delivered on July 20, 2016, Lady Justice L. Gacheru discharged the said inhibitory orders of Motion dated 6/7/2011.
 9. The Plaintiff added that sometime in July 2022, the 2nd Defendant called the Mr. Ojiambo from 0xxx claiming that he had acquired the suit property and threatened to evict the Plaintiff's workers residing on the suit property if not granted vacant possession immediately. Also, that the 2nd Defendant had previously visited the suit property and delivered a certificate of search purporting that the 1st Defendant was the owner of the suit property as shown in the title to the 1st Defendant issued on 01/01/1970. The Plaintiff explained that the suit property was in 1995 excised from the larger Nairobi Block 105 as per the survey records, thus its title could not be issued in 1970.
 10. The Plaintiff stated that the 2nd Defendant in paragraphs 13 to 15 of his Replying Affidavit, confirmed that in 2016 the suit property was no longer available at Embakasi Ranching Company Limited for



transfer to them and yet they acquired a parallel title over the same more than eight (8) years after the same had been transferred to the Plaintiff.

11. It is the Plaintiff plea that they will suffer irreparable loss and damage if the Defendants are not restrained from making good their threats to evict the workers and interrupt the business and quiet occupation of the suit property.

2nd Defendant's Replying Affidavit

12. The 2nd Defendant swore a replying affidavit on May 2, 2023 stating that his late grandmother, (who is the 1st Defendant's late mother) was a shareholder at Embakasi Ranching Co. Ltd with 2 shares pursuant to share certificate number 4048 dated August 1, 1978. That subsequent to the said Share Certificate, his grandmother was issued with an allotment letter serial number 2331, dated November 28, 1982 which allotted her plot numbers R.54 and R.55.
13. He explained that upon subdivision and/or mutation of the mother title, Plot number R.54 and R.55 were assigned Title Numbers Nairobi/Block 105/1987 and Nairobi/Block 105/1988 respectively and Certificates of Title thereto were procured in the years 2016 and 2020 respectively.
14. The 1st Defendant stated that on or about September 2007, his late grandmother elected to give one (1) of her shares with ERC Ltd to the 1st Defendant. That on or about September 17, 2007, they proceeded to pay the requisite transfer fees for the 2 plots and title Number Nairobi/Block 105/4987 was to be transferred to the 1st Defendant and Title Number Nairobi/Block 105/4988 to herself. The 1st Defendant deposed further that before they could process the Certificates of Lease, the grandmother passed away in November 2014. Thereafter, the family unanimously agreed that the 1st Defendant would be the beneficiary of the second plot allotted to his late mother and the title to be processed in his name as well; a position that was communicated to the officials of ERC Ltd.
15. He stated that the 1st Defendant commenced and managed to transfer Title Number Nairobi/Block 105/4987 on or about 19th September 2016 but the process of procuring that of Nairobi/Block 105/4988 (the suit property) was more challenging as its Lease could not be traced by ERC Ltd forcing the 1st Defendant to initiate the process of procuring a grant from allotment letter. He added that on or about 4th November 2020, the 1st Defendant became a beneficiary of the former government's special titling programme and was issued with a lease for the suit property.
16. The 1st Defendant also stated that this court lacks the pecuniary jurisdiction to hear and determine the instant application as the suit property's current open market value is less than KShs.20,000,000 as per the valuation report dated 29th September 2015 which put the value to be Kshs.8,600,000. The 1st Defendant contended that though the Plaintiff has been in occupation of the suit property, the same has been interrupted as he has laid claim thereon. He added that the title registered under the Plaintiff, was procured through fraudulent and illegal means which position has been confirmed by an official search annexed to Plaintiffs application and marked as AO-13.
17. The 1st Defendant contended that the Plaintiff's failure and/or neglect to enjoin ERC Ltd as a Defendant/Interested Party to this suit goes to show their intention and/or motive of defrauding the 1st Defendant of the suit property. He further contended that the Plaintiff does not have a prima facie case to warrant the granting of the orders sought.

Submissions

18. The Plaintiff filed submissions dated June 26, 2023 and the 1st and 2nd Defendants filed submissions dated July 14, 2023. With regard to the Preliminary objection by the 1st and 2nd Defendants, the



- Plaintiff submitted that the same is a non-starter stating that the valuation report dated May 2, 2023 authoritatively puts the value of the suit property at Kshs 22,500,000 within the jurisdiction of the Court. They added that the Respondent has not provided a contrary valuation report to impeach the valuation report produced.
19. The Plaintiff submitted that preliminary objection can neither be raised where the pleaded facts are contested nor where the pleaded facts need to be ascertained and cited Court of Appeal of Kenya in *Nitin Properties Ltd v. Singh Kalsi & another* [1995] eKLR.
 20. On its application, the Plaintiff submitted on the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent as laid out in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR.
 21. The Plaintiff submitted that root of the title it holds over the suit property is traceable while the 1st Defendant acquired a later title and no credible search of that title has been exhibited nor can the root be traced. Further, they submitted that when there are two competing titles, the first in time will prevail and in support cited the case of *Wreck Motors Enterprises v The Commissioner of Lands and others*, Civil Appeal No. 71 of 1997 as reaffirmed in *Benia Properties Limited v Svedna Mohammed Burbannudin Sabed & 4 others* [2015] eKLR, case of *Gitwany Investment Ltd v Taimal Ltd & 3 others* (2006) eKLR
 22. The Plaintiff submitted that it carries the business of a workshop on the suit property while the 2nd Defendant intends to enter and sell the suit property thus loss likely to be incurred if the workshop were to shut down, cannot be adequately compensated by an award of damages.
 23. The Plaintiff further submitted that the 1st and the 2nd Defendants in obtaining parallel titles and thereafter threatening to forcefully take over the physical possession of the suit property tilts the balance of convenience in their favour. It is their averment that it is the duty of this Court to ensure that parties as far as possible ought not to be allowed to obtain a position of advantage through any blatant and unlawful acts.
 24. The 1st and 2nd Defendants laid out the background of the case stating that the Plaintiffs filed the suit claiming ownership of the suit property having bought it from Embakasi Ranching Company Limited in the year 2009 and has had quiet possession since then. They argue that they are disputing the pecuniary jurisdiction of the court on the basis of the declared value of the suit property as per the Plaintiff's bundle of documents marked AO-8 and AO-9. That the magistrates' courts are vested with jurisdiction over land matters whose value does not exceed 20,000,000/- such as the present case.
 25. They submitted that the objection raised is not on controverted facts but on a pure point of law and premised on the express provisions of article 23(2), 26, 50(1), 169 (1)(a) and (2) of the *Constitution of Kenya*, 2010, section 3 of the *Environment and Land Court Act*, 2011 and section 7 and 9 of the *Magistrates' Court Act*, 2015. In support they cited the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696.
 26. The 1st and 2nd defendants submitted that the value of the subject matter being less than Kshs.20,000,000 this court has no jurisdiction, a primary and important issue which must deal and be consistent with the principle elucidated by Nyarangi JA in the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya)Ltd* [1989] KLR 1.
 27. On the issue as to whether the plaintiff should be granted the reliefs sought, the 1st and 2nd defendants submitted that the orders are discretionary in nature and equitable and while citing the case of *John Njue Nyaga v Nicholas Njiru Nyaga & another* (2023)- eKLR submitted that equity calls to those seeking its aid to come before it with clean hands and also do equity. They explained that the 1st defendant's late mother was a registered member of the ERC Ltd as evidenced by the member



share certificate dated 1st August 1978 which was not transferred to any person, he added that 1st Defendant(son) as a shareholder/agent on 17th September 2007 thus there is a question on how the Plaintiff acquired Non-member Certificate of Plot ownership dated 14th May 2008. They added that throughout the period that the Plaintiff transacted with ERC Ltd behind the 1st Defendant mother's back, he did so with full knowledge that the suit land had been allocated to her and was waiting the requisite documents to enable her acquire a title.

28. The 1st and 2nd Defendants submitted that the 1st Defendant is the beneficial owner of the mother's share and parcel was issued with a Certificate of Lease as evidenced by the search certificate procured by the 1st and 2nd Defendants on 14th July 2022. They stated that subjecting the Plaintiff's application to the tests set out in the case of *Giella v Cassman Brown* [1973] E.A 358 it is close to impossible to make a determination on the prayers sought.
29. I begin by considering whether or not this court has jurisdiction to hear this matter. The argument put by the defendants is that the value of the subject matter is below Kshs 2000000. This in my view which I so hold means that both this court and the Magistrate's court has jurisdiction to hear and determine the claim. The value of the subject matter does not oust the jurisdiction of the ELC court except the court in exercise of its powers can transfer the matter for trial to the Magistrate's court. It is my determination that the preliminary objection is misplaced and it is hereby dismissed.
30. Next, can the orders of temporary injunction be issued? Both the plaintiff and the defendants are laying claim to the suit property. The applicant has annexed searches and a copy of the title to demonstrate that he has a *prima facie* case. Besides, the Plaintiff are in physical possession and deposed that they are utilizing the same, according to them since 2009. Under the heading of balance, the scale tilts in favour of the Plaintiff retaining possession until the matter is heard on merits.
31. The case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR which defined the concept of balance of convenience as:

‘The meaning of balance of convenience tilt in favor 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 plaintiff 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 plaintiff's; to show that the inconvenience caused to them be greater than that which may be caused to the defendant's inconvenience.

In other words, the plaintiff has to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting”

32. In the instant, refusing to grant the Plaintiff the order of temporary injunction may result in their dispossession of the suit property by the Defendants who have not denied that they have been attempting to gain access to the suit property. Consequently, I am persuaded to grant the application to allow the preservation of the suit property pending determination of the main suit. The application is allowed as presented under order numbers (c), (d) and (f) of the motion.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF NOVEMBER, 2023

A. OMOLLO

JUDGE

