



**Monde & 6 others v Masai & 4 others (Environment & Land Case E040 of 2021) [2022] KEELC 3946 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3946 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE E040 OF 2021**

**TW MURIGI, J  
JULY 27, 2022**

**BETWEEN**

**REGINA MUTINDA MONDE ..... 1<sup>ST</sup> PLAINTIFF  
GRISHON KITHUVI KIMWELI ..... 2<sup>ND</sup> PLAINTIFF  
JULIANA NZISA MUIYA ..... 3<sup>RD</sup> PLAINTIFF  
MARTIN WAMBUA NG'ATA ..... 4<sup>TH</sup> PLAINTIFF  
EVELYNE KATHINI KATULE ..... 5<sup>TH</sup> PLAINTIFF  
MARY MUENI MUINDI ..... 6<sup>TH</sup> PLAINTIFF  
WINNICASTER MBITHE KIUMI ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**LABAN NDUVA MASAI ..... 1<sup>ST</sup> DEFENDANT  
CHAIRMAN MUKAA SUB-COUNTY LAND CONTROL BOARD .... 2<sup>ND</sup>  
DEFENDANT  
COUNTY SURVEYOR, MAKUENI COUNTY ..... 3<sup>RD</sup> DEFENDANT  
COUNTY LAND REGISTRAR, MAKUENI COUNTY ..... 4<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated 22<sup>nd</sup> November, 2021 brought pursuant to the provisions of Article 159 (2)(d) of the *Constitution*, Section 63(e) of the *Civil Procedure Act*, Sections 3, 13(7) (a) & 19 (2) of the *Environment and Land Court Act*, and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 the Plaintiffs/Applicants are seeking for the following orders: -



1. Spent.
2. That an Order of injunction do issue restraining the Defendants, their servants, agents and/ or anybody working under them or claiming through them from transferring, or authorizing transfer and/or interfering with the possession by Defendants of the land Parcels consisting of land parcels title registration numbers Machakos/Ulu/1001-1072 which forms part of the land parcels known as Machakos/Ulu/381, 398, 400, 410, 412, 415, 452 and 501 pending hearing and determination of this application.
3. That an Order of injunction do issue restraining the Defendants their servants, agents and/ or anybody working under them or claiming through them from transferring, or authorizing transfer and/or interfering with the possession by Defendants of the land Parcels consisting of land parcels title registration numbers Machakos/Ulu/1001-1072 which forms part of the land parcels known as Machakos/Ulu/381, 398, 400, 410, 412, 415, 452 and 501 pending hearing of this suit.
4. That costs of this application be borne by the Defendants.

### **Applicants' Case**

2. The application is premised on the grounds on its face together with the supporting affidavit of Regina Mutinda Monde sworn on the even date. A summary of the grounds and the averments is that the Applicants are the lawful owners of the suit properties otherwise known as land parcel numbers Machakos/Ulu/381, 398, 400, 410, 412, 415, 452 and 501. That the 1<sup>st</sup> Respondent when purporting to implement a Court order issued in Makueni ELC Judicial Review Case No. E002 of 2021, had the suit properties combined with land parcel numbers Machakos/Ulu/451 and 28 which he then subdivided into plots ranging from Machakos/Ulu/1001-1072. The Applicants averred that the resultant subdivisions have led to an overlap with the suit properties which is irregular and unlawful.
3. The Applicants further averred that the subdivisions could not have become possible without approvals emanating from the offices of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. The Applicants stated that the 1<sup>st</sup> Respondent is now threatening the Applicants with eviction. The Applicants contend that if the 1<sup>st</sup> Respondent transfers the suit properties to 3<sup>rd</sup> parties, the Applicants will be exposed to irreparable loss which cannot be compensated by an award of damages. The Applicants argued that they have a strong case against the Respondents with the probability of success. The Applicants contend that the balance of convenience tilts in favour of granting the injunction.

### **The 1<sup>st</sup> Respondent's Case**

4. Opposing the application, the 1<sup>st</sup> Respondent *vide* a replying affidavit sworn on 21<sup>st</sup> December, 2021 averred that he was one of the beneficiaries of land Parcel Nos. 450, 451 and 28. He averred that the Applicants do not have a good title to the suit properties and that the respective entries in their search certificates are based on fraud and corrupt schemes. The 1<sup>st</sup> Respondent argued that the Applicants' parcels of land are distinct and separate from Title Nos. 450 and 451 and the resulting subdivisions thereof. He contends that the Applicants have approached this Court with unclean hands by availing suspect documents and the concealment of material facts.
5. Opposing the application, the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Respondents *vide* a replying affidavit, sworn by Roseline M. Soo on 2<sup>nd</sup> February 2022 on their behalf averred that the land parcels in dispute are Title Nos. Machakos/Ulu/381, 398, 400, 410, 412, 415, 452, 501, 450 and 451 and in addition provided a description of the registration details of each parcel. That according to their records, suit



parcels numbers 400, 381, 412 and 398 were acquired by the Government (KENHA) and are utilized for public parking. She added that the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents have filed Counter Claims against the Plaintiffs' suit seeking cancellation of their Title deeds on the basis of fraud, illegality and irregularity. They argued that the application is incompetent for seeking orders of interlocutory injunction against the Government since if such orders are granted, it would be against public interest.

6. In a supplementary affidavit sworn by Regina Mutinda Monde on 25<sup>th</sup> February, 2022, the Applicants averred that the Respondents had not presented proof of the acquisition of the suit plots by the Government. The Applicant averred that the only acquisition by Government was in respect of Parcel No. Machakos/Ulu/30 which measures 0.46 Ha and thus the suit plots are outside the public parking lot.
7. A further affidavit was sworn by Laban Masai and filed on 17<sup>th</sup> March, 2022. He averred that subsequent to the Government's acquisition of Machakos/Ulu/30, two subdivisions emanated therefrom namely Machakos/Ulu/380 and Machakos/Ulu/381. That Machakos/Ulu/380 was further subdivided irregularly by Muthoka Itumo and one subdivision thereof, Plot No. 427, was the subject of Nairobi HCCC No. 1727 of 1990. That pursuant to the Ruling of Justice Pall in the said Case, Title Nos. 450 and 451 registered in the name of Muthoka Itumo were cancelled and thereafter registered in the names Mutetema Itumo and Kamene Nzalai. The 1<sup>st</sup> Respondent argued that the land being disputed by the Applicants is public land occupied as a parking area.
8. The application was canvassed by way of written submissions.

### **The Applicants' Submissions**

9. The Applicant's submissions were filed on 28<sup>th</sup> February, 2022. Counsel submitted that the Applicants had met the threshold for grant of injunctive orders as outlined in the case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. Counsel argued that the Applicants had established a prima facie case as they had annexed copies of Title deeds to the suit properties. Counsel went on to submit that the annexed copies of official search certificates issued by the 3<sup>rd</sup> Respondent did not bear any endorsement on them to show acquisition of the land by Government.
10. On irreparable injury, Counsel submitted that the Applicants are in possession of the suit properties. That the 1<sup>st</sup> Respondent has issued eviction notices and it threatens to cost the Applicants losses in rent which they collect from tenants in the suit property. Counsel went on to submit that the balance of convenience is in favour of the Applicants since they are in possession and have made improvements to the suit property. The Applicants relied on the following cases to buttress their submissions: -
  1. [\*Nguruman Limited v Jan Bonde Nielsen & 2 Others\*](#) [2014] eKLR;
  2. [\*Mrao Ltd v First American Bank of Kenya Ltd & 2 Others\*](#) [2003] eKLR;
  3. [\*Pius Kipchirchir Kogo v Frank Kimeli Tenai\*](#) [2018] eKLR.

### **The 1<sup>st</sup> Respondent's Submissions**

11. The 1<sup>st</sup> Respondent submissions were filed on 21<sup>st</sup> March, 2022. Counsel submitted that the 1<sup>st</sup> Respondent sub divided land parcel Machakos/Ulu/450 upon being granted consent to do so and that the issue of overlap was not supported or proved by any evidence. Counsel submitted that Applicants have failed to prove that they are the registered owners of Parcel Nos. Machakos/Ulu/381, 398, 400, 412, 415 and 501.



12. On irreparable injury, Counsel submitted that the Applicants should not be allowed to benefit from an illegal occupation of Machakos/Ulu/450 registered in the name of the 1<sup>st</sup> Respondent after their parcels were acquired by the Government. Counsel argued that the balance of convenience tilts in favour of the 1<sup>st</sup> Respondent.
13. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents elected not file submissions in opposition to the application.

### **Analysis and Determination**

14. Having considered the application, affidavits and the rival submissions, I find that the issue for determination is whether the Applicants have met the threshold for the grant of an order of injunction.
15. The principles applicable in an application for an injunction were laid down in the celebrated case of *Giellla v Cassman Brown & Co Ltd* 1973 EA 358 where the Court held that in order to qualify for an injunction. First the Applicant must show 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 harm which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on a balance of convenience.
16. The first issue for determination is whether the Applicant have established that they have a *prima facie* case with a probability of success.
17. A *prima facie* case was defined by the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* (2003) eKLR as follows;

“a *prima facie* case in a civil application includes but is not confined to a genuine and arguable case”. It is a case 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.”
18. The Plaintiffs/Applicants averred that they are the lawful owners or have proprietary interest in the suit properties known as Machakos/Ulu/400, Machakos/Ulu/452, Machakos/Ulu/415, Machakos/Ulu/381, Machakos/Ulu/410, Machakos/Ulu/412, Machakos/Ulu/501 and Machakos/Ulu/398. In that regard the Applicants annexed copies of the of the titles marked as annexures RMM1 TO RMM7.
19. On the other hand, the 1<sup>st</sup> Respondent averred that the Applicants do not have a good title as the entries were obtained by fraud or by corrupt means. The 2<sup>nd</sup> to 5<sup>th</sup> Respondents stated that they had filed a Counter Claim to have the titles cancelled as they were obtained illegally, irregularly and by means of fraud.
20. Section 26(1) of the *Land Registration Act* provides that the certificate of title is to be held as conclusive evidence of proprietorship. It provides as follows;
  - 1) The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except: -
    - a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

It is evident from the averments by the Respondents that they are challenging the certificate of titles held by the Applicants on the grounds that they were obtained by means of fraud or through a corrupt scheme.

21. The issue for determination is whether the Applicants obtained the certificate of titles by means of fraud or through a corrupt scheme. At this stage the Court is not required to determine the issues which will be canvassed at the trial. In the case of *Mbuthia v Jimba Credit Finance Corporation Ltd & Another* (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.”

22. Similarly, in the case of *Edwin Kamau Muniu v Barclays Bank of Kenya Ltd* Nairobi 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 that stage is whether the applicant is entitled to an injunction.”

23. In the case of *Joash Ochieng Ougo & Another v Virginia Edith Wambui Otieno* (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 in a trial.”

24. The Court is aware that at the interlocutory stage, it is not required to make any definitive conclusion on the matters that are in controversy. In the present case, it is evident that the Applicant’s proprietary claim over the suit property is anchored on the certificate of tiles. The issues whether the Applicants obtained the certificate titles fraudulently or through a corrupt scheme can only be determined in a full trial where the parties will have the opportunity call evidence and have the same challenged by way of cross examination. Looking at the documents annexed to the respective affidavits, it is evident that the Plaintiff’s claim is not baseless.

25. On the basis of the material that is on record, I find that the Applicants have established a *prima facie* case with a probability of success.

26. On the issue whether the Applicants will suffer irreparable harm which cannot be adequately compensated by award of damages, the Applicants must demonstrate that it is a harm that cannot be quantified in monetary terms or cannot be cured.

27. The Court of Appeal in *Nguruman Limited v Bonde Nielsen & 2 Others* (2014) eKLR held that: -

“On the second factor, the applicant must establish that he might otherwise suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate *prima facie*, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the Applicant. The equitable remedy of



temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot adequately be compensated by an award of damages. An injury is irreparable where there is no stand by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation of whatever amount, will never be adequate remedy.”

28. On whether the Applicant will suffer irreparable harm which cannot be adequately be compensated by an award of damages, it is clear from the certificate of titles that the Applicants are the lawful owners of the suit properties. The Applicants alleged that that the 1<sup>st</sup> Respondent has threatened to evict them and demand notices have been issued in that regard. The said letters were marked as annexures “RMM10” in the Applicants supporting affidavit. They stated that they are apprehensive that they would be evicted if the 1<sup>st</sup> Respondent transfers the suit properties to third parties, From the foregoing, this Court is convinced that the Applicants stands to suffer irreparable harm if the orders sought are not granted and they are evicted from the suit properties.
29. On the issue of balance of convenience, the Court has to weigh the hardship to be borne by the Applicants by refusing to grant the injunction, against the hardship to be borne by the Respondents by granting the injunction. It is evident that the Applicants are in possession of the suit properties. Looking at the evidence presented by the parties herein, I find that if the suit properties are not preserved, they may be wasted away. On the issue of balance of convenience, I find that it tilts in favour of maintaining the status quo on the suit properties.
30. In light of the foregoing, I find that the Applicants have met the threshold for the grant of a temporary injunction. Consequently, the application dated 22<sup>nd</sup> November 2022 is allowed as prayed pending the hearing and determination of this suit.

**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF JULY 2022.**

IN THE PRESENCE OF: --

Court assistant – Mr. Kwemboi.

Mutia for the Applicants.

Makundi for the 1<sup>st</sup> Respondent.

Lungu for the Hon. Attorney General.

