



REPUBLIC OF KENYA



KENYA LAW
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**Butt v Mamo & 8 others (Environment & Land Case 001 of 2022)
[2022] KEELC 14881 (KLR) (25 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 14881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 001 OF 2022**

AK BOR, J

OCTOBER 25, 2022

BETWEEN

ABID MAHMOUD BUTT PLAINTIFF

AND

DABASA HALKAHI MAMO 1ST DEFENDANT

WILSON KANYI NDERI 2ND DEFENDANT

SAMUEL TIANDA 3RD DEFENDANT

LUCY NYARUAI NDERITU 4TH DEFENDANT

SAMUEL MACHARIA WARUI 5TH DEFENDANT

SAMSON GICHUKI 6TH DEFENDANT

BASHIRI DABASO HALKAN 7TH DEFENDANT

ABDI DABASO HALKAN 8TH DEFENDANT

DAVID MWANIKI KANYI 9TH DEFENDANT

RULING

1. The plaintiff brought the application dated March 22, 2022 seeking to have the defendants, members of their families or their agents restrained through an injunction from wasting, damaging, alienating, cultivating, planting on or otherwise carrying out any activity on land reference number 10422/9 (“the suit property”) pending hearing of the application and determination of the suit. The application was made on the grounds that the plaintiff was the registered owner of the suit property and that the defendants had commenced or were continuing destruction of the suit property and had issued threats of violence against the plaintiff.



2. The plaintiff swore the affidavit in support of the application and averred that he purchased the suit property and was issued a title over the land in 2016. He produced a copy of the title dated March 21, 2016 together with the transfer executed by George O Oraro and David M Silverstein. He averred that at the time of transacting he was made to understand that the temporary structures on the suit property were being occupied by former employees of the previous owner. When they refused to vacate the land, he filed Nyeri ELC Case No 230 of 2016 and obtained judgment for their eviction from the land on October 14, 2021. That upon the entry of that judgment, the defendants in this case filed Nyeri ELC Case No E008 of 2021 seeking orders for adverse possession. They also filed Nanyuki ELC Case No E001 of 2021 seeking similar orders.
3. Mr Butt deponed that when he entered the suit property in 2016 the only structures that existed on the suit property were the housing units and bits of cultivation being done around the homesteads. After the establishment of the British Army Training Unit (BATUK) Camp across the suit property, temporary structures serving as curio shops and eateries sprung up to tap onto the business potential from the BATUK camp, which he attributed to the defendants.
4. He averred that the defendants had intensified their trespass on the suit property and employed mechanized cultivation over large expanses of the suit property. He attached photographs of a tractor ploughing the land. He averred that he had been threatened with violence by the 8th defendant and on reporting to the police he was advised by the officer commanding the Nanyuki Police Station to obtain a court order.
5. The file was placed before this court on March 23, 2022 and the court noted that there was the judgment of Lady Justice M C Oundo which was delivered by judge J O Olola on October 14, 2021 declaring the plaintiff in this suit as the owner the suit property. The judgment gave the defendants 30 days to vacate the suit property. The court observed that another suit had been filed claiming adverse possession of the suit property. This court granted a temporary order of injunction and directed the plaintiff to serve the application for *inter partes* hearing on April 21, 2022.
6. Upon service, the defendants filed the application dated March 24, 2022 seeking the discharge of the orders this court made on March 23, 2022 on the grounds that there was material non-disclosure of facts by the plaintiff and that the suit offended section 6 of the Civil Procedure Act because there was Nyeri ELC Case No 230 of 2016, Nyeri ELC Case No E008 of 2021 (O.S) and Nanyuki ELC Case No E001 of 2021 involving the same suit property and similar parties. The 4th defendant swore the affidavit in support of the application and attached copies of some of the pleadings filed in those cases. She deponed that Nyeri ELC Case No E008 of 2021 (O.S) had proceeded for hearing of the application for injunction before judge J Olola at the Nyeri ELC. She faulted the plaintiff for filing this suit instead of addressing his grievances to the judge in Nyeri.
7. The defendants filed a notice of preliminary objection on March 28, 2022 raising the issue of the existence of the other suits while terming this suit an abuse of the due process of court.
8. Mwangi Kariuki, the advocate for the plaintiff swore the affidavit opposing the defendants' application dated March 24, 2022 and clarified the position regarding the cases before the Nyeri ELC and the distinction between the cases pending in the two courts.
9. In her replying affidavit sworn on April 20, 2022, the 4th defendant reiterated that the defendants were not trespassers on the suit property. She explained that this court stayed Nanyuki ELC Case No E001 of 2021 and directed that the defendants' claim be filed in Nyeri. She averred that the defendants lived, farmed, reared livestock and derived their livelihood from the suit property and that injuncting them



- from carrying out any activities on the suit property would deprive them of the crops they had already planted and it would also render them destitute yet they had lived on the suit property for many years.
10. Parties filed submissions which the court has considered. The plaintiff submitted that he filed this suit against the defendants who he did not know of at the time he filed Nyeri ELC Case No 230 of 2016 and obtained judgment against the trespassers on his land. The plaintiff cited *Giella v Cassman Brown (1973) EA 358* and *Mrao v First American Bank of Kenya limited and 2 Others [2003] eKLR* on the conditions to be met for grant of an interlocutory injunction. He submitted that as the registered owner of the suit property he had made out a *prima facie* case. He explained that he had allowed the status quo to prevail over the suit property until this suit was heard and determined since he acknowledged that the defendants trespassed on his land before he filed the suit by establishing residences on the land and cultivating bits and pieces of it. He was compelled to file the application when there was fresh ploughing of parts of the suit property in March this year. The plaintiff was apprehensive that if the mature trees shown on the photographs as being on the suit property were felled, then he would suffer damage which could not adequately be compensated by an award of damages. He urged that if an order for injunction were not granted he would be prejudiced because he would have been deprived of the use of parts of his land and that his land would be devalued by the additional use and possession by the defendants.
 11. What falls for determination is whether this court should grant an order of injunction restraining the defendants from dealing with the suit property or whether this suit offends section 6 of the *Civil procedure Act* in light of the existence of Nyeri ELC Case No 230 of 2016, Nyeri ELC Case No E008 of 2021 (O.S) and Nanyuki ELC Case No E001 of 2021 involving the same suit property and similar parties. This court stayed Nanyuki ELC Case No E001 of 2021 on November 22, 2021 and directed the applicants to file their application for injunction in Nyeri ELC Case No 230 of 2016 where the court gave the orders which the applicants were aggrieved by. This court noted that it could not sit on appeal or review the orders made by a judge of concurrent jurisdiction. The applicants did not file their application in that case as directed by the court. Instead they filed Nyeri ELC Case No E008 (O.S) of 2021 seeking a declaration that the title over the suit property first held by the estate of Livia Le Poer Trench and subsequently by Abid Mahmoud Butt had been extinguished by virtue of the defendants' possession of that land for a period of 12 years. Judge Olola sitting at the Nyeri ELC transferred Nyeri ELC Case No E008 (O.S) of 2021 on May 10, 2022 to this court and it was renumbered Nanyuki ELC Case No 1 of 2022 (O.S).
 12. It is common ground that there is a judgment touching on ownership of the suit property which was delivered in Nyeri ELC Case No 230 of 2015 by Lady Justice M C Oundo in which she determined the legality and propriety of the 1st respondent's title over the suit property. Being a judgment *in rem*, that judgment binds the whole world because it operates directly on the suit property and affects all persons who may have an interest in the suit property.
 13. *Black's Law, 10th Edition* defines a judgment *in rem* as a judgment that determines the status or condition of property and that operates directly on the property itself. Further, that the phrase denotes a judgment that affects not only interests in a thing but also all persons' interest in the thing
 14. A determination on the ownership of the suit property was already made in Nyeri ELC Case No 230 of 2016 and it has not been set aside or reviewed. What is left is the enforcement of that judgment which ought to be done in that suit and not through the filing of another suit.
 15. The suit is struck out. Each party will bear its costs.

DELIVERED VIRTUALLY AT NANYUKI THIS 25TH DAY OF OCTOBER 2022.



K BOR

Judge

In the presence of: -

Mr Mwangi Kariuki for the plaintiff

Mr John Muu for the defendants

Ms. Stella Gakii- Court Assistant

