



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 114 OF 2019(OS)

JOHNBOSCO KISOME MUTISYA.....1ST PLAINTIFF/RESPONDENT

FRANCIS MAKAU MUTISYA.....2ND PLAINTIFF/RESPONDENT

WILLIAM MULEMBA MUTISYA.....3RD PLAINTIFF/RESPONDENT

GRACE NTHAMBA MASWII.....4TH PLAINTIFF/RESPONDENT

MARTHA MBULA MUTISYA.....5TH PLAINTIFF/RESPONDENT

ELIZABETH MUTINDI PAUL MUINDI..6TH PLAINTIFF/RESPONDENT

RAPHAEL KYENGE MUTISYA.....7TH PLAINTIFF/RESPONDENT

JOSEPH MUTHINI MUTISYA.....8TH PLAINTIFF/RESPONDENT

COLLECTOR MUENI MUTISYA.....9TH PLAINTIFF/RESPONDENT

VERSUS

GABRIEL MULEMBA.....DEFENDANT/APPLICANT

RULING

Introduction:

1. In the Notice of Motion Application dated 5th August, 2020, the Defendant/Applicant has sought the following orders:

a) Spent.

b) Spent.

c) Spent.

d) That pending the hearing and determination of this suit, a temporary injunction do issue restraining the Plaintiffs/Respondents, their servants and/or agents from excavating, digging, making bricks, constructing, cutting trees, subdividing, selling and/or in any other way interfering with the conditions and state of the suit property known as Matuu/Ikaatini/676.

e) That the OCS Ekalakala Police Station in Machakos do ensure compliance with orders above.

f) That the costs of the suit plus interests be provided for.

2. The Application is supported by the Affidavit of the Defendant in which he deponed that he is the registered owner of the suit property known as Matuu/Ikaatini/676 measuring 21.38 Ha which property was acquired by way of succession and a Title Deed issued to that effect.

3. The Defendant deponed that he is in possession of the suit property; that in the year 2003, when the 1st and 3rd Plaintiffs/Respondents tried to encroach on his property, he reported the same to the Land Adjudication and Settlement department which was determining Appeal Case No. 260 of 1996 and that the Tribunal directed that *status quo* be maintained.
4. The Defendant/Applicant deponed that on 30th October, 2003, the Land Adjudication Tribunal directed the Chief of Ikaatini Location to ensure that the Plaintiffs/Respondents do desist from their activities such as grazing and cultivating on the suit property; that the Plaintiffs/Respondents did not comply with the directions of the Land Adjudication Tribunal and that he instructed his advocates to demand from the 3rd Respondent to desist from such activities and *status quo* be maintained as directed by the Land Adjudication Tribunal.
5. The deponent averred that in the year 2005, the Plaintiffs/Respondents tried to bury their father on the suit property; that he moved the court which restrained them from burying their deceased father on the land and that the Respondents filed an Originating Summons dated 22nd October, 2019 claiming ownership of the suit property by dint of adverse possession, which suit is pending before this Honourable Court.
6. According to the Defendant/Applicant, on 4th August, 2020, the 3rd Plaintiff/Respondent without any justifiable cause started making bricks on the suit property; that the said activity will permanently affect the state and condition of the suit property and that the making of bricks on the suit property has led to erosion of soil and negatively impacted on the state and condition of the property which has made him suffer immense losses that will only be remedied if the orders sought herein are granted.
7. The Defendant/Applicant filed a Supplementary Affidavit on 10th August, 2020 and averred that having learnt of the 3rd Plaintiff's intention of excavating and making bricks before determination of the Application, he sought for the assistance of the area chief to stop the 3rd Plaintiff from carrying out the said activities and maintain *status quo* and that the 3rd Plaintiff vowed to continue with the said activities.
8. The 1st Plaintiff/Respondent, with the authority of the 2nd - 9th Plaintiffs/Respondents, opposed the Application vide a Replying Affidavit deponed by him on 20th August, 2020. It was deponed that the Application has not met the principles known in law for the grant of an injunction.
9. It was deponed that although the Defendant/Applicant is the registered owner of parcel of land known as Matuu/Ikaatini/676, he acquired the land fraudulently through succession and disinherited the Plaintiffs/Respondents; that there is no way him and the 3rd Plaintiff/Respondent could encroach into a parcel of land they have stayed on since 1968; and that even if there was a dispute before the Land Adjudication Tribunal and an award given in favour of the Defendant/Applicant, the same does not take away the fact that they have stayed on the disputed parcel of land uninterrupted since 1968.
10. The 3rd Plaintiff deponed that the Defendant/Applicant was silent as to whether after the Tribunal's award, the same was adopted as a Judgment of the court and why he has not executed the said award to date. The 3rd Plaintiff deponed that they never attempted to bury their father on parcel no. Matuu/Ikaatini/676.
11. The 3rd Plaintiff/Respondent deponed that having stayed, built and cultivated part of parcel No. Matuu/Ikaatini/676 since 1968, the idea of an injunction to stop him from making bricks is ill intended and that the Defendant/Applicant is only seeking the said injunction because they have filed a suit before this court claiming adverse possession. It was deponed that no evidence has been adduced to the effect that the brick making project initiated by the 3rd Respondent has caused soil erosion.
12. The Defendant/Applicant filed a Further Affidavit in response to the Replying Affidavit filed by the Plaintiffs/Respondents. The Defendant/Applicant deponed that the allegations of him having fraudulently acquired an interest in the suit land are unfounded and an afterthought.
13. The Defendant/Applicant deponed that he duly followed the succession procedures; that the Respondents neither raised objections during the succession proceedings nor reported to the relevant authorities of the alleged fraud and that even after the parcel of land was registered in his name, they never registered a caution or restriction.
14. The Defendant/Applicant deponed that the Respondents do not have homes on the suit property, and neither do they stay nor cultivate on property known as Matuu/Ikaatini/676. It was deponed that it's only the 3rd Plaintiff/Respondent who temporarily stayed on a small portion of the suit property and has previously been warned from encroaching on the said property.
15. The Defendant/Applicant averred that despite the long standing dispute between his mother and the Respondents' mother over the said parcel of land, the adjudication committee made a verdict that the parcel of land rightfully belongs to his mother and that the Respondents unsuccessfully appealed against the said decision.
16. He deponed that the order of injunction was meant to restrain the Plaintiffs/Respondents from interfering in any manner with the state and condition of the suit property failure to which the effects cannot be remedied.

Submissions:

17. The Application was canvassed vide written submissions. The Defendant's/Applicant's counsel submitted that the Defendant is the registered owner of the suit property having acquired ownership of the same by way of succession vide a Certificate of Confirmation of Grant which was published in the Kenya Gazette for a period of six (6) months without objection.

18. Counsel urged the court to exercise discretion in favour of the Applicant since no objection was ever raised throughout the Petition process and that there has been no material evidence placed before court to that effect. Therefore, it was submitted, the only inference that can be made is that the Applicant acquired a clean title. Reliance was placed on the case of **Mary Njeri Mbugua vs. Alice Muthoni [2018] eKLR**.

19. Learned counsel referred the court to Section 26(1) of the Land Registration Act which provides:-

“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 the encumbrances, easements, restrictions and conditioned contained or endorsed in the certificate, and that title 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.”

20. It was counsel’s submission that this Honourable Court has discretion to grant an injunction where the property in dispute is in the danger of being wasted, damaged or alienated. Counsel cited the provision of Order 40 Rules 1(a) & (b) of the Civil Procedure Rules which provides as follows:-

“Where in any suit it is proved by affidavit or otherwise-

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in the circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such an act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

21. The Applicant’s counsel submitted that the 3rd Plaintiff’s activities of excavating, brick making, cutting trees with the intention of constructing houses are acts of wastage or wasting the suit property and that the Defendant who has a great interest in the suit property will suffer great loss unless an injunction is issued, which loss has no adequate remedy. Counsel relied on **James Thendu Gitau & Another vs. John Ngina Magecha (2020) eKLR** where Gacheru J. stated as follows:

“However this Court notes that the Appellants had indicated that the Respondent was excavating rocks from the suit land and therefore degrading the said land...there is no doubt that his acts of excavation would most definitely degrade the land and in this case the same would make the Appellants suffer irreparable loss and which loss cannot be compensated by way of damages. Even if damages could compensate the Appellants, this could not be a bar for them to preserve the suit property by way of an injunction.”

22. Counsel for the Applicant submitted that he had placed before this Honourable Court undisputed and/or unchallenged material evidence for the grant of orders sought. Counsel relied on the case of **Kanan Dairy Limited vs. Beatrice Nzakwa Makau & Another (2020) eKLR** where this court held as follows:

“The Plaintiff’s Director deponed that he purchased land known as for Kshs. 3,400,000/= and took possession. The Plaintiff produced in evidence the sale Agreement dated ...

The Plaintiff also produced in evidence the copy of the Title Deed in respect of the suit property. The said Title Deed shows that the land was registered in favour of the Plaintiff on 4th July, 2014...

The Plaintiff has a Title Deed which can only be defeated on the basis of fraud or mistake. The Defendants have not placed before the court any evidence to show that the Title Deed held by Joseph Muthama, who transferred the land to the Plaintiff, was obtained fraudulently or by mistake...a Title Deed is prima facie evidence of ownership of land, I find that the Plaintiff has established a prima facie case with chances of success. Indeed, the Plaintiff having developed the suit property, he will suffer irreparable damages that cannot be compensated by damages unless the injunctive orders are granted. For those reasons, I allow the Plaintiff’s application dated 3rd December, 2019 as prayed.”

23. The Plaintiffs’/Respondents’ counsel vide submissions filed on 5th November, 2020 submitted that neither the Plaintiffs nor the Defendant has disputed the fact that the 3rd Plaintiff stays on the suit property known as Matuu/Ikaatini/676; that it is the evidence of the Plaintiffs/Respondents that they have all along been in occupation of the suit property known as Matuu/Ikaatini/676 since 1968 and that the Plaintiffs do not only live on the suit property, but also have been doing farming from which they earn a livelihood.

24. According to counsel, the 3rd Plaintiff’s occupation of the suit property on what the Defendant calls ‘temporary stay’ is laughable; that it defeats logic to refer to a long stay on the suit land since 1968 as temporal; that Mary Mutinda Mulemba, the Defendant’s mother, took advantage of the sickness of the Plaintiffs’ mother, who was then ailing and admitted in hospital during the adjudication period and fraudulently registered parcel No. Matuu/Ikaatini/676 in her name culminating in a long ownership dispute between the two parties and that

it is trite law that a party who fails to disclose material facts cannot be granted orders of injunction.

25. According to counsel, the fact that the adjudication committee found in favour of the Defendant's mother, and the fact that the Defendant applied for succession upon the demise of his mother and registered both parcels in his name, does not take away the fact that the Plaintiffs have been in continuous possession of parcel no. Matuu/Ikaatini/676 since 1968.

26. Learned counsel submitted that the Defendant has not met the threshold for the grant of an order of injunction and that the Plaintiffs/Respondents have demonstrated that the title to the suit land was acquired fraudulently by the Defendant/Applicant through succession thus disinherit the Plaintiffs.

27. The Plaintiffs' counsel submitted that the issuance of a title is not conclusive to establish a *prima facie* case especially where the said title is challenged and that the court must go further to establish the root of such a title and how the same was acquired and/or procured and whether there are any subsisting interests on the said property before the court can issue any injunction.

28. It was therefore counsel's argument that where the registered owner's title is challenged on the ground of fraud or misrepresentation and the facts and issues are in contest, then the Honourable Court cannot issue a restraining order but rather make a determination that the *status quo* be maintained. Counsel relied on the case of **Wilfred Ogero Mosigisi vs. Julius Ogero Mosigisi and Another (2016) eKLR** where Mutungi J. held:-

"The Defendants challenge the transfer to the plaintiff as having been procured fraudulently. Should the defendants succeed in the challenge at the trial, the transfer in favour of the plaintiff would be liable to be annulled and in that event the properties would revert to the estate of their deceased father and therefore liable to administration through succession. The defendants in my view have demonstrated they have an arguable case. I am not on the facts of this case able to hold that the plaintiff has demonstrated a prima facie case with a probability of success. The facts and issues between the plaintiff and the defendants are highly contested and there can be no resolution of the facts and the issues without a full hearing where the parties give evidence and they are cross-examined..... where the facts and the issues are in contest the court has a duty to preserve the subject matter of the suit until the suit is heard and determined. In the result, I decline to grant the prayers sought by the plaintiff in the notice of motion dated 21st August 2015 and in place thereof I make an order directing the parties to maintain and observe the obtaining status quo and specifically direct and order that there be no dealings with the suit property relating to sale, transfer and/or charge of the same to any third party pending the hearing and final determination of the suit."

29. It was the Plaintiffs' advocates' submissions that the Defendant has miserably failed in meeting the threshold for the grant of an injunction and that the Application should be dismissed.

Analysis and findings:

30. Having considered the pleadings, the annexures to the respective Affidavits and the submissions of counsel, the only issue for determination is whether an order of injunction should issue restraining the Plaintiffs from "excavating, digging, making bricks, constructing, cutting trees, sub-dividing, selling and/or in any other way interfering with the conditions and state of the suit property known as Matuu/Ikaatini/676."

31. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (*See Giella vs. Cassman Brown & Co. Ltd (1973) EA 358 and Fellowes and Son v. Fisher [1976] I QB 122*).

32. What amounts to a *prima facie* case, was explained in **Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** case as follows:

"...In civil cases, it is a case in 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."

33. It has been established by the law and the decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the *status quo* between the parties, pending the disposal of the main suit. It is also trite that interlocutory orders are granted without full investigation of the merits of either side's case. To be granted interlocutory relief of injunction, the Applicant must show a more than an arguable case. (*See Fessenden vs. Higgs and Hill Ltd [1935] ALL ER 435*).

34. In **Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892**, Sir John Donaldson MR, while criticising the expression 'balance of convenience', an expression posited in the House of Lords decision in **American Cyanamid vs. Ethicon, [1975] AC 396**, said this about the purpose of interim injunctions:

"Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience."

35. The other factor that is relevant to an Application for injunction is the extent to which the determination of the application, at an

interlocutory stage, will amount to a final determination of the rights and obligations of the parties. That issue was addressed in **NWL Limited v. Woods [1979] WLR 1294** by Lord Diplock as follows:

“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.”

36. This suit was commenced by way of an Originating Summons dated 22nd October, 2019. In the said Summons, the Plaintiffs have sought for the determination of the following questions:

a) A declaration that title to Gabriel Mulemba to the interest in L.R No. Matuu/Ikatini/676 if any has been extinguished by the Plaintiffs' adverse possession thereof for a period of more than 12 years in terms of section 17 and 38 of the Limitation of Actions Act;

b) A declaration that the Plaintiffs have acquired an interest in land parcel number Matuu/Ikatini/676 by their adverse possession for a period of more than 12 years.

c) An order be issued directing the land registrar, Machakos to register the Plaintiffs as the rightful owners of land parcel number Matuu/Ikatini/676 in place of Gabriel Mulemba.

37. The Plaintiffs' suit is therefore wholly based on the provisions of Section 7 and 38 of the Limitation of Actions Act. Section 7 of the Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.”

38. Section 38 of the Act compliments Section 7 of the Act as follows:

“Where a person claims to have become entitled by adverse possession to land registered under any of the Acts cited in Section 37 of this Act, or land comprised in a lease registered under any of those Acts, he may apply to the High Court for an order that he be registered as the proprietor of the land or lease in place of the person then registered as proprietor of the land.

(2) An order made under subsection (1) of this section shall on registration take effect subject to any entry on the register which has not been extinguished under the Act.”

39. The courts have put the above provisions of the law and the doctrine of adverse possession into context. In the case of **Kimani Ruchine vs. Swift Rutherford & Co. Ltd [1980] KLR**, the court held as follows

“The Plaintiffs have to prove that they have used this land which they claim, as of right: nec vi, nec clam, nec precario...The possession must be continuous. It must not be broken for any temporary purposes or any endeavours to interrupt it or by any recurrent consideration.”

40. In **Teresa Wachuka Gachira vs. Joseph Mwangi Gachira (2009) eKLR**, the Court of Appeal held as follows:

“There is no proof of exclusive, continuous and uninterrupted possession of the land for twelve years or more before the suit against her was filed. Possession could have been by way of fencing or cultivation depending on the nature, situation or other characteristics of the land. Periodic use of the land is not inconsistent with the enjoyment of the land by the proprietor.”

41. In **Benjamin Kamau Murima & Others vs. Gladys Njeri, Civil Appeal No. 213 of 1996**, the Court of Appeal held as follows:

“The combined effect of the relevant provisions of Sections 7, 13 and 17 of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya is to extinguish the title of the proprietor of land in favour of an adverse possession of that land.”

42. The Supreme Court of India, in **Karnataka Board of Wakf vs. Government of India & Others (2004) 10 SCC 779**, stated as follows:

“In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person takes possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well- settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and continuous. The possession must be adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owner and be actual, visible, exclusive, hostile and continued over the statutory period.”

43. The Plaintiffs having filed this suit claiming to be registered as the proprietors of the suit property pursuant to the provisions of Sections

7 and 38 of the Limitation of Actions Act cannot at the same time plead, as they have done in the current Application, that the Defendant obtained the Title Deed in respect to the suit property fraudulently.

44. Where one claims to be registered as the proprietor of land due to effluxion of time, he has to concede that the suit property is lawfully registered in the name of the Defendant and not otherwise.

45. The Defendant's main complaint in the current Application is that the Plaintiffs intend to waste the suit property by making bricks. Indeed, the Plaintiffs have not denied that they have the intentions of making bricks on the suit land.

46. It is trite that bricks are made by excavating soil, thus interfering with the land to the extent of having the same not to be of any economic use. Under Order 40 Rule 1(a) and (b) of the Civil Procedure Rules, the court is obliged to issue an order of injunction where *"it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit."*

47. In the case of ***James Thendu Gitau & Another vs. John Ngina Magecha (2020) eKLR*** Gacheru J. stated as follows:

"However this Court notes that the Appellants had indicated that the Respondent was excavating rocks from the suit land and therefore degrading the said land...there is no doubt that his acts of excavation would most definitely degrade the land and in this case the same would make the Appellants suffer irreparable loss and which loss cannot be compensated by way of damages. Even if damages could compensate the Appellants, this could not be a bar for them to preserve the suit property by way of an injunction."

48. Considering that the Plaintiffs have not denied that they intend to use the suit property to make bricks, which endeavour will waste the suit property, and in view of the fact that the issue of whether the Plaintiffs are entitled to the suit property by way of adverse possession has not been heard and determined, I find that an injunction restraining the Plaintiffs from wasting or selling the land should issue.

49. For those reasons, I allow the Application dated 5th August, 2018 as follows:

a) That pending the hearing and determination of this suit, a temporary injunction do and is hereby issued restraining the Plaintiffs/Respondents, their servants and/or agents from excavating, digging, making bricks, constructing, cutting trees, subdividing, selling and/or in any other way interfering with the conditions and state of the suit property known as Matuu/Ikaatini/676.

b) The OCS Ekalakala Police Station in Machakos do ensure compliance with the orders above.

c) Each party to bear his own costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 12TH DAY OF FEBRUARY, 2021.

O.A. ANGOTE

JUDGE