



**Mayieka v Athineum Group Limited & 2 others (Environment & Land  
Case E058 of 2023) [2024] KEELC 661 (KLR) (14 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 661 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E058 OF 2023  
CA OCHIENG, J  
FEBRUARY 14, 2024**

**BETWEEN**

**MICHAEL KIBAGENDI MAYIEKA ..... PLAINTIFF**

**AND**

**ATHINEUM GROUP LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**NGOLU HOLDINGS COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**FRANK MATINGU' MUEKE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 21<sup>st</sup> June, 2023 where he seeks the following Orders:-
  1. Spent.
  2. That the Honourable Court be pleased to issue an order of status quo pending the hearing and determination of this matter.
  3. That pending the hearing and determination of this Application, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants either by themselves, their servants, agents and otherwise be and are hereby restrained by an injunction from charging, offering for sale, transferring and trespassing into the Plaintiff's property being LR No 17840 IR No 227024.
  4. That pending the hearing and determination of this suit, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants either by themselves, their servants, agents and otherwise be and are hereby restrained by an injunction from charging, offering for sale, transferring and trespassing into the Plaintiff's property being LR No 17840 IR No 227024.



5. That the Officer Commanding Police Station Athi River police to ensure enforcement and compliance of the order.
  6. That cost of this Application be in cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Michael Kibagendi, the Plaintiff herein. He deposes that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have been constantly trespassing into LR No 17840 IR No 227024 hereinafter referred to as the 'suit land' belonging to him. He claims that the 3<sup>rd</sup> Defendant is constantly sending youth to destroy his fence, structures and Pit Latrine on site. He contends that he is the registered owner of the suit land and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have without the provocation and/or claim on several occasions instructed armed youth and goons to trespass into the said land and destroy the fence. He states that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are being given political cover and leverage by the 3<sup>rd</sup> Defendant who intends to grab the land from him. Further, that he is in possession of the suit land and the constant unwarranted disturbance and destruction is causing him massive loss and damages. He reiterates that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are not the owners of the suit land as such have no legal basis in accessing the said property. Further, that the current certificate of search indicates he is the sole proprietor of the suit land and the title document is conclusive proof ownership of land unless otherwise ruled by the court.
  3. The 3<sup>rd</sup> Defendant opposed the instant application and filed a Replying Affidavit sworn by Frank Matingu Mueke who is a Director of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants'. He contends that the Application is misconceived, mischievous and is fashioned to mislead this Honourable Court hence is an abuse of the court's process. He explains that the purported suit land being Land Reference Number 17840 (originally measuring 2.0 hectares) is not in existence as it had been sub-divided on or about the 23<sup>rd</sup> January, 2012 after the compulsory acquisition of 0.32 hectares (out of the initial 2.0 hectares) for a road expansion. Further, that the purported suit land was subdivided into Land Reference Numbers 17840/2 (that is in the names of the 1<sup>st</sup> Defendant) and 17840/1 that was annexed by the government of Kenya for road expansion. He explains that subsequent re-survey of the land was done and fresh title issued for the two subdivisions from which the 2<sup>nd</sup> Defendant acquired a Certificate of Title which was later transferred to the 1<sup>st</sup> Defendant for value. He insists that the official search from the Registrar of Titles dated the 14<sup>th</sup> August, 2023 confirms that indeed the 1<sup>st</sup> Defendant is the *bona fide* registered proprietor of the leasehold interest in all the property known as LR 17840/2, now suit land. He reiterates that a party claiming a right over a property must demonstrate an interest in the land and in this instance, an interest cannot sustain against a title that does not exist. He avers that the orders sought herein are incapable of being granted for the non-existence of the subject matter. He provides a historical background of the suit land and challenges the Plaintiff to avail an official search (under seal) from the Registrar of Titles together with the historical background of ownership of the suit land and relevant survey maps to prove his purported ownership if at all. He reaffirms that it is the 1<sup>st</sup> Defendant who has been in actual occupation of LR 17840/2 to date, which land is currently under crops. He sought for the instant application to be dismissed with costs.
  4. The Plaintiff filed a Supplementary Affidavit reiterating his averments above and insisting that he is the owner of the suit land. He argues that from the government records, the original land reference for the title LR No 12197 was surrendered to the government and given Land Reference No 17840 with a Deed Plan No 168883 to BAT Kenya Limited on 5<sup>th</sup> July, 1991. He claims the Defendant has fraudulently through corrupt officials at Lands Registry interfered with the file for Land Reference No 17840 with a Deed Plan No 168883 and attempts to conduct a current search have proved futile. He insists that on the strength of the surrender of Land Reference No 17840 with a Deed Plan No 168883 to the government, he applied for its allocation and the same was issued to him. He confirms



the County Government of Machakos is to date receiving Rates from him, in respect to the suit land. He reaffirms that the Defendants do not have credible documents and they were scammed of their money if they ever did pay any to Diara Limited. Further, that as late as 23<sup>rd</sup> September, 2005 through Gazette Notice No 7570 the parcel of land was still registered under BAT Kenya Limited and as such Diara Limited has never owned the suit land.

The Application was canvassed by way of written submissions.

### Analysis and Determination

5. Upon consideration of the Plaintiff's Notice of Motion Application dated the 21<sup>st</sup> June, 2023 including the parties' Affidavits and rivaling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of interlocutory injunction pending the outcome of the suit.

The Plaintiff in his submissions reiterates his averments as per the respective Affidavits and insists that there is sufficient legal justification to issue orders of injunction restraining the Defendants' or their agents' from trespassing into the suit land. He contends that he has established a *prima facie* case as the owner of the suit land, disputes the ownership documents held by the Defendants' insisting they are fake and claims he will suffer irreparable harm that cannot be compensated by damages, if the orders sought are not granted. Further, that the balance of convenience tilts in his favour. To support his arguments, he relied on the following decisions: *Giella v Cassman Brown & Co. Ltd* (1973) EA 358; *Moses C Muhia Njoroge & 2 others v Jane W Lesaloi & 5 others* ELC Case No 514 of 2013; *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) KLR 125 and *Mtana Lewa v Kabindi Mwangandi* (2015) eKLR.

6. The Defendants' in their submissions reiterated their averments as per their Replying Affidavit and insisted that the Plaintiff had not established a *prima facie* case with a probability of success at the trial. Further, that land parcel number 17840 did not exist hence a claim over the said land cannot stand. They contended that they are the legal owners of the suit land based on the documents they annexed to the Supporting Affidavit especially the latest Certificate of official search. They further submit that since they are in possession and occupation of the suit land, the balance of convenience favours them. To support their arguments, they relied on the following decisions: *Stephen Mwadoro & 56 others v Alhad Mohamed Hatimy* (2020) eKLR; *Giella v Cassman Brown & Co. Ltd* (1973) EA 358; *Hubert L. Martin & 2 others v Margaret J Kamar & 5 others* (2016) eKLR and *Paul Gitonga Wanjau v Gathuti Tea Factory Company Ltd & 2 others* (2016) eKLR.

In this instance, the Plaintiff has sought for orders of interlocutory injunction against the Defendants insisting that he is the owner of the suit land. He contends that the Defendants' should be restrained from dealing with the suit land as they have trespassed thereon and destroyed his properties. As to whether the Plaintiff has established a *prima facie* case with a probability of success at the trial, I will rely on the principles established in the case of *Giella v Cassman Brown & Company* (1973) EA 358 as well as the definition of a *prima facie* case as stated in the case of *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) KLR 125. The Plaintiff claims the Defendants title was fraudulently acquired while the Defendants' insist that they are the legal owners of the land as the title held by the Plaintiff does not exist. Further, that they are the ones in possession and occupation of the suit land which is under crop.

7. From the various annexures presented by both parties, I note both the Plaintiff and the Defendants' hold titles to the land they claim. Further, I note the Defendants' have furnished court with the latest Certificate of Official Search issued by the Registrar of Titles dated the 14<sup>th</sup> August, 2023 which confirms that indeed the 1<sup>st</sup> Defendant is the *bona fide* registered proprietor of the leasehold interest in all the property known as LR 17840/2. The Plaintiff disputes that the suit land was subdivided and a



portion compulsorily acquired by the government. The Defendants provided a historical background of the suit land – LR Number 17840 measuring 2.0 hectares and explained that it was originally owned by BAT Kenya Limited which transferred it to Diara Limited vide registration on 31<sup>st</sup> August, 1995. Further, that Diara Limited sold the suit land to the 2<sup>nd</sup> Defendant vide a transfer made on the 13<sup>th</sup> January, 2014 and registered at Land Titles Registry Nairobi as Number IR 64878/7 on the 21<sup>st</sup> January 2014. They confirm that the said land was transferred to the 2<sup>nd</sup> Defendant subject to terms therein (compulsory acquisition of 0.32 acres by government) which acquisition led to re-survey and developing of fresh titles being LR 17840/2 in the names of the 2<sup>nd</sup> Defendant. They further confirm that the 2<sup>nd</sup> Defendant subsequently transferred the said land parcel into the names of the 1<sup>st</sup> Defendant for valuable consideration. The Plaintiff has disputed this explanation on the historical background of the suit land and insists this is meant to hoodwink the court as he is the true owner of the said land.

Based on the facts before court including the documents presented, noting that there are two competing titles presented by the parties herein, while associating myself with the decisions cited, at this juncture, I find that the Plaintiff has not established a *prima facie* as against the Defendants' who also hold a title to the suit land.

8. In relying on the principles established in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* (2014) eKLR, in which it was held that where a party fails to fulfill the first limb on injunction, the Court need not proceed to deal with the two remaining limbs; and in the circumstances, I will not do so.

It is against the foregoing that I find the Plaintiff's Notice of Motion Application dated the 21<sup>st</sup> June, 2023 unmerited and will disallow it.

I will however direct that the obtaining *status quo* be maintained.

Costs will abide the outcome of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14<sup>TH</sup> DAY OF FEBRUARY, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

