



REPUBLIC OF KENYA



Ochieng v Francis Kimani Ngugi t/a Alfred Agencies & 4 others (Environment & Land Case E189 of 2022) [2024] KEELC 5152 (KLR) (4 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5152 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E189 OF 2022**

AA OMOLLO, J

JULY 4, 2024

BETWEEN

STEPHEN OCHIENG PLAINTIFF

AND

FRANCIS KIMANI NGUGI T/A ALFRED AGENCIES 1ST DEFENDANT

ABDIRAHMAN MOHAMED ELMI T/A ELMI TRADERS 2ND DEFENDANT

GRACE WANJIKU KIMANI 3RD DEFENDANT

DANIEL KINYUA MUGO 4TH DEFENDANT

CHIEF REGISTRAR OF LANDS 5TH DEFENDANT

RULING

1. The Plaintiff/Applicant filed a notice of motion dated 6th February 2024 seeking for the following orders;
 - a. Spent
 - b. Spent
 - c. Pending the hearing and determination of this suit, an order of injunction be and is hereby issued restraining the Defendants, and particularly the 2nd Defendant, whether by themselves, agents or servants from trespassing upon, invading, altering the nature, remaining upon, alienating, constructing upon, occupying, disposing of, transferring, charging, leasing, registering interests and/ or in any manner whatsoever dealing with all that parcel of land known parcel number LR No 21936 situated in Nairobi City County, which order should be enforced by the Officer Commanding, Langata Police Station or any other nearby Police Station.



- d. The costs of this application be provided for.
2. The motion was supported by an affidavit sworn by Applicant on 6th Feb 2024 and on the grounds; that the Applicant is the current lawful registered owner of parcel number LR No 21936 situated in Nairobi herein after referred to as “the suit property” which he purchased. That he has been in peaceful vacant possession of the suit property until the Defendants started interfering with the said possession prompting the filing of this suit.
 3. The possession of the suit property by the Applicant was corroborated by affidavits sworn by Joseph Saruni Melita and Samwel Rioba Moturi on 9th April 2024. Mr Samwel deposed that he worked in the suit property as a caretaker since 2017 while Mr. Joseph stated that he had known the Plaintiff for about two years since they acquired the suit property from the previous owner Westone Kipkosgei Langat.
 4. The Applicant averred that after filing this suit, the Defendants ceased the illegal attempts to dispossess him the suit land but after the matter was fixed by consent of the parties for the 5th of March,2024 and on 7th November, 2023, the 2nd Defendant on the 3rd February,2024 in the company of armed goons violently and forcibly trespassed onto the suit property, threatening his agents stationed there with actual physical harm if they did not vacate the property.
 5. That the said criminal actions were reported to Lang’ata Police Station on 4th February,2024 and an occurrence booking number 19/04/02/2024 was issued. He posited that the 2nd Defendant and his agents have remained undeterred by making concerted efforts to permanently deprive him of the suit property, progressing with the illegal construction activities that have the effect of permanently altering the character of the subject matter.
 6. The Applicant contended that while he holds the title for the suit property, the 2nd Defendant categorically conceded that he does not hold any title and or grant over the same as is evident at paragraph 15(j) of the 2nd Defendant’s Defence dated 14th July,2023. Thus, he has not demonstrated the justification for his illegal acts of trespass. The Applicant asserts that unless the court intervenes, the the 2nd Defendant will succeeding in unlawfully dispossessing the Applicant and also alter the nature and character of the suit property through the planned illegal construction activities exposing him to irreparable loss.
 7. The application was opposed by the 2nd Defendant vide a replying affidavit sworn by Abdirahaman Mohamed Elmi on 22nd February 2024. He stated that together with Suleiman Abdinur Ali and Mursel Mohamed Elmi - trading as Elmi Traders, they are the lawfully registered proprietor of the suit property which parcel number has since been converted by the Ministry of Lands and is now known as title No Nairobi/ Block 24/1821.
 8. He avers that sometime in the year 1996, the Government of Kenya commissioned a surveyor by the name G.O. Wayumba of Geometer Surveyors Limited to survey all that property known as LR Number 11976 situate in Nairobi and subdivide the same for the purpose of allocation. That the survey was conducted and a survey plan F/ R No 300/9 of 1996 produced. Following the survey of the land, it was allocated with the 2nd Respondent which was registered on 3rd September 1993, being allocated the suit property by a Letter of Allotment dated 15th April 1996 and accepted by way of a letter of even date.
 9. The 2nd Defendant averred that it has had continuous uninterrupted possession. However, before it could make payment of the stand premium of Kenya Shillings Four Hundred and Twenty-Two Thousand One Hundred and Ten Shillings (Kshs 422,110.00), the 5th Defendant by itself and or its servants, assignees, agents and or employees deliberately caused the disappearance of the



- correspondence file thereby frustrating the processing of payment and issuance of the document of title to its favour.
10. The 2nd Defendant contended that sometime in March 2014, the 5th Defendant by itself and or its servants, assignees, agents and or employees purported to rediscover the correspondence file relating to allotment of the suit property and notified them that it could proceed to make payment as per terms of the Letter of Allotment dated 15th April 1996. That the same was done through a banker's cheque dated 15th March 2014 for Kenya Shillings Four Hundred and Twenty-Two Thousand One Hundred and Ten Shillings (Kshs 422,110.00), to the Commissioner of Lands as stand premium.
 11. Consequently, they were required to obtain a Deed Plan from Survey of Kenya for purposes of processing of title but the Deed Plan in respect of the (mother) property was missing. Upon follow up by Surveyor Wayumba at Director of Surveys and the Ministry of Lands the complaint was referred to the Directorate of Criminal Investigations, for further inquiry and investigation. The Respondent further contended that upon the rediscovery of the correspondence file in respect of the Suit Property, the 5th Defendant by itself and or its servants, assignees, agents and or employees, in conjunction with the 1st Defendant fraudulently issued the 1st Defendant with the said deed plan so as to unlawfully process the document of title in favour of the 1st Defendant rather than to the Respondent.
 12. The Respondent stated that they subsequently commenced proceedings against inter alia the 1st and 5th Defendants in Nairobi Environment and Land Court Case No 302 of 2017, Abdirahman Mohamed Elmi t/a Elmi Traders v Mary Nyambeki, Francis Kimani Ngugi t/a Alfred Agencies & 1 other seeking various reliefs in respect of the Suit Property. That in the said suit vide a ruling dated 2nd August 2017 and orders emanating therefrom dated 15th August 2017, the Court issued an order inhibiting the registration of any dealings on the suit property until the said suit was heard and determined.
 13. That the said orders were presented of registration at the Lands Titles Registry at Nairobi on 16th August 2017 but the same could not be registered until 16th October 2017 due to the unavailability of the Suit Property's parcel file. On 1st July 2019, their suit was dismissed but on appeal, the dismissal was overturned by Court of Appeal which directed that the 2nd Defendant is the registered owner ordering the 5th Defendant to accordingly issue it with a title.
 14. The 2nd Defendant stated that the Orders of the Court of Appeal dated 17th March 2023 were presented for registration on 8th June 2023, and the same were duly registered against the Suit Property's title. It is deposed further that by way of a letter dated 13th July 2023 from the Director of Surveys to the Director of Land Administration, the requisite Amended Registry Index Map for Nairobi Block 24/1831, formerly known as Land Reference Number 21936 was forwarded to the Director of Land Administration, and due payment for the same being made.
 15. The deponent averred that the 2nd Defendant has been in possession of the suit property and has had private security guards to guard it since 2014. That the said Westone Kipkosgei Langat is fraudulent as his name on the title was issued in 2017, the same year that they commenced proceedings against the 1st Defendant in Nairobi Environment and Land Court Case No 302 of 2017.
 16. The Plaintiff/Applicant filed a supplementary affidavit sworn on 16th April 2024 stating that while the 2nd Defendant has admitted that the purported allocation of the suit property was in the name of Elmi Traders. That Elmi is a business name with no capacity to acquire and hold interests in land in its name and that there was non-compliance with the conditions of the alleged allocation. He avers to have tendered documents demonstrating that Westone Langat was lawfully allocated the suit property, complied with all the conditions and was subsequently registered as the proprietor thereof.



17. That the 2nd Defendant engineered the illegal conversion of the suit property and generation of title documents during the pendency of these proceedings and shall dispose of the suit property to unsuspecting members of the public unless the Court intervenes through issuing appropriate orders.

Submissions.

18. The Plaintiff/Applicant filed submissions dated 17th April 2024, in support of his motion stating that he had met the threshold set out in the case of *Giella v Cassman Brown* [1973] EA 358. He also the Court of Appeal in *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR, to argue that he has made a *prima facie* case having presented material before the court to show that he is the registered owner of the suit property and has further tendered documentary evidence showing that the vendor had good title to pass to him.
19. The Applicant further submitted that he stands to suffer irreparable harm which cannot be compensated by way of costs if the injunction orders sought are not granted as the suit property may be disposed of to unsuspecting third parties and its character destroyed thus rendering these proceedings academic. In support, he cited the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* (2018) eKLR which defines irreparable injury.
20. The Plaintiff/Applicant also submitted that the 2nd Defendant's actions are not only against the doctrine of *lis pendens* but shall also equally expose him to irreparable harm as the substratum of these proceedings may permanently be destroyed going by the conduct exhibited by the 2nd Defendant and his enablers. That the balance of convenience lies in his favour as he stands to suffer the greatest damage if the orders sought are not granted.
21. I have considered the parallel affidavits sworn between the two parties laying claim to the suit property and also deposing to be in occupation at the same time. The Plaintiff has given a narration on how he acquired the suit property and proceeded to annex two affidavits of two gentlemen who confirm he (the Applicant) is the one in possession of the suit property. On its part, the 2nd Defendant has also exhibited documents showing the processes it has undertaken to secure the title documents of the suit property as well as arguing that it had engaged security guards to man the property thus evidence of occupation.
22. The Applicant argues that the 2nd Defendant is a registered as a business name thus it lacks capacity to own any interest on land in its own name. However, that is not an issue for consideration in application seeking interlocutory injunction and having been sued, the 2nd Defendant has a right to defend itself. The three principles to be weighed in while determining whether or not to grant an order of injunction are *prima facie* case, irreparable loss and on whose favour balance of convenience tilts.
23. Having analysed the facts presented, I am satisfied that the Applicant has established a *prima facie* case. This is not to say that I have disregarded the title claimed by the 2nd Defendant but on the basis that demonstration of a *prima facie* case does not mean the party will be successful. To the extent that the Applicant has shown by way of affidavit of Mr Samuel and Mr Joseph that he was in occupation and by virtue of the fact that the 2nd Defendant has not denied going to the suit property on 3rd February 2022 is sufficient evidence of the need to make orders to preserve the status quo.
24. On the heading whether the Applicant will suffer irreparable loss if he is dispossessed of the suit property, he has explained that the 2nd Defendant is likely to dispose of the suit property unless it is restrained. The Applicant stated that he acquired the suit property through purchase. He has not pleaded to having undertaken any development on the suit property. Hence as at now, the value of the suit property can be ascertained and if he is dispossessed of the same, he can be compensated by an



award of damages equivalent to the value of the suit property. Therefore, under this heading, I am not satisfied proof has been made.

25. Lastly, on whose favour does the balance of convenience tilt? The pleadings filed by both parties reveal that they are having parallel claims in respect of the suit property. It is discernible from the pleadings that neither of the parties have put up developments on the land. The intention of order 41 rule 1 was to preserve any property in dispute from being damaged, wasted or alienated;

“the court may by order grant a temporary injunction to restrain such act, or make such other 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”

26. Consequently, on account that the Applicant has made out a *prima facie* case and has persuaded me that he is in possession, I do allow prayer (b) of the application as sought. I go further to state the interests of justice require the preservation of the subject matter in its current state since the 2nd Defendant is also claiming ownership. Therefore, the Applicant is directed not to sell/dispose of the suit property and or part with possession and or carry out any developments on it pending hearing and determination of this suit.

27. The costs of the application to abide the successful party when this suit gets to be concluded.

DATED, SIGNED & DELIVERED AT NAIROBI THIS 4TH JULY, 2024.

A. OMOLLO

JUDGE

