



Mutavi v Mulinge & another (As Legal Representatives and Beneficiaries of the Estate of the Late Jackson Kimeu Mulinge) (Environmental and Land Originating Summons E006 of 2024) [2024] KEELC 5990 (KLR) (16 September 2024) (Ruling)

Neutral citation: [2024] KEELC 5990 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E006 OF 2024
CA OCHIENG, J
SEPTEMBER 16, 2024
IN THE MATTER OF SECTION 37 AND SECTION 38 OF THE
LIMITATION OF ACTIONS ACT, CAP 22 LAWS OF KENYA
AND
IN THE MATTER OF THE LAND REGISTRATION ACT 2012

BETWEEN

SAMMY MWENDWA MUTAVI APPLICANT

AND

MAJ GEN RTD JAMES MUTUA MULINGE 1ST RESPONDENT

PATRICK MUTINDA MULINGE 2ND RESPONDENT

AS LEGAL REPRESENTATIVES AND BENEFICIARIES OF THE ESTATE OF
THE LATE JACKSON KIMEU MULINGE

RULING

1. What is before Court for determination is the Applicant's undated Chamber Summons Application which was filed on 31st January, 2024 where he seeks the following Orders: -
 1. Spent
 2. Spent
 3. That pending the hearing and determination of the suit herein or until further orders of the court, an order of temporary be issued, restraining the Respondents, its agents, beneficiaries/



family or any other person acting on their behalf from threatening and or causing illegal forceful eviction of the Applicant.

4. That in the event the Honourable Court decline the Petitioners humble Petition in paragraph 2 and 3 above, then it is the humble prayer of the Applicant that the court, pending the hearing and determination of this Application herein or until further orders of the court, do issue an order of status quo, restraining the Respondents, their agents, beneficiaries/family or any other person acting on their behalf, from selling, leasing, constructing and or any activity or threatening or causing the illegal eviction of the Applicant from the suit land.
 5. That this Honourable Court do issue such other orders as may be necessary to meet the ends of justice.
 6. That costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Sammy Mwendwa Mutavi where he deposes that he has been in possession of land parcel number Mavoko Town Block 3/3045 hereinafter referred to as the 'suit land', for over fourteen (14) years. Further, that the suit land is registered in the name of Jackson Kimeu Mulinge (deceased). He claims he has been cultivating the suit land for a livelihood in the form of indigenous trees farms and nursery for over fourteen (14) years and has never been dispossessed of the same by the Respondents. He contends that he has obtained legal rights over the suit land by way of adverse possession. He explains that it is only on 24th January, 2024 when the 2nd Respondent attempted to enter the suit land. He avers that on 13th February, 2021, his tree farm was attacked by the Respondents who sent goons in the company of the 2nd Respondent whereby they destroyed a portion of the farm. Further, that he reported the said attack at Kyumvi Police Station vide OB NO. 15/19/02/2022 but to date not much progress has been made in respect to the investigations.
 3. The Respondents opposed the instant Application by filing a Replying Affidavit sworn by Ambassador Major General (rtd) James Mutua Mulinge where he deposes that the Applicant has not satisfied the requirements on injunctions. He confirms that the Applicant is his neighbour and that he negotiated the sale and purchase of suit land in 2008 on behalf of his late father Mzee Jackson Kimeu Mulinge who was then ailing. He explains that the Applicant had agreed to purchase the suit land for Kshs. 1,900,000 out of which he paid a deposit of Kshs. 1,350,000. Further, that the Applicant was to be granted possession and occupation of the suit land upon payment of the full purchase price which he failed to pay. He avers that his late father also declined to approve the sale culminating in their refunding the Applicant the amount of Kshs. 1,350,000 which he had paid, vide a forwarding letter dated the 13th February, 2009. He insists that after the refund, the parties were restored back to their previous positions as if there was never a transaction with the Applicant. He argues that if the Applicant wished to enforce the transaction, then he should have moved the court in 2009 for specific performance at the time he was refunded the money. He states that upon the refund of the purchase price, they continued to live peacefully and harmoniously as neighbours in Lukenya until around 2017 when the Applicant encroached on slightly more than two (2) acres of their land and fenced it off, an act of intrusion which they never took kindly. Further, that their relationship with the Applicant mutated from that of peaceful and harmonious neighbours to a boundary dispute. He reiterates that they engaged the County Surveyor Machakos but the Applicant was uncooperative.
 4. The instant Application was canvassed by way of written submissions.



Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the Applicant is entitled to orders of interlocutory injunction restraining the Respondents from the suit land pending the determination of the Originating Summons.
6. In applying the principles established in the case of *Giella v Cassman Brown* (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 Ltd*, I will proceed to analyze whether the Applicant has established a prima facie case to warrant the orders of temporary injunction as sought.
7. The Applicant claims to have been in possession of the suit land for fourteen (14) years wherein he cultivated indigenous trees and had a tree nursery thereon. He avers that it is only on 24th January, 2024 when the 2nd Respondent attempted to enter the suit land and that on 13th February, 2021, his tree farm was attacked by the Respondents who sent goons in the company of the 2nd Respondent whereby they destroyed a portion of the farm. Further, that he reported the said attack at Kyumvi Police Station vide OB NO. 15/19/02/2022. From the OB No. I note he reported the alleged incident after one year.
8. The Respondents opposed the instant Application and explained that they had an agreement with the Applicant which was frustrated and this culminated in the Applicant being refunded the portion of the purchase price he had paid. Further, that it is the Applicant who attempted to encroach on a portion of the suit land and fenced the same which culminated in a boundary dispute. They insist that they involved the County Surveyor Machakos to resolve the boundary dispute but the Applicant was uncooperative.
9. Looking at the documents presented, I note as per letter dated the 13th February, 2009, the 1st Respondent confirmed depositing Kshs. 1,350,000 being refund of monies the Applicant had paid. Further from the photographs annexed to the Supporting Affidavit, except for a few cut trees, there is no indication that the said land is under cultivation and neither are their tree nurseries thereon. I note there is a letter dated the 23rd October, 2023 from the Land Registrar and several correspondence in respect to ascertainment of a boundary dispute that touched on the suit land. Further, the Applicant has not denied that he received the refund of his purchase price in 2008.
10. Based on the facts before me, at this juncture, I find that the Applicant has not established a prima facie case to warrant the orders of temporary injunction as sought.
11. In relying on the principles established in the case of *Nguruman Limited v Jan Bonde Nielsen* where the Court of Appeal had held that when the Applicant fails to establish a prima facie case, the court need not proceed to deal with the other two limbs on injunction, and will decline to do so.
12. In the circumstances, I find the instant Notice of Motion Application unmerited and will dismiss it but make no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 16TH DAY OF SEPTEMBER, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of:

Kamau for Plaintiff



Masinde and Odero for Respondents

Court Assistant – Simon/Ashley

