



**Muragu & another v Abdisalan & 2 others (Environment & Land Case E336 of 2022) [2023] KEELC 16081 (KLR) (9 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 16081 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E336 OF 2022**

**AA OMOLLO, J  
FEBRUARY 9, 2023**

**BETWEEN**

**BERNARD NDUWA MURAGU ..... 1<sup>ST</sup> PLAINTIFF**

**MARY NYAMBURA MURAGU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ABDIKADIR SHEIKH ABDISALAN ..... 1<sup>ST</sup> DEFENDANT**

**KIAMBU DANDORA FARMERS COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**AMBOSELI COURT LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed a notice of motion dated October 11, 2022 seeking for the following orders;
  - a. Spent;
  - b. Granted;
  - c. That the Court be pleased to grant an order of injunction restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents whether by himself or themselves, their servants, workmen, agents, their clients, their nominees or otherwise howsoever from continued construction.
  - d. That the officer commanding Kayole Police Station -DCIO do ensure compliance of with any Order(s) or Directions given by this Honourable Court.
  - e. That costs of the Application be awarded to the Plaintiffs/Applicants.
2. The grounds of the application were outlined in the supporting affidavit and further affidavit both sworn by Bernard Nduwa Muragu on October 11, 2022 and November 7, 2022 respectively. Mr Muragu deposed that the Plaintiffs purchased the suit property from the first allottee, one James



- Kariuki Kinyua vide a sale agreement dated 22/7/2014 on the strength of an earlier sale agreement dated January 17, 2014 executed between him and the 3<sup>rd</sup> Defendant who was the registered owner of Land Reference Number 15400/171 (IR 112111).
3. That the original number 15400/171 (I.R 112111) was sub divided into several sub plots *inter alia* No 317 and 318 each measuring 0.0130 Ha and that the said title has never been revoked. Pursuant to the sale agreement, the complied with the requirements set by the 3<sup>rd</sup> Defendant including payment of title processing fee. The Applicants aver that they received a copy of the certificate of lease in respect of their plot vide LR No 15400/518 (original no 15400/172/347) issued on April 2, 2015.
  4. The Applicants deposed that they took physical possession of the suit property but did not construct on it and have been paying Rates to the county Government. The Applicants stated that they learnt that someone had trespassed and was building on the suit property. Therefore, in September 2022, the 1<sup>st</sup> Plaintiff went to confirm and upon confirmation reported the illegal trespass at the DCIO Kayole Police Station and was issued with OB Number 49/01/09/2022. They deposed on writing a letter to the 3<sup>rd</sup> Defendants to lodge a formal complaint with regard to the trespass on the suit property.
  5. The Applicants are apprehensive that the 1<sup>st</sup> Defendant in conjunction with the 2<sup>nd</sup> Defendant might dispose of the suit property to unsuspecting buyers and further occasioning them a further loss that cannot be compensated by an award of damages. The Applicants also contended that the 2<sup>nd</sup> Defendant is Kiambu Dandora Farmers Company Limited but hold the title that bears the name Kiambu Dandora Farmers Company.
  6. The 1<sup>st</sup> Defendant filed a replying affidavit sworn by Abdikadir Sheikh Abdisalan on October 31, 2022 stating that he is in possession of 0.0155 ha forming part of LR No 11379/3 owned and registered under the 2<sup>nd</sup> Defendant. The 1<sup>st</sup> Defendant stated that he bought the land from the owners who had acquired it in 1970. He avers that after purchasing, he was issued with a certificate of shareholder and clearance whose copies he annexed to the replying affidavit. The 1<sup>st</sup> Defendant contended further that the 2<sup>nd</sup> Defendant's title has never been revoked, nullified and or cancelled hence the 3<sup>rd</sup> Defendant never held a good title to pass it to James Kariuki Kinyua to pass it to the Plaintiffs hence do not have any cause of action against him as they should pursue their purported seller.
  7. The 1<sup>st</sup> Defendant added that the title being relied upon by the Plaintiffs is one of the titles mentioned in the Ndun'gu Land Commission Report and which report is in the public domain as having being acquired irregularly hence the Plaintiffs ought to have been diligent to know. The 1<sup>st</sup> Defendant deposes that he is in occupation of the suit property and the house that was under construction is complete with painting only remaining hence there is nothing to injunct. He proceeded to annex copies of the photos of the impugned house.
  8. The 1<sup>st</sup> Defendant deposed that he is aware that the National Land Commission has also held that the original title which created his plot belonged to the 2<sup>nd</sup> Defendant thus the Applicants may be victims if they are not part of the plan to dispossess the 1<sup>st</sup> Defendant of his land. He urged the court to disallow the application.
  9. The 2<sup>nd</sup> Defendant also opposed the motion vide a replying affidavit sworn by Joseph Mwangi Karanja on October 31, 2022 associating fully with the contents of the affidavit by the 1<sup>st</sup> Defendant. Mr Karanja stated that a genuine title cannot give way to fraudulent title hence the alleged title being held by the Plaintiffs cannot oust theirs. Therefore, there are no grounds to grant the orders sought by the Plaintiffs.



10. In response to the facts deposed to in the replying affidavits, the Applicants took issue with the difference in name of the 2<sup>nd</sup> Defendant as sued and the name appearing in the copy of title annexed to the Defendants' pleadings. The Applicants contend further that the issue before the court was not about the house being complete rather it is to interrogate the suit property titles and the infringement of rights of owners. The Applicants averred that the 1<sup>st</sup> Respondent has disregarded this court's order issued in October 2022 and continued with construction hence he is before the court with unclean hands.
11. The parties agreed to argue the application by way of written submissions. The Applicants filed their submissions dated November 7, 2022 and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed theirs on November 16, 2022. The Plaintiffs submitted that the 1<sup>st</sup> Defendant only holds a share certificate and clearance certificate issued by the 2<sup>nd</sup> Defendant and not a lease to confirm proprietary rights to the suit property.
12. The Plaintiffs relied on the case of *Giella vs Cassman Brown* and *Cyanamid Co vs Ethicom Limited* (1975) A AER 504 arguing that the suit property is in danger of being alienated by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Plaintiffs also submitted that they had established a prima facie case with probability of success citing *Mrao Ltd vs First American Bank of Kenya and 2 others* (2003) as cited with approval in *Moses C Mubia Njoroge & 2 others vs Jane W Lesaloi and 5 others* (2014)eKLR , *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Lt & 2 others* [2016]eKR, *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*,(1990)eKLR.
13. The Plaintiffs submitted that they will suffer irreparable loss that cannot be compensated by an award of damages if the injunction orders are not granted as they have produced the lease document owned at the moment by the 3<sup>rd</sup> Defendant and that they had made part payments and also that the balance of convenience tilts in their favour.
14. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the material presented before the court proves that the title which the 1<sup>st</sup> Defendant relies on was issued to his seller in 1970 and having not been revoked, it is not possible for the Plaintiffs to obtain another title and that an injunction is not meant to occasion prejudice to any party but preserve the substratum of the suit pending hearing and determination of the suit hence should not be issued as the 1<sup>st</sup> Defendant is in actual possession of the suit property.
15. The 1<sup>st</sup> Defendant submitted that he is in occupation and an injunction being an equitable remedy can be refused where it would be inequitable as was held in *David Kabubii Kuria vs Revival & Restoration International Church* (2021)eKLR. He submits that the Plaintiff's prayer is to stop construction which he has demonstrated has already been done adding that the court cannot stop what has already happened relying in the case of *Stanley Kirui vs Westlands Pride Limited* (2013)eKLR and *Rose Wanjeri Magwi & Another vs Arthur Magwi Kagema & Another* (2016)eKLR.
16. The principles for granting injunctions are well laid out in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and it was the responsibility of the Applicants to demonstrate that they have a prima facie case, or will suffer irreparable loss or that the balance of convenience tilts in their favour. I have looked at the Applicants' pleadings on record which contest the title held by 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Applicants have annexed copies of title showing their ownership of the suit plot which makes for a prima facie case. The issue to be determined at the full trial is which of the two titles (the Applicants on one hand and the 1<sup>st</sup> Defendant's on the other hand) is valid.
17. Therefore, at the interlocutory stage, the court will not look at the merits or otherwise of this case as is being argued by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Although I am satisfied that the Applicants have demonstrated they have a prima facie case, the court is unable to grant the order of the injunction



sought because the 1<sup>st</sup> Defendant pleaded that the house under construction was complete save for paint works. The Applicants did not dispute the stage of the impugned construction but they commented that photos of windows and doors do not prove ownership of the subject land.

18. However, the Applicants had moved this court seeking orders specific to continued construction on the suit property. I am alive to the fact that even painting is a form of construction but there is no way painting only would alter the status of the land in dispute. In the circumstances of this case, I find that the balance of convenience tilt in favour of the 1<sup>st</sup> Defendant on the basis that he is in actual possession of the suit property and the building in construction in whose orders are sought against, has already been completed.
19. In view of the observations made, I find that the orders sought by the Plaintiffs/Applicants cannot be granted as they were overtaken by events. To preserve the suit property, this court in the exercise of its powers conferred under section 3 and 3A of the *Civil Procedure Act* does issue an order restraining the 1<sup>st</sup> and 2<sup>nd</sup> Defendants from selling and or transferring or parting with possession of the suit property whether referenced as LR No 15400/518 or a portion of LR No 11379/3 measuring 0.0155ha pending hearing and determination of this case
20. The costs of the application shall abide the winner of this suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 9TH DAY OF FEBRUARY 2023**

**A. OMOLLO**

**JUDGE**

