



**Tsutsu v Charo & another (Environment & Land Case  
106 of 2022) [2023] KEELC 15941 (KLR) (1 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 15941 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 106 OF 2022**

**SM KIBUNJA, J  
MARCH 1, 2023**

**BETWEEN**

**EDWARD MWADENA TSUTSU AKA MWEDENA TSUTSU  
CHIRENJE ..... PLAINTIFF**

**AND**

**HATIME ALI CHARO ..... 1<sup>ST</sup> DEFENDANT  
RAZAKI ALI JOHO ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff vide the notice of motion dated the October 6, 2022 seek for;
  - a. “Spent.
  - b. Spent.
  - c. That the honourable court be pleased to grant orders mandatory injunction against the respondents themselves, their agents, servants, and or such persons claiming under the respondents by directing and compelling them to pull down their construction/structure if any lying there, restraining them from purporting to trespassing, cultivating the land, leasing, constructing, erecting, wasting, damaging, intruding, selling, alienating, developing, disposing, alienating, transferring, dealing or in of any interfering with the plaintiff occupation the land more particularly known as plot Mikahani/Mawemabomu/Chonyi/386 pending the hearing and determination of the instant suit.
  - d. That the Officer Commanding Rabai Police Station do provide security during enforcement and compliance of the orders above.
  - e. The honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of the case.



f. The costs of this application be provided for.”

The application is premised on the sixteen (16) grounds marked (a) to (p) on its face and supported by the affidavits sworn by Edward Mwadena Tsutsu on the October 6, 2022 and October 31, 2022. He contends that he is the proprietor of plot Mikahani/Mawemabomu/Chonyi/386, the suit land, as adjudicated under the [Land Adjudication Act](#) chapter 284 of Laws of Kenya. That the respondents trespassed onto the said land sometimes in 2022 and started growing crops and constructing structures without his permission thereby interfering with his enjoyment of the land. That the respondents may start disposing of the land causing him substantial loss. The he has reported to the chief, police and County Commissioner. That the plot does not belong to Mwambaji Mbaji Dambi as that person owns plot Mikahani/Mawemabomu/Chonyi/286. That the suit land had not been bought by the 1<sup>st</sup> defendant’s husband and the agreement relied on is not signed. The minutes relied on by the defendants’ states that there were some developments done by them mostly in 2019 and 2020 when he could not stop them due to Covid 19. That the Assistant County Commissioner’s direction that they come to court over the ownership of the plot was irregular as he had been issued with title document on the October 11, 2019

2. The application is opposed by the defendants through their joint replying affidavit sworn on the October 21, 2022. It is their case that the suit land as per the official search belongs to Mwambaji Mbaji Dambi, and not to the plaintiff. That the portion of the land measuring one acre that they are utilizing was sold to their husband/father before his death on the 7<sup>th</sup> September 2020, by the plaintiff on the March 21, 1998, and August 7, 1999. That the dispute over the land has been heard before the local administration and police, and it was confirmed that they are the bona fide users of the land where they have permanent house under construction, grown avocados, trees, mangoes, pineapples, and beefwood trees which they planted over 25 years ago. That they were not present during the adjudication of the land process, and the plaintiff incorporated their portion of land into his parcel without disclosing that he had sold it to them. That they did not trespass onto the land in 2022 as alleged, but are owners having bought it from the plaintiff in 1998.
3. The learned counsel for the plaintiff and the defendants filed their submissions dated the December 5, 2022 and December 10, 2022, which the court has given due considerations.
4. The issues for the determinations by the court are as follows;
  - a. Whether the plaintiff has made out a prima facie case for mandatory injunction to issue at this interlocutory stage.
  - b. Who pays the costs of the application.
5. The court has carefully considered the grounds on the notice of motion, affidavit evidence by both sides, submissions by the learned counsel for the parties, superior courts decisions cited thereon, and come to the following conclusions;
  - a. That it is apparent that what the plaintiff seeks is mandatory injunction in terms of prayer 3 of the notice of motion, pending the hearing and determination of the suit. Prayer 2 that had sought for temporary injunction pending the hearing and determination of the application is now spent. That perusing the plaint dated the October 6, 2022, it comes out clearly that the prayers sought are for permanent injunction against defendants, declaration that the plaintiff is the registered owner of the suit land, costs and interest.
  - b. In considering whether or not interlocutory injunctions should issue, pending the hearing and determinations of a suit, order 40 rule 1 of the [Civil Procedure Rules](#), has the conditions



to be satisfied for orders to issue. The superior courts have also pronounced themselves in various cases on the tests to be considered in such applications. The cases include, but not limited to *Giella versus Cassman Brown & Co. Ltd* (1073) EA 358, *Paul Gitonga Wanjau versus Gathuthi Tea Factory Co. Ltd & 2 others* [2016] eKLR, and *Mrao Ltd versus First American Bank of Kenya & 2 others*, cited with approval in *Mosess C, Muhia Njoroge & 2 others versus Jane W. Lesaloi & 5 Others* [2014] eKLR. That what comes out clearly is that for an applicant to succeed, the existence of a prima facie case with a probability of success must be established. Secondly, the applicant should show that irreparable loss that may not adequately be compensated by an award of damages will occur unless the order is issued. Thirdly, where in doubt, the court will apply the balance of convenience.

- c. It is trite law that mandatory injunctions ought not be granted at interlocutory stages except where special circumstances have been established, and even then, only in the clearest of cases where the court is of the considered view that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could be easily remedied or where the defendants had attempted to as it were 'steal a match' on the plaintiff. This position has been set out in the cases of *Locabail International Finance Ltd versus Agroexport & Others, The Sea Hawk* [1986] All ER 901 and *Kenya Breweries Ltd versus Okeyo* [2002] 1 EA 109.
  - d. In his endeavor to establish ownership to the suit land, the plaintiff has annexed to his supporting affidavit a copy of a title deed to the suit land issued in his name on the October 11, 2019. At page 2 of the said title, it is clear the parcel was registered on the January 8, 2019. The defendants have on their part challenged the plaintiff's claim to the title of the suit land by annexing to their replying affidavit a copy of the certificate of official search over the suit land title dated the October 6, 2022 that shows the land was registered in the name of Mwambaji Mbaji Dambi and title deed issued in his name. The said Mwambaji Mbaji Dambi is not a party in this proceedings. With the issue of title to the suit land being in contention, then an order of mandatory injunction may not issue, especially considering the plaintiff has conceded the defendants have been on the land for years before the filing of this suit.
  - e. That having found no merit with the application, then pursuant to section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the plaintiff should pay the defendants costs.
6. That as a consequent of the above conclusions, the plaintiff's notice of motion dated the October 6, 2022 is without merit, and is hereby dismissed with costs.

It is so ordered.

**DATED AND VIRTUALLY DELIVERED THIS 1<sup>st</sup> DAY OF MARCH 2023.**

**S. M. Kibunja, J.**

**ELC MOMBASA.**

IN THE PRESENCE OF;

PLAINTIFF: Absent

DEFENDANTS : Absent

COUNSEL : Mrs. Kyalo for Plaintiff/Applicant.

WILSON – COURT ASSISTANT.

S. M. Kibunja, J.

