



Attari ((Suing for Himself, and on behalf of the Estate of Hatim Mohamedali Jevanjee - Deceased)) v Oduor & another (Environment & Land Case 77 of 2022) [2023] KEELC 17315 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17315 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 77 OF 2022**

NA MATHEKA, J

MAY 10, 2023

BETWEEN

**ZAHIDHUSSEIN E. ATTARI APPLICANT
(SUING FOR HIMSELF, AND ON BEHALF OF THE ESTATE OF HATIM
MOHAMEDALI JEVANJEE - DECEASED)**

AND

**JABES ODUOR 1ST RESPONDENT
MOMBASA COUNTY LAND REGISTRAR 2ND RESPONDENT**

RULING

1. The application is dated July 7, 2022 and is brought under order 40 rule i (a) and order 51 rule 1 of the [Civil Procedure Rules](#), sections IA, IB and 3A of the [Civil Procedure Act](#), article 35 of the [Constitution](#) seeking the following orders that;
 1. This honourable court be pleased to certify this matter urgent, dispense with the service in the first instance and hear the same *ex-parte*.
 2. Pending the inter parties hearing and determination of this application, the court be pleased to issue an injunction restraining 1st respondent by himself, his agents, servants, or whomsoever else acting on his behalf or instructions from entering, trespassing, moving into, seeking to occupy, alienating, charging, selling, disposing of and/or in any other manner whatsoever interfering with the applicant's rights of ownership, possession, occupation or use of the parcel of land known as subdivision No 22E section I (original plot No 4 section I).
 3. Pending the hearing and determination of this suit, the court be pleased to issue an injunction restraining the 1st respondent whether by himself, his agents, servants, or whomsoever else



acting on his behalf or instructions from entering, trespassing, moving into, seeking to occupy, alienating, charging, selling, disposing of and/or in any other manner whatsoever interfering with the applicant's rights of ownership, possession, occupation or use of the parcel of land known as subdivision No 22E section I (original plot No 4 section I),

4. Mandatory injunction compelling the 2nd respondent to produce to the court certified documents including the parcel file, green card, consents, receipts, valuations, register, court order, transfer and any other documents related to the particulars of the registered ownership of the parcel of land known as subdivision No 22E section 1 (original plot No 4 section I) within 14 days from the date of issuing the order.
 5. The applicant be granted leave to serve the order, summons and pleadings by way of substituted service.
 6. Costs.
2. It is premised on the supporting affidavit of Zahidhussein Ibrahim Attari and grounds that the applicant has a good case with high chances of succeeding at the trial because at all material times to this suit the applicant, jointly with Mr Hatim Mohamedali Jevanjee (deceased) and Mr Mohsin Mohamedali Jevanjee (deceased) under a tenancy-in-common were and still are the registered owners of the parcel of land situate at Nyali Mombasa known as subdivision No 22E section I (original plot No 4 section I). The applicant is the administrator of the estate of Hatim Mohamedali Jeevanjee who died on November 15, 1986 in Mombasa vide a grant of probate of written will issued by the High Court in succession cause No HC/RM 43 of 2001 in the matter of the estate of Hatim Mohamedali Jevanjee (deceased) and a confirmation of the said grant of probate issued by the High Court on December 10, 2003. That the applicant by himself, Mr Hatim Mohamedali and Mr Mohsin Mohamedali or through their authorised agents have remained in exclusive possession of the suit property from the time the property was registered in their names in 1960. That at all material times to this suit, up to and including January 19, 2022 the applicant has been servicing the suit property by paying annual land rates to the County Government of Mombasa. That on or about the year 2019, on a date not known to the applicant, the 1st respondent entered into the suit property without any lawful permission, licence or lease from the applicant or any of the registered owners. Further the 1st respondent has refused to vacate the suit property despite having actual and constructive knowledge that the applicant is and his co-owners were the registered proprietors.
3. On October 6, 2021, the National Construction Authority (NCA) on their own volition carried out inspection on the 1st respondent's illegal construction on the suit property and issued the 1st respondent with a suspension of works order. On June 2, 2022, the county government of Mombasa issued the 1st respondent with a stay order Ref No CPI-I/Stay OrderNol 1/005 ordering the 1st respondent to immediately stop the development on the suit property as the 1st respondent had not yet complied with the requirements of the relevant county authorities. On June 6, 2022, the applicant reported the matter at the Nyali Police Station and was issued with OB No 25/6/6/2022.
4. That on June 14, 2022, with the applicant's authorization, the applicant's agent Mr George Kariuki visited the office of the Mombasa Land Registrar to conduct a search. The registry informed Mr Kariuki, who later informed the applicant, that the file was incomplete because some material record/ documents are missing from the file. Further, the officers at the lands office demanded that the applicant produces the original title for inspection before they could release the search to him. Based on the foregoing developments and information from the 2nd respondent, the applicant is apprehensive that the 1st respondent is in the process of unlawfully interfering with the registered ownership and



- title of the applicant by presenting false documents to the 2nd respondent to transfer the suit property to the 1st respondent or otherwise interfering with the documents in the register to falsify his claim.
5. The 1st defendant/respondent stated that the grant of probate as well as the certificate of confirmation of grant were issued to one Zahidhusein Ebrahim Mohamedali and not the applicant herein. That the annexures therein confirm without doubt that the suit property was owned by three individuals, Zaidhusein Ibrahim, Hatim Mohamedali and Moshin Mohamedali. That the applicant herein is neither of the three named original owners and equally, the grant purportedly made in favour of the applicant was made in favour of Zahidhusein Ebrahim Mohamedali. That the 1st respondent categorically states that he moved to the suit property in the year 2005 wherein he erected the boundary walls, planted trees and put up a permanent two bed-roomed house. A true copy of the photograph showing the house, the trees and the boundary walls is contained at page 1 of the 1st respondent's bundle of exhibits. That the 1st respondent avers that he has openly, without secrecy and with the sole intention of acquiring ownership of the suit land occupied it for the last seventeen (17) years. The registered owners have never lodged any case against the 1st respondent or any other person or entity over the suit property.
 6. That in the year 2011, the now defunct Municipal Council of Mombasa approved his construction to "upgrade of the existing building" into a permanent four (4) bedroomed family house on which his family and him have been residing in. True copies of the approved building plan and the PPA2 approved by the council is contained at pages 2 to 8 of the 1st respondent's bundle of documents. That the alleged inspection by the National Construction Authority (NCA) on October 6, 2021 had nothing to do with ownership. In fact, the applicant's annexure marked Z-10 confirms as much and goes ahead to show that the construction would go on once there was compliance. That having been in the suit property for more than seventeen (17) years, he proceeded to file a case for adverse possession. That the applicant's complaint lodged at Nyalı Police Station *vide* OB number 25/6/6/2022 was a tactic deployed about three (3) months ago by the applicant and his other accomplices and agents but the police have not taken any action considering that the applicant is simply an impostor.
 7. This court has considered the application and the submissions therein. The applicant submits that on or about the year 2019, on a date not known to the applicant, the 1st respondent entered into the suit property without any lawful permission, licence or lease from the applicant or any of the registered owners. Further the 1st respondent has refused to vacate the suit property despite having actual and constructive knowledge that the applicant is and his co-owners were the registered proprietors. on the other hand the 1st respondent states that he moved to the suit property in the year 2005 wherein he erected the boundary walls, planted trees and put up a permanent two bed-roomed house. A true copy of the photograph showing the house, the trees and the boundary walls is contained at page 1 of the 1st respondent's bundle of exhibits. That the 1st respondent avers that he has openly, without secrecy and with the sole intention of acquiring ownership of the suit land occupied it for the last seventeen (17) years. It is not disputed that the 1st respondent is in occupation of the suit property and what the applicant seems to request for is a mandatory injunction as he has already entered the suit premises and constructed a house. In the case of *Kenya Breweries Ltd & another v Washington O. Okeya* (2002) eKLR, the Court of Appeal stated as follows on mandatory injunctions.

"A mandatory injunction ought not to be granted on an interlocutory application in the absence or special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory



injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

8. In the case of *Nation Media Group & 2 others v John Harun Mwau* (2014) eKLR, the court of appeal said;

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrate as we have stated a temporary injunction can only be granted in exceptional and in the clearest of cases.”

9. The above cited cases lay down the principles of law to be considered in an application for mandatory injunction and the condition that stands out is that the applicant must establish the existence of special and exceptional circumstances that warrant the granting of orders of mandatory injunction. I find this has not been established but however the applicant has raise a prima facie case and hence I order that the status quo be maintained pending the hearing and determination of this suit. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 10TH DAY OF MAY 2023.

N.A. MATHEKA

JUDGE

