



Kilonzo v Muka Mukuu Farmers Co-op Society Ltd & 2 others (Environment & Land Case E071 of 2022) [2023] KEELC 17113 (KLR) (4 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17113 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E071 OF 2022**

CA OCHIENG, J

MAY 4, 2023

BETWEEN

NICHOLAS MUTUA KILONZO PLAINTIFF

AND

MUKA MUKUU FARMERS CO-OP SOCIETY LTD 1ST DEFENDANT

DISTRICT LAND SURVEYOR, MACHAKOS 2ND DEFENDANT

DISTRICT LAND REGISTRAR, MACHAKOS 3RD DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 5th September, 2022 where he seeks for the following orders:
 1. Spent.
 2. A temporary order of injunction be issued against the 1st Respondent, their employees, workers, agents and/or whomsoever acting on their behalf or instruction jointly or severally restraining them from interfering with, transferring, disposing off, allocating, or subdividing Plot No 5-148 by private sale or otherwise pending the hearing and determination of this suit;
 3. A permanent order of injunction be issued against the 1st Respondent, restraining them, their agents, servants and/or employees, or whomsoever acting on their behalf or instructions from entering, invading, moving into, trespassing upon and/or in any other manner whatsoever from interfering with the Applicant's ownership, use, occupation and/or possession of Plot No. 5-148;
 4. Pending the hearing and determination of this suit, an order of injunction be issued against the Respondents compelling them to produce the allocation map used to allocate plots to their members and locate Plot No. 5-312 on the said map;



5. The 1st Respondent produces the findings of the arbitration hearings held with the Applicant and the people with an interest in Plot 5-312.
 6. The Surveyor be ordered to resurvey Plot No. 5-148 as according to the original allocation map and the plot record held by the Respondent.
 7. The cost of this suit; and
 8. Any other axillary order this court may deem fit for the ends of justice to be met.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Nicholas Mutua Kilonzo where he claims to be the legal owner of Plot No. 5-148 hereinafter referred to as the '*suit land*' which he purchased in the late 1980s. He explains that he was issued with a Share Certificate by the 1st Respondent dated the 24th January, 1994 as proof of ownership of the suit land. He insists that Plot No. 5-312 does not exist on the allocation map and the 1st Defendant has severally attempted to sell and hold majority of the suit land as being location of Plot No. 5-312. He contends that Plot No. 5-312 was transferred to his father by the 1st Respondent to act as compensation for the acquiring of his Plot No. 5-147 to build a dam and this is reflected in the Share Certificate dated the 26th July, 1996 including a later dated the 12th July, 1996 issued by the 1st Respondent to his mother as well as the original owner of Plot No. 5-312. He avers that the 1st Respondent has on several occasions failed to show him together with his family the location of Plot No. 5-312. Further, that it has sold several non-existent plots to unsuspecting buyers. He claims the 1st Respondent has engaged in unscrupulous acts such as ordering for the resurveying of the suit land in his absence so as to alter the acreage and boundary. Further it has fraudulently allocated and sold Plot No. 312 supported by letter dated the 12th July, 1996, listing Musau Kata as its original owner. He further reiterates that several arbitration meetings have been held to resolve the dispute and it concluded that he is the owner of Plot No. 5-148.
3. The 1st Respondent opposed the instant Application by filing a Replying Affidavit sworn by Stephen Kariuki Kiania where he deposes that he is a member of the 1st Respondent Management Committee and well conversant with the issues in dispute and have the authority to swear the Affidavit. He contends that the Applicant's Application is an afterthought, misleading, full of falsehoods and discloses no cause of action against the 1st Respondent. Further, that it is vexatious, scandalous and otherwise an abuse of the court process and should be dismissed forthright. He explains that the 1st Respondent is constituted of members who have subscribed shares whereby each member can buy one share or several shares and each share is converted to one main plot. Further, the member is allowed to select the same. He avers that on or about 14th August, 1968 one Esther Kalekye Munyithya joined the 1st Respondent, and was assigned share No. 844 where she was later allocated Plot No. 5-147 in February, 1983. Further, on or about 26th September, 1994, Esther Kalekye Munyithya transferred the same share No. 844 and Plot No. 5-147 to one Kilonzo Kyalo, the father of the Applicant. He states that around the year 1993, the 1st Respondent constructed a dam which encroached into a portion of Plot No. 5-147 for share no. 844 and because of this, Kyalo Kilonzo opted to vacate Plot No. 5-147 and was allocated four (4) plots in the central farm, being plot numbers KYC 516, KYC 517, KYC 518 and KYC 519 respectively. He explains that on or about 12th September, 1996 the 1st Respondent was requested by one Dorothy Syokau Kilonzo who is the wife of Kilonzo Kyalo and the mother to the Plaintiff that Plot No. 5-147 be exchanged with Plot No. 5-312 which borders, the said Plot No. 5-147 that had been surrendered for dam construction as the owner of Plot No. 5-312, one Musau Kata, membership no. 1917 was yet to settle therein. Further, when the request by the 1st Respondent was made to Musau Kata he declined and thereafter a dispute arose between the family of Kilonzo Kyalo and Musau Kata. He reiterates that the same dispute was presented before the 1st Respondent's



Committee for settlement by way of arbitration whereby the panel on 6th November, 2014 affirmed that the Plot No. 5-312 belongs to Musau Kata for share no. 1917. Further, thereafter Musau Kata transferred the same Plot No. 5-312 to one Paul Wambua Kavulya on 7th May, 2015. He states that Paul Wambua Kavulya then exchanged Plot No. 5-312 with Plot No. Athi M.81 leaving Plot No. 5-312 vacant. Further, that the vacant Plot No. 5-312 was then allocated to one Florence W. Mutisya for her share No. 2508. He insists that despite the transfer of Plot No. 5-312 being validly made to one Florence W. Mutisya, the Applicant has continuously obstructed the Surveyor from marking the beacons on the said plot and efforts by the 1st Respondent to convince the Applicant on the same have been futile. He reaffirms that on 25th January, 2019, share no. 844 and plot numbers KYC 516, KYC 517, KYC 518 and KYC 519 owned by Kilonzo Kyalo were transferred to one Francis Mutuku Kyalo who exchanged the plots KYC 516-519 for Plot No. Athi Mithongo No. 38 which measures 7 acres. Further, Plot numbers 5-147, 5-148 and 5-312 measuring 2.827 acres, 4.947 acres and 6.413 acres respectively have bordered each other based on the map for the said plots. He further insists that based on the 1st Respondent's records plot numbers 5-147, 5-148 and 5-312 have been allocated to the rightful owners and the Applicant has no claim whatsoever over other portions, save for Plot No. 5-148 measuring approximately 4.947 acres and another at Athi Mithongo area. Further, that the Applicant as a purchaser of Plot No. 5-148 from Raphael Makau is only entitled to the portion of land which Raphael had as a member. He sought for the instant Application to be dismissed.

4. The 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 Plaintiff is entitled to an order of temporary injunction restraining the Defendants from interfering with the suit land, pending the outcome of this suit.
6. The Plaintiff in his submissions reiterates his averments as per the Supporting Affidavit and contends that he has established a *prima facie* with high chances of success case. He insists that the 1st Respondent has every intention of evicting him and he will hence suffer irreparable harm. He argues that the balance of convenience tilts in favour of granting him an injunction. To support his averments, he has relied on the following decisions: *JM v SMK & 4 Others* [2022] eKLR; *R.J.R. Macdonald v Canada (Attorney General)*; *Francis Muriithi Ndirangu v Ruth Wanjiku Nderitu* [2016] eKLR; *Chebii Kipkoech v Barnabas Tuitoek Bargaroria & Another* [2019] eKLR.
7. The 1st Defendant in its submissions insists that the Applicant has not indicated the size of his land hence it is difficult to prove his allegations of any interference by owners of Plot N0. 5-312. It argues that the Applicant has failed to meet the legal requirements as to production of documents annexed to an Affidavit, as he has lumped a list of documents without marking them. It reiterates the averments in the Replying Affidavit and insists that the Applicant has failed to show he has a case with a probability of success. It insists that Plot Nos. 5-147, 5 -148 and 5-312 have bordered each other based on the map for plots and if the order of injunction is granted it will amount to evicting owners of Plot No. 5-132. Further, that a prayer for injunction cannot issue at this stage. It avers that the prayers No. 4, 5 and 6 are spent since it has already produced the documents sought by the Applicant. To support its averments, it has relied on the following decisions: *Giella v Cassman Brown & Company Limited* (1973) EA 358; *Francis A. Mbalanya v Cecilia N. Waema* [2017] eKLR and *Sammy Kemmo Arekai v Eliakim W Olweny & Another* [2021] eKLR.
8. In line with the principles for granting an injunction as established in the case of *Giella v Cassman Brown & Company Limited* [1973] EA 358, I will proceed to determine whether the Plaintiff is



entitled to the orders as sought in the instant Application. On whether the Plaintiff has established a prima facie case, I will associate myself with the definition of the same as espoused in the case of *Mrao Ltd v First American Bank Limited* [2003] K.L.R. 125.

9. In the current scenario the Plaintiff claims to be the legal owner of Plot No. 5-148 which he purchased in the late 1980s. Further, that he was issued with a Share Certificate by the 1st Respondent dated the 24th January, 1994 as proof of ownership of the suit land. He insists that plot No. 5-312 does not exist on the allocation map. Further, that the 1st Defendant has severally attempted to sell and hold majority of the suit land as being location of Plot No. 5-312. He contends that Plot No. 5-312 was transferred to his father by the 1st Respondent to act as compensation for having acquired his Plot No. 5-147 to build a dam and this is reflected in the Share Certificate dated the 26th July, 1996 including a later dated 12th July, 1996 issued by the 1st Respondent to his mother. He avers that the 1st Respondent has on several occasions failed to show him together with his family the location of Plot No. 5-312.
10. The 1st Defendant opposed the instant Application and provided the history of the suit plots. It explained that on 14th August, 1968 one Esther Kalekye Munyithya was assigned share No. 844 where she was allocated Plot No. 5-147 in February, 1983. Further, on 26th September, 1994, Esther Kalekye Munyithya transferred the same share No. 844 and Plot No. 5-147 to one Kilonzo Kyalo, the father of the Applicant. It contended that in 1993, Kyalo Kilonzo was allocated 4 plots in the central farm, being plot numbers KYC 516, KYC 517, KYC 518 and KYC 519 in exchange for plot No. 5-147. Further, that on 12th September, 1996 the 1st Respondent was requested by one Dorothy Syokau Kilonzo who is the wife of Kilonzo Kyalo and the mother to the Applicant that Plot No. 5-147 be exchanged with Plot No. 5-312 which borders Plot No. 5-147 that had been surrendered for dam construction as the owner of Plot No. 5-312, one Musau Kata, membership no. 1917 was yet to settle therein. Further, when the request by the 1st Respondent was made to Musau Kata he declined and thereafter a dispute arose between the family of Kilonzo Kyalo and Musau Kata. He reiterates that the same dispute was presented before the 1st Respondent's Committee for settlement by way of arbitration whereby the panel on 6th November, 2014 affirmed that the Plot No. 5-312 belongs to Musau Kata for share no. 1917. Further, thereafter Musau Kata transferred the same Plot No. 5-312 to one Paul Wambua Kavulya on 7th May, 2015. He states that Paul Wambua Kavulya then exchanged Plot No. 5-312 with Plot No. Athi M.81 leaving Plot No. 5-312 vacant. Further, that the vacant Plot No. 5-312 was then allocated to one Florence W. Mutisya for her share No. 2508. He states that it is the Applicant who has continuously obstructed surveyors to mark beacons on Plot No. 5-312 which was validly allocated to one Florence W. Mutisya. I note the Applicant has not denied that he was allocated Plot numbers KYC 516, KYC 517, KYC 518 and KYC 519 in exchange of Plot No. 5-147. Further, that on 25th January, 2019 he transferred them to one Francis Mutuku Kyalo who exchanged the plots KYC 516-519 for Plot No. Athi Mithongo No. 38 which measures 7 acres. Further, Plot Nos. 5-147, 5-148 and 5-312 measuring 2.827 acres, 4.947 acres and 6.413 acres respectively have bordered each other based on the map for the plots. From the Plaintiff's averments, despite mentioning the documents he is relying on, he never annexed any of them hence his allegations all remain unsupported. Looking at the documents presented by the 1st Defendant, I find that the 1st Defendant's explanations are plausible. Further, on perusal of annexure 'SKK 4', it emerges that the 1st Defendant vide its letter dated the 25th January, 2022, had actually provided the Plaintiff with a history of the plots and informed him of the ownership of Plot Nos. 5-148, 312 and 147 respectively. I opine that the Plaintiff is not being candid with some of his allegations. In the circumstances, I find that the Plaintiff has not established a prima facie case to warrant the orders of injunction as sought. As for prayers 4 and 5, I note the 1st Defendant has produced the said documents as annexures and will hence make no order to that effect. I will not deal with prayer No. 6 at this juncture.



11. In associating myself with the decision *Nguruman Ltd. v Jan Bonde Nielsen* CA No. 77 of 2012, where the Court of Appeal held that in instances when a party has failed to establish a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction and will hence decline to do so.
12. It is against the foregoing that I find the Plaintiff's Notice of Motion dated the 5th September, 2022 unmerited and will dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 4TH DAY OF MAY, 2023

CHRISTINE OCHIENG

JUDGE

