



**Mutisya (Suing as the administrator of the Estate of Johnstone Mutisya Munee) v Daud & another
(Environment & Land Case 44 of 2022) [2023] KEELC 17774 (KLR) (7 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 17774 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 44 OF 2022**

CA OCHIENG, J

JUNE 7, 2023

BETWEEN

**FELIX MUSAU MUTISYA PLAINTIFF
SUING AS THE ADMINISTRATOR OF THE ESTATE OF JOHNSTONE
MUTISYA MUNEE**

AND

**YUSUF MOHAMMED DAUD 1ST DEFENDANT
ABEY ABDINOOR OSMAN 2ND DEFENDANT**

RULING

1. What is before court for determination is the plaintiff's notice of motion application dated the August 8, 2022 where he seeks the following orders:-
 1. Spent.
 2. This honourable court be pleased to grant an order of temporary injunction to maintain the status quo by restraining the respondent whether by themselves, their agents and/or servants from wasting, constructing on, developing, alienating or otherwise interfering or dealing with the land known as LR No 12715/148 within Machakos county pending the hearing and final determination of this application.
 3. This honourable court be pleased to grant an order of temporary injunction to maintain the status quo by restraining the respondent whether by themselves, their agents and/or servants from wasting, constructing on, developing, alienating or otherwise interfering or dealing with the land known as LR No 12715/148 within Machakos county pending the hearing and final determination of the main suit.
 4. The officer commanding station Mlolongo do enforce compliance of the above order.



5. The costs of this application be provided for.
2. The application is premised on the grounds on the face of it and supported by the affidavit of Felix Musau Mutisya. The plaintiff confirms being the administrator of the estate of the late Johnstone Mutisya Muneo, the owner of the all that property known as LR No 12715/148 hereinafter referred to as the 'suit land.' He contends that the defendants entered upon and trespassed on the suit land, erected a wall and commenced construction of apartments without his authority, knowledge or consent. He explains that the suit land initially belonged to Syokimau Farm Ltd, that was the original owner of all that property known as LR No 7149/11/R and the suit land is a resultant subdivision therefrom. He contends that Syokimau Farm Limited allocated the suit land to its members in the form of shares, which members paid for. Further, that Johnstone Mutisya Muneo became member No 219 and was allocated shares Nos 2181 - 2190. He claims that the suit land belongs to Johnstone Muneo and they have been in quiet and uninterrupted possession thereon, with the title still in the name of Johnstone Muneo. Further, that as the administrator he has paid up to date the land rates and land rent. He avers that the defendants are intent on wasting, damaging, alienating, disposing of or otherwise intermeddling with the said suit land to his detriment.
3. The 1st defendant opposed the instant application by filing grounds of opposition and replying affidavit where he stated that the application does not meet the test for grant of interlocutory injunctions as sought; the plaintiff has not showed how he will suffer irreparable damage not capable of monetary compensation if the application is not granted; the plaintiff's claim is grasping on straws as it relies on insufficient evidence and mere apprehension and has not demonstrated a *prima facie* case that shows probability of success; the balance of convenience leans in favor of not granting the injunction sought; the application does not meet the test for grant of a mandatory interlocutory injunction and the plaintiff has not laid any basis for grant of the orders sought.
4. In the replying affidavit sworn by Yussuf Mohammed Daud he deposes that the instant application is an abuse of the court process and ought to be dismissed with costs. He contends that the document named as supporting affidavit is not commissioned and abuses the rules as per the *Oaths and Declaration Act* and should be struck off with costs. He denies dealing with the plaintiff and avers that the instant application is malicious, designed by the applicant having the intention to defraud and disposes him of his land. He confirms being the *bona fide* purchaser of LR No 12715/14011 and LR No 12715/14012 and has his name duly registered as the legal owner. Further, that the documents produced by the applicant marked FMM1-FMM8 are of questionable character intended to mislead the court to arrive at an illegal determination. He explains that prior to the sale and purchase of plots LR No 12715/14011 and LR No. 12715/14012 from the 2nd defendant, he carried out a physical search, did an online search that verified the 2nd defendant was the registered owner who had been paying land rates for the said property. He explains that he entered into a sale agreement with the 2nd defendant on June 13, 2019 for purchase of LR No 12715/14011 and LR No 12715/14012. Further, after purchase, he commenced construction and developments thereon until he was interrupted by the plaintiff claiming that he is the owner of the property. He denies knowledge of any property known as LR No 12715/148. He argues that if indeed the applicant was in actual possession of the suit land, then he ought to have been aware of the developments thereon. He reiterates that the plaintiff has no legal basis to seek the orders sought as he has no known legal interest in the properties known as LR No 12715/14011 and LR No 12715/14012.
5. The 2nd defendant opposed the instant application by filing a replying affidavit sworn by Abey Abdinoor Osman where he deposes that the said application is an abuse of the court process. He contends that all the documents presented by the applicant in support of his application are of questionable character and are at the very least all forgeries. He challenges the authenticity of the



following documents: grant number IR 44876 and title LR No 12715/148 purportedly transferred to one Johnstone Mutisya Munee; share certificate No 219 from Syokimau Farm Limited, dated the 3rd of November 1980; Letter of allotment from Syokimau Farm Limited No 219 granted to Johnson Mutisya Munee dated August 6, 1981; Syokimau Farm Limited undated receipt No 0219 for Kshs 1005 issued to Johnson Mutisya Munee; Syokimau Farm Limited receipt No 259 and dated January 4, 1980 for Kshs. 1500 issued to Johnson Mutisya Munee; Syokimau Farm Limited receipt No 645 and dated August 6, 1981 for Kshs. 350 issued to Johnson Mutisya Munee; search certificate dated April 28, 2022; Machakos rent clearance certificate dated May 13, 2022; Machakos official receipt for clearance certificate dated May 13, 2022 for Kshs 6,500.00; Machakos official receipt for land rates penalties and land rates current year dated May 13, 2022 for Kshs 43,631. He explains that the late Johnstone Mutisya Munee was allocated plot No LR No 12715/148 but he was never registered as the owner of the said property as he sold his interest to one James Wambua Makau who was thereafter registered as the lawful owner of the said property. He is aware that James Wambua Makau the duly registered owner, divided the property into two being LR No 12715/13848 and LR No 12715/13849 respectively. Further, prior to the sale and purchase of the two plots LR No 12715/13848 and LR No, 12715/12849, in addition to carrying out a physical search, he did carry out an online search that verified the details of the registered owner. He confirms that on the 8th of May, 2018, he entered into an agreement for sale and purchase of the LR No 12715/13848 and LR No 12715/13849 with one James Wambua Makau for thirty million each (Kshs 30,000,000 each). He avers that the said registered owner James Wambua Makau paid rents and rates for the year 2018 before the transfer was effected to him. He states that on or about the 25th of September, 2018 the 2nd defendant transferred the said properties LR No 12715/13848 and LR No 12715/13849 into his name and he was therefore registered as the lawful owner. Further, prior to the transfer of the said properties, the spouse of the seller James Wambua Makau, one Catherine Nduku James Wambua, executed a spousal consent, consenting to the disposal of the said parcel of lands. He states that on the 30th of January, 2019 he proceeded and made payment for the rates for both properties wit LR No 12715/13848 and LR No 12715/13849 and was issued with a rate clearance certificate for the year 2019. Further, on the 4th of December 2018, he subdivided the suit land into 36 plots measuring 50 x 100 and surrendered back the two titles and the subdivision plans to the Ministry for approval. He reiterates that the new certificates were issued numbers 12715/13996-14013 of what was formerly 12715/13848 and 12715/14014-14031 for 12715/12849 respectively. He reiterates that the said sub-division led to the creation of 36 new titles for the combined parcel wit 13996-14031. He further confirms that he subsequently entered into different sale agreement over a period of two years to dispose of the 36 plots including plots No. 12715/14011 and 12715/14012, which he sold to the 1st defendant herein on the June 13, 2019. He insists that the plaintiff has no legitimate claim over the suit land. He argues that the plaintiff annexed a letter of allotment marked as FMM5 bearing plot No 49 but subsequently proceeds to claim ownership of LR No 12715/148 which are distinct. Further, that FMM1 is unclear and unsupported by documents. He reaffirms that documents marked FMM5 being the letter of allotment dated August 6, 1981, the undated receipt no 0219 for Kshs 1005, the receipt no 259 dated April 4, 1980 for Kshs 1500 and the receipt dated August 6, 1981 for Kshs 350 are all suspicious documents for want of consistency in so far as the signature of the secretary is concerned, the location of the company i.e. Tala, Kangundo and or Athi River, the postal address of the company i.e. Box 17 Athi River, and Box 59708 Nairobi. Further, that the authenticity of the payment slip is questionable and requires verification. He further argues that the applicant could not have failed to notice the construction on the property if indeed he had been possession. Further, that the construction being carried out by the 1st defendant is legitimate as he had acquired the plot lawfully and legitimately and hence has all the rights appertaining to the use or abuse of his property. He further avers that prior to the sale and disposition of the various plot from



the land in question, he did erect a perimeter wall round the property in the year 2019 and hence if the applicant had any legitimate claim, he ought to have raised the same immediately.

6. The plaintiff filed a further affidavit reiterating his averments and insisting that the deceased owned the suit land. Further, that he never sold it to James Wambua. He insists that no one could process title to the suit land without approval of Syokimau Farm Limited. He argues that the defendants have not provided proof of payment of land rates and rent.
7. The application was canvassed by way of written submissions.

Analysis and Determination

8. Upon consideration of the instant notice of motion application including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether an order of interlocutory injunction should issue restraining the defendants from dealing with the suit land.
9. As to whether the plaintiff has established a prima facie case with a probability of success at the trial, I will rely on the principles stated in the case of *Giella v Cassman Brown & Company* (1973) EA 358 as well as the definition of a *prima facie* case as provided in the case of *Mrao Ltd v First American Bank of Kenya & 2 others* (2003) KLR 125.
10. The plaintiff claims his father Johnstone Mutisya Munee who was a member of Syokimau Farm Limited owned the suit land. He contends that defendants have trespassed thereon, erected a wall and commenced construction of apartments without his authority. He explains that Syokimau Farm Limited was the original owner of all that property known as LR No 7149/11/R and the suit land is a resultant subdivision therefrom. Further, that Johnstone Mutisya Munee became member No 219 and was allocated shares Nos 2181-2190. He insists he has been paying land rent and rates for the land. The defendants opposed the instant application and contended that the late Johnstone Mutisya Munee who was the plaintiff's father was allocated plot No LR No 12715/148 but he was never registered as its owner as he sold his interest to one James Wambua Makau who was thereafter registered as the lawful owner of the said property. They explained that James Wambua Makau subdivided the property into two being LR No 12715/13848 and LR No 12715/13849 respectively. Further, the 2nd defendant purchased the two Plots LR No 12715/13848 and LR No 12715/13849 from James Wambua Makau. They confirm that James Wambua Makau paid rents and rates for the year 2018 for the two parcels land before the transfer was effected to the 2nd defendant. Further, the 2nd defendant confirms that on the 4th of december 2018, he subdivided the suit land into 36 plots measuring 50 x 100 and new certificates of title were issued being numbers 12715/13996 – 14013 of what was formerly 12715/13848 and 12715/ 14014-14031 for 12715/13849 respectively. The 2nd defendant confirms selling the resultant subdivisions over a period of two years and disposed of plots No 12715/14011 and 12715/14012 to the 1st defendant on the June 13, 2019 after which the 1st defendant was registered as proprietor of the two plots. They insist that the plaintiff has no legitimate claim over the suit land. The 2nd defendant confirms he built a perimeter wall before selling the plots. Further that the 1st defendant has commenced construction on his two plots.
11. Looking at the documents presented by the respective parties, I note the property number LR No 12715/148 which is claimed by the plaintiff does not exist as it has been subdivided and some of the resultant subdivisions sold to third parties who are not in this suit. Further, since the title to the suit land has been subdivided severally, the plaintiff has not explained how he acquired a recent search which does not indicate the subdivisions. I note the plaintiff annexed a letter of allotment marked as FMM5 bearing plot No 49 but subsequently claims ownership of LR No 12715/148 and has not explained the nexus between the two plots. From the photographs presented by the plaintiff, it shows construction



which is at an advanced stage and the plaintiff has not indicated why he took long to file this suit if indeed he was in possession of the suit land. The defendants have demonstrated how they acquired their lands and produced a certificates of title in the name of James Wambua Makau showing that he owned LR No 12715/13848 and 12715/ 13849 as at November 1, 1983. Further, the said James Wambua Makau actually sold the two parcels of land to the 2nd defendant on May 8, 2018.

12. From the analysis of the documents presented, it is my considered view that the plaintiff except for waving the certificate of official search and letter of allotment, has failed to provide proof that he is in possession of the suit land. Further, I note both parties have receipts indicating payment of land rent and rates. From the copies of receipts presented by the plaintiff as issued by Syokimau Farm Limited, they bear various signatures and postal addresses that will require a representative from the said company to confirm whether they emanated therefrom. At this juncture, I opine that it would be improper to restrain a registered proprietor of land who is in actual possession, from the said land.
13. Based on the facts as presented including my analysis above while associating myself with the decisions cited above, I find that the plaintiff has not established a prima facie case to warrant of the orders of temporary injunction as sought against the defendants. I opine that since the plaintiff is not in possession of the suit land, he can be compensated by way of damages. Further, in relying on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 others* [2014] eKLR, where the Court of Appeal had stated that where a party has failed to prove a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction, I will hence decline to deal with the other two limbs.
14. It is against the foregoing, that I find the notice of motion application August 8, 2022 unmerited and will dismiss it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 7TH DAY OF JUNE, 2023

CHRISTINE OCHIENG

JUDGE

