



Musa ((Suing as the personal representative of the Estate of Amina Chepkemboi Mwalimu) v Rotich & 8 others (Environment & Land Case 89 of 2021) [2023] KEELC 18640 (KLR) (5 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18640 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAPSABET

ENVIRONMENT & LAND CASE 89 OF 2021

MN MWANYALE, J

JULY 5, 2023

(FORMERLY ELDORET ELC NO. 39 OF 2016)

BETWEEN

MARIAM SAID MUSA PLAINTIFF
(SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF AMINA CHEPKEMBOI MWALIMU

AND

JOEL ROTICH 1ST DEFENDANT
ISAAC KIPKERING KUTO 2ND DEFENDANT
PROF JOSPHAT KIPKOECH YEGO 3RD DEFENDANT
HELLEN AUMA OMONDI 4TH DEFENDANT
ELPHAS OMBUYA ANGORO 5TH DEFENDANT
MARTIN DOUGLAS 6TH DEFENDANT
EDEN SPRINGS COMPANY LIMITED 7TH DEFENDANT
EDWIN KIRWA BIRGEN 8TH DEFENDANT
FLORENCE MBOGA ISAAC 9TH DEFENDANT

RULING

1. The application coming up for determination is the one dated May 24, 2023 brought by the plaintiff seeking for the following orders;-
 - i. Spent



- ii. Spent
 - iii. That, this honourable court be pleased to issue an order of injunction to restrain the 3rd respondent, his servants or his agents claiming through him and others jointly and severally from damaging leasing, trespassing upon, tiling, surveying, destroying, wasting or in any other manner whatsoever erecting structures on my said piece of land along Chepcholol road Nandi/Kamobo/5275 pending the hearing and determination of this suit or until further or other orders of this court.
 - iv. That, the costs of this application be provided for.
2. The application is premised on the grounds that the applicant is the registered owner of Nandi/Kamobo/5275, the sit property herein which borders the 3rd respondents property known as Nandi/Kamobo/2622. The applicant claims for orders of eviction of the 3rd respondent who has allegedly encroached on the southern part of the suit property. That the said portion was subjected to survey by the Nandi County Surveyor who confirmed that the encroachment portion forms part of the applicant's property. The alleged act of trespass by the 3rd respondent prompted the filing of this suit as well as the instant application in order to restrain him. The applicant has averred that due to her apprehension that the instant suit will take long to be determined as well as the irreparable loss she will suffer, she is seeking for orders of temporary injunction against the respondents pending the outcome of this suit. She has stated further that a *prima facie* case has been established since she holds title over the suit property.
 3. The application is supported by an affidavit sworn by the applicant on May 24, 2023 reiterating the contents of the grounds in the application, which have been elaborated herein. The applicant prayed for grant of the orders sought in the circumstances.
 4. The 3rd defendant/respondent opposed this application *vide* replying affidavit sworn on June 8, 2023. He deposed that he is the registered of the suit property known as Nandi/Kamobo/2622 while one Ahmed Mustafa, Swaleh Mustafa, Miraaj Mustafa and Kulthum Mustafa are the registered owners of the adjacent property known as Nandi/Kamobo/5275. He annexed copies of title deeds over the two suit properties to support his assertions. The 3rd respondent contended that the applicant had no locus to institute the present application nor the main suit since she has no beneficiary or proprietary interests over the suit properties. In the circumstances, he used this honourable court to dismiss the present application for failure to meet the threshold for grant of the orders sought.
 5. On June 5, 2023, the court directed parties to file written submissions. However, on June 12, 2023 this court directed for hearing of the application orally since parties had failed to comply with the earlier directions of the court.
 6. The applicant submitted that the building erected on the 3rd respondent's property had encroached onto her property which was adjacent to the 3rd respondent's. She submitted by giving a history of the sale and purchase of Nandi/Kamobo/2622. She stated that when the said property was sold to the 3rd respondent it was measuring 0.138Ha however, the acreage of that property was changed to 0.15 Ha as evidenced by the Mutation Form Annexed to her application. It is on this basis that the applicant submitted that her property known as Nandi/Kamobo/5275 has been encroached by the 3rd respondent.
 7. Counsel for the 3rd respondent submitted on his part that the annexures to the application were not certified hence their authenticity could not be ascertained. He stated further that the construction was situated on the 3rd respondent's property and not on the adjacent parcel of land as alleged by the



applicant. Counsel informed this court that the applicant was aware of the construction since inception until completion in the year 2020. He urged the court to proceed with the substantial hearing of the suit since there was no urgency or need for issuance of the orders sought by the applicant.

8. In rebuttal, the applicant submitted that the building in dispute is not in occupation as the same is still under construction. She therefore prayed for the orders sought.

Analysis And Determination:-

9. The principles for grant of temporary injunction were well settled in the celebrated case of *Giella v Cassman Brown Company Ltd*(1773) EA 358 and reiterated in many other judicial pronouncements. This ruling will form part of the said pronouncements.
10. This court has to be satisfied that the applicant has established a *prima facie* case with a probability of success has demonstrated they shall suffer irreparable loss, which cannot be compensated by an award of damages and lastly in whose favour the balance of convenience tilts. All these requirements have to be met conjunctively.
11. Looking at the fact presented in this case vide the application before me, has the applicant established a *prima facie* case with a probability of success? A *prima facie* case was described in the case of *Mrao Limited v First American Bank of Kenya & 2 others* (2003) eKLR as follows;-

“A *prima facie* case in a civil case include but is not confined to a “genuine or arguable” case. It is a case which on the material presented to the court, a tribunal property directly itself will include there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
12. The applicant has not based her claim for ownership over the suit property on any title document as is required under section 26(1) of the *Land Registration Act*. The law is clear to the effect that a certificate of title issued by the Registrar upon registration is to be taken by all courts as *prima facie* evidence that the person names as the proprietor is the absolute and indefeasible owner.
13. The 3rd respondent on his part has presented to court *vide* his replying affidavit a copy of title deed over Nandi/Kamobo/2622 registered in his name, as well as a copy of title over Nandi/Kamobo/2622 registered in his name, as well as a copy of title over Nandi/Kamobo/5275 which the plaintiff claims ownership over. However, the latter property is registered in the names of Ahmed Mustafa, Swaleh, Mustafa, Miraj Mustafa and Kulthum Mustafa. Notably, the plaintiff/applicant’s name is not reflected therein.
14. In view of my limited role at this stage of the proceedings, which is, to not delve into the merits of the case, I find that the applicant has failed to make out a *prima facie* case with overwhelming chances of success.
15. On consideration of the second principle, I also find that the applicant shall not suffer irreparable injury incapable of compensation. This suit is premised on an alleged encroachment on land whose value is ascertainable and an order for compensation made to restore the applicant.
16. With regards to the last principle, in whose favour balance of convenience lies in the event the court is in doubt. This court I evidently not in doubt as to the two principles elaborated herein. It follows therefore that the instant application does not meet the threshold for grant of temporary injunctive orders and is hereby dismissed with costs, which shall be in the case.

DELIVERED AND DATED AT KAPSABET THIS 5TH DAY OF JULY, 2023.



HON. M. N. MWANYALE,

JUDGE

In the presence of:

Mrs Lelei for 9th Defendant, holding brief for Mr. Rotich for 1st, 3rd, 4th, 5th and 8th Defendant and also holding brief Mr. Kiprono for 7th Defendant.

Mariam Said Plaintiff in person.

