



**Community Housing Co-operative Society Ltd v Joseph Kimani Mbugua t/a Kimson Holdings Ltd
(Environment & Land Case 2 of 2022) [2023] KEELC 20571 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20571 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 2 OF 2022
CA OCHIENG, J
OCTOBER 12, 2023
FORMERLY MILIMANI ELC CASE NO. E031 OF 2021**

BETWEEN

COMMUNITY HOUSING CO-OPERATIVE SOCIETY LTD PLAINTIFF

AND

JOSEPH KIMANI MBUGUA T/A KIMSON HOLDINGS LTD DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 28th January, 2021 where it seeks the following Orders:
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, a temporary injunction do issue restraining the Defendants/Respondents whether by themselves, servants, employees, and/or Agents from transferring, alienating charging or trespassing on land known as Mavoko/ Municipality Block 36/296 or interfering with the peaceful possession of the suit property by the Plaintiffs in any way.
 - d. That 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 Wilson Mungai Thiong'o, its Chairman where he deposes that the Plaintiff is the beneficial and rightful owner of all that parcel of land known as Mavoko Municipality Block 36/296, hereinafter referred to as the 'suit land', which was part of the larger LR No.7340/296. He avers that the Plaintiff legally purchased and fully paid for the suit land vide a Sale Agreement dated the 8th May, 1995. He contends that the Sale and Transfer of the suit land was done in a transparent process and the Plaintiff was issued



with a Certificate of Lease dated the 3rd April, 2008. He explains that sometime in August, 2020 the Defendant trespassed on the suit land which was in possession of the Plaintiff, erected a makeshift perimeter fence and destroyed developments thereon. Further, that the Defendant has proceeded to misuse Police Authority to guard the illegal construction of the fence and issue summons to the Plaintiff's Chairman so as to intimidate him. He reiterates that the Defendant has declined to move from the suit land despite their demand for it, to do so.

3. In opposition to the instant Application, the Defendant filed a Replying Affidavit sworn by one Joseph Kimani Mbugua, its Managing Director where he deposes that the said Application is incompetent to the extent that the Plaintiff lacks capacity to institute the suit together with it. He argues that the grounds upon which the Application was brought were speculative and there was no proof that failure to issue the prayers sought would prejudice the Plaintiff. He states that the Plaintiff had not established a prima facie case with a probability of success nor had it established any irreparable harm that would be suffered. Further, that the balance of convenience tilted in favour of the Defendant. He avers that sometime in 1995, the officials of the Plaintiff sought to purchase, discussed the terms of sale and executed a Sale Agreement for 294 plots measuring 40ft by 60ft, to be hived from the larger property known as LR 7340/130, Githunguri Njiru farm. He explains that pursuant to the Sale Agreement, Change of User and subdivision of the said property was undertaken into 295 plots and that one plot measuring 0.04045 was left intentionally unallocated without a number as it was to belong to the Defendant. He contends that, after the registration of the 294 with numbers issued as Mavoko Block 36/1 to 36/295, the Plaintiff's officials moved out of their then offices and he lost contact with them for a long while. Further, that the remaining portion remained undeveloped without interference or trespass by any person. He confirms that he eventually made contact with one Simon Kapaiko, the former Secretary of the Plaintiff, who informed him that the Plaintiff's Chairperson had fraudulently transferred the extra portion to himself with the intention of selling it for his gain but passed away before the transfer was completed. He reiterates that the said Simon Kapaiko also informed him that the Plaintiff's society had disintegrated after the 1995 sale and new officials had irregularly taken over its leadership. He reaffirms that the said Simon had informed him that he had handed over the title document of the extra portion, being No. 36/296 to the Plaintiff's officials with the instruction that they were to notify the Defendant and co-operate with cancellation of the said title. Further, that the officials had disregarded the advice of Simon and refused to co-operate. He further explains that the registration of the extra portion that was bigger than the other 294 plots was done in 2008 which was thirteen (13) years after the sale transaction of the 294 plots and this demonstrated irregularity including fraud in the acquisition of the said title. He further reiterated that the Plaintiff's evidence is unsubstantiated and that they do not satisfy any of the settled principles for grant of injunctive relief.

The Application was canvassed by way of written submissions.

Analysis and Determination

4. 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 orders of interlocutory injunction pending the outcome of this suit.
5. The Plaintiff in its submissions reiterated its averments as per the Supporting Affidavit and argued that they are the registered proprietors of the suit land. It insisted that it would suffer irreparable harm, since the Defendant had erected a makeshift perimeter fence over the suit land and destroyed its development thereon. It further submitted that the balance of convenience tilted in its favour as it stood to lose the land if the orders of injunction were not granted. To support its averments, it relied on the following decisions: *Giella v Cassman Brown* (1973) 358 EA; *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR; *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR and *Koyopel*



v Lomukerang & Another (Environment & Land Case 8 of 2022) (2022) KEELC 20 (KLR) (5 May 2022) (Ruling).

6. The Defendant in its submissions also reiterated its averments as per the Replying Affidavit and insisted that the Plaintiff gave no documentary evidence to prove the alleged trespass. It contended that the Plaintiff had bought 294 and not 295 plots from it hence the title to the extra plot could only have been fraudulently obtained. It argued that the Plaintiff could not claim a prima facie case on a contested title. It insisted that since the suit was filed in 2021, it had not done any actions that would waste, alienate, transfer or in any way interfere with the suit land, even in the absence of any injunctive order. It was also its contention that the Plaintiff had not come to court with clean hands, hence the equitable remedy sought could not be granted. It reaffirmed that damages would be sufficient remedy and that the balance of convenience tilted in its favour. To support its averments, it relied on the following decisions: *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR; *East African Development Bank v Hyundai Motors Kenya Limited* (2006) eKLR; *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR; *Abdul Malik Thomas Matee Nzomo v Tabitha Katile Kawizi & 2 Others* [2022] eKLR; *Vulpine Investments Limited V Posstone Limited & Another* (2021) eKLR; *Elijah Ole Nanteya v Kipainoi Sayagie & Another* (2021) eKLR and *Joseph Mukonyi Gibendi v Moses Ugusimba & Another* (2021) eKLR.
7. In relying on the principles established in the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 and the description of a prima facie case as stated in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR I will proceed to analyze if the Plaintiff has established a prima facie case to warrant the orders of interlocutory injunction as sought.
8. In this instance, the Plaintiff claims to be the beneficial and rightful owner of all that parcel of land known as Mavoko Municipality Block 36/296, which was part of the larger LR No. 7340/296. It contends that it legally purchased the said land from the Defendant and paid for it, vide a Sale Agreement dated the 8th May, 1995. The Plaintiff confirms that it was issued with a Certificate of Lease dated the 3rd April, 2008 and has been in possession of the suit land. It avers that in August, 2020, the Defendant interfered with the suit land and put up a makeshift fence thereon. The Defendant has vehemently opposed the instant Application and confirms that sometime in 1995, the officials of the Plaintiff executed a Sale Agreement for purchase of 294 plots measuring 40ft by 60ft, to be hived off, from the larger property known as LR No. 7340/130, Githunguri Njiru farm. The Defendant explained that pursuant to the aforementioned Sale Agreement, Change of User and subdivision of the said property was undertaken into 295 plots and that one plot measuring 0.04045 was left intentionally unallocated without a number as it was to belong to him. Further, that after the registration of the 294 plots, it lost contact with the said officials of the Plaintiff but the remaining portion of land remained undeveloped without interference or trespass by any person. The Defendant claims one Simon Kapaiko, the former Secretary of the Plaintiff, informed him that the Plaintiff's Chairperson had fraudulently transferred the extra portion of land to himself with the intention of selling the same for his gain but he had passed on before the transfer was completed. Further, that the said Simon had informed him that he had handed over the title document of the extra portion, being No. 36/296 to the Plaintiff's officials with the instruction that they were to notify the Defendant and cooperate in cancelling the title but the Plaintiff's officials were uncooperative. The Defendant insists that the registration of the extra portion which was done in 2008 was irregular and fraudulent.
9. Looking at the documents presented by the respective parties, I note the Plaintiff was registered as proprietor of the disputed land in 2008. Further, the Defendant proceeded to put up a makeshift fence around the suit land, in August, 2020, which was thirteen (13) years later and has not explained why he took so long to do it, yet the said land was in possession of the Plaintiff. The Defendant has further



not furnished court with an affidavit sworn by Simon Kapaiko on the averments he has alluded to in the Replying Affidavit that the title was acquired fraudulently by the previous Chairman, The Defendant has further not denied using the police to guard the makeshift fence.

10. Based on the facts before me, while associating myself with the decision I have cited, I find that the Plaintiff has indeed established a prima facie case to warrant the orders of interlocutory injunction as sought.
11. On the second principle as to whether the Plaintiff will suffer irreparable loss which cannot be compensated by way of damages, I wish to refer to the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR where it was held that:

“...the applicant must establish that he ‘might otherwise’ suffer irreparable injury which cannot be adequately compensated remedied by damages in the absence of an injunction, this is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot ‘adequately’ be compensated by an award of damages.”

12. From the averments in the respective Affidavits, I note that the Plaintiff holds title to the suit land where the Defendant has proceeded to destroy developments made thereon and erect a makeshift perimeter fence. Further, the Defendant has not denied that he proceeded to misuse Police Authority to guard the illegal construction of the fence and issue summons to the Plaintiff’s Chairman so as to intimidate him and declined to move from the suit land. In the foregoing, I find that the Plaintiff’s alleged injuries are demonstrable and not speculative. Further, that it stands to suffer irreparable harm which cannot be compensated by way of damages.
13. On the question of balance of convenience, from the evidence presented by the parties at this juncture, I am not in doubt that the balance does tilt in favour of the Plaintiff who has been the registered proprietor of the suit land since the year 2008.
14. It is against the foregoing that I find the Notice of Motion Application dated the 28th January, 2021 merited and will allow it.

Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2023

CHRISTINE OCHIENG

JUDGE

