



Omar & 2 others v Kithindi & 2 others (Environment & Land Case 81 of 2019 & E051 of 2021 (Consolidated)) [2023] KEELC 21384 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21384 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 81 OF 2019 & E051 OF 2021 (CONSOLIDATED)
MN GICHERU, J
NOVEMBER 8, 2023
(FORMERLY NAIROBI ELC 361/2016, NAIROBI ELC 212/2013
AND NAIROBI HIGH COURT CIVIL SUIT NO. 1213 OF 2006)

BETWEEN

SALIM BIN MAHFUDH OMAR 1ST PLAINTIFF

MBARAK SALIM MAHFUDH 2ND PLAINTIFF

AND

JOSEPH WACIRA KITHINDI RESPONDENT

AS CONSOLIDATED WITH
ENVIRONMENT & LAND CASE E051 OF 2021

BETWEEN

ROBERT MUTUKU MUTINDA PLAINTIFF

AND

JOSEPH WACIRA KITHINDI 1ST DEFENDANT

LAND REGISTRAR KAJIADO 2ND DEFENDANT

RULING

1. This ruling is on the notice of motion dated 29/3/2023. The motion which is by Salim Bin Mahfudh Omar is brought under Order 40 Rule 1, Order 45 Rule 1, Order 51 Rule 1 [Civil Procedure Rules](#), Sections 1A, 1B, 3A and 80 of the [Civil Procedure Act](#) and all other enabling provisions of the law. It seeks the following orders.



- i. Setting aside of the order dated 13/3/2023 requiring the Applicant to deposit the accrued rent in an account to be opened by their three counsel.
 - ii. Reinstatement of the Applicant's suit No. ELC 131 of 2018 which should be deemed the first in priority.
 - iii. An order of injunction restraining the other parties to this suit and anyone claiming under them from entering, harassing and claiming the Applicant's property comprising of L.R. 86 Noonkopir Trading Center pending the hearing of this suit.
 - iv. In the alternative, there be an order of status quo.
 - v. A declaration that the Applicant is the rightful owner of L.R. No. 86 Noonkopir Trading Centre Kajiado County.
2. The motion is based on eighteen grounds. It is also supported by an affidavit sworn by the Applicant dated 29/3/2023. It has three annexures. The gist of the above material is as follows.
 3. Firstly, the Applicant is the registered owner of L.R. 86 Noonkopir Trading Centre in Kajiado County pursuant to a lease for 99 years which commenced on 1/11/1987.
 4. Secondly, he has never sold the suit property to any of the other parties. The only person who had attempted to buy the land was Robert Mutuku Mutinda but the sale did not happen and the deposit was refunded to the said R.M. Mutinda. The rest of the purchase price was kept by the conveyancing advocate. All the parties claiming the suit land from the Applicant want to defraud him of his property.
 5. Thirdly, a suit that the Applicant filed, being ELC No. 131 of 2018 was removed for unknown reasons despite it being the first in priority.
 6. Fourthly, the Applicant was condemned unheard on a day when his advocate attended virtually but he was at the same time told to go to open court.
 7. Fifthly, he is deeply dismayed and disappointed at the manner in which the order was obtained as the case was for mention and not for the hearing of the application that led to the issuance of the order.
For the above and other reasons, he prays for the orders in the motion.
 8. The motion is opposed by Robert Mutuku Mutinda and Raphael Lerionka Kapai both of whom have sworn replying affidavits. In his affidavit dated 5th May 2023, Robert deposes that the order of 13/3/2023 was properly issued following an application dated 1/8/2022 and that it was justified in order to safeguard the purchasers' interest in the suit property and in the broader interests of justice.
 9. Further to the foregoing, the suit land exists otherwise the Applicant would not be seeking the current orders and it is not fair for the Applicant to continue collecting rent for the suit property when he received the full purchase price from Robert.
 10. On the part of Raphael Lerionka Kapai, in his affidavit of 27/4/2023, he deposes that he is the rightful owner of the suit land having lawfully purchased it from Joseph Wachira Kithindi.
 11. Secondly, when the order of consolidation was made, the Applicant was represented by Mr. Makori who was present in court on 9/6/2022.
 12. Thirdly, it was agreed by consent that owing to the complexity of the matter, all proceedings be conducted in open court.



13. Fourthly, the Applicant's counsel was served with the motion dated 1/8/2022 via email and when the matter came up on 9/11/2022, the Applicants' counsel was present and sought for time to file a replying affidavit.
14. Fifthly, when the matter came up on 13/3/2023, the Applicant had not filed any reply and his counsel did not appear in the open court. The application was allowed because it was not opposed. For the above and other reasons, the motion ought to be dismissed as it is an abuse of the court process, made in bad faith and lacks merit.
15. I have carefully considered the motion in its entirety including the grounds, the affidavits together with the annexures. I have also considered the record especially the proceedings of 9/6/2022 where we were told that the County Government of Kajiado was preparing a report which is not yet on record. Counsel for the bank is also on record as saying that there is a report that may change the entire case. This report is not on record either. I make the following findings.
16. Firstly, the legal ownership of the suit property is still unknown with at least four parties claiming ownership thereto.
17. Secondly, the County Government which said it would file a report almost one and half years ago has not done so and this report could be key to the just determination of the dispute.
18. Thirdly, it is not contested that Salim Bin Mahufudh Omar is either in occupation of the suit premises or the one collecting rent.
19. Fourthly, the pleadings in ELC 131 of 2018 which relate to Mahufudh Omar do not seem to be incorporated in the consolidation of all the related suits.
20. Given the above findings, I find that it is fair and just to set aside the orders dated 13/3/2023 because failure to do so would mean that one or two parties who do not own the suit land lawfully and who do not occupy it will have partly succeeded in restraining the apparent owner from enjoying his property yet finally only one party will be successful.

I call the applicant the apparent owner because of the actual or constructive possession that he enjoys. Section 16 of the *Evidence Act* proves as follows.

"When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner"

Since the Applicant has been in possession of the suit land even after the alleged sale to Joseph Wachira Kithundi and Robert Mutuku Mutinda, let him remain in occupation until the suit is heard and determined. I therefore set aside the orders of 13/3/2023 and order that the status quo remains.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 8TH DAY OF NOVEMBER, 2023.

M.N. GICHERU

JUDGE

