



**Hebron Properties Limited v Mutunga & another (Environment & Land
Case E010 of 2020) [2022] KEELC 56 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 56 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E010 OF 2020**

A NYUKURI, J

MAY 4, 2022

BETWEEN

HEBRON PROPERTIES LIMITED APPLICANT

AND

BENEDICT MUTEVU MUTUNGA 1ST RESPONDENT

MOHAMUD IBRAHIM KHALIF 2ND RESPONDENT

RULING

1. This Ruling relates to two Applications, both filed by the Plaintiff. The first application is dated 12th October 2020 which seeks for a temporary injunction against the defendants barring them from interfering with land parcel number L.R 20145 in Mavoko, Machakos County; while the second application is dated 9th August 2021 and seeks to commit the Respondents to civil jail for disobedience of court orders issued on 15th October 2020 in favour of the Plaintiff.

Application dated 12th October 2020

2. In the application dated 12th October 2020, the Plaintiff/Applicant sought the following orders;
 1. **Spent.**
 2. **Spent.**
3. That the honorable court be pleased to issue a temporary order of injunction restraining the Defendant/Respondents whether by themselves, nominees, agents, servants and/or any other person acting on their behalf or behest be restrained from evicting, harassing, intimidating, trespassing on, wasting, construction on, alienating or otherwise interfering or dealing with the Plaintiff/Applicants property known as L.R. 20145 in Mavoko, Machakos county and/or in any way interfering with the developments therein pending the hearing and determination of the main suit.



4. That the OCS, Mavoko, the Area Chief and the OCPD Athi River to enforce the orders of the Honorable court issued herein.

That costs of this Application be provided for.

3. The Application is supported by the grounds on its face as well as the supporting affidavit sworn on 12th October 2020 by Amos Kilonzo Mutinda, a director of the Plaintiff/Applicant. The Applicant averred that they are the registered absolute proprietor of the property known as Land Reference Number 20145, I.R 108894 measuring 4.993 Ha. located in Mavoko, Machakos County, pursuant to a grant of 99 years term from 1st January 1993 (hereinafter referred to as the suit property); that they have subdivided the said property part of which they have sold to third parties; that the Respondents have encroached on the suit property, claiming to be the rightful owners thereof by virtue of a certificate of title being I.R number 215035 Land Reference number 25957 measuring approximately 5.122 hectares, which number the Applicant claims to relate to a parcel of land situated in Nairobi and registered in the name of one Caleb Tawayi Muhuyi.
4. The Applicant further states that the Respondents threatened to evict the third parties who purchased the suit land from the Plaintiff and have occupied sections of the suit premises and began the construction of a perimeter wall on the suit property, demolishing structures built by the Applicant's clients and agents; that the title held by the Respondent is a forgery and that the parcel referenced by the Respondent is different from that which the Applicant holds.
5. The Application is opposed by the 1st Respondent in a Replying Affidavit dated 28th October, 2020. He states that the Applicant's alleged title is a forgery since the Applicant Company was registered in the year 2020 hence there was no possibility of the title deed being registered in the name of the Applicant on 19th October 2000 as indicated on the title held by the Applicant, yet the Applicant was registered in the year 2020.
6. Further the 1st Respondent stated that he is the registered owner of the property known as Land Reference Number 25957 IR 215035 which he alleged to be in actual possession, and denied to have encroached on the Applicant's property. He also claimed to know one Amos Kilonzo Mutinda who is a director at the Applicant's company and previously involved in land grabbing cases. He further stated that the said Amos Kilonzo Mutinda had been named by the task force which was investigating land grabbing within Mavoko, Mulolongo and Mulinge scheme and recommended his prosecution. He further stated that he does not know Caleb Tawayi Muhuyi and the Applicant did not disclose the source of the title in the name of the said Caleb Tawayi Muhuyi; that it is Amos Kilonzo Mutinda who forged the title certificate of the suit land as he submitted a title certificate thereof in his name to the OCS Athi River Police station.
7. It was the 1st Respondent's contention that he has been paying rates for his property and he annexed copies of receipts in support of the same. He further deposed that it is the Applicant who has been encroaching on his property and led him to file a case at Mavoko Law courts, being CMC ELC No 22 of 2020 despite the Applicant's claim that there is no other suit pending in any court. He expressed that he stands to suffer irreparable harm which cannot be compensated unless the suit is dismissed. He thus urged the court to dismiss the Application with costs.
8. In response thereto vide a further affidavit sworn on 1st March 2021, the Applicant reiterated the contents of his supporting affidavit and denied to have ever been involved in any grabbing. He further stated that it is the Respondent who is a notorious land grabber with various reports being made against him. As regards the case at Mavoko being CMC ELC NO.22 OF 2020, he averred that the suit had



been dismissed vide a ruling dated 22nd October, 2020 and that it had not been instituted against the Applicant.

9. The parties filed their respective submissions in support of their cases. The Applicant filed their submissions on 1st March 2021, while the Respondents filed their submissions on 13th July 2021.

Submissions

10. The Applicant submitted that they had established a prima facie case with a high chance of success having demonstrated being the owner of the suit land. Counsel relied on the cases of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2004) eKLR, and *Kenleb Cons Ltd v New Gatitu Station & another* (1990) eKLR. Further, counsel argued that if the injunction sought is not granted, the applicant stands to suffer irreparable injury. Counsel contended that the suit property is unique and therefore the respondents' activities will lead to loss and damage which cannot be compensated in damages. Counsel placed reliance on the cases of *Tritex Industries Ltd & 3 other v National Housing Corporation & another* (2014) eKLR, *Hutchings Biemier Ltd v Barclays Bank of Kenya Ltd & another* (2006) eKLR and *J M Gichanga v Cooperative Bank of Kenya Limited* (2005) eKLR.
11. On the question of the balance of convenience, counsel argued that the plaintiff had demonstrated being the registered owner of the suit property since 1992 and that he has sold part of the land to third parties who have developed the same and hence the balance of convenience tilts in favour of granting a temporary injunction. Counsel referred to the case of *Paul Gitonga Wanjau v Gathuthis Tea Factory Company Ltd & 2 others* (2016) eKLR.
12. In his submissions, the respondent reiterated the contents of the 1st respondent's replying affidavit and contended that the applicant had failed to establish a *prima facie* case as the applicant having been registered as a company on 7th August 2020 could not possibly have been registered as proprietor of the suit land on 19th October 2000. He further submitted that the applicant was not a party to the annexed agreement for purchase of the suit property dated 24th December 2019 and that the said agreement was made before the Applicant came into existence. Counsel further argued that the applicant had not demonstrated the nature of the injury they were likely to suffer if the injunction is declined.

Analysis and determination

13. I have carefully considered the Application and the Affidavit in support thereof, the Response thereto and the submissions filed. The issue for determination is whether the applicant has met the threshold for grant of temporary injunction.
14. The principles governing grant of temporary injunction are well settled in the case of *Giella v Cassman Brown and Company Limited* (1973) EA 358, as follows;
 - a. The applicant must demonstrate a *prima facie* case with a probability of success;
 - b. The Applicant must show that they will suffer irreparable injury which cannot be compensated in damages if the injunction is denied;
 - c. If the court is in doubt, it ought to decide the application on a balance of convenience.
15. The Applicant claims to be the rightful owner of property known as LR NO20145 in Mavoko, Machakos County and has annexed certificate of title showing that they were registered on 19th October 2000. They have also annexed sale of land agreements in respect of the suit land to demonstrate that they sold part of the suit land to third parties. One of the agreements is dated 24th December 2019 and



the same is between Jackson Makali Kalolwe and Zedekiah Amukambwa Mukoya and another is dated 24th April 2018. They argue that the certificate of title by the Respondents is a forgery as it relates to land in Nairobi owned by one Caleb Tawayi Muhuyi, and have annexed a copy of a certificate of title to that effect. On the other hand, the Respondent claims that it is the Applicant who has forged the title certificate in their possession as they came into existence on 7th August 2020, yet they claim to have been registered as proprietors of the suit property on 19th October 2000. They annexed a certificate of search from the Registrar of companies showing that the Applicant was indeed registered in the year 2020. They also argued that it is not possible that the Applicant sold part of the suit property to third parties in 2019 as shown in the sale agreement.

16. On the question of whether the applicant has established a *prima facie* case, I note that the assertion and evidence of the Respondents that the applicant was registered as a company on 7th August 2020 has not been denied, challenged or rebutted by the Applicant. It is therefore not possible for a company which came into existence in the year 2020 to have owned property in the year 2000. Neither could such company have sold property in 2018 and 2019 as exhibited by the Applicant's sale agreements. It is my finding that the inescapable conclusion is that the applicant's title was unlawfully obtained and therefore cannot confer proprietary interest capable of being protected by our Constitution and the laws of this Republic. This court cannot protect interests in land acquired by unlawful means. It is my finding therefore that the applicant has failed to establish a *prima facie* case to warrant the protection of this court by way of temporary injunction.
17. Having found that there is no *prima facie* case by the applicant, it is not necessary to inquire in to whether the applicant stands to suffer irreparable loss or in whose favour the scale of convenience tilts.
18. The upshot is that the application dated 12th October 2020 lacks merit and the same is dismissed with costs.

Application dated 9th august 2021

19. In the Application dated 9th August 2021, the Applicant seeks the following orders;

Spent.

2. That the respondents be committed to civil jail for six (6) months for contempt of this honorable court's orders issued on 15th October, 2020 in ELC NO.010 of 2020 which are still in force.
3. That this honorable court do compel the DCIO and OCPD, Athi River, OCS Mlolongo and the area chief (and their duly authorized agents respectively) to assist in the enforcement of the orders issued on the 15th October 2020.
4. That this Honourable Court do issue any other and/or further orders as it may deem necessary and expedient in the interest of justice.

That costs of this Application be provided for.

20. This Application is premised on the grounds on its face as well as the affidavit of the plaintiff/applicant sworn on 9th August 2021 where the applicant deposed that on 15th October, 2020, this court issued interim injunctive orders restraining the defendants from evicting, harassing, intimidating, trespassing on, wasting, constructing on, alienating or interfering with land known as LR 20145; that on 29th June 2021 at 00300 hours, the respondents with their agents encroached on the suit land and damaged the



property and that of third parties residing on the suit property in contravention of the order, which acts were reported to the police.

21. The application is opposed. The 1st respondent filed a replying affidavit sworn on 10th September 2021 where he deponed that he was not served with the said order and denied committing acts complained of by the applicant. He stated further that he respects the court and that if there was any demolition, then the same was not done by himself or his agents.

Analysis and determination

22. I have carefully considered the application, the affidavit in support thereof, the response thereto and the submissions filed. The issue for determination is whether the respondents are in contempt of the orders of this court made on 15th October 2020.
23. The purpose for punishing contempt of court is to preserve the rule of law and the dignity and authority of the court. In the case of *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another*, the Court stated as follows;

It is essential for the maintenance of the rule of law and order that the authority and the dignity of our courts are upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. IT is the plain and unqualified obligation of every person against or in respect of whom, an order is made by court of competent jurisdiction, to obey it unless and until that order is discharged.

24. Under Order 40 Rule 3 of the *Civil Procedure Rules*, where there is disobedience or breach of the terms of a temporary injunction, the court may order the property of the contemnor to be attached and may also order such person to be detained in prison for a term not exceeding six months.
25. The principles governing contempt of court are well settled. In the case of *Sheila Cassatt Isenberg & another v Antony Machatha Kinyanjui* [2021] eKLR, the court cited with approval the holding in the Supreme court of Canada case of *Carey v Laiken*, 2015 SCC 17 (16th April 2015), where the court laid out the elements that must be proved in a contempt of court application as follows;
 - a. The order alleged to have been breached must state clearly and unequivocally what should and should not be done. This ensures that a party will not be found in contempt where an order is unclear. An order may be found to be unclear if, for example it is missing an essential detail about where, when and to whom it applies; if it incorporates overly broad language; or if external circumstances have obscured its meaning.
 - b. The party alleged to have breached the order must have had actual knowledge of it. It may be possible to infer knowledge in the circumstances, or an alleged contemnor may attract liability on the basis of the willful blindness doctrine.
 - c. The party alleged to be in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels.
26. It is therefore clear that to prove contempt, the applicant must show that the order was in clear and unequivocal terms, that the contemnor was aware of the order and that he disobeyed the order willfully.
27. I have considered the application, and there is no evidence that the order of 15th October 2020 was served upon the respondents. The respondents have argued that they were not served with the said order, and therefore are not in contempt of the same. For a party to be said to be in contempt, they must



be served with the court order in issue. As there was no service of the order in this case, I find that the Applicant has failed to prove contempt of the same by the Respondents. In addition, the respondents have denied causing the damage Complained of by the Applicant. No evidence has been given by the Applicant to link the damage complained of, with the respondents. In the premises, I am not satisfied that the respondents are in violation of the orders issued on 15th October 2020, hence the application must fail.

28. In the end, I find that both the applications dated 12th October 2020 and that of 9th August 2021 are unmeritorious and the same are dismissed with costs to the Respondents.

29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 4TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Mutinda for the Respondent

No appearance for the Applicant

Ms Josephine Misigo – Court Assistant

