



**Ndungu v Macaharia (Environment & Land Case E036 of 2023)
[2024] KEELC 1062 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E036 OF 2023**

J OMANGE, J

FEBRUARY 22, 2024

BETWEEN

JOSEPH NDUNGU PLAINTIFF

AND

KENNEDY MWANGI MACAHARIA DEFENDANT

RULING

1. Before me is the Notice of Motion application dated 12th August 2023 in which the Applicant seeks the following orders:
 - a. Spent.
 - b. That an eviction order be issued against the Respondent who has been illegally living on the Applicant's land LR No Nairobi/block 126/489.
 - c. That an order be issued restraining the Respondent, his agents, servants, or/and any other person from effecting any dealings on the said land herein before and after the hearing and determination of this suit.
 - d. Costs of the application be provided for.
2. The Applicant deponed that he is the registered owner of the suit property herein and has a certificate of registration of title. That the defendant illegally without any right has encroached on the suit property and despite severally being issued with notices to vacate has refused and or ignored the notices.
3. The Applicant in their submissions argue that the certificate of title is prima facie evidence that he is the absolute owner of the suit property and relies on section 24(a) and 26(1) of the [Land Registration Act](#) which require the court to consider that a certificate of title is prima facie evidence of ownership unless the title is challenged on account that it was obtained fraudulently or illegally which was not the case as the Respondent had not produced any evidence to discredit the title.



4. The Plaintiff cited the case of *Dr Joseph Arap Ngok v Justice Moiyo Ole Keiwua & 5 others*, Civil Appeal No Nai 60 of 1997 He further submitted that being the rightful owner and as the defendant had failed to prove his claim on the property, he is entitled to occupation of the suit property which occupation has been hindered by the defendant who is in physical occupation of the property hence warranting the injunctive and eviction orders.
5. The Respondent filed a notice of preliminary objection arguing that the suit is bad in law, made in bad faith and an abuse of the court process since it was sub judice. He filed a Replying Affidavit dated 13th September 2023 in which he deponed that the Plaintiff had failed to disclose to the court that there was an active matter in the lower court ELC Case No 8514/2019 seeking similar orders which had proceeded to full hearing and was yet to be determined. It was his case that the suit property had been purchased from the Plaintiff's father but somehow the Plaintiff illegally obtained a title to the land.
6. The Respondent urged the court to strike out the suit as the application is not signed. He further submitted that as he is in occupation the order of injunction could not issue. He stated that the Applicant had failed to meet the conditions for grant of injunctive orders. He urged the court to dismiss the application and status quo to remain.
7. The Applicant filed further submissions in response to the notice of preliminary objection indicating that the Applicant had used his initials to sign the pleadings hence the application is not defective. Counsel insisted that the court had the jurisdiction to entertain the application under Articles 162(2) (3) and 165(5) of the *Constitution of Kenya* 2010.
8. Having considered the foregoing, the following are issues for the court's determination; Whether the application is incompetent as it is not signed. Whether the application is subjudice. whether the plaintiff has satisfied the requirements for issuance of a temporary injunction.
9. On the question that the application is not signed, the Applicant has pointed out that although the application is not signed it is initialed. I note that the application and amended application are initialed. This suffices considering that at the point of filing the Applicant was unrepresented.
10. A second issue raised by the Respondent is that the application is sub judice. The Respondent's argument is that there is a similar matter involving the parties herein seeking similar orders before the Chief Magistrate's court that is ELC Case No 8514 /2019 *Joseph Ndungu v Kennedy Mwangi* which is yet to be determined. It is apparent from the pleadings which are attached to the Respondents Replying Affidavit, that the parties are the same, the suit property is the same and the issues are the same.
11. Section 6 of the *Civil Procedure Act* provides that: -

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
12. It is an abuse of the process of the court for one litigant to file multiple suits before different courts. This court cannot proceed with this matter and yet there is another matter which was filed earlier.
13. However, quite apart from this I note that the application by the Applicant seeks interlocutory orders in a Notice of Motion application. There is no plaint in respect of which the interim orders sought in the application will be anchored. The court would essentially be issuing final orders.



14. For the above reasons, I find that the application is incompetent and is an abuse of the process of the court. The application is struck out with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF FEBRUARY 2024.

JUDY OMANGE

JUDGE

In the presence of: -

Ms Wanjiru for Ms Wanjiru Wanja for Plaintiff

Mr. Mwangi D R for Defendant

Steve - Court Assistant

