



REPUBLIC OF KENYA



Mahamud & 9 others v Wambua & 2 others (Environment & Land Case E049 of 2023) [2024] KEELC 1465 (KLR) (20 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1465 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E049 OF 2023**

CA OCHIENG, J

MARCH 20, 2024

BETWEEN

HUSSEIN ABDI MAHAMUD 1ST PLAINTIFF
ABDINOOR ABDULLAHI SHEIKH 2ND PLAINTIFF
ORTO SORI 3RD PLAINTIFF
OMAR MOHAMED ABDILLE 4TH PLAINTIFF
AHMED YUSSUF 5TH PLAINTIFF
AHMED HADI & ISMAEL BURO 6TH PLAINTIFF
AMINA MAHAMUD DAGANE & SHUKRI ABDI 7TH PLAINTIFF
MOHAMED MAHMUD KASSIM 8TH PLAINTIFF
ISMAIL HASSAN HUSSEIN 9TH PLAINTIFF
HIBAQ NASSIR ARTE & SAADIA ABDI HASSAN 10TH PLAINTIFF

AND

TIMOTHY MUTUA WAMBUA 1ST DEFENDANT
THE CHIEF LAND REGISTRAR 2ND DEFENDANT
ALI ADAN ABDI 3RD DEFENDANT

RULING

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 14th June, 2023 where they seek the following Orders:-
 - a. Spent.



- b. Spent.
- c. Spent.
- d. That pending the hearing and final determination of this suit, this Honourable Court be pleased to issue a temporary injunction restraining the 1st and 3rd Defendants by themselves, their servants, employees, legal representatives, proxies, agents or otherwise whomsoever from trespassing, encroaching, digging trenches, constructing, disposing, further constructing or in any other manner interfering with or wasting or disposing off the Plaintiffs/Applicants' properties being:
 - 1. L.R No. 12715/1167 (Original Number 12715/680/2);
 - 2. L.R No. 12715/1168 (Original Number 12715/680/3);
 - 3. L.R No. 12715/1170 (Original Number 12715/680/5);
 - 4. L.R No. 12715/1171 (Original Number 12715/680/6);
 - 5. L.R No. 12715/1173 (Original Number 12715/680/8)
 - 6. L.R No. 12715/1174 (Original Number 12715/680/9);
 - 7. L.R No. 12715/1175 (Original Number 12715/680/10);
 - 8. L.R No. 12715/1176 (Original Number 12715/680/11);
 - 9. L.R No. 12715/1177 (Original Number 12715/680/12); and
 - 10. L.R No. 12715/1178 (Original Number 12715/680/13);
- e. Spent.
- f. That pending the hearing and determination of the suit herein, this Honourable Court be pleased to issue an order directed to the 1st and 3rd Defendant/Respondents that they forthwith remove all the materials brought on the suit properties, including but not limited to excavators, machines, building stones.
- g. Spent.
- h. That pending the hearing and determination of this suit, this Honourable be pleased to issue an order directed to the 1st and 3rd Defendants/Respondents to immediately and forthwith fill up the dug-up trenches that are currently a health hazard to the Plaintiffs/Applicants and their families and other unsuspecting members of the public, failure to which, the Plaintiffs/Applicants be at liberty to fill them up at the 1st and 3rd Defendants/Respondents' cost.
- i. Spent.
- j. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order compelling the 2nd Defendant/Respondent to forthwith produce a copy of the Deed Files for:
 - a. L.R No. 12715/680
 - b. L.R No. 12715/1167 (Original Number 12715/680/2);
 - c. L.R No. 12715/1168 (Original Number 12715/680/3);



- d. L.R No. 12715/1170 (Original Number 12715/680/5);
 - e. L.R No. 12715/1171 (Original Number 12715/680/6);
 - f. L.R No. 12715/1173 (Original Number 12715/680/8);
 - g. L.R No. 12715/1174 (Original Number 12715/680/9);
 - h. L.R No. 12715/1175 (Original Number 12715/680/10)
 - i. L.R No. 12715/1176 (Original Number 12715/680/11);
 - j. L.R No. 12715/1177 (Original Number 12715/680/12); and
 - k. L.R No. 12715/1178 (Original Number 12715/680/13);
- k. That this Honourable Court be pleased to order that the Plaintiffs be at leave to effect service upon the 1st Defendant and 3rd Defendant vide substituted service through registered post to his last known address.
- l. That the Officer Commanding Station Syokimau Police Station to ensure compliance with the orders above.
- m. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Hussein Abdi Mahamud where he deposes that he was swearing the Affidavit on behalf of all the Plaintiffs'. He confirms that the Plaintiffs' are the lawful owners of the properties known as: L.R No. 12715/1167 (*Original Number 12715/680/2*); L.R No. 12715/1168 (*Original Number 12715/680/3*); L.R No. 12715/1170 (*Original Number 12715/680/5*); L.R No. 12715/1171 (*Original Number 12715/680/6*); L.R No. 12715/1173 (*Original Number 12715/680/8*); L.R No. 12715/1174 (*Original Number 12715/680/9*); L.R No. 12715/1175 (*Original Number 12715/680/10*); L.R No. 12715/1176 (*Original Number 12715/680/11*); L.R No. 12715/1177 (*Original Number 12715/680/12*); and L.R No. 12715/1178 (*Original Number 12715/680/13*), hereinafter referred to as the 'suit land'. He explains that the Plaintiffs' legally acquired the suit land having purchased the same from one Rose Mumbua Kisule for valuable consideration on diverse dates. Further, that they are currently holding original Titles documents for the said suit land. He claims the Plaintiffs developed the suit land, put up their houses and currently live thereon with their families. He explains that on or around 30th May, 2023, strangers came onto the suit land and dug trenches on the said land. Further, that the Plaintiffs' were taken aback by the said actions as they have been in peaceful and quiet possession of the suit land for over 15 years. He contends that the Plaintiffs discovered that it is the 1st and 3rd Defendants who engaged the said goons to interrupt their peaceful and quiet enjoyment of the suit land. Further, that the 1st and 3rd Defendants' have without any colour of right trespassed onto the Plaintiffs' property. He avers that the 1st and 3rd Defendants brought several material and machinery onto the suit land. Further, that the trenches are still open thereby posing a hazard to the Plaintiffs', their children and unsuspecting members of the public. He reiterates that the Plaintiffs' legally acquired the suit land on or around the year 2005, for valuable consideration and stand to suffer irreparable loss if the Defendants are not stopped from illegally trespassing as well as constructing thereon.
3. The 1st Defendant opposed the instant Application by filing a Replying Affidavit sworn by Timothy Mutua Wambua where he deposes that the suit land (*I.R. 47939, L.R. No. 12715/680*) belongs to his deceased father and not the Plaintiffs. He confirms that his father died on the 17th October, 2016 at Jamaa Hospital. He explains that his late father acquired the said property by virtue of the shares he



held in Syokimau Farm Limited. He claims before the father's demise, he had given him the suit land as a gift vide an agreement dated the 28th May, 2005 having donated one of his kidney's to one of his brother's while receiving treatment in India. Further, that in the said agreement dated the 28th May, 2005 his father stated unequivocally that he had not received the original title and that he should follow on the same to ensure it's in his custody. He contends that up to and until his demise the title to the said suit land had not been handed to him. Further, that even when they did succession in respect of their late dad's Estate vide Kangundo Succession Cause No. 5 of 2017 they did not include the suit land as they had not managed to get the title. He denies having a title to the suit land in his name. He avers that he has been vigilant and keen on the activities taking place on the suit land and on the 27th May, 2023 when he saw a wall being constructed thereon, he reported the incident to Syokimau Police station vide OB No. 21/27/05/2023. He argues that, it is not true that the trenches were dug on the 30th May, 2023 as alleged by the Plaintiffs but on the 27th May, 2023 as reported vide the OB indicated hereinabove. He reiterates that the reporting of the matter to Syokimau Police Station by the Plaintiffs' on the 4th June, 2023 vide OB No. 20/4/6/2023 was a mere afterthought to cover-up, their illegal and unlawful activities of 27th May, 2023. Further, that currently there is a wall and one house which is still under construction thereon. He denies that the Plaintiffs have put up homes on the suit land and neither has he constructed or dug trenches as alleged. Further, that the Plaintiffs or their agents must have been, behind the putting up of the wall and digging of trenches in a well-orchestrated move to paint him in bad light just in a similar scheme with respect to the creating of a fake title in his name. He reaffirms that on 13th April, 2023 he sought to know the outstanding land rates arrears and penalties from the County Government of Machakos by providing his late dad's ID card, IR and LR Number and found out that the outstanding land rates arrears and penalties stood at Kshs. 4,186,050. He insists that the suit land has never been sub-divided and/or sold to anyone as alleged by the Plaintiffs' at all. Further, that the alleged sale of the suit land to one Rose Mumbua Kisule has no basis or any foundation at all. He reaffirms that no good title could have been passed to the Plaintiffs in view of the fact that the suit land was never sold during the lifetime of his father and upon his demise, its only after a succession process has been undertaken, that the said suit land can receive the legitimacy of a good title. He further reiterates that the entire suit is built on fraud, falsehoods and misrepresentation of material facts and as such ought to be dismissed forthwith.

4. The Plaintiffs filed a Supplementary Affidavit sworn by Hussein Abdi Mahamud where he reiterates the averments as per the supporting affidavit. He insists that, at the time of purchasing the suit land, the same were registered in the name of Rose Mumbua Kisule. Further, that Rose Mumbua Kisule has confirmed this position in her Affidavit annexed to the Supplementary Affidavit. He avers that Rose Mumbua Kisule confirmed that she entered into a Sale Agreement with Josephat Wambua Kiveke on 19th August, 1994. Further, subsequently, a Transfer was drawn on 14th September, 1994. He argues that assuming the 1st Defendant's Annexure "TWM 3a" is genuine and refers to LR. No. 12715/680, Josephat Wambua Kiveke could not reasonably purport to gift to him the property in May, 2005 as the said property no longer belonged to the deceased. He further reiterates that he has been in occupation of his property from around the 27th December, 2005, erected a house and has been openly living thereon since then. He avers that if indeed the 1st Defendant's Annexure "TMW1" is genuine, the said occupation and development was also done during Josephat Wambua Kiveke's lifetime. He states that since the alleged will of May, 2005, the 1st Defendant has never challenged his occupation and/or development on the suit land, neither has he challenged the other Plaintiffs' occupation and ownership of the said parcels of land. He challenges that the 1st Defendant has ever reported the matter to the Police as alleged and only sought to find out about the outstanding land rates arrears and penalties on 13th April, 2023, over 17 years after he was allegedly gifted the property. Further, he never followed up on issuance of a title and only allegedly reported the incident of construction of the wall around 27th



May, 2023. He insists there is no indication that the 1st Defendant has ever contested their occupation and ownership of the suit land and shortly after enquiring about the rates, the construction on the premises commenced which is not a coincidence.

5. The 3rd Defendant opposed the instant Application and filed a Replying Affidavit sworn by Ali Adan Abdi where he deposes that the proceedings herein are incompetent. He contends that the Plaintiffs' have no legitimate claim over the suit land or any of the purported resultant subdivisions therefrom as their claim is fraudulent and unlawful. He avers that the Plaintiffs' are not in possession of the suit land and apart from one incomplete structure, none of the Plaintiffs' including their families resides thereon. He insists that he is the beneficial owner of the suit land having purchased the same from one Bernard Kituku Kisingu and annexed a copy of a Sale Agreement and certificate of land rates dated the 30th May, 2023. He claims Bernard Kituku Kisingu purchased the suit land from the original owner Joseph Wambua Kiveke in the year 1989. Further, that upon purchase he obtained all the necessary approvals from the local authority for purposes of building a boundary wall and taking possession. He explains that immediately after the transaction between Bernard Kituku Kisingu and Joseph Wambua Kiveke, the latter was the sole owner of the suit land vide Share Certificate No. 478 by Syokimau Farm Limited and Letter of Allotment dated the 6th August, 1981. He believes that the vendor Joseph Wambua Kiveke made an application to Syokimau Farm Limited to have the suit land transferred to Bernard Kituku Kisingu. Further, Syokimau Farm Limited transferred the suit land to Bernard Kituku Kisingu on 18th May, 1989. He argues that the Plaintiffs' do not have a legitimate claim over the suit land and the said land was not available for purchase by Rose Mumbua Kisule. He insists that the Plaintiffs' have not presented any subdivision deed or document to that effect. Further, that the registration of the title to the suit land being waived by the Plaintiffs' can only be absolute and indefeasible if the creation of such titles were in accordance with the law. He reiterates that the title documents presented by the Plaintiffs as belonging to the 1st Defendant are fake. Further, that the Plaintiffs' have not established a prima facie case to warrant the orders as sought.
6. The Application was canvassed by way of written submissions.

Analysis and Determination

7. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, annexures and rivalling submissions, the only issue for determination is whether the Plaintiffs are entitled to orders of interim injunction in respect to the suit land pending the outcome of this suit.
8. In line with the principles on granting of interlocutory injunction as espoused in the case of *Giella v Cassman Brown and Company Limited* [1973] E.A. 358, as well as the definition of a prima facie case as stated in the case of *Mrao Ltd v First American Bank of Kenya and 2 Others* [2003] KLR 125, I will proceed to decipher if the Plaintiffs have established a prima facie case to warrant the orders sought.
8. The fulcrum of this dispute revolves around the Plaintiffs' claim over the suit land and the alleged trespass on the said land by the 1st and 3rd Defendants. The Plaintiffs have provided a background on how they acquired the suit land and presented resultant titles to that effect. Further, in the Affidavit sworn by ROSE MUMBUA KISULE which was annexed to the Plaintiff's Supplementary Affidavit, she explains that sometime in 2014, he was introduced to Josephat Wambua Kiveke by a lady called Madam Ndanu. She confirms that she met with Josephat Wambua Kiveke and he informed her that he was selling his land, L.R. No. 12715/680 (*suit land*) and showed her the physical location of the said land. Further, they proceeded to negotiate on the purchase price, which they agreed and on 19th August, 2014, she entered an Agreement for Sale with Josephat Wambua Kiveke for the sale and purchase of L.R. No. 12715/680 (*suit land*). Further, at the time of entering the Agreement for Sale and upon



paying the first instalment, Josephat Wambua Kiveke came with his family including the original title, copies of his ID and those of his wife including sons. She recalls that the vendor, his wife and sons were present during the execution of the Agreement for Sale and the 1st Defendant was also present during the transaction. Further, that none of the people present were opposed to the sale and transfer to her name which was done on 14th September, 1994, upon paying the last installment, where Josephat Wambua Kiveke executed a Transfer of L.R No. 12715/680 in her favour. She contends that on 19th March, 1997, she subdivided LR. No. 12715/680 into smaller plots i.e. LR. No. 12715/1167-LR. No. 12715/1178 which she has since sold the subtitles LR. No. 12715/1167-LR. No. 12715/1178 to the Plaintiffs herein. She reiterates that during her ownership and occupation of the suit land herein, no one ever laid a claim to it, nor filed a suit contesting her occupation, ownership and eventual subdivision of L.R. No. 12715/680. She argues that it is impossible for Josephat Wambua Kiveke to have allegedly gifted the 1st Defendant L.R. No. 12715/680 on 28th May, 2005 after she had already subdivided it and sold resultant subdivisions therefrom. She is aware that the 1st Plaintiff erected a building on his parcel being LR. No. 12715/1173 (*Original Number 12715/680/8*), almost immediately after purchasing the property. She insists that the Plaintiffs' are the *bona fide* registered and legal proprietors of the suit land.

9. Both the 1st and 3rd Defendants all claim the suit land but none has presented their Certificate of Titles to that effect. Further, they insist that the Plaintiffs' titles are fake but have not demonstrated whether they reported the same to the DCI for investigations nor presented a report from the Police confirming this position. Looking at the documents presented by both parties, I note the Plaintiffs' have presented title documents, deed plans and transfer which at this juncture I cannot disregard. Further, the 1st Defendant has denied that he has a title to the suit land. Based on the facts before me, I find that the Plaintiffs' have indeed satisfied the first limb of the requirements for grant of the orders of injunction as sought, being the demonstration of a *prima facie* case with a probability of success.
10. As to whether the Plaintiffs' will suffer irreparable harm which cannot be compensated by way of damages. The Plaintiffs' claim the 1st and 3rd Defendants have trespassed on the suit land and I note the 3rd Defendant even commenced constructing a Wall thereon. In relying on the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*, I find that the Plaintiffs' averments are not speculative as indeed they will suffer irreparable harm which cannot be compensated by way of damages if the orders of interlocutory injunction are not granted.
11. On the issue of balance of convenience, I find that the same tilts in favour of the Plaintiffs who have Certificates of Title in respect to the suit land, as opposed to the 1st and 3rd Defendants.
12. It is against the foregoing that I find the Notice of Motion dated the 14th June, 2023 merited and will allow it, in the following terms:-
 1. That pending the hearing and final determination of this suit, a temporary injunction be and is hereby issued restraining the 1st and 3rd Defendants by themselves, their servants, employees, legal representatives, proxies, agents or otherwise whomsoever from trespassing, encroaching, digging trenches, constructing, disposing, further constructing or in any other manner interfering with or wasting or disposing off, the following properties being:
 - a. L.R No. 12715/1167 (Original Number 12715/680/2);
 - b. L.R No. 12715/1168 (Original Number 12715/680/3);
 - c. L.R No. 12715/1170 (Original Number 12715/680/5);
 - d. L.R No. 12715/1171 (Original Number 12715/680/6);



- e. L.R No. 12715/1173 (Original Number 12715/680/8)
 - f. L.R No. 12715/1174 (Original Number 12715/680/9);
 - g. L.R No. 12715/1175 (Original Number 12715/680/10);
 - h. L.R No. 12715/1176 (Original Number 12715/680/11);
 - i. L.R No. 12715/1177 (Original Number 12715/680/12); and
 - j. L.R No. 12715/1178 (Original Number 12715/680/13);
2. That pending the hearing and determination of this suit, the 2nd Defendant be and is hereby directed to produce a copy of the Deed Files for:
- a. L.R No. 12715/680
 - b. L.R No. 12715/1167 (Original Number 12715/680/2);
 - c. L.R No. 12715/1168 (Original Number 12715/680/3);
 - d. L.R No. 12715/1170 (Original Number 12715/680/5);
 - e. L.R No. 12715/1171 (Original Number 12715/680/6);
 - f. L.R No. 12715/1173 (Original Number 12715/680/8);
 - g. L.R No. 12715/1174 (Original Number 12715/680/9);
 - h. L.R No. 12715/1175 (Original Number 12715/680/10)
 - i. L.R No. 12715/1176 (Original Number 12715/680/11);
 - j. L.R No. 12715/1177 (Original Number 12715/680/12); and
 - k. L.R No. 12715/1178 (Original Number 12715/680/13);
3. That the Officer Commanding Station Syokimau Police Station to ensure compliance with the orders above.

SUBPARA 4.

Costs of this Application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF MARCH, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Gulam for Plaintiff/Applicant

Onsombi for 1st Defendant

Lungwe for 3rd Defendant

Court Assistant – Simon/Ashley

