



Theuri & 5 others v Kavisi & 4 others (Environment & Land Case E069 of 2022) [2024] KEELC 1359 (KLR) (13 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1359 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E069 OF 2022**

**A NYUKURI, J
MARCH 13, 2024**

BETWEEN

**JOSEPH THEURI 1ST PLAINTIFF
JAMES MUNENE 2ND PLAINTIFF
ALBERT MUGERA 3RD PLAINTIFF
IRENE W. MUNYUE 4TH PLAINTIFF
PETER MAJAU MWAI 5TH PLAINTIFF
BISHOP MARK KARIUKI 6TH PLAINTIFF**

AND

**JACKSON KASAMU KAVISI 1ST RESPONDENT
JOSHUA O. OMOLLO 2ND RESPONDENT
TIMOTHY AGALO 3RD RESPONDENT
CHIEF LAND REGISTRAR 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. Before court is the application dated 16th September 2022 filed by the plaintiffs seeking the following orders;
 - a. Spent
 - b. Spent



- c. That an injunction do issue restraining the 1st, 2nd and 3rd Defendants/Respondents, their agents, servants, employees, assigns or whosoever from offering for sale, selling, disposing, transferring, beaconing, erecting a perimeter wall, occupying or in any other manner with the suit properties known as L.R Nos 26681/130, 26681/50, 26681/48, 26681/29, 26681/5, 26681/6 and 26681/59 Machakos county pending the hearing of the suit or further directions.
 - d. Spent.
 - e. That costs of the application be provided for.
2. The application is based on grounds on the face of it and supported by the affidavit of one Joseph Theuri. He deposed that the applicants are the registered owners of parcels L.R Nos 26681/130, 26681/50, 26681/48, 26681/29, 26681/5, 26681/6 and 26681/59 (suit properties), having purchased the same from Deliverance Church Registered Trustees sometimes in 1994. He further averred that some applicants have developed their parcels while others have not, and that in the year 2007, a gang led by the 1st Respondent had invaded the suit properties and neighbouring properties and engaged unsuspecting purchasers who have erected illegal structures thereon. He also asserted that a Taskforce, dubbed “Saitoti taskforce” was formed in 2011 to address the complaints by the legitimate owners of land within Athi River, which recommended eviction of illegal land owners. That National Land Commission had in their letter dated 17th April 2018 indicated that it had not allocated any land to any individual in Katani/Ngelani area in Mavoko. Further that in the same year the government through its security agents ordered demolition of illegal structures put up by land grabbers. That subsequently the invaders led by the 1st to 3rd respondents moved back to the land, threatening the owners with dire consequences, whereof the applicants reported to Athi River Police Station. That another taskforce was formed and a report presented to the Cabinet secretary Ministry of Lands. He attached authority to plead; copies of title and searches, reports from the taskforces; letter from National Land Commission; OB dated 2020 photographs and letters from the applicants.
3. The application is opposed. The first respondent, Jackson Kasamu Kavisi, swore a replying Affidavit dated 1st December 2022. He deposed that together with 2000 other residents, they had been living on L.R Block 12610/1 Mavoko which was subdivided to various parcels including the one claimed by the Plaintiffs. He averred that in 2018, the County Government of Machakos attempted to evict them leading to their filing of Constitutional petition No.12 of 2018 and thereafter ELC Case No. 108 of 2019 claiming the suit property under the doctrine of adverse possession. Further that Deliverance Church filed ELC No. 140 of 2018 whereof the court directed that the three matters be heard alongside each other and issued orders of status quo. He stated that since the suit property in the three suits is the same, the orders of status quo should be maintained. He stated that no one is carrying out construction on the suit property and that the photographs attached by the applicants have no dates or time and are misleading the court. He stated that if the orders sought are granted, it will amount to an eviction. He attached authority to plead; ruling and order in High Court petition 12 of 2018; Originating Summons in ELC 108 of 2019.
4. Besides the replying affidavit, the 1st to 3rd respondents filed a preliminary objection dated 1st December 2022 wherein they stated that this suit is sub judice as there is pending before this court a similar matter being ELC No. 140 of 2019. On 12th July 2023, the court directed that the preliminary objection and the application shall be heard together.
5. Although on 12th July 2023, the court directed parties to file submissions, none were filed.



Analysis and Determination

6. I have considered the application, replying affidavit and the preliminary objection. The issues that arise for determination are two;
 - a. Whether this suit is sub judice due to the pendency of Machakos ELC 108 of 2019 (OS)
 - b. Whether the applicants have met the threshold for grant of interlocutory injunction.
7. Section 6 of the *Civil Procedure Act* provides for the doctrine of sub judice as follows;

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is 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.

Explanation-the pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.
8. Therefore, where there exists a pending previously filed suit, a subsequent suit over the same issue regarding the same parties or their privies ought to be stayed.
9. In this matter, the 1st to 3rd respondents argue that there exists a similar suit, namely ELC 108 of 2019. They attached a copy of an Originating Summons filed in that suit which showed that the defendants herein sued 10 defendants who are BAT Kenya Ltd; Deliverance church; Deliverance fellowship; Ephraim Mwangi; Isaac Wanjohi; Hezekiel Mwangi; Duncan Muthoka; Benson Okanga; National Land Commission and the Chief Land Registrar. In that suit, the Plaintiffs claim parcel No. 12610/1 under the doctrine of adverse possession.
10. In this suit, the suit property is LR Nos. 26681/ 26681/130, 26681/50, 26681/48, 26681/29, 26681/5, 26681/6 and 26681/59. On the other hand, the suit property in the previous suit is 12610/1, and the 1st to 3rd respondents have not provided any evidence to demonstrate the nexus between parcel 12610/1 and the suit properties herein. In addition, none of the plaintiffs herein is a party in ELC 108 of 2019. Besides, the defendants herein have not filed any defence to show that their claim in this suit is for adverse possession like in the previously filed suit. In the circumstances, I am not persuaded that this suit involves the same issue or that the parties are the same as those in ELC 108 of 2019. In the premises I find and hold that the defendants have not demonstrated the elements in section 6 of the *Civil Procedure Act* and therefore this suit is not sub judice.
11. On whether the applicants have met the threshold for grant of temporary injunction, Order 40 Rule 1 of the *Civil Procedure Rules* empowers the court to grant a temporary injunction where an applicant demonstrates that a suit property is in danger of being wasted, damaged, alienated, wrongfully sold in execution or the defendant threatens to remove or dispose the same in circumstances that will obstruct or delay execution of any decree in favour of the applicant if they eventually succeed in their claim.
12. Principles for grant of a temporary injunction are well settled. The applicant must establish a prima facie case with chances of success; demonstrate that if the injunction is not granted, he or she stands to suffer irreparable injury that may not be compensated in damages and where the court is in doubt it ought to consider where the scale of convenience tilts. (See *Giella v. Cassman Brown* [1973] EA 358.)
13. A prima facie case is one which demonstrates sufficient evidence to establish the plaintiffs' claim of apparent violation of their right, requiring evidence of rebuttal from the defendant. In *Mrao v. First*



American Bank of Kenya Limited & 2 Others [2003] eKLR, the Court of Appeal defined a prima facie case as one which on the material presented in court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the respondent.

14. In the instant case, the applicants state that they are the registered owners of the suit properties. They have exhibited their ownership and registration thereof by attaching title and search documents. They state that the defendants' interference with their land is unjustified and without any legal basis. They have also shown that the defendants who had invaded the suit properties were at some point evicted therefrom, but later returned to the land. In their reply, the 1st to 3rd respondents have stated that they reside on the suit property and that there exists another suit. Although the 1st to 3rd respondents stated that the previously filed suit is ELC 140 of 2019, they attached the Originating Summons for ELC 108 of 2019 (O.S). They alleged that the court ordered ELC 108 of 2018 to be heard together with ELC 140 of 2019, yet no evidence of the said suits or such order was attached. And although they also alleged that status quo orders were issued by this court in ELC 140 of 2019, which they referred to as annexure JKK-3, no such orders were attached to their replying affidavit. Therefore, the allegation that there are status quo orders in regard to the suit property is misleading and not supported by any evidence.
15. Registration of land gives the registered proprietor thereof indefeasible and absolute ownership, unless it is proved that registration was done by fraud, misrepresentation, unprocedurally or through a corrupt scheme.
16. Section 26 of the *Land Registration Act* provides as follows;
 1. The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
 2. A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.
17. In the instant case, there is no allegation by the respondents herein that the applicants obtained registration of the suit property by fraud, misrepresentation, want of procedure or through corruption. All that the respondents are saying is that they together with 2000 others are residents on the suit property. However, no evidence was attached to the replying affidavit to demonstrate that they are in occupation of the suit property. In any event, occupation without legal basis cannot get legal protection at all.
18. In the premises, in view of the fact that the plaintiffs are the registered proprietors of the suit property, and no legal basis has been shown for the respondents' interference with the same, I am satisfied that the applicants have demonstrated a prima facie case.
19. On the question of whether the applicants stand to suffer irreparable loss, the applicants have stated that unless the orders sought are granted, there is bound to be anarchy, violent confrontation, breach of peace, loss of property and loss of life. Indeed, there is evidence that this matter has been reported at



Athi River Police station as per the attached OB report. In the premises, I am satisfied that the applicant has demonstrated that if orders sought are not granted, the applicants stand to suffer irreparable loss.

20. The applicants being the registered owners of the suit property, it is my view that the balance of convenience tilts in favour of granting the orders sought.
21. In the premises, I find and hold that the Notice of Motion dated 16th September 2022 is merited and the same is hereby allowed as follows;
 - a. That a temporary injunction be and is hereby issued restraining the 1st, 2nd and 3rd Defendants/ Respondents, their agents, servants, employees, assigns or whosoever from offering for sale, selling, disposing, transferring, beaconing, erecting a perimeter wall, occupying or in any other manner interfering with the suit properties known as L.R Nos 26681/130, 26681/50, 26681/48, 26681/29, 26681/5, 26681/6 and 26681/59 Machakos county pending the hearing of the suit.
 - b. The 1st to 3rd respondents to bear the costs of the application.
22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 13TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Murage for plaintiffs/applicants

No appearance for defendants/respondents

Abdisalam – Court Assistant

