



REPUBLIC OF KENYA



**Sammy & 4 others v Daystar University & 4 others (Environment & Land
Case E002 of 2024) [2024] KEELC 1286 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1286 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E002 OF 2024**

**A NYUKURI, J
MARCH 7, 2024**

BETWEEN

**NICHOLAS SAMMY 1ST PLAINTIFF
JIMMY MUTAVA 2ND PLAINTIFF
BENSON NZOMO 3RD PLAINTIFF
ALBERT MUOKI MASAI 4TH PLAINTIFF
DAVID MAITHA 5TH PLAINTIFF**

AND

**DAYSTAR UNIVERSITY 1ST DEFENDANT
DAYSTAR UNIVERSITY SACCO 2ND DEFENDANT
MICHAEL MUASYA NDUNDA 3RD DEFENDANT
CHIEF LANDS REGISTRAR 4TH DEFENDANT
THE HON. ATTORNEY GENERAL 5TH DEFENDANT**

RULING

1. In the undated Notice of Motion filed on 12th January 2024, the plaintiffs sought an order of injunction to restrain the defendants or their agents from alienating, demarcating, disposing, transferring, leasing or evicting the plaintiffs from L.R. No. 8784/1 Mavoko (suit property) pending the hearing and determination of this suit. They also sought for an order of inhibition to inhibit registration of any dealings on the suit property. Lastly, they sought costs.
2. The application is supported by the affidavit sworn by Nicholas Sammy the 1st plaintiff on 10th January 2024. The applicants' case is that he had been living on the suit property with his neighbours since 1989



- as the same is part of their ancestral land. The deponent averred that the 1st to 3rd defendants have never been owners of the suit property but only started claiming recently that the same belonged to them.
3. He further stated that they have put up houses on the suit property, buried their loved ones thereon and paid utility bills thereon. He stated that recently the 1st defendant brought heavy machinery on the suit property with intention to alienate, demarcate and evict the plaintiffs. He averred that the applicants stood to suffer irreparable loss if the orders sought are not granted. He attached photographs of houses and machinery.
 4. The application is opposed. The 1st defendant/respondent filed grounds of opposition dated 24th January 2024. They stated that the application was incompetent, bad in law and an abuse of the court process, and that the applicants had not met the threshold for grant of the orders sought. They stated that L.R. No. 8784/1 does not exist and that the 1st defendant has no dealings with the suit property.
 5. In addition, Professor Muturi Wachira, the Deputy Vice Chancellor for Finance, Administration and Planning at Daystar University, the 1st defendant herein swore a replying affidavit dated 30th January 2024. He stated that the applicants do not deserve the equitable remedy of injunction as their supporting affidavit contains several falsehoods. He stated that contrary to allegations that the applicants have been on the suit property since 1989, the position is that they illegally invaded several parcels including LR. No. 8784/107 and LR. No. 8784/108 in the year 2022.
 6. He asserted that the application was incurably defective as the Parcel LR. No. 8784/1 no longer exists, having been subdivided. That the said parcel once belonged to the late Kimani Wa Nyoike who sold part thereof to the defendants herein. That in 2022 when the applicants trespassed on the suit property, they removed beacons, purported to subdivide into many plots and erected structures thereon, leading to a report at Athi River Police Station. He stated that the 1st respondent was in 2005 registered as owner of LR. No. 8784/107 and LR No. 8784/108 each measuring 2.00 hectares. He pointed out that the applicants had not produced title or search of LR. No. 8784/1 and that they had not disclosed the acreage or deed plan details thereof.
 7. He stated that the applicants had not disclosed names and other particulars of their fathers whom they allegedly inherited the land from; their deceased relatives buried on the suit property; names and registration documents of churches on the suit property or utility bills since 1989.
 8. He averred that when LR. No. 8784/1 was subdivided, it created LR. No. 8784/107 and LR. No. 8784/108 registered in the names of the 1st defendant; LR. Nos. 8784/103, LR. No. 8784/104, LR. No. 8784/105 and LR. No. 8784/106 registered in the 2nd defendant's names; and LR. No. 8784/109, LR. No. 8784/110, LR. No. 8784/111 and LR. No. 8784/112 registered in the name of the 3rd defendant.
 9. That due to invasions of the 1st defendant's neighbouring properties, case No. Machakos ELC No. 036 of 2022 was filed whereof the 3rd defendant was joined as a co-plaintiff. That in that case, this court issued orders restraining the defendants from trespassing or interfering with the suit property. That although the 1st defendant tried to access the land on the basis of those orders, the applicants have barred them.
 10. He stated that the photographs produced by the applicants show buildings of third parties and not of the applicants and that the same are situated elsewhere and not on the 1st defendant's parcel LR. No. 8784/107 or LR. No. 8784/108. He pointed out that one of the houses captured in the photographs on the 1st, 4th and 6th pages of the applicants bundle marked NS1 do not belong to the applicants but to John Munda and Zacharia Kiteta, both members of staff of the 1st defendant. Further that the house



on the 2nd page of NS1 belongs to one Pastor Mburu. That the house on the 4th page of NS1 belong to Pastor Darius Kimathi. He also stated that the first page of NS2 is a portion of the house owned by the 2nd plaintiff trespassed on LR No. 8784/107, and that pictures on 2nd to 6th pages of the applicants NS2 is a foundation trench excavated by the 1st defendant. He attached the 1st defendant's letter to Athi River Police Station dated 24th May 2022; OB report No. 43/17/01/2024; certificates of title for LR. No. 8784/107 and LR 8784/108, 8784/1, 8784/109; an order of injunction issued in ELC No. E036 of 2022 and photographs.

11. Moreover, Michael Muasya Ndunda the 3rd defendant filed a replying affidavit sworn on 7th February 2024. He stated that the suit was mischievous and incompetent as there was no certified extract of title attached thereto contrary to provisions of Order 37 rule 7 of the *Civil procedure Rules*.
12. He maintained that the applicant had not shown a prima facie case since he had not stated the registered proprietors of the parcel LR. No. 8784/1. He stated that he has never been registered as owner of LR. No. 8784/1 and therefore no orders of adverse possession can be maintained against him.
13. He stated that it is now a matter of public notoriety that there were tendencies of some persons in Machakos County particularly in Mavoko and Athi River areas to set upon private properties with goons and forcefully take possession. He stated that he had already filed Machakos ELC 71/2023 against the five plaintiffs in this suit claiming his parcels 8784/109, 110, 111 and 112 which they were selling to unsuspecting members of the public.

Analysis and determination

14. I have carefully considered the application and the response. The issue that arise for determination is whether the applicants have met the threshold for grant of temporary injunction and inhibition.
15. Order 40 Rule 1 gives the court power to order for a temporary injunction pending determination of a suit, where the applicant demonstrates that the property in dispute is in danger of being wasted, damaged, alienated or disposed in circumstances that would lead to obstructing or delaying the plaintiff from executing any decree that may be made in their favor.
16. Principles for grant of temporary injunction are well settled. An applicant must demonstrate that they have established a *prima facie* case with chances of success; that if the injunction is not granted they will suffer irreparable injury that may not be atoned by an award of damages; and where the court is in doubt, it ought to decide the dispute on a balance of convenience. (See *Giella v. Cassman Brown & Co. Ltd* [1973] EA 358).
17. In this case, the applicants allege to have lived on the suit property since 1989 as the same is their ancestral land. They attached photographs of houses which they stated that they were situated on the suit property and that they belonged to them. The defendants have denied the existence of LR. No. 8784/1 and stated that they have no dealings therein.
18. From the evidence availed by the applicants, apart from photographs, they did not avail the search certificate to show that parcel LR. No. 8784/1 was in existence and who the registered proprietor thereof is. However, the evidence availed by the defendants show that LR. No. 8784/1 was registered in the name of Kimani Wa Nyoike and the same was subdivided since 1996 and those subdivisions were further subdivided in the year 2004 and lastly subdivisions done in 2005, giving rise to titles held by the respondents herein, namely LR. No. 8784/104, 8784/105, 8784/106, 8784/107, 8784/108, 8784/109, 8784/110, 8784/111 and 8784/112. Therefore as the suit property which the applicants claim is LR. No. 8784/1, which land is not in the names of the respondents and has already been



subdivided, no claim can be sustained in regard to the same. Therefore there is no *prima facie* evidence to support the applicant's claim.

19. Besides, although the applicants produced photographs showing houses on the suit property, the 1st respondent stated that the houses and structures shown in the photographs belong to the 1st respondent and their employees. No expert evidence was presented to show the registration number of the land upon which the houses in the photographs are situated.
20. Moreover, the applicants alleged that they are the owners of the suit property because the same is their ancestral land. However no evidence was produced to prove that allegation. But more fundamentally, the evidence shows that the land owned by the respondents herein is subject of two cases pending before this court, namely Machakos ELC No. 36 of 2022 ad ELC No. 71 of 2023. In the two cases, the applicants herein are parties and in ELC No. 36 of 2022, this court issued orders on 28th March 2023 restraining the plaintiffs from interfering with parcels emanating from subdivision of Parcel No. LR. No. 8784/1. In addition, in ELC No. 71 of 2023, the applicants herein have been sued by the 3rd respondent herein and they are represented by the same advocates who appear for them in this suit. When the applicants filed the instant application, they failed to disclose the above material facts, yet they seek equitable remedies in their application. Therefor they have approached equity with unclean hands, hence they are undeserving of the orders sought.
21. In view of the above, it is clear that the applicants have failed to establish a *prima facie* case with a likelihood of success. That being the position, the questions of whether there is imminent irreparable injury and where the scale of convenience tilts become moot and this court will not address the same.
22. In the premises, I find and hold that the undated Notice of Motion filed on 12th January 2024 lacks merit and the same is hereby dismissed with costs.
23. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 7TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Omondi for 3rd defendant

Ms. Kamau for 1st defendant/respondent

No appearance for 4th, 5th and 2nd respondents

Mr. Okello for applicant

Josephine – Court Assistant

