



**Muli & 8 others v Matungulu Farmers Company Ltd & another (Environment & Land Case E039 of 2023) [2024] KEELC 4301 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4301 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E039 OF 2023**

**CA OCHIENG, J**

**MAY 28, 2024**

**BETWEEN**

**BERNADETTA MUTUNGE MULI ..... 1<sup>ST</sup> PLAINTIFF**  
**VIRGINIA MWIKALI MUSAU ..... 2<sup>ND</sup> PLAINTIFF**  
**BONIFACE MUTUA NTHENGE ..... 3<sup>RD</sup> PLAINTIFF**  
**SAMSON MATHEKA NGUMBI ..... 4<sup>TH</sup> PLAINTIFF**  
**BONIFACE NDOLO ..... 5<sup>TH</sup> PLAINTIFF**  
**SAMMY KOMU MUTHIANI ..... 6<sup>TH</sup> PLAINTIFF**  
**DANIEL MAKENZI ..... 7<sup>TH</sup> PLAINTIFF**  
**FRANCIS MUTYOTA KANGUTI ..... 8<sup>TH</sup> PLAINTIFF**  
**MWILU WAITA ..... 9<sup>TH</sup> PLAINTIFF**

**AND**

**MATUNGULU FARMERS COMPANY LTD ..... 1<sup>ST</sup> DEFENDANT**  
**MUTUA MAELE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiffs' Notice of Motion Application dated the 9<sup>th</sup> October, 2023 where they seek the following Orders:-
  1. Spent.
  2. Spent.



3. That the Respondents herein, their agents and/or employees be restrained from entering into, re – surveying, trespassing into, cutting trees, removing fences and/or in any way interfering with Land Reference Number 11931/17 in Machakos County and/or plot No. 41 of the Original approved sub-division map by surveyor Gatome/Gitau ref. GL 2012 – 81006/101 pending the hearing and determination of this suit.
4. That costs of this Application be awarded to the Applicants.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Bernadetta Mutunge Muli. The Applicants’ contend that the 1<sup>st</sup> Applicant is a bona fide member of the 1<sup>st</sup> Respondent. Further, that she is the registered proprietor of Land Reference Number 11931/17 in Machakos County measuring two hundred and forty (240) acres, of the Original approved sub-division map by surveyor Gatome/Gitau Ref. GL 2012 – 81006/101, hereinafter referred to as the ‘suit land’. They confirm that the 1<sup>st</sup> Applicant was registered as owner of the suit land in 1992 and there has been no boundary dispute with anyone. They claim that the 2<sup>nd</sup> to 9<sup>th</sup> Applicants purchased their respective parcels of land from the 1<sup>st</sup> Plaintiff and settled thereon. They state that on 20<sup>th</sup>, 26<sup>th</sup>, 27<sup>th</sup> September, 2023 respectively, the Respondents entered upon the suit land, started clearing vegetation, cutting trees and placing beacons thereon, claiming to be resurveying the said land, without the Applicants’ knowledge. They insist that the Respondents acts are unlawful, unjustified and amount to trespass upon private property.
3. The Defendants opposed the instant Application by filing a Replying Affidavit sworn by LEONARD MUNYAO KIITI where he deposes that in 1982 the Defendant’s Company under the Chairmanship of the late Henry Muli resolved to have the Company land surveyed and subsequently allocated to members. He explains that Mr. Gitau who purported to be a licensed surveyor was contracted to carry out the survey exercise, however the said survey done had numerous shortcomings which members aggressively complained of. Further, the complaints persisted and the directors of the company benefited by grossly allocating themselves parcels that were prime and touching the Masinga Dam frontage. He contends that on 4<sup>th</sup> February, 1986, an Annual General Meeting (AGM) was held, where Henry Muli and his co-directors were voted out and new directors elected. Further, after intense deliberations, it was agreed that the survey exercise done by Mr. Gitau was flawed, and the members of a select committee identified 45 corrections to be done. He avers that Mr. Gitau promised to do 15 corrections but flew out of the country, before doing so. He confirms that, it was later discovered that Mr. Gitau was not a licensed surveyor and the survey he did was flawed hence not registrable at the Director of Surveys, Kenya. Further, on 30<sup>th</sup> December, 1987 another Surveyor Mr. F. Munuve Kasyi commenced the process of resurveying but the greatest challenge was in meeting the costs of the surveying process. He contends that, after completing their report, the Committee presented it to the directors who on 4<sup>th</sup> May, 1991 called a Special General Meeting where members agreed that people would be resettled on parcels of land they had constructed on and members should accept and move on. Further, the recommendations of Surveyor Mr. F. Munuve Kasyi were unanimously agreed upon. He reiterates that in accordance with the Defendant’s companies’ resolution dated the 4<sup>th</sup> May, 1991, any survey done before then, and allotment thereto that was not in line with the recommendation of the committee tasked with reviewing the impugned survey of 1982, was unacceptable, invalid and not enforceable and that explains why there were no records with the Director of Survey as prepared by Mr. Gitau. Further, the new survey which was sanctioned by the Special General Meeting of 4<sup>th</sup> May, 1991, resolved that every member had to get their parcels of land as follows: 6 acres at the waterfront; 105 acres at the plain and 29 acres at the hilly area. He insists that the survey process commenced in 1992 and was completed in early 2000. Further that, it involved the consolidation including subdivisions of LR Nos. 11931/3, 5 and 10 which together formed Ndithini/Mananja Block



6 that resulted to new numbers 1 - 339 with the said survey yielding 8 (16 copies) of survey sheet. He reaffirms that todate there is no other survey record involving the consolidation and subdivision of LR No. 11931/3, 5 & 10 into Ndithini/Mananja Block 6 as the survey that the Applicants' are alluding to, was unregistered with the Survey of Kenya. He states that, as the survey process was being completed, a list of beneficiaries was also submitted, indicating clearly the acreage for each of the individual shareholder and their respective numbers, to aid in the preparation of title deeds to each member. He avers that the 1<sup>st</sup> Plaintiff and her late husband Henry Nzioka Muli jointly had one and half shares, which is equivalent to two hundred and ten (210) acres. Further, that the 1<sup>st</sup> Plaintiff is a beneficiary of the following parcels of land: Ndithini/Mananja Block 6/99 measuring 42.607 acres; Ndithini/Mananja Block 6/228 measuring 158.3764 acres and Ndithini/Mananja Block 6/338 measuring 8.8 acres. He highlights the owners of Ndithini/Mananja Block 6/335 – 342 claimed by the 1<sup>st</sup> Plaintiff. He further avers that the 1<sup>st</sup> Plaintiff erroneously sold Ndithini/Mananja Block 6/229 belonging to Benedetta Nzilani Paul and John Muthusi Ngananga to the 2<sup>nd</sup> to 9<sup>th</sup> Plaintiffs' respectively and it is only after the owners demanded the cessation of trespass by the 2<sup>nd</sup> to 9<sup>th</sup> Plaintiffs, that the 1<sup>st</sup> Plaintiff filed the instant suit. He further insists that, todate there is no parcel of land known as LR 11931/17 in any Government records that is capable of attracting the protection through an order of injunction.

4. The Plaintiffs' filed a Further Affidavit sworn by BERNADETTA MUTUNGE MULI where she reiterates her averments, contends that the Replying Affidavit is bad in law as it offends the hearsay rule. She denies that, her late husband was ever the Chairman of the 1<sup>st</sup> Defendant but confirms he was elected Secretary and during his tenure, it is when the 1<sup>st</sup> Defendant commissioned messrs Development Survey Services to undertake subdivision, which was drawn as well as presented to all relevant authorities as approved on 25<sup>th</sup> July, 1983 vide approved number GL 2012 Ref. No. 81006/101. She explains that the new committee suspended the already concluded survey work and engaged a new surveyor Mr. F. Munuve Kasyi to resurvey the land. She claims the new Surveyor has failed to present a sub divisional plan to the members and on taking his subdivision to the lands office, it was returned unapproved thus reverting to the original subdivision plan. She insists that her plot is LR No. 11931/17 and the Deed Plan is No. 160550 in Survey of Kenya Folio No. 221, under register No. 13 of the County Government of Machakos. She further avers that, the 1<sup>st</sup> Respondent's amended List of Members includes persons who were not genuine shareholders. Further, that her late husband, had two shares with each Share having 120 acres culminating in her 240 acres. She further insists that the land parcels listed by the Respondent claiming she is a beneficiary of, do not exist on the ground as the attempted subdivision plans were not approved.
5. The Application was canvassed by way of written submissions.

### **Analysis and Determination**

6. Upon consideration of the Notice of Motion dated the 9<sup>th</sup> October, 2023 including the respective Affidavits and rivaling submissions, the only issue for determination is whether the Plaintiffs' are entitled to orders of a temporary injunction pending the outcome of the suit.
7. The Plaintiffs in their submissions reiterate their averments above and insist that they have met the threshold set on injunctions. To support their arguments they have relied on various authorities including: *Olympic Sport House Ltd v School Equipment Centre Ltd* (2012) eKLR; *Giella Vs Cassman Brown* (1973) EALR 358; *Jan Bolden Nielsen v Herman Philipus Steyn & 2 others* (2012) eKLR and *Joseph Mugo Njuguna v Veronica Wangui Njuguna* HCCC No. 142 of 2011.



8. The Defendants filed their written submissions reiterating their averments and insisting that the Plaintiffs' had not established a prima facie case. To support their averments, they relied on the following decision: *Giella Vs Cassman Brown* (1973) EALR 358.
9. In reference to the decisions of *Giella Vs Cassman Brown* (1973) EALR 358 and *Mrao Ltd V First American Bank of Kenya Ltd* (2003) eKLR, I will proceed to decipher whether the Plaintiffs' have established a *prima facie* case with a probability of success at the trial.
10. It is not in dispute that the Plaintiffs' are in current occupation of the suit land. It is further not in dispute that the 1<sup>st</sup> Plaintiff sold portions of the suit land to the 2<sup>nd</sup> to 9<sup>th</sup> Plaintiffs. Further, that the 1<sup>st</sup> Plaintiff's deceased husband was a Shareholder of the 1<sup>st</sup> Defendant. What is in dispute is the Plaintiffs' averments that they own the suit land but the Defendants have trespassed thereon and commenced undertaking a survey exercise. The Defendants opposed the Application and explained that a resurvey of the suit land had been undertaken, hence the Plaintiffs' cannot rely on the survey done by Mr. Gitau.
11. Looking at the documents presented by the respective parties, I note there are different explanations offered in respect to the acreage and location of the suit land. The 1<sup>st</sup> Plaintiff has insisted that the alleged parcels of land which the Defendants' indicate belong to her are non-existent on the ground. Further, the 1<sup>st</sup> Plaintiff has challenged the second survey exercise conducted and insists that the same was not registered. She however admits that there was indeed a new surveyor hired to conduct a fresh survey exercise. However, except for the Sale Agreements, I note the Plaintiffs have not presented Certificates of Title nor photographs indicating whether they occupy the suit land or not. Even though the Plaintiffs' are not registered as proprietors of the suit lands', but noting that the 1<sup>st</sup> Plaintiff was allocated the said land in 1982 and sold portions of the said land to the rest of the Plaintiffs', I opine that the Plaintiffs have indeed established a *prima facie* case. However, since there seems to be a dispute in respect to the survey exercise, which cannot be determined at this interlocutory stage, I opine that it is pertinent to protect the substratum of the suit.
12. It is against the foregoing that I find the instant Notice of Motion Application merited, but I will not grant the orders as sought. Further, I direct that the obtaining status quo be maintained where no party should interfere with the substratum of the suit land, nor any persons' occupancy of a portion of the said suit land, pending the hearing and determination of the suit.
13. Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 28<sup>TH</sup> DAY OF MAY, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Ms. Kitanga holding brief for Mutua Mboya for Plaintiffs

No appearance for Defendants

Court Assistant – Simon/Ashley

