



REPUBLIC OF KENYA



KENYA LAW
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**Kathilu v Gichu & another (Land Case E019 of 2023)
[2024] KEELC 4901 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4901 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE E019 OF 2023
CA OCHIENG, J
JUNE 20, 2024**

BETWEEN

ALEX MUTUA KATHILU PLAINTIFF

AND

PAUL WATORO GICHU 1ST DEFENDANT

COFFEE BEE PROCESSORS LIMITED 2ND DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 5th September, 2023 where he seeks the following Orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That the Court orders the Land Registrar in Machakos visits the suit property to make a determination with regards to the boundary and the extent of the encroachment/trespass and to file a comprehensive independent status survey report on the mutations, establishment, existence, ownership, ground bearings/coordinates and boundaries in relation to Land Reference Number LR No. 27702/5 (the suit property) and the adjacent public access roads.
 - e. That the orders issued herein be served upon the OCS Machakos Police Station for further assignment to Mavoko Police Station to ensure compliance.
 - f. That there be such other or further orders as the court may deem fit and just to grant in the circumstances.
 - g. That the costs of this application be borne by the Respondents/Defendants.



2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Alex Mutua Kathilu where he deposes that he is the registered owner of land reference LR No. 2770/5 hereinafter referred to as the 'suit property'. He claims that sometime in August, 2023 the Defendants invaded the suit property, commenced excavating thereon with claims he was marking part of the property that belonged to him. Further, that the Defendants are threatening to take over ownership of part of the suit property yet they purchased the land adjacent to it.
3. He explains that in March, 2016 he completed the process of transferring the suit property from his late father to himself. Further, that the Defendants fenced off a portion of the land they purchased from the deceased. He insists that he was born and brought up on the suit property for over thirty (30) years and no one had ever claimed that he encroached upon their land, as no boundary dispute was ever raised. Further, his deceased parents are buried on the suit property. He confirms that sometime in 2020, he fenced off the suit property using stones and he resurveyed as well as produced beacon certificates. Further, that the suit property holds a primary and kindergarten school and the Defendants have threatened to demolish the said school.
4. The Defendants opposed the instant Application by filing a Notice of Preliminary Objection dated the 23rd October, 2023, Grounds of Opposition as well as a Replying Affidavit sworn by Paul Watoro Gichu. In the Notice of Preliminary Objection, they contend that this court lacks jurisdiction to entertain, hear and determine the instant motion and suit, in light of Sections 18 and 19 of the Land Registration Act. They insist that the suit does not disclose any cause of action as against them to warrant the granting of any interlocutory reliefs. Further, the Plaintiff has not established a *prima facie* case with a probability of success at the trial and the entire suit including Notice of Motion as drawn are speculative, disjointed and failed to disclose particulars to warrant the granting of the orders as sought.
5. In the Replying Affidavit of Paul Watoro Gichu, he denies amounting any claim on the suit property nor that it is owned by the 2nd Defendant. He explains that he is a director of Endmor Steel Millers Limited which is the proprietor of LR No. 27702/3 and 27702/4 respectively. He confirms that the 2nd Defendant is a tenant on LR No. 27702/3 and 27702/4 which properties are adjacent to the suit property. Further, that the 2nd Defendant was incorporated on 17th August, 2022 and could not have entered into a Sale Agreement with the late Sebastian Paul Muinde Kathilu in the year 2016. He denies that the 2nd Defendant and himself have ever been involved in digging and excavation of the suit property and the tractor on site was within the public access road next to the rented premises and not on the said suit property. He reiterates that the Plaintiff has failed to disclose a cause of action against the 2nd Defendant and himself.
6. The Plaintiff filed a Further Affidavit where he reiterated his averments and insisted that the dispute herein was an actionable act of trespass and not a boundary issue. He reaffirms that there has never been an issue or discrepancy regarding measurements, location of physical boundaries or any form of dispute between the adjoining parcels of land, which fact is within the Defendants' knowledge. Further, on the basis of the said knowledge, the 1st Defendant proceeded to fence off the property he purchased, from his deceased father and registered it, in the name of Endmor Steel Millers Limited.
7. He explains that he proceeded to file the instant suit with the reasonable knowledge that the 2nd Defendant is the registered occupier and owner of the property, adjacent to the suit property without the knowledge that the said party was a tenant to the property legally owned by Endmor Steel Millers Limited, a company associated with the 1st Defendant. He insists that there are photographs depicting the excavation and the averments by the Defendant that the tractor was on an access road, is false. He reiterates that he seeks injunctive orders against encroachment and trespass and not to litigate on boundaries. Further, that this court has jurisdiction to handle the matter.



8. The Application was canvassed by way of written submissions.

Analysis and Determination

9. I have considered the instant Notice of Motion Application, the Notice of Preliminary Objection, the respective affidavits, annexures including rivalling submissions and the following are the issues for determination:

- a. Whether this Court has jurisdiction to handle this dispute herein.
- b. Whether the Plaintiff is entitled to the orders as sought.

10. As to whether the Court has jurisdiction to handle this matter. The Defendants' have opposed the instant Notice of Motion Application including the suit, insisting that this Court does not have jurisdiction to handle this matter by dint of Section 18 and 19 of the Land Registration Act. On perusal of the Plaintiff, I note at paragraph 7 of the Plaintiff, the Plaintiff claims the Defendants have laid a claim on suit property on account that it was transferred to the 2nd Defendant by the Plaintiff's father during his lifetime. The Plaintiff has averred that the Defendants have trespassed on the suit property and threatened to erect a fence to secure the property.

11. The Plaintiff sought for the following Orders:

- a. A declaration that the Plaintiff is the legally registered owners of the suit property.
- b. A permanent injunction restraining the Defendants, their agents, servants, employees, proxies and/or assigns from selling, trespassing, encroaching, grabbing or whatsoever dealing with all that parcel of land located in Syokimau, Mlolongo Subcounty known as LR No. 27702/5 and as per the sketch map showing their portions of land.
- c. General Damages.
- d. Costs of the suit to follow the cause.
- e. Any other or further orders that this Honourable Court may deem necessary.

12. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited* [1969] EA 696; the Court held that:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

13. In the case of *Avtar Singh Bhamra & Another v Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, the Court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.” Emphasis Mine

14. I note the Plaintiff raised the issues of trespass on the suit property which fact the Defendants' have not controverted. It is trite that where a Defendant fails to file a Defence expressly rebutting the Plaintiff's averments, the claim remains unopposed. However, in this instance, while associating myself with



the decisions I have cited, I opine that the issues raised in the Plaintiff including trespass can only be ascertained during a full hearing. Further, since the Plaintiff is the registered proprietor of the suit property, and has even fenced it, he has proprietary interest over the said land. I opine that since the titles to the suit land emanated from the repealed *RTA*, the boundaries are fixed and hence the Land Registrar does not have mandate to handle it. I hence find the instant Preliminary Objection unmerited and will disallow it.

15. As to whether the Plaintiff is entitled to orders as sought.

The Plaintiff has sought for orders of interlocutory injunction as well as compulsion of the Land Registration to measure the extent of encroachment. On whether the Plaintiffs have established a prima facie case with a probability of success at the trial, I will rely on the principles as enunciated in the case of *Giella v Cassman Brown & Company* [1973] EA 358 including the description of a *prima facie* case as outlined in the case of *Mrao Ltd v First American Bank of Kenya & 2 Others* [2003] KLR 125.

16. It is not in dispute that the Plaintiff is the registered proprietor of the suit property. The Defendants' have not denied that the Plaintiff is in occupation thereof. The Plaintiff confirms he has put up permanent structures on the suit property and there is a school including kindergarten thereon. I however note, from the prayers sought in the application, it is for orders of injunction pending the outcome of the application which cannot issue as they have been exhausted. Be that as it may and in the interest of justice, and invoking the inherent jurisdiction of this court, I find that it would be pertinent to preserve the substratum of this suit and will hence issue an order of status quo pending the outcome of this suit.

17. In the foregoing, I will proceed to disallow the instant Notice of Preliminary Objection but allow the Notice of Motion application in the following terms:

- a. The obtaining *status quo* be maintained where no party should interfere with the person in occupation of the suit property pending the outcome of this suit.

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

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ominde holding brief for Kemunto for Plaintiff/Applicant

No appearance for Defendant

Court Assistant – Simon/Ashley

