



Mukirai & 5 others v Bendende & 3 others (Environment & Land Case E036 of 2023) [2024] KEELC 4468 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4468 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E036 OF 2023**

SM KIBUNJA, J

JUNE 5, 2024

BETWEEN

CHRISTOPHER MATHEA MUKIRAI & 5 OTHERS PLAINTIFF

AND

KAKONO BENDENDE & 3 OTHERS DEFENDANT

(Notice Of Motion Dated 24th October 2023)

RULING

1. The plaintiffs moved the court through the notice of motion dated the 24th October 2023 seeking for temporary injunction, restraining the defendants from trespassing, selling, constructing any structure and or house, offering for sale, charging or in any other manner whatsoever dealing with the plaintiffs' parcel of land, MN/V/2534, suit property, measuring 1.529 hectares pending the hearing of this suit. The application is premised on the four (4) grounds on its face, and supported by the affidavit of Christopher Mathea Mukirai, 1st plaintiff, sworn on the 24th October 2023, and supplementary affidavit sworn on the 6th December 2023.
2. The application is opposed by the defendants through the replying affidavit sworn by Kakono Bendende, the 1st defendant, on the 22nd November 2023, *inter alia* denying any dealing with the suit property. He deposed that they are occupying plot No.2712/V/MN, C.R 65086 measuring 36.75 HA that was a subdivision from Plot No. 387/3 registered with Kahidi Charo Kalume & 16 Others.
3. The court issued directions on filing and exchanging submissions on the 7th December 2023. The learned counsel for the plaintiffs and defendants filed their submissions dated the 16th December 2023 and 2nd February 2024 respectively, which the court has considered.
4. The issues for determinations are as follows:



- a. Whether the plaintiffs have established a *prima facie* case with probability of success for the order sought to be issued at this interlocutory stage.
 - b. Who pays the costs?
5. The court has carefully considered the grounds on the application, affidavit evidence, submissions filed, superior courts decisions cited thereon and come to the following conclusions:
- a. The principles guiding the courts in applications for temporary injunctions have been discussed in many superior court decisions including the case of *Giella versus Cassman Brown* [1973] EA 358, that was cited by both counsel in their submissions. Simply put, for an applicant to succeed, he/she/it has an obligation to establish a *prima facie* case, and show the likelihood of suffering irreparable loss if the order was not granted, and that the balance of convenience tilts in their favour.
 - b. The plaintiffs claim to be joint owners of MN/V/2534, the suit property, that measures 1.529 hectares, and seek for the injunction order because the defendants have trespassed on it, and are carrying out construction thereon without their consent. The defendants have denied that claim and insists they own plot No.2712/V/MN, C.R.65086, measuring 36.75 hectares, that was a subdivision from Plot No. 387/3 registered with Kahidi Charo Kalume & 16 Others. That they have occupied that land for over 40 years.
 - c. The court has considered the affidavit evidence availed by both parties, and specifically the surveyor's report dated the 7th August 2023, referenced "Investigative Survey & Report On Plot No. Mn/v/2534 (cr 57135) Versus Plot No. Mn/v/2794," that is annexed to the plaintiffs' supplementary affidavit. The surveyor's report by one E. M. J. Kiguru inter alia stated that:

"We confirm that we have undertaken the investigative survey on Plot No. MN/V/2534 which also falls inside MN/V/2794 – thus exhibiting an encroachment scenario.

Note the fact that the subject plot MN/V/2534 falls total inside Plot MN/V/2794 – and has a frontage to the old Mombasa – Nairobi Road.....

Please note that the ruling in the ELC case directed that all surveys that had hitherto (previously) been undertaken within Plot No. MN/V/387 be cancelled and their titles be expunged from records – and thence a fresh survey be undertaken as per details stated in the said ruling (therein).

The subsequent surveys that were carried out are contained in survey maps detailed hereunder:

- a) F/R 574/81 – a compilation survey of Plot No. MN/V/387/R.
- b) F/R 409/21 & 374/81 – creating Plots Nos. MN/V/2711 – 2715.
- c) F/R 451/31 (a survey which is an amendment to above (b)0 – creating Plots Nos. MN/V/2791 & MN/V/2792 – 2799.

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Observations/recommendations.



1. Please note that the survey of Plot No. MN/V/2534 was done before the survey of the overlapping survey – i.e. Plot No. MN/V/2794 etc.
2. Since the title/grant for plot No. MN/V/2534 (i.e CR No. 57135) is intact, it appears to us that your plot was inadvertently not considered (for cancellation) during the surveys that were done in accordance with the decree/ ruling of ELC Case No. 194 of 2010. Nevertheless, note that this plot is not excluded in the said surveys (!!) – hence the overlapping scenario.
3. In our opinion it may be worth considering that you could initiate a process of excising your plot (MN/V/2534) out of the (large) plot, known as MN/V/2794. However please note that the plot almost certainly has a registered title – whose details we have not yet been able to obtain.
4. We are also aware of another party who has gone to court with an ultimate aim of ‘overturning’ ELC Case No. 194 of 2010. If this application succeeds, then you would be in a better position to take full possession of your property (MN/V/2534) – free of encroachments.”

The court has also perused the copy of the judgement dated 30th October 2014, and decree issued on 14th November 2014 in Mombasa ELC No.194 of 2010, that are attached to the replying affidavit. The said documents among others confirms that Kahindi and 16 others, who were the applicants were successful in the adverse possession claim against Cassman Suleiman Sumar & another, and were awarded 132 acres out of land title CR 8813.

- d. That having considered the affidavit evidence presented by both sides, it is clear the claim by the plaintiffs that the defendants have trespassed onto their land, parcel MN/V/2534, has been disputed. The defendants have insisted that their activities are on parcel MN/V/2712. The provisions of sections 107 to 109 of the *Evidence Act* chapter 80 of Laws of Kenya obligated the plaintiffs to tender proof that the defendants activities constituting trespass, were being carried out on parcel MN/V/2534, suit property. I have looked at all the annexures to the supporting and supplementary affidavits and none of them attempts to do so. The attached photographs of structures do not tell on what parcel of land they are positioned or situated.
- e. The finding in (d) above, coupled with the suit property situational details as captured in the surveyor’s report, whose excerpts I have set out at (c) above, leads the court to conclude that the plaintiffs have failed to meet the threshold for injunction order to issue at this stage.



- f. That under section 27 of the *Civil Procedure Act*, chapter 21 of Laws of Kenya, that prescribes that costs follow the event unless otherwise ordered for good cause, the defendants would have been entitled to costs of the application. However, I find due to the nature of the claim, the costs should abide the outcome of the suit.
1. Flowing from above determinations on the notice of motion dated the 24th October 2023, the court finds and orders as follows:
 - a. That the application is without merit and is dismissed.
 - b. The costs to abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF JUNE 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiffs : Mr. Wamwayi

Defendants : Mr. Tindi

Leakey – Court Assistant.

