



**Osman v Mohamed & 3 others (Environment & Land Case
E108 of 2023) [2024] KEELC 5796 (KLR) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5796 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E108 OF 2023**

OA ANGOTE, J

JULY 31, 2024

BETWEEN

ABBEY ABDINOOR OSMAN PLAINTIFF

AND

ABDIRAHMAN MOHAMED 1ST DEFENDANT

MAHAD ADAN 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

CORNER HOUSE APARTMENT LIMITED 4TH DEFENDANT

RULING

1. This Ruling is in respect of two applications, the Plaintiff's application dated October 5, 2023 and the 4th Defendant's application dated November 9, 2023.
2. In the Notice of Motion dated October 5, 2023, the Plaintiff has sought for the following prayers:
 - i. That pending the hearing and determination of the suit, an order of injunction be issued against the Defendants restricting them; and anyone affiliated with them; from trespassing onto, remaining in, occupying, disposing of, transferring, leasing, constructing, dumping, excavating and in any other way interfering or dealing with the land Nairobi/Block 42/129 which order should be enforced by the Officer Commanding Police Station Starehe or any other police station within the area; and
 - ii. The costs of this application be provided for.
3. The application is supported by the affidavit of the Plaintiff who has deposed that he is the lawful lessee from the government and the registered proprietor of land known as Nairobi/Block 42/129 (the suit property).



4. The Plaintiff deponed that he has enjoyed peaceful and quiet possession of the suit property since he acquired it until 2nd October, 2023 when the 1st and 2nd Defendants violently trespassed on the suit property, off loaded assorted construction materials and started excavating it.
5. It is the Plaintiff's case that the 1st and 2nd Defendants have no legal or recognizable interests over the suit property which is lawfully owned and registered in his name and that he has a *prima facie* case with chances of success.
6. The 1st, 2nd and 4th Defendants filed an application dated 9th November, 2023 in which they have sought for the following orders;
 - a. The order issued by this Honourable Court on 2nd November 2023 does not give the Plaintiff the Carte Blanche to invade the suit property and engage in wilful destruction of the structures therein in a bid to evict the Defendants herein.
 - b. The 1st and 2nd Defendant and the Intended 4th Defendant's right to be heard is in jeopardy owing to the impugned order issued by this honourable court on 2nd November, 2023 due to the fact that:
 - i. The honourable court has in its impugned order enjoined the 1st and 2nd Defendant from remaining upon and/or occupying the suit property despite them being in possession and occupation of the suit property.
 - ii. The 1st and 2nd Defendants as the directors of the lawful registered proprietor of the suit property are entitled to peaceful and quiet possession and occupation of the suit property.
 - iii. The impugned order has the effect and connotation of exposing the Corner House Apartments Limited and 1st and 2nd Defendants to the threat of eviction from their property.
7. The application is supported by the affidavit of the 1st Defendant who deponed that he is the Director of the 4th Defendant; that the 4th Defendant is the one in possession of the suit property and that vide a transfer dated 2nd May, 2023, Paul Muchunu Mbaria and Joseph Mwangi Mbaria, in their capacity as Administrators of the estate of Mbaria Mathai transferred the suit property to the 4th Defendant.
8. It is the Defendants' case that on 2nd February, 2005, the Ministry of Lands approved and recommended the renewal of the lease over the suit property for a further term of 50 years after the application for renewal was approved by all the relevant departments and that on 15th March, 2005, Raphael Karina Kamotho and 13 others received confirmation of the renewal of the lease over the suit property for a term of 50 years.
9. It is the Defendants' case that the estate of Mbaria Mathai alias Francis Mbaria was duly issued with a letter of allotment for renewal of lease; that the lease and certificate of lease was eventually issued and that the 1st and 2nd Defendants have been in possession of the land.
10. The 1st Defendant deponed that on 18th August, 2022, the 4th Defendant purchased the suit property from the Estate of Mbaria Mathai for valuable consideration and that the search that the 4th Defendant conducted at the Ministry of Lands on 24th October, 2023 confirmed the 4th Defendants to be the legal owner of the suit property.
11. It was deponed by the 1st Defendant that the 4th Defendant immediately took possession of the suit property; that the 4th Defendant obtained all the requisite approvals and licences to enable it commence



construction on the suit property and that the order of injunction in the 4th Defendants favour should issue.

12. In response to the Defendant's application, the Plaintiff filed a further affidavit in which he deponed that the claim by the Defendants over the suit property is anchored on fraud, deliberate misrepresentation of facts and falsehoods.
13. According to the Plaintiff, the 4th Defendant was incorporated in February, 2023 and yet it purports to have purchased the suit property on 12th August, 2022 for Kshs. 50 million and that the suit property was allocated to him vide a letter of allotment dated 6th February, 2007 following his application for the land vide his letter of 8th September, 2004.
14. It is the Plaintiff's case that he applied for the allocation of the land then known as residential plot number 209/3271/77 upon ascertaining that the previous lease had expired and no extension had been sought and or granted by the government.
15. According to the Plaintiff, the 1st, 2nd and 4th Defendants' claim over the suit property is anchored on a questionable allotment letter as well as an alleged Memorandum of understanding; that the MOU dated 9th May, 2005 purported to bestow interest over the suit property after the lease over the suit property had expired and before the issuance of the purported letter of allotment which is dated 10th May, 2005.
16. The Plaintiff finally deponed that the 1st, 2nd and 4th Defendant's claim over the suit property is not only anchored on a non-existent parcel of land and questionable ownership records but they have also failed to demonstrate the legality of the root of the title they purport to have acquired. Both parties filed submissions and authorities which I have considered.

Analysis and findings

17. I have carefully considered the Plaintiff's application dated 5th October 2023, and submissions. I have also given thought to the 3rd Defendant's Replying Affidavit dated 20th May 2024, the 1st, 2nd and 4th Defendants' application dated 9th November 2023; together with the submissions. The only issue falling for determination is who ought to be granted injunctive orders between the Plaintiff and the 4th Defendant, if at all.
18. It is trite that a temporary injunction will issue where a party shows that he has a *prima facie* case with chances of success. As a provisional measure, preliminary injunction's mainstay is preventing irreparable harm that cannot be remedied by an award of monetary damages. In granting an injunctive relief to either party, the court must ensure that the suit property is preserved pending the hearing and determination of the suit.
19. Kenya's current precedents have broadened and adapted to the present times from what was then the 'American Cyanamid Guidelines' in *American Cyanamid Co (No 1) vs Ethicon Limited* [1975] UKHL 1 that used to consider; (1) if there was a serious question to be tried, (2) whether damages would be an adequate remedy, (3) where the balance of convenience lay and (4) any other special factors.
20. Considering that a temporary injunction is an equitable remedy, the court is keen on the notions of fairness and justice. The court should be sensitive to the issues presented by the parties, which issues are to be considered on a case by case basis. The circumstances under which a temporary injunction may be granted pending the hearing of the suit are provided for under Order 40 Rule 1 of the [Civil Procedure Rules](#) as follows:



1. When any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 2. when the Defendant threatens or intends to remove or dispose of the property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.”
21. The nature of a temporary injunction in this case pertains to the preservation of the suit land. The Plaintiff presented evidence showing that the suit property was initially titled L. R. Number 209/3271/77 but due to the ongoing conversion of titles to align with the new land laws, the title number of the suit property changed to Nairobi/Block 42/129.
 22. To support the claim over the suit property, the Plaintiff annexed on his affidavit the Certificate of Lease dated 23rd August, 2023 which is in his name; the official search as at 2nd October, 2023 and the rates and rent clearance certificates.
 23. The Defendants on the other hand annexed evidence of title L. R. Number 209/3271/77 which shows the history of the land from initiation until the alleged transfer to the 4th Defendant dated 10th May 2023.
 24. Considering that both the Plaintiff and the Defendants have distinct titles to the suit property, both of them had to show that they have a *prima facie* case with chance of success. There is the question of which side of history the suit property took; which title is legitimate and the repercussions on the usage by either party pending the hearing and determination of the suit. This presents a case that all the parties must indeed answer at trial.
 25. Without belabouring the matter, and after perusing the Replying Affidavit of the 3rd Defendant, it is this court’s finding that both parties have genuine and arguable cases after producing proof of the existence of a right that has been infringed to call for a response. The court will ultimately make a finding on which title takes precedence after trial.
 26. In terms of irreparable damage, it was the Plaintiff’s assertion that if construction continues, the state of the suit property will not be restored to its initial state. The gap I find here is that both parties do not give an initial description of the suit property. The 1st and 2nd Defendants state that there were structures on the suit property before their alleged purchase but the Plaintiff does not detail the state of the suit property before this dispute arose.
 27. In addition, it would have bolstered the Plaintiff’s case if he had mentioned what use he had with the suit property so that there would be a measure of what he terms as ‘initial and productive state’. At the moment, the court cannot adequately set out the level of irreparable harm to both parties so as to quantify if the injuries can or cannot be compensated by damages if a temporary injunction is issued in favour of either party.
 28. The circumstances of this case at this stage are that if the injunction is issued to restrain the Defendants, then they will not be able to continue with the construction that they had commenced. In their opinion, there would be an extra expense if there is a delay in completing the construction.
 29. The converse is true: if an injunction is issued in favour of the Defendants, they will continue with the construction, thus changing the status of the suit property, which will prejudice the Plaintiff in the event the suit is decided in his favour.



30. In this context, it is a quandary on which party ought to be granted a temporary injunction with all the gaps as to the legitimate history of the suit property, the legitimate title between the owners and the lawful proprietor, moreso considering that the suit has not been heard and finally determined.
31. In the circumstances, I decline to issue an injunction in favour of either party at this stage. Ultimately, I make the following disposal orders:
- i. Pending the hearing and determination of the suit, the current status quo shall be maintained, meaning that there shall be no further survey work, mapping, application for further approvals and licences, construction, development, depositing of any equipment or material, charging, selling or any dealing with the suit property that would change the current state of the property by the parties or their agents until the suit is heard and determined.
 - ii. Pending the hearing and determination of the suit, and to preserve the suit property and the construction materials already deposited on the suit property, the 1st, 2nd and 4th Defendants may employ security guards for the sole purpose of guarding the suit property and ensuring that no one access the suit property, including the 1st, 2nd and 4th Defendants.
 - iii. The Officer Commanding Starehe Police Station shall enforce the above orders.
 - iv. Costs of the applications shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 31ST DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Odunga for Plaintiff/Applicant

Mr. Omar for 1st, 2nd and 4th Defendant

Mr. Allan Kamau for 3rd Defendant

Court Assistant - Tracy

