



**Simba v Mutiso & 4 others (Environment & Land Case
E057 of 2023) [2024] KEELC 5491 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5491 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E057 OF 2023**

A NYUKURI, J

JULY 24, 2024

BETWEEN

BONIFACE NDOLO SIMBA PLAINTIFF

AND

JAMES MOSES MUTISO 1ST DEFENDANT

REBECCA MUKONYO MAUNDU 2ND DEFENDANT

COUNTY LAND SURVEYOR 3RD DEFENDANT

COUNTY LAND REGISTRAR 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

RULING

Introduction

1. Before court is a Notice of Motion application dated 21st November 2023 filed by the plaintiff seeking the following orders;
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit, a temporary order of injunction do issue restraining the 1st and 2nd respondents whether by themselves or their agents, representatives, servants and/or assigns from howsoever implementing the 3rd and 4th defendants/respondents surveyor's reports dated 1st November 2023 and 7th September 2023 by trespassing into, fencing, selling, alienating and/or in any other manner whatsoever interfering with or otherwise dealing with the property known as Machakos/Mua Hills 770 and Machakos/Mua Hills 1480.



- d. That costs of this application be provided for.
2. The application is based on grounds on the face of it and supported by the affidavit of Boniface Ndolo Simba, the plaintiff herein. The applicant's case is that he is the registered owner of the parcels of land known as Machakos/Mua Hills 770 and Machakos/Mua Hills 1480, measuring 0.65 Ha and 0.191 Ha respectively. He stated that since 1993 he has been in possession of his parcels of land where he has built permanent houses and been farming and fenced as per the existing boundaries. He further stated that the 1st respondent owns properties known as Machakos/Mua Hills 399 and Machakos/Mua Hills/794 whereas the 2nd respondent is the registered owner of Machakos/Mua Hills/936. He also averred that the mutation forms for Machakos/Mua Hills/770 and Machakos/Mua Hills 1480 were registered on 18th May 2010 and 21st June 2018 respectively.
 3. The deponent further averred that the 1st respondent purchased his property in 1980 whereas the 2nd respondent purchased her land in 2017. He also deposed that the parcel numbers 936 shares a boundary with number 770 and the parcel number 399 shares a boundary with parcel number 936.
 4. Further, it was deposed that the 3rd respondent visited parcels 794, 936, 399, 793, 769, 1045, 776, 151, 934, 933, 936, 1480, 1481, 768, 790, 789 and 770 to ascertain and fix boundaries as a result of which he prepared a report dated 7th September 2023 which report made findings that the 1st respondent's parcel No. 399 had been encroached on by the proprietor of parcel No. 936. He also stated that on 14th September 2023, the 3rd and 4th respondent visited parcels 399, 793, 936, 770, 768, 1481, and 769 for purposes of determining the boundaries thereof. That they prepared a report which stated that the owner of numbers 770 and 1480 had encroached on the 2nd respondent's parcel number 936 by constructing houses thereon. Further that the report stated that the boundaries on the RIM did not conform to the boundaries on the ground. That the 3rd and 4th defendants therefore fixed boundaries on the ground and the 1st respondent is in the process of fencing off the entire parcels belonging to the applicant and has already closed the access road to parcel 770. He stated that the effect of the new boundaries was that the applicant would lose two parcels with a total of 2.07 acres. Further that the 2nd respondent also plans to fence off the applicant's land.
 5. It was further averred by the deponent that he had also engaged a private surveyor who also visited the two parcels; Machakos/Mua Hills/770 and Machakos/Mua Hills 1480 and noted that the shapes of the surveyed parcels did not confirm to the shapes on the survey map and that the differences were quite substantial, that the boundary map does not tally with the existing ground boundaries. He also alleged to have made a report to the Machakos police station for trespass occasioned by the 1st respondent vide OB number 41/23/10/23 as the 1st respondent attempted to cut off part of the fence forming part of the parcels no.770 and 1480 so as to erect a new fence and fence off his two plots with parcel number 399.
 6. He further asserted that the 2nd respondent has also been making arrangements to cut off his fence with assistance of the police so as to fence off his two parcels of land no.770 and 1480 as forming part of the parcel number 936. He averred that he stood to suffer irreparable harm if the orders sought were not granted and that the application satisfied the requirements for grant of temporary injunction as set out in the case of Giella vs Cassman Brown. He attached his title deeds; photographs showing his developments and new developments; 2023; maps; surveyor's reports; letters dated 15th September 2023 and 7th November; OB extract; and photographs of alleged damaged fence.
 7. The application is opposed. The 1st respondent, James Moses Mutiso, swore a replying affidavit dated 4th January 2024 in response thereof. He deposed to have purchased land in the year 1980 from one David Ndolo Mutavi, the father of the plaintiff whose original title was Machakos/Mua Hills/157.



- That his land was excised from the said title for Machakos/Mua Hills/399 which is registered in his name while the remainder of the land became Machakos/Mua Hills/400. He further deposed that after realizing that his land had been encroached upon, he followed the right channels to have the issue resolved, which resulted in the surveyor's report dated 7th September 2023 which clearly shows that Machakos/Mua Hills/399 does not share any boundary with the plaintiff's two plots Machakos/Mua Hills/770 and Machakos/Mua Hills/1480, and which report was found to be satisfactory by the other neighbours affected by the boundaries.
8. He also deposed that he had not trespassed onto the plaintiff's land but that it was the plaintiff who together with the owner of Machakos/Mua Hills/936 had encroached onto the 1st respondent's land, as confirmed by the plaintiff's father who is still alive. It was his averment that the plaintiff's land was still intact and unoccupied and that he ought to negotiate with the owner of Machakos/Mua Hills/936 whose land the plaintiff has wrongfully developed. He further averred that the mutation provided by the plaintiff for plot Nos. 1480 and 1481 also showed that the 1st respondent does not border any of the plaintiff's plots, and so did the map provided by the private surveyor appointed by the plaintiff.
 9. In the 1st respondent's view, the plaintiff had either deliberately or mistakenly developed on land which did not belong to him and was now attempting to use the court process to justify his wrong. He further deposed that the plaintiff's letter to the county surveyor for correction of the map and reports to the police about trespass were all intended to intimidate the 1st respondent into ceding part of his lawfully acquired land. That it is unfair to stop him from using his own land when it is the plaintiff who should be barred from preventing him from fencing his land upon by the plaintiff. He attached sale of land agreement; title deed; mutations for his land and the surveyor's report and map.
 10. The 2nd respondent also filed a replying affidavit dated 19th January 2024 in response to the application. She averred that she is the freehold owner and entitled to the land parcel no. Machakos/Mua Hills/936, having purchased the same in January 2017 and the same having been transferred to her in February 2021. She averred to have developed the said land, built a permanent house thereon, landscaped and even planted trees thereon. She deposed that at the instance of the 1st respondent, the county surveyor visited the 1st respondent's land with a view to establishing boundaries and that the properties mentioned by the applicant were likely to be affected by the process and it was his belief that all affected persons were served with requisite notices and participated in the process of boundary establishment.
 11. She further averred that she did not participate in the actual process of fixing boundaries but was horrified to learn as per the report dated 7th September 2023, that her house was sitting on the 1st respondent's property. She stated that upon this finding, she applied to the Machakos Lands registry to ascertain and fix boundaries to her property, Title No. Machakos/Mua Hills/936, which led to a visit by the county surveyor and that among other things, it was found that the applicant had encroached onto the 2nd respondent's parcel of land and even built his home on a part of it, which findings were found on the report dated 1st November 2023.
 12. It was her averment that the applicant did not state that the exercise of fixing the boundaries by the county surveyor was illegal or irregular, and that the 2nd respondent is of the view that the court ought to visit the site together with the county surveyor and re-establish the boundaries of the said properties. She prayed that the application be dismissed with costs. She attached her title deed and the surveyor's report.
 13. The 4th respondent chose not to participate in the application. None of the parties filed any submission in support of their cases.



Analysis and determination

14. The court has carefully considered the application and responses thereto. The only issue that arise for determination is whether the applicant deserves orders of temporary injunction.
15. Order 40 Rule 1 of the *Civil Procedure Rules* grants the court power to grant a temporary injunction where there is evidence that a suit property is in danger of being wasted, damaged or alienated, or wrongfully sold or the defendant threatens or intends to remove or dispose it in circumstances that may obstruct or delay execution in the event of a decree in favour of the plaintiff.
16. Conditions for grant of a temporary injunction are well settled. The applicant must demonstrate that he or she has a prima facie case with chances of success; that if the injunction is not granted, she or he stands to suffer irreparable loss that may not be compensated in damages and where the court is in doubt, it ought to consider the balance of convenience.
17. The case of *Nguruman Limited v. Jan Bonde Nielsen & 2 others* CA No.77 of 2012 (2014) eKLR the Court of Appeal held that;

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to a, establishes his case only at a prima facie level, b, demonstrates irreparable injury if a temporary injunction is not granted and c, ally any doubts as to b, by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.

18. A prima facie case is one which demonstrates sufficient evidence to establish the plaintiff's claim of an apparent violation of their right, requiring rebuttal from the defendant. In the case of *Mrao v First American Bank of Kenya Limited & 2 Others* [2003] eKLR, the Court of Appeal defined a prima facie case as one which on the material presented in court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the respondent.
19. The decision in the case of *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR provides an explanation for what is meant by irreparable injury in the following terms;

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The Applicant should further show that irreparable injury will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.

20. Regarding the balance of convenience, the court explained the same in the case of *Chebi Kipkoech v Barnabas Tuitoek Bargarora & Another* [2019] eKLR as follows;

The court should issue an injunction where the balance of convenience is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but



the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

21. In the instant case, it is clear from the 1st respondent's evidence in the form of the mutation for parcel Machakos/Mua Hills/157, which is not denied by the plaintiff, that the original title from which all the titles of the parties herein emanated was parcel number Machakos/Mua Hills/157 which belonged to the plaintiff's father one David Ndolo Mutavi. Parcel 157 was subdivided in 1991 to create parcels 399 and 400. Parcel 399 was transferred to the 1st defendant while parcel number 400 remained in the name of the plaintiff's father, but was subsequently subdivided severally. It is also clear that several subdivisions were made in regard to parcel 400, which ultimately led to the creation of the plaintiff's parcel 770 on 7th February 2019 and parcel 1480 on 18th July 2018. The title for parcel 936 was created on 4th October 2013, but transferred from the original owner Peter Nzioki Musembi into the 2nd defendant's name on 18th February 2021. This parcel is also a resultant parcel from subdivisions of parcel 400. Therefore, the parcels owned by the plaintiff and the 1st and 2nd respondents were all created from parcel 157 which was owned by the plaintiff's father.
22. Although the boundaries herein are general boundaries, the evidence by the plaintiff and the 1st defendant show that parcel number 399 belonging to the 1st defendant does not border the plaintiff's parcels 770 and 1480. Parcel 1480 borders parcel 936 belonging to the 2nd defendant and there is a road between parcel 399 and 770.
23. In view of the above, the plaintiff's allegation that he had been in occupation of parcels 770 and 1480 since 1993 cannot be true as the two parcels were created on 7th February 2019 and 18th July 2018 respectively as demonstrated from the title deed and mutations presented by the plaintiff. In addition, it is the plaintiff's own evidence through his private surveyor's report by Aspect Land Surveyors Limited on ground verification for parcels 770 and 1480, that the shapes of the surveyed parcels do not conform to the shapes on the survey map and the differences are substantial because of the huge shift towards the northern side by 90 meters. Part of the plaintiff's evidence is a letter dated 15th September 2023 to the County Land Registrar asking for correction of the map sheet No. 4 Machakos/Mua Hills. In that letter the plaintiff states that the current exercise by the Land Registrar will lead to long court battles which can be avoided if the map is corrected instead of displacement which he did not want. It is clear therefore from the plaintiff's own evidence above that the plaintiff confirms that the boundaries on the ground are substantially different from the boundaries on the map, because of his own actions. He however does not give any lawful justification why the ground should vary from the map from the department of Survey, when the map is the official record of the parcels of land in dispute. Besides, he does not give any basis for correction of the map because he does not provide an alternative map or the basis for his construction on the properties outside the boundaries of his land.
24. The plaintiff produced the map by the 3rd and 4th respondents showing the extent of his encroachment into parcel 399. The plaintiff has not in his evidence discredited the fact that there is encroachment or the extent of the encroachment. All he says is that the Registry Index Map (RIM) should be corrected by 90 meters to conform to the ground, without giving any lawful justification for the same, apart from stating that he has constructed on the stated encroached parcel.
25. As the plaintiff has not given any lawful or reasonable justification of his encroachment into the defendants' parcels of land, as clearly demonstrated by the report of the 3rd and 4th defendants, I find



and hold that he has not made out a prima facie case to warrant grant of injunctive orders. In addition, the plaintiff failed to disclose material facts including the fact that all the parcels of land herein were originally owned by his father who is still alive, and that his titles were issued in 2018 and 2019 way after the defendants' titles had been issued, cannot be entitled to an equitable remedy of injunction because he has come to equity with unclean hands.

26. In the end, I find no merit in the application dated 21st November 2023 which I hereby dismiss with costs to the defendants.

27. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 24TH DAY OF JULY, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms. Nzilani for plaintiff/applicant

Mr. Kuria holding brief for Ms. Momanyi for 3rd – 5th defendants

Mr. Inyangu for 2nd respondent

Ms. Isika for 1st respondent

Court assistant – Josephine

