



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mohamed & 33 others v Mautu (Environmental and Land Originating Summons  
E002 of 2023) [2024] KEELC 6883 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6883 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENTAL AND LAND ORIGINATING SUMMONS E002 OF 2023  
SM KIBUNJA, J  
OCTOBER 23, 2024**

**BETWEEN**

**SULEIMAN MOHAMED & 33 OTHERS ..... APPLICANT**

**AND**

**BAKARI SWALEH MAUTU ..... RESPONDENT**

**RULING**

1. The applicants filed the notice of motion dated the 20<sup>th</sup> February 2024, seeking for the respondent to be restrained by himself, servants and or agents from evicting, demolishing, harassing and or interfering with the applicants occupation of plot No. CR. 78080, being subdivision No. [original No. 15188/9], Section 11, Mainland North, Mombasa County, and the OCPD Kisauni Police Division, OCS Kiembeni Police Station and OCS Bamburi Police Station to enforce the order pending the hearing of this suit. The application is premised on the four (4) grounds on its face and supported by the affidavit of Suleiman Mohamed, 1<sup>st</sup> applicant, sworn on the 20<sup>th</sup> February 2024, in which he inter alia deposed that he was the chairman of the residents on plot No. CR. 78080 [being subdivision No. [original N0. 15168/9] Section 11 Mainland North, Utange, Mombasa County, the suit property; the suit property has been occupied by families of indigenous communities from Kenya, but the respondent, whose title to the land is doubtful, has been threatening to evict them; that the respondent has colluded with the County Government officers to disrupt their activities on the suit property, by arresting their workers, and the court should issue the temporary injunction sought.
2. The respondent opposed the application through the grounds of opposition dated 24<sup>th</sup> April 2024, and replying affidavit of Bakari Swaleh Mwachutu, sworn on the 12<sup>th</sup> April 2024. It is the respondent's case inter alia that he is the registered proprietor of plot No. LR. NO. MN/11/15168/9, which has been subdivided into MN/11/16592, measuring 0.9928 hectares, that the applicants have invaded in 2021; that the applicants have erected structures on the land and have declined to vacate despite his seeking police assistance; that the applicants had obtained injunction orders in respect of plot No. 303/11/



MN/2 Utange, Mombasa County, against him in Mombasa CMELC NO. 266 of 2021, which was later struck out for failure to comply with valuation order of 15<sup>th</sup> February 2022; that the suit land, subject matter of that lower court suit was not his but the applicants used the order thereof to invade his property; that the application has not been brought in good faith, but is aimed illegally interfering with the respondent's rights over his land; that the applicants intends to misuse the court order and illegally erect structures on the suit property; that the applicants have not met the threshold for the temporary injunction order to be issued;

3. The learned counsel for the applicants and respondent filed their submissions dated the 11<sup>th</sup> July 2024 and 25<sup>th</sup> June 2024 respectively, which the court has considered.
4. The issues for the court's determinations are as follows:
  - a. Whether the applicants have met the threshold for temporary injunction to issue at this interlocutory stage.
  - b. Who pays the costs?
5. The court has carefully considered the grounds on the notice of motion, grounds of opposition, affidavit evidence, submissions by the two learned counsel, superior courts decisions cited thereon, and come to the following determinations:
  - a. That as submitted by both counsel, an applicant for a temporary injunction order must meet the set principles, that have been discussed in several superior courts decisions, including the case of Giella versus Cassman Brown & Co. Ltd [1973] EA 358, summarized as follows;
    - i. Applicant must establish a prima facie case with high chances of success;
    - ii. Show that the applicant would suffer irreparable loss that cannot be compensated by an award of damages, and
    - iii. Where the court is in doubt, it will decide on a balance of convenience.

It is trite that a claim based on adverse possession is against the registered owner or proprietor of the land subject matter of the suit. Where an applicant is challenging the title of the respondent, and at the same time sets out to prosecute a claim based on adverse possession, commenced through originating summons like in this instant, then it becomes a herculean task to surmount the test of establishing a prima facie case, with a high chance of success.

- b. That it has not been disputed that some of the applicants had filed Mombasa CMELC NO. 266 of 2021 against the respondent herein, albeit over a different parcel of land, which the respondent has indicated was not his. The question that follows is whether the applicants were actually in possession of the suit property herein as of 2021, or on that other land that was subject matter of the lower court suit. That question can only be effectively answered, after the court has heard both sides in the originating summons. At this stage, I find the applicants have failed to establish a prima facie case as required.
- c. That though the applicants have not shown or particularized what irreparable loss they would suffer if the temporary injunction is not issued at this stage, I have taken note of the respondent's deposition at paragraphs 3 & 4 of his replying affidavit that the applicants invaded his land, plot No. MN/11/16592, in 2021, and erected structures thereon and have declined to vacate, and his efforts to seek assistance from the police has been unsuccessful. With that in mind, I find it appropriate to order the parties to maintain the obtaining status quo pending the hearing and determination of this suit. The parties should ensure no continuation of



erection of structures, or construction of new constructions, and digging of trenches on the suit property.

- d. That though section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides that costs shall follow the event unless otherwise ordered for good cause, I find in this application, the costs abide the outcome of the originating summons.
6. In view of the determinations set out above on the application dated the 20<sup>th</sup> February 2024, the court orders as follows:
- a. That the notice of motion dated the 20<sup>th</sup> February 2024 is without merit.
  - b. The said application is dismissed with costs to abide the outcome of this suit.
  - c. The above notwithstanding, the court on its own motion orders the parties to maintain the obtaining status quo on the suit property, and in so doing, ensure there is no continuation of constructions or erection of structures/houses or new constructions of structures/houses, or digging of trenches on the said land, pending the hearing and determination of this suit.
7. Orders accordingly.

**DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 23<sup>rd</sup> DAY OF OCTOBER 2024.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In The Presence Of:

Applicants : Mr Owino

Respondent : Mr Maithya

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC Mombasa.

