



Mutiso & 2 others v David Mwangela t/a Egal School & 3 others (Environment & Land Case E064 of 2024) [2024] KEELC 13443 (KLR) (21 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13443 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E064 OF 2024
CA OCHIENG, J
NOVEMBER 21, 2024**

BETWEEN

**BENEDICT NTHEI MUTISO 1ST PLAINTIFF
ZABLON NYAGAYA SIRO 2ND PLAINTIFF
JOYCE MWIKALI NYAMAI 3RD PLAINTIFF**

AND

**DAVID MWONGELA T/A EGAL SCHOOL 1ST DEFENDANT
THE LAND REGISTRAR, NAIROBI 2ND DEFENDANT
MACHAKOS COUNTY GOVERNMENT 3RD DEFENDANT
ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. What is before Court for determination is the Plaintiffs’ Notice of Motion Application dated the 26th August, 2024 where they seek the following Orders:-
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of this suit and order of injunction be made restraining the Respondents whether by themselves, employees, servants and or assigns or any other persons whatsoever employees, servants, agents and or assigns or any other person whatsoever acting on his/her behalf instruction form issuing any titles of ownership to the 1st Respondent interfering with the Land Reference Plot No. 276 LR No. 32293, IR 168245/1 and Plot No. 269 Athi River within Mavoko Municipality within Machakos County Government.



- d. That costs of this suit be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of the Plaintiffs' Benedict Nthei Mutiso, Zablun Nyagaya Siro and Joyce Mwikali Nyamai where they claim that they have been on land reference numbers IR 228155/1, LR No. 32292, IR 168245/1, LR 29776 and Plot No. 269 Athi River. They contend that they have been on the said properties until the 1st Respondent with unknown parties demolished their walls and started constructing walls thereon. They aver that they have bona fide documents from the 2nd, 3rd and 4th Respondents. Further, that they regularly pay rates to the 4th Respondent through the sub county of Mavoko Municipality and have been issued with receipts including Clearance Certificates.
 3. They state that the 1st Respondent herein has fraudulently alleged that he has been allocated the suit properties but has not shown any of the documents even when he started construction with protection from the area Police. Further, that they have made several reports to the Police in the area who have failed to take any step to protect their property. They reiterate that the Respondents have ignored their documents including payments made and are protecting the 1st Respondent against their interest. They insist that they have the Beacon Certificate and the Area Map.
 4. The 1st Respondent opposed the instant Application by filing a Replying Affidavit sworn by David Mwongela where he denies trespassing nor destroying the suit property. He disputes that the suit property has a fence and insists that one portion of the said land is open while another portion is fenced with iron sheets. He contends that there is a public ring road measuring 20M which is being murramed. Further, that the owners of Blocks 276 and 279 were trying to amend the course of this road which lies between the two aforementioned blocks and his block being LR No. 21119. He explains that there has been a long-standing dispute over the 20M road along the Plaintiffs' land, who have challenged its boundaries and location. Further, that the dispute arose in 2016 when the Plaintiffs encroached on the 20M road and were further trying to encroach on Block 21119, which matter was referred to the National Land Commission to resolve. He claims on 10th April, 2016 the Director of Surveys wrote a letter stating that they were in the process of constituting a group of Government Surveyors to resolve the issue and indicated that there were several overlapping which was rampant in Mulinge Scheme. Further, the Director of Surveys visited the suit property and established Beacons to demarcate the public road, the Plaintiffs blocks 276 and 279 as well as block 21119. He avers that the road lies between the blocks and the report shows the position of the road. Further, that the Plaintiffs were present during the surveying and beaconing process.
 5. He claims in December, 2023 when they commenced construction on block 21119, the Plaintiffs started harassing them culminating in the DCI even stopping their construction between January and March of the same year. Further, Surveyors came to the disputed area on 7th, 15th, and 19th March, 2024 respectively, in the presence of the owners of blocks 276 and 280, DCI Mlolongo, including several neighbours, and Beacons were reestablished. He reiterates that the Director of Surveyor gave a report to the DCI, Mlolongo being Ref: CT 221/125/19 dated 26th March, 2024 confirming the position of the road, their block LR No. 21119, FR 282/88, FR No. 264/137 & 508/153. Further, in the said report, Beacons were confirmed.
 6. He denies demolishing a wall, insisting the wall is on his land and that the Plaintiffs cannot suffer any loss as they are not even neighbours. He reaffirms that he will suffer irreparable loss if the orders sought are granted. He further denies being protected by the DCI.
 7. The instant Application was canvassed by way of written submissions.



Analysis and Determination

8. Upon consideration of the instant Notice of Motion Application including the respective affidavits, annexures and rivaling submissions, the only issue for determination is whether the Plaintiffs are entitled to orders of interlocutory injunction to restrain the Defendants from issuing any titles of ownership to the 1st Defendant nor interfering with LR No. 276 LR No. 32293, IR 168245/1 and Plot No. 269 Athi River, pending the outcome of the suit.
9. In relying on the principles established in the case of *Giella vs Cassman Brown* (1973) EA 358 as well as the description of a prima facie case as espoused in the case of *Mrao Ltd v First American Bank Limited* (2003) eKLR, I will proceed to decipher if the Plaintiffs have established a prima facie case to warrant the orders of interlocutory injunction as sought.
10. The Plaintiffs claim that they have been on land reference numbers IR 228155/1, LR No. 32292, IR 168245/1, LR 29776 and Plot No. 269 Athi River. They aver that the 1st Defendant with unknown parties demolished their walls and started constructing walls on the said properties. Further, that they have bona fide documents from the 2nd, 3rd and 4th Defendants, regularly paid land rates and have been issued with receipts including Clearance Certificates. They further claim that the 1st Defendant has fraudulently alleged that he has been allocated the suit properties but has not shown any of the documents to that effect. They insist that they have the Beacon Certificate and the Area Map.
11. The 1st Defendant opposed the instant Application and denied trespassing nor destroying the suit property. He confirmed that one portion of the Plaintiff's land is open while the other portion is fenced with iron sheets. He explained that there is a public ring road measuring 20M, which the owners of Block 276 and 279 were trying to amend its course. Further, that the 20M road lies between the two aforementioned blocks and his block being LR No. 21119. He confirmed the existence of a long standing dispute revolving around the 20M public road and contended that is the Plaintiffs who have challenged its boundaries and location. It was his explanation that in 2016 the Plaintiffs encroached thereon and even attempted to encroach on Block 21119, which matter was referred to the National Land Commission to resolve. Further, that the Director of Surveys visited the suit property and established Beacons to demarcate the public road, the Plaintiffs blocks 276 and 279 as well as block 21119 in the presence of the said Plaintiffs. He averred that in December, 2023 when they commenced construction on block 21119, the Plaintiffs started harassing them culminating in surveyors coming to the disputed area on 7th, 15th, and 19th March, 2024 respectively, in the presence of various parties and re-establishing the beacons. He made reference to the Director of Surveyor's report ref: CT 221/125/19 dated 26th March, 2024 confirming the position of the road, their block LR No. 21119, FR 282/88, FR No. 264/137 & 508/153.
12. Looking at the documents presented by all the parties, I note the Plaintiffs and 1st Defendant each own their respective parcels of land. Further, the Plaintiffs have not denied that the Director of Surveys established the boundaries of the 20M public road twice, in their presence. The Plaintiffs have further not disputed the contents of the Director of Surveyor's report ref: CT 221/125/19 dated 26th March, 2024 confirming the position of the road, their block LR No. 21119, FR 282/88, FR No. 264/137 & 508/153.
13. It is trite that under Section 18 of the [Land Registration Act](#), it is the Land Registrar with the assistance of the Land Surveyor who are mandated to deal with boundary disputes in the first instance, which the Director of Surveys has twice undertaken. It is my considered view that the Plaintiffs' seemed to have been aggrieved by the determination of the boundary dispute as related to the 20M public road vis a vis



their properties, hence this suit. In the foregoing, I find that the Plaintiffs have indeed not established a prima facie as against Defendants to warrant the orders of injunction as sought.

14. Further, in relying on the parameters set in *Nguruman Ltd. v Jan Bonde Nielsen* (2014) eKLR, where the Court of Appeal held that if a party fails to establish a prima facie case, then irreparable injury and balance of convenience need no consideration, I will decline to deal with the other two limbs.
15. In the circumstance, I find the Notice of Motion Application dated the 26th August, 2024 unmerited and will disallow it.
16. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 21ST DAY OF NOVEMBER, 2024

CHRISTINE OCHIENG

JUDGE

