



REPUBLIC OF KENYA



KENYA LAW
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**Kinyanjui & another v Muhumed (Land Case E059 of 2024)
[2024] KEELC 13316 (KLR) (18 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13316 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE E059 OF 2024
A NYUKURI, J
NOVEMBER 18, 2024**

BETWEEN

MAGDALENE NYOKABI KINYANJUI 1ST PLAINTIFF

DICKSON MACHARIA WAIGANJO 2ND PLAINTIFF

AND

OSMAN MUHUMED DEFENDANT

RULING

1. Before court is a notice of motion dated 13th August 2024 filed by the plaintiffs seeking the following orders;
 - a. Spent.
 - b. That pending the interparties hearing and determination of this application, a temporary injunction be issued restraining the defendant, whether by himself, his servants and or agents and any person acting under him from entering, trespassing, constructing, taking possession, disposing, transferring or interfering, with plaintiffs' quiet possession or in any manner dealing with the plaintiffs' parcel of land being LR. No. 29749 situated along Quarry road, off Mombasa Road within Mavoko Sub-County, Machakos County.
 - c. That upon the hearing and determination of this application, a temporary injunction be issued restraining the defendant, whether by himself, his servants and or agents and any person acting under him from entering, trespassing, constructing, taking possession, disposing, transferring or interfering, with plaintiffs' quiet possession or in any manner dealing with the plaintiffs' parcel of land being LR. No. 29749 situated along Quarry road, off Mombasa Road within Mavoko Sub-County, Machakos County.



- d. That a mandatory injunction do issue directed to the defendant to immediately and unconditionally remove the structures erected on the plaintiffs' parcel known as L.R. No. 29749 failing which the plaintiffs be authorized to remove the said structures at the defendant's cost forthwith.
 - e. That this Honourable Court be pleased to grant an order for police assistance directing the OCS Sustainable Neighborhood Programme (SNP) Mulinge Scheme Police Station as well as the OCS Mlolongo Police Station and the OCPD Athi River Police Station to supervise and enforce the implementation of orders for purposes of maintaining law and order.
 - f. Any other or further relief that this Honourable Court may deem fit to grant.
2. The application is supported by the affidavit sworn by Magdalene Nyokabi Kinyanjui, the 1st plaintiff on 13th August 2024. The applicants' case is that they are joint proprietors as leases of the parcel of land known as LR. No. 29749 (IR No. 204929) measuring 0.3509 Ha. for a term of 99 years from 1st March 1999 situated along Quarry Road, off Mombasa Road, Mavoko Sub-County, Machakos County (suit property). That they have always complied with county regulations and paid rates. They complained that the defendant had been trespassing on the suit property and was illegally constructing a perimeter wall and preventing the plaintiffs from accessing the suit property as he has placed hired armed thugs on the suit property. She attached a certificate of title; a search certificate; rates clearance certificate and photographs of the suit property.
 3. The application is opposed. Osman Mohamed, the defendant herein filed a replying affidavit dated 15th October 2024 opposing the application. He denied trespassing on the suit property and stated that he was the legitimate owner of LR. No. 28176 along Quarry Road off Mombasa road within Mavoko Sub County, Machakos County which he had developed and that the location of the parties' properties herein can only be confirmed by a joint survey exercise in the presence of the parties and their representatives. He stated that he purchased the suit property and was issued with an allotment letter and deed plan and has been paying rates.
 4. He took the position that the orders sought can only be issued upon the hearing of the main suit. He prayed that the court orders that he is in possession and that status quo orders be issued to maintain the status quo until the suit is heard and determined. He attached a copy of clearance certificate and a letter of allotment.
 5. In a rejoinder, the 1st plaintiff filed a supplementary affidavit dated 28th October 2024. She deposed that from the defendant's allotment letter there is no land reference number indicated and that the Plot Number 33 indicated in the allotment letter has no nexus with LR. No. 28176 and no deed plan has been annexed. She further stated that the defendant had not explained the process of acquisition of the parcel of land as no certificate of title has been shown and there was no evidence of payment of allotment charges. She maintained that rates clearance certificate is not evidence of ownership of land.
 6. Parties filed written submissions in support of their respective cases. On record are submissions filed by the applicant dated 22nd October 2024 and those filed by the respondent dated 4th November 2024, both of which this court has duly considered.

Analysis and determination

7. The court has duly considered the application; the supporting, replying and supplementary affidavits as well as the parties' written submissions. From the motion before me, it is clear that prayers 1, 2 and 3 of the application are spent as the same were sought pending interpartes hearing of the instant application. Therefore, the only prayers for the court's determination at this stage are prayer numbers 4



and 5 of the application. Therefore, the only issue that arise for determination is whether the plaintiff is entitled to an order of mandatory injunction to remove the defendant's structures on the suit property at this stage.

8. As there is a distinction between a prohibitory injunction and a mandatory injunction, the threshold for grant of a mandatory injunction is higher. In the case of *Shepard Homes v. Sandham* [1970] 3 WLR pag 356 cited with approval in the case of *Bandari Investments & Co. Ltd v. Martin Chiponda & 139 Others* [2022] eKLR, the court held as follows;

Whereas a prohibitory injunction merely requires abstention from acting, a mandatory injunction requires the taking of positive steps and may require the dismantling or destruction of something already erected, or constructed. This will result in a consequent waste of time, money and materials, if it is ultimately established that the defendant was entitled to retain the erection.

9. In the case of *Malier Unissa Karim v. Edward Oluoch Odumbe* [2015] eKLR, the Court of Appeal stated as follows;

The test for granting a mandatory injunction is different from that enunciated in the *Giella versus Cassman Brown Case* which is the locus classicus case of prohibitory injunctions. The threshold in mandatory is higher than the case of prohibitory injunction and the Court of Appeal in the case of *Kenya Breweries Ltd v. Washington Okeyo* [2002] EA 109” had the occasion to discuss and consider the principles that govern the grant of a mandatory injunction was correctly stated in *Vo. 24 Halsbury Laws of England 4th Edition* paragraph 948 which states as follows;

A mandatory injunction can be granted on an interlocutory application as well as the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and which the court thinks it ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, a mandatory injunction will be granted on an interlocutory application.

10. As a mandatory injunction may have the effect of destroying something already constructed, like in the case herein, the court can only grant the same in the clearest of cases where the court thinks that it would not be necessary to hear the parties in the main suit before the mandatory injunction is granted. The right to be heard is a non-derogable Constitutional right that is jealously guarded by the *Constitution*. The opportunity to be heard before one is condemned is a right that is not subject to limitation under our Constitution as it is a basic tenet of justice. Indeed, natural justice requires that no one should be condemned unheard. Therefore, in considering whether or not to grant a mandatory injunction, the court must be clear in its mind that it would not serve the interests of justice to grant the defendant an opportunity to be heard on the merits of the case before the mandatory injunction is granted. This means that the applicant must unambiguously demonstrate existence of special circumstance overriding and militating against the defendant's right to be accorded an opportunity to be heard, before adverse orders are issued against them, at an interlocutory stage.
11. I therefore proceed to interrogate the application herein to see whether the plaintiffs/applicants have discharged their obligations of demonstrating special circumstances and showing that this is a clear case for issuance of a mandatory injunction.



12. In this case, the plaintiffs have stated that they are the registered proprietors of LR. No. 29749 along Quarry road off Mombasa road, and have produced a copy of lease and certificate of title. They have further stated that the defendant has unlawfully constructed on the suit property. In response, the defendant denied he trespassed on LR. No. 29749 and alleged that he is in possession of LR. No. 28176 along Quarry Road off Mombasa road, which he purchased and was issued with an allotment letter. He further conceded that he was in possession of the land and urged the court to find that he is in possession thereof and to order maintenance of status quo. He stated that there is need for surveyor's evidence on the location of the disputed property.
13. I have considered the certificate of title and it is true that the plaintiffs are the registered proprietor of LR. No. 29749 along Quarry road off Mombasa road. The defendant challenged the plaintiffs' claim arguing that the land in dispute is not LR No. 29749 but LR. No. 28176. While the plaintiffs faulted the defendant's documents rightly pointing out that the defendant did not exhibit the nexus between Plot No. 33 stated in the letter of allotment with LR. No. 28176, the plaintiff did not avail a surveyor's evidence to demonstrate that where the defendant has put up structures is indeed LR. No. 29749, and not LR. No. 28176 or any other parcel for that matter. That being the case, even if the defendant has not shown ownership of LR. No. 28176 as clearance certificate is not proof of land ownership; the plaintiffs have not shown that the ground upon which the defendant has constructed is LR. No. 29749 and therefore this is not a clear case for grant of mandatory injunction.
14. However, as the defendant has not demonstrated proof of lawful acquisition of the property he claims is his, as no sale agreement and no date of purchase has been disclosed, and no nexus has been demonstrated between the alleged allocated Plot No. 33 and the alleged LR. No. 28176, this court will not assist the defendant to retain a position of advantage which he appears to have obtained through unlawful means, as allowing the defendant to retain ownership of what he has not shown to be his, will be an injustice.
15. In the premises, the order that commends itself in the circumstances of this case, which I hereby grant is an order that each party forthwith keeps off the suit property pending hearing and determination of this suit. There is no order as to costs.
16. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 18TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.

A. NYUKURI

JUDGE

In the presence of;

Ms. Wanyonyi for plaintiffs

Mr. Nyachoti for defendant

Court assistant – Josephine

