



**James (Suing on his own Behalf and as a Representative of the Estate of James William Mailu - Deceased) v Muema & 6 others (Environment & Land Case E026 of 2023) [2024] KEELC 13275 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13275 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E026 OF 2023  
CA OCHIENG, J  
NOVEMBER 14, 2024**

**BETWEEN**

**MICHAEL MUNYAO JAMES ..... PLAINTIFF  
SUING ON HIS OWN BEHALF AND AS A REPRESENTATIVE OF THE  
ESTATE OF JAMES WILLIAM MAILU - DECEASED**

**AND**

**JULIUS KIOKO MUEMA ..... 1<sup>ST</sup> DEFENDANT  
DAVID MUTISYA ..... 2<sup>ND</sup> DEFENDANT  
GABRIEL MBOKOYE ..... 3<sup>RD</sup> DEFENDANT  
KATHEKA-KAI FARMERS CO-OPERATIVE SOCIETY LIMITED .... 4<sup>TH</sup>  
DEFENDANT  
TABATHI WATER WORKS DEVELOPMENT AGENCY ..... 5<sup>TH</sup> DEFENDANT  
MACHAKOS COUNTY LAND REGISTRAR ..... 6<sup>TH</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 26<sup>th</sup> September, 2023 and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's Notice of Preliminary Objection dated the 19<sup>th</sup> October, 2023. In the Notice of Motion Application, the Plaintiff seeks the following Orders:-
  - a. Spent
  - b. Spent



- c. Spent
  - d. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of injunction restraining the 4<sup>th</sup> and 6<sup>th</sup> Defendants/Respondents herein, their agents, servants, employees, assigns or any other person/entity acting on the instructions of the 4<sup>th</sup> and 6<sup>th</sup> Respondents from subdividing, allocating, registering, issuing title deeds or in any other way interfering with the registration of all that land known as Machakos/ Katheka-Kai 5/263 measuring 7 acres or thereabout located within the larger parcel of LR No. 11161 measuring 31.58 Ha, which larger parcel (LR No. 11161) is in the process of being compulsorily acquired by/through the 7<sup>th</sup> Defendant.
  - e. Spent
  - f. Spent
  - g. That this Honourable Court be pleased to issue an order of injunction restraining the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants herein, their agents, servants, assigns, employees, proxies or any other person/entity claiming authority from the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Defendants from negotiating and/ or undertaking any activity leading to the compulsory acquisition of all that land known as Plot No. Machakos/Katheka-Kai 5/263 measuring 7.00 Acres or thereabout and located within parcel No. 11161 Measuring 31.58 HA pending hearing and determination of this suit.
  - h. Costs of this Application be provided for.
  - i. Such other, further, incidental or alternative reliefs as the Honourable Court may deem just and expedient.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of MICHAEL MUNYAO JAMES. The Plaintiff claims to be the administrator of the Estate of JAMES WILLIAM MAILU – DECEASED pursuant to a grant of Letters of Administration issued on 19<sup>th</sup> February, 2020. He explains that pursuant to the Gazette Notice Vol. CXXV No. 27 dated 2<sup>nd</sup> February, 2023, the Chairman of the 7<sup>th</sup> Defendant published an amendment to the Gazette Notice No. 637 of 2023 expressing an intention by the 7<sup>th</sup> Defendant, on behalf of the 5<sup>th</sup> Defendant to acquire parcel No. 11161 measuring 31.58 HA, hereinafter referred to as the ‘suit land’. He avers that the suit land has been embroiled in various disputes which he highlights. He states that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in cahoots with the 4<sup>th</sup> and 6<sup>th</sup> Defendants took advantage of the aforesaid disputes and caused the deceased land to be unlawfully subdivided into three parcels being Machakos/ Katheka – Kai/5/263 ‘A’, ‘B’, ‘C’, and ‘D’ respectively. Further, the 5<sup>th</sup> Defendant is in the process of issuing titles with an intention to have them illegally benefit, from the compulsory acquisition to his detriment and other land owners.
3. The 1<sup>st</sup> Defendant opposed the instant Application by filing a Replying Affidavit sworn by JULIUS KIOKO MUEMA where he deposes that the said Application is baseless, devoid of merit as the Plaintiff has come to court with unclean hands. He contends that the Plaintiff’s claim is baseless as there is no nexus between the Applicant and himself as he is the son to the late MUEMA MWATU, who sold the piece of land to the Plaintiff. He denies that the Estate of their late father has ever appointed an administrator and insists he is just a beneficiary. Further, that the Application has been brought in bad faith. He confirms that in the year 1995, the 2<sup>nd</sup> Defendant entered into a land purchase agreement with his father MUEMA MWATU (deceased) for a parcel of land known as KATHEKA KAI VOTA BLOCK 5 NO. 263. Further, the 2<sup>nd</sup> Defendant purchased an extra two acres and after the said sales, the father filled in transfer forms. He claims the Plaintiff has been trespassing on the suit land. Further, that



- the 4<sup>th</sup> Defendant issued an official communication confirming the 2<sup>nd</sup> Defendant as the actual owner of MKS/KATHEKA KAI BLOCK 5/263. He confirms that the purchasers paid for the requisite transfer fees.
4. The 7<sup>th</sup> Defendant/Respondent opposed the instant Application by filing a Replying Affidavit sworn by WAKO YUSUF, its Senior Valuation & Taxation Officer where he deposes that in the course of carrying out its constitutional and statutory duties, the Commission received a request from the 5<sup>th</sup> Defendant/Respondent to undertake land acquisition for the purpose of development of a water catchment dam where land parcel Machakos Town Block 5/263 was among the parcels earmarked for acquisition. He confirms that the suit land was inspected for valuation following publication of notice of intention to acquire, vide Gazette Notice Number 14865 of 3<sup>rd</sup> November, 2023 which was an addendum to Gazette Notice No. 4392 of 2021. Further, that the Commission carried out ground inspections for purposes of verification of the affected properties and valuation of the interests of the affected people. He contends that in strict compliance to Section 112 of *Land Act*, the Commission invited the land owners for the inquiry process at Katelembu Chief's Office on 24<sup>th</sup> November, 2023. He explains that during the process of inquiries, the Plaintiff and the deceased were identified as, being the owners of parcels of land No. Machakos Town Block 5/263. He contends that upon consultation with the Land Registrar Machakos on the status of the suit land, he was issued with a copy of Certificate of Official Search on Title Number Machakos Town Block 5/263, which confirmed that the Plaintiff and the Defendants save for 1<sup>st</sup> Defendant are all included as lawful proprietors of the suit land. He contends that the suit land had not been subdivided as alleged by the Plaintiff hence defeating the Plaintiff's allegations. He further confirms that the Commission is yet to proceed with issuance of the Awards in accordance with Section 113(1) of the *Land Act*.
  5. In the Notice of Preliminary Objection, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants sought for the suit to be struck out, on the following grounds:-
    - a. The instant suit was brought outside the statutory limitation period of 12 years in view of the provisions of section 7 of the *Limitation of Actions Act*. Cap 22 Laws of Kenya.
    - b. The Plaintiff has sued the wrong party in this cause as the remedies he is seeking cannot lie against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.
    - c. The Plaintiff claims against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants is to that extent incompetent, bad, barred in law, fatally defective and otherwise an abuse of the Court.
    - d. Granting the orders sought herein would totally prejudice the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants who has been irregularly brought to this Court on the basis of innuendos and rumors and cannot obey by the Court orders since they are not owners of the suit property.
    - e. The Plaintiff's suit and subsequent application should be dismissed forthwith and costs awarded to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in the instant suit.
    - f. This Court lacks jurisdiction to entertain this suit herein as it is vexatious and an abuse of the Court process.
  6. The instant Notice of Motion and Notice of Preliminary Objection were canvassed through written submissions.



## **Analysis and Determination**

7. I have considered the instant Notice of Motion Application, the Notice of Preliminary Objection, the respective Affidavits, annexures including rivalling submissions and the following are the issues for determination:-
  - a. Whether this suit is statute barred and if the Plaintiff has sued wrong parties.
  - b. Whether the Plaintiff is entitled to the orders of interlocutory injunction as sought.
8. As to whether this suit is statute barred and if Plaintiff has sued wrong parties. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' have opposed the instant Notice of Motion including the suit, insisting that this suit is statute barred and the Plaintiff has sued some wrong parties. On perusal of the Plaintiff, I note the Plaintiff has sought for various orders against the Defendants.
9. In the case of Mukhisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Company Limited (1969) EA 696; the Court held that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”
10. In the case of Avtar Singh Bhamra & Another Vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004, the Court held that:-

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.” Emphasis Mine
11. I note the Plaintiff raised various issues in his Plaintiff, which the Defendants have not controverted. It is trite that where a party does not file a Defence expressly rebutting the Plaintiff's averments, the claim remains unopposed. In this instance, while associating myself with the decisions I have cited, I find that the issues raised in the Plaintiff have to be expressly rebutted and later on ascertained during a full hearing. Further, since there is no defence, I find the instant Notice of Preliminary Objection premature as it is not anchored on any pleading.

### **As to whether the Plaintiff is entitled to orders as sought.**

12. The Plaintiff has sought for orders of interlocutory injunction as against the various Defendants. In line with the principles as enunciated in the case of Giella Vs Cassman Brown & Company (1973) EA 358 including the description of a prima facie case as outlined in the case of Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125, I will proceed to decipher whether the Plaintiff has established a prima facie case to warrant the orders as sought.
13. The Plaintiff who is an administrator of the deceased person's Estate claims pursuant to the Gazette Notice Vol. CXXV No. 27 dated 2<sup>nd</sup> February, 2023, the 7<sup>th</sup> Defendant published an amendment to the Gazette Notice No. 637 of 2023 expressing an intention by the 7<sup>th</sup> Defendant, on behalf of the 5<sup>th</sup> Defendant to acquire parcel No. 11161 measuring 31.58 HA. He contends that the deceased parcel of land had been involved in disputes and during that time, the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in



cahoots with the 4<sup>th</sup> and 6<sup>th</sup> Defendants took advantage and caused the deceased land to be unlawfully subdivided into three parcels being Machakos/Katheka-Kai/5/263 'A', 'B', 'C', and 'D' respectively. Further, the 5<sup>th</sup> Defendant is in the processing of issuing titles with an intention to have them illegally benefit from compulsory acquisition to his detriment and other land owners. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants opposed the instant Application by filing their Notice of Preliminary Objection. Further, the 1<sup>st</sup> Defendant in his Replying Affidavit contended that the Plaintiff's claim is baseless as there is no nexus between the Plaintiff and himself as he is the son to the late MUEMA MWATU, who sold the piece of land to the Plaintiff. He denied that the Estate of their late father had ever appointed an administrator and contended that he is just a beneficiary. Further, that the Application has been brought in bad faith. He confirmed that in the year 1995, the 2<sup>nd</sup> Defendant into a land purchase agreement with his father MUEMA MWATU (deceased) for a parcel of land known as KATHEKA KAI VOTA BLOCK 5 NO. 263. Further, the 2<sup>nd</sup> Defendant purchased an extra two acres and after the said sales, his father filled in transfer forms. He claimed it is the Plaintiff who had been trespassing on the suit land. Further, that the 4<sup>th</sup> Defendant issued an official communication confirming that the 2<sup>nd</sup> Defendant is the actual owner of MKS/KATHEKA KAI BLOCK 5/263.

14. The 7<sup>th</sup> Defendant in its Replying Affidavit confirmed that suit land was inspected for valuation following publication of notice of intention to acquire vide Gazette Notice Number 14865 of 3<sup>rd</sup> November, 2023 which was an addendum to Gazette Notice No. 4392 of 2021. Further, that the Commission carried out ground inspections for purposes of verification of the affected properties and valuation of the interests of the affected people. It explained that an inquiry process was undertaken at Katelembu Chief's Office on 24<sup>th</sup> November, 2023, and during the said process, the Plaintiff and the deceased were identified as being the owners of land parcel No. Machakos Town Block 5/263. Further that upon consultation with the Land Registrar, Machakos, on the status of the suit land, it was issued with a copy of Certificate of Official Search on Title Number Machakos Town Block 5/263, which confirmed that the Plaintiff and the Defendants save for 1<sup>st</sup> Defendant are all included as lawful proprietors of the suit land. It reiterated that the suit land had not been subdivided as alleged and the Awards are yet to be issued.
15. Looking at the documents presented by the parties, I note the subdivision of the suit land has not been undertaken as alleged by the Plaintiff. Further, there is no indication that the Awards in respect to compensation over compulsory acquisition of the suit land have been issued. Since the Plaintiff is included as one of the proprietors of the suit land including some of the Defendants herein except the 1<sup>st</sup> Defendant, I opine that the said Defendants cannot be restrained against land which they also lawfully own.
16. Based on the facts as presented while associating myself with the decisions cited above, I find that the Plaintiff has not established a prima facie case to warrant of the orders of temporary injunction as sought against the Defendants. Further, in relying on the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR, where the Court of Appeal had stated that when a party fails to prove a prima facie case, the court need not proceed to make a determination of the other two limbs on injunction, and I will hence decline to deal with the other two limbs.
17. In the foregoing, I find the Plaintiff's Notice of Motion Application dated the 26<sup>th</sup> September, 2023 and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' Notice of Preliminary Objection dated the 19<sup>th</sup> October, 2023 unmerited and will disallow them, but make no order as to costs.
18. I direct the Defendants to file and serve their respective Defences within twenty one (21) days from the date hereof.



**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 14<sup>TH</sup> DAY OF  
NOVEMBER, 2024**

**CHRISTINE OCHIENG**

**JUDGE**

In the presence of:

Mutava for 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants

Mundia for Plaintiff

Momanyi for 6<sup>th</sup> Defendant

No appearance for 4<sup>th</sup>, 5<sup>th</sup>, 7<sup>th</sup> Defendants

Court Assistant – Simon/Ashley

