



REPUBLIC OF KENYA



**Musau v Muleu & 3 others (Environment & Land Case E057 of 2023)  
[2024] KEELC 7397 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7397 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE E057 OF 2023  
LC KOMINGOI, J  
NOVEMBER 7, 2024**

**BETWEEN**

**SIMON MUTISO MUSAU ..... PLAINTIFF**

**AND**

**BENSON MULEU ..... 1<sup>ST</sup> DEFENDANT**

**KAPAITO OLE PAIKA ..... 2<sup>ND</sup> DEFENDANT**

**RICHARD OLE SALONIK ..... 3<sup>RD</sup> DEFENDANT**

**LEKUNDAYO OLE LOIRIMO ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is the Notice of Motion dated 21<sup>st</sup> December 2023 brought under; (Order 40 Rules 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A of the [Civil Procedure Act](#) Cap 21 and all other enabling powers and provisions of the law).
2. It seeks orders;
  1. Spent.
  2. Spent.
  3. That a temporary injunction to issue restraining the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and/or 4<sup>th</sup> Defendants herein their servants, agents or any other person authorized by or claiming through them from trespassing into, entering, selling, sub-dividing, leasing, depositing building materials, constructing, building, cultivating or by any other means using the parcel of land known as Loitokitok/rombo "B"/4453 within Kajiado County pending the hearing and determination of the main suit.
  4. That area Officer Commanding Police Station to ensure compliance with the orders of court.



5. That the costs of this Application be in the cause.
3. The grounds are on the face of the Application and are set out in paragraphs 8-14.
4. The Application is supported by the Affidavit of Simon Mutiso Musau, the Plaintiff/Applicant herein, sworn on the 21<sup>st</sup> December 2023 and a supplementary affidavit sworn on the 6<sup>th</sup> March 2024.
5. The Applications opposed. There is a Replying Affidavit sworn by Benson Muleu the 1<sup>st</sup> Defendant/Respondent on the 21<sup>st</sup> February 2024.
6. On the 19<sup>th</sup> March 2024, the court with the consent of the parties directed that the Notice of Motion be canvassed by way of written submissions.
7. The Plaintiff/Applicant's submissions are dated 6<sup>th</sup> March 2024. Counsel submitted that the Plaintiff/Applicant has not been a party to any suit against the Defendants/Respondents herein. That he was not a party to ELC E043 of 2022 hence the orders were not directed at him.
8. It is also submitted that when the Plaintiff/Applicant acquired the suit property it was not occupied by the 1<sup>st</sup> Defendant/Respondent. The 1<sup>st</sup> Defendant/Respondent has not proved ownership and/or possession of the suit property. It is his case that he has been farming on the land parcel but the Defendants/Respondents' have disrupted his activities.
9. It is further submitted that the Plaintiff's/Applicant's bought the suit property located in Rombo after the sub-division of Rombo Group Ranch. There was no orders stopping the said sub-division.
10. It is also submitted by the Defendants'/Respondents' wrongful acts the Plaintiff/Applicant has been denied the use, benefit, enjoyment and proper utility of the said parcel thereby occasioning him to suffer damage. Reliance is placed on the case of Giella Vs. Cassman Brown (1973) EA 358.
11. This court is urged to find that the Plaintiff/Applicant has established a prima facie case with high chances of success at the trial. He prays that the Application be allowed.
12. The Defendants/Respondents submissions are dated 11<sup>th</sup> April 2024. Counsel submitted that the Plaintiff/Applicant is not a member of Rombo Group Ranch but an agent of Salash Keturai, the 11<sup>th</sup> Defendant in Kajiado ELC E043 of 2022, having purportedly bought the land currently occupied by the 1<sup>st</sup> Defendant from the said Salash Keturai.
13. Reliance is placed on the cases of; Giella Vs. Cassman Brown & Co. Ltd; (Supra); Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 Others (2003) KLR 125 to submit that the Plaintiff's case is premised in ownership of land yet he does not state how and from whom.
14. It is further submitted that though the Plaintiff was not a party in ELC E043 of 2022, he was aware of the existence of the suit. It is stated that he acquired the suit land on 20<sup>th</sup> June 2022 during the pendency of ELC E043 of 2022.
15. Counsel further submitted that the Plaintiff should not be allowed to benefit from his own wrong doing, that is of forcefully and illegally entering the Defendants parcel of land. He has put forward the case of Gabriel Mbui Vs. Mukindia Maranya (1993) eKLR.
16. It is also submitted that the Plaintiff has failed to establish a prima facie case as he has failed to demonstrate how he acquired the suit property and that he took possession through lawful means.
17. Counsel further submitted that the Plaintiff has failed to demonstrate that an award of damages will not offer him adequate compensation if he is denied the interlocutory injunction and thereafter his



suit succeeds at the conclusion of the case. He has put forward the case of Helga Hahmann Vs. Charles Mumba Mwangandi (2008) eKLR where the court cited the case of Mureithi Vs. City Council of Nairobi (1976-1985) EA 331.

18. It is also submitted that the balance of convenience tilts in favour of the Defendants as members of Rombo Group Ranch in whose favour the court made an order in Kajiado ELC E043 of 2022 to maintain the status quo pending the hearing and determination of the suit. He prays that the Application be dismissed with costs to the Defendants.
19. I have considered the Notice of Motion, the affidavits in support and the response thereto. I have also considered the written submissions and the authorities cited. The issues for determination are;
  - i. Whether the Plaintiff/Applicant's application meets the threshold for grant of temporary injunction.
  - ii. Who should bear the costs of this application?
20. The principles for grant of temporary injunction were laid down in the precedents setting case of Giella Vs. Cassman Brown & Co. Ltd (1973) E.A. 358. In the case of Mrao Ltd Vs. First American Bank of Kenya Ltd & 2 others (2003) KLR 125 the Court of Appeal stated what amounts to a prima facie case.
21. It is the Plaintiff/Applicant's case that he is the registered owner of Loitokitok/Rombo "B"/4453 since 20<sup>th</sup> June 2022. As he is not a member of Rombo Group Ranch he does not state how he acquired the suit property and from whom.
22. It is the Defendants'/Respondents' submission that the Plaintiff/Applicant is an agent of Defendant Salash Keturai, the 11<sup>th</sup> Defendant in ELC E043 of 2022. The said Salash Keturai was aware of the said suit and the orders granted therein.
23. It appears the Plaintiff/Applicant was issued with a title deed during the pendency of ELC E043 of 2022. This is against the doctrine of *les pendens*.
24. Although, the Plaintiff/Applicant claims that the orders granted were not directed to him since he was not party to that suit, the doctrine of *lis pendens* prohibits any dealings with property that is subject to ongoing litigation. The Court of Appeal in *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auc* [2017] KECA 79 (KLR) held:

“Our previous land legislation regime expressly embraced the doctrine under Section 52 of the repealed Indian Transfer of Property Act (ITPA) 1882 by stipulating that:

“During the active prosecution in any Court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as



it may impose.”

25. Although the ITPA was repealed, this doctrine is still applicable under common law and as such binding as held by the Court of Appeal in the above case of Cooperative Bank of Kenya Ltd: “... this Court has previously held that the doctrine of lis pendens is still applicable to this day, albeit under common law (see. Naftali Ruthi Kinyua v Patrick Thuita Gachure & Patrick Thuita Gachure & Another [2015] eKLR...”
26. This means, the issuance of the Applicant’s title during the pendency of ELC Case No. E043 of 2022 calls into question the legitimacy of the title and any rights purportedly conferred by it.
27. I am not satisfied that the Plaintiff/Applicant has established a prima facie case with a probability of success at the trial.
28. I am also not convinced that he will suffer irreparable injury that cannot be compensated by an award of damages.
29. Finally the balance of convenience tilts in not granting the orders sought as there is a pending suit being ELC NO.E043 of 2022 which involves the members of Rombo Group Ranch.
30. In conclusion I find no merit in this application and the same is dismissed. The costs will abide the outcome of the main suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 7TH DAY OF NOVEMBER 2024.**

**L. KOMINGOI**

**JUDGE.**

In The Presence Of:

N/A for the Plaintiff/Applicant.

Mr. Kiprono for the Defendants/Respondents.

Court Assistant – Mutisya.

