



**Katitu & 2 others v Wasike & 6 others (Environment & Land Case
E009 of 2023) [2023] KEELC 15783 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15783 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E009 OF 2023
A NYUKURI, J
FEBRUARY 23, 2023**

BETWEEN

**JAMES MWAURA KATITU 1ST PLAINTIFF
JOHN MUTINDA NZIOKA 2ND PLAINTIFF
DANIEL KIOKO 3RD PLAINTIFF**

AND

**JACINTA N. WASIKE 1ST DEFENDANT
BONIFACE ANYANGU 2ND DEFENDANT
HARRISON NDEGWA ALIAS MURIUKI 3RD DEFENDANT
MARGARET NGII 4TH DEFENDANT
THE DIRECTOR OF SURVEYS NAIROBI 5TH DEFENDANT
THE CHIEF LAND REGISTRAR NAIROBI 6TH DEFENDANT
HON. ATTORNEY GENERAL 7TH DEFENDANT**

RULING

1. By a Notice of Motion application dated February 9, 2023, the Plaintiffs sought the following orders;
 - a. Spent
 - b. Spent
 - c. Spent



- d. That pending the hearing and determination of this suit, there be an order of status quo, meaning there should be no further construction in the suit property being L R No 20173 measuring 29.20 Ha or any portion thereof.
 - e. That the OCS Mlolongo Police Station do enforce the orders of the court.
 - f. That the costs of the application be borne by the Defendants/Respondents.
 - g. That this Honourable Court be pleased to issue any other or further orders that it may deem fair and just.
2. The application is premised on the grounds on its face as well as the affidavits of James Mwaura Katitu and John Mutinda Nzioka the 1st and 2nd Defendants herein. It is the Plaintiffs/Applicants' case that the Plaintiffs are members of Jerusalem Prime Homes, who are the legitimate allottees of land known as LR No 20173 measuring 29.20 Ha situated along Mlolongo area (suit property) hence entitled to absolute and exclusive possession thereof.
 3. The Applicants further stated that the 1st Defendant in the company of armed Mlolongo Police Officers invaded the suit property on February 3, 2023 and more specifically Plot Numbers 236, 237, 239, 240, 241, 243, 245, 246, 238, 249, 250, 251 and 252 measuring approximately two acres part of LR. No. 20173 and put up a perimeter wall around the 2nd Plaintiff's house without any justifiable reasons. Further that the 2nd Defendant has put up a foundation to a permanent house on the portion of the Plaintiff's land without any justification. They also stated that the 3rd Defendant had illegally put up a perimeter wall engulfing temporary mabati houses belonging to the Plaintiffs. They further averred that the 4th Defendant had put up a mabati structure on the Plaintiffs' land.
 4. According to the Plaintiffs, the actions of the Defendants are unlawful and have resulted in the Plaintiffs being unable to peacefully occupy, use or deal in their property and therefore that an injunction was necessary. The Plaintiffs attached a certificate of registration for Jerusalem Prime Homes indicating that that entity was registered on October 7, 2022. They also produced an allotment letter dated January 8, 1993 in favour of Jerusalem Prime Homes for LR No 20173 – Athi River. In addition, they attached a receipt for Kshs 501,550/- dated June 14, 1994 in respect of Stand Premium and other levies. A deed plan dated October 19, 1994 was also produced in respect of LR No 20145 – 20173, 20430, 20434. They also produced a list of members of Jerusalem Prime Homes and undated share certificates Nos 163, 161 and 164. The Plaintiffs also attached photographs of the suit property, a proposed subdivision of LR No 20173 dated January 7, 2023 signed by the Plaintiffs, a deed plan No 280172 dated 28th September 2007, letter dated September 27, 2022 by the Plaintiffs to the Director of Surveys, a report on LR No 20173 and LR No 19150 by the Director of Surveys dated October 5, 2022 in response to the Plaintiffs letter dated September 27, 2022 showing that the correspondence file for LR No 19150 cannot be traced; and search for motor vehicle KBJ 927E.
 5. The application was opposed. The 1st Defendant Jacinta N Wasike filed a replying affidavit sworn on February 16, 2023. It was her case that the application is misconceived as the Plaintiffs have no title to the suit property. It was her case that on March 12, 2009, she purchased from one Peter Mutuku, LR No 19150 IR No 64396 measuring 0.7570 Ha which she took possession. She insisted that her land is not what the Plaintiffs are claiming. Further, that in November 2022, some people attempted to encroach on the land which led to a report to the police and that after investigation of the matter by the DCI, there was confirmation from the Lands Office by their letter dated December 9, 2022, that she was the legitimate owner of the suit property. She attached a certificate of title indicating that she was registered as proprietor of the suit property on March 12, 2009. She also attached a deed plan, transfer instrument dated February 28, 1995 and a letter from the Chief Land Registrar dated December 9,



- 2022 showing that the title for LR No 19150/151 was first registered in the name of Mavoko Municipal Council and later transferred to the 1st Defendant.
6. Boniface Anyango the 2nd Defendant filed a replying affidavit sworn on February 18, 2023 opposing the application herein. It was his case that he was the beneficial owner of LR No 19150/27, as the registered owner thereof was his spouse. He stated that a business name cannot hold land or property in Kenya. He faulted the Plaintiffs' allotment letter stating that the name of the County Council that allotted the land to Jerusalem Prime Homes was not stated. He stated that the certificate of title where he was constructing his premises was title for IR 64265, LR No 19150/27.
 7. His position was that the Plaintiffs attempted to grab the properties stated herein on September 22, 2022 through ELC No E052 of 2022 where the court barred the same group of individuals from interfering with the Defendants' land. That therefore, the registration of a business name was aimed at deceptively filing this suit. He stated that the Applicants were threatening the owners of the suit property with economic and bodily harm and that they had not met the threshold for grant of the orders sought. He attached a certificate of registration of Jerusalem Prime Homes, certificate of title for IR No 64265, official search showing Agnes Moraa as title holder, development application permission, publication for change of user in the Daily Nation of July 27, 2022, an order issued by this court in ELC No. E052 of 2022 and a letter by the OCS Mlolongo in respect of IR 64265.
 8. Margaret Ngii, the 4th Defendant filed a replying affidavit sworn on February 16, 2023, in opposition to the application. It was her case that she acquired LR Nos 19150/83 (IR No 64321) and 19150/84 (IR No 64322) in 2021 from her father one Joseph Mutuku Ngii and that those two parcels were transferred to her and her husband Martin Kinyua Mate. Further, that they have been in occupation although the Applicants have been harassing them.
 9. According to the 4th Defendant, the allotment letter of the Plaintiffs was fabricated as a business name is not a legal person and cannot be allocated any land. Further, that the receipt dated June 14, 1994 Serial No 36/871 is a forgery and that the deed plan for LR No 20173 is a forgery as it lacks supporting documents. It was her position that the Applicants had not met the threshold for grant of a temporary injunction as they have no legal or demonstratable interest over the suit premises. She attached certificate of title for IR 64321 for LR No 19150/83 showing that the said title was registered in her name and the name of Martin Kinyua Mate on June 30, 2021. She also attached a certificate of title for IR 64322 showing that the 4th Defendant and Martin Kinyua Mate were the registered proprietors thereof as of June 30, 2021 and lastly attached a transfer instrument for IR 64321 from Joseph Mutuku Ngii to Martin Kinyua Mate and Margaret Mutuku Ngii.
 10. Although the 3rd, 5th, 6th and 7th Defendants were duly served as shown by the affidavits of service filed in court on February 14, 2023 and 21st February 2023, they neither entered appearance nor filed a response to the application.

Analysis and Determination

11. The substantive prayer herein by the Plaintiffs is an order of status quo so that there is no further construction on the property LR No 20173 measuring 29.20 Ha or any portion thereof, pending hearing of the suit. Therefore the Plaintiffs have sought for restraining orders.
12. The law under Order 40 Rule 1 of the *Civil Procedure Rules* grants this court the jurisdiction to grant temporary orders to preserve the suit property pending the determination of a suit where it is shown by evidence that any property in dispute is at risk of being wasted, damaged, alienated, disposed off or wrongly sold in circumstances that will obstruct or delay execution of any decree that may subsequently be passed against the Defendant.



13. Grant of temporary orders is governed by well settled principles. The applicant must show that they have a *prima facie* case with chances of success; that if the temporary orders are not granted, they stand to suffer irreparable loss that may not be compensated in damages and that where the court is in doubt, it ought to decide on a balance of convenience. (See *Giella vs Cassman Brown Co Ltd* [1973] EA 358).
14. In this suit the Plaintiffs have stated that they are members of Jerusalem Prime Homes who are allottees of LR No 20173 measuring 29.20 Ha. They attached a certificate of business name registration for Jerusalem Prime Homes showing that the said business name was registered on October 7, 2022. James Mwaura Katitu who is one of the persons named as trading in the said name refers to himself as the Chairman of Jerusalem Prime Homes. In addition, the Plaintiffs produced an allotment letter dated January 8, 1993 which does not indicate the name of the County Council that allegedly allocated the suit property to Jerusalem Prime Homes. The Plan Number is not indicated. They attached a receipt in the name of Jerusalem Prime Homes dated June 14, 1994. From that receipt, it shows that the same was in respect of Title No L R No 20173. That Title Number is also in the letter of allotment. They also provided share certificates showing ownership of the land.
15. Is the above evidence sufficient to show that the Plaintiffs have a legal interest in the suit property sufficient enough to get legal protection?
16. The Plaintiffs have filed suit in their own names and not on behalf of Jerusalem Prime Homes. That can be gleaned from the Complaint. Jerusalem Prime Homes is a business name of the three Plaintiffs. A business name is merely a trade name of natural persons and therefore registration of a business name does not create a legal person separate from the persons who have fronted the business name. The name is merely their alias. It is therefore strange and untenable in law that a business name with three natural persons has a list of 85 members which is annexure marked JMK – 5.
17. Back to Jerusalem Prime Homes which was registered on October 7, 2022 as a business name for the 3 Plaintiffs herein, it is also not possible for a business name registered on October 7, 2022, to have been allocated land on January 8, 1993 as that business name was not in existence then. In any event, the business name is not a legal person capable of being allocated land or any interest in land. Therefore, the allotment letter herein is questionable and could only be termed as having been prepared for purposes of this case.
18. I say so because that allotment letter refers to LR No 20173 – Athi River. It refers to a titled property. The process of allotment of public land under the Government Land Act (repealed) was elaborate. It began with the preparation of a Part Development Plan (PDP), which is a Sketch Plan that indicated the land to be allocated. The PDP was then approved by the Commissioner of Lands or the Minister for Lands. The PDP had a specific number. Thereafter, a letter of allotment based on the approved PDP was issued to the allottee. It was after issuance of the allotment letter and compliance with the terms thereof that a Cadastral Survey was conducted for purposes of the issuance of a certificate of lease. The survey was to be authenticated by the Director of Surveys before a Land Reference Number was issued in respect of the allotted land. (See *Nelson Kazungu Chai & 9 Others vs Pwani University College* [2014] eKLR).
19. Therefore, the allocation of public land required that planning preceded survey. The Plaintiffs' letter of allotment refers to a Land Reference No 20173 – Athi River. That means that as at the time the allotment was being done, the land being allotted had already been surveyed and a land reference number issued. This is because the receipt dated June 14, 1994 for payment of stand premium by the Plaintiffs indicated that payment was in respect of Title Number L R No 20173. In addition, while the allotment letter had a land reference number showing that survey land already been done, strangely there is no PDP No in the letter of allotment and therefore there is no nexus between what could have



been surveyed if at all with the land that was allotted, as an allotment letter must be in line with an approved PDP. The Plaintiffs produced a deed plan No 280172 to back up their claim. The deed plan is shown to be in reference to Land Reference Number 20173, yet no title for the said deed plan has been produced.

20. The law requires the Plaintiff to demonstrate that they have a prima facie case with a chance of success to get restraining orders. It is not a matter of throwing at the court several documents from the Ministry of Lands. The Plaintiff must systematically, procedurally and lawfully demonstrate acquisition and ownership of the land. It is my view that they have failed to show that they own the suit property. My finding at this stage in regard to the letter of allotment, unless the contrary is proved at the substantive hearing on this matter, is that the letter of allotment dated January 8, 1993 issued to Jerusalem Prime Homes, which was registered on October 7, 2022 is a forged document. In addition, the said allotment letter is non compliant with the law as it was not issued pursuant to any approved PDP and the name of the local authority that held the land prior to the allotment is not shown.
21. I have called for the court file ELC No E052 of 2022 and I note that the same is slated for March 28, 2023. While that suit touched on the mother Title No 19150, the resultant titles therein are not necessarily those mentioned herein. I will therefore make no further reference to that matter at this stage.
22. Having found that the allotment letter by the Plaintiffs is a forged document, I also note that the Plaintiffs hold share certificates for Jerusalem Prime Homes. That entity is not a legal person. It is not a company capable of having shares recognized in law and therefore the undated share certificates which on the face of it, were done in a hurry with no names of the persons approving the same (Chairman, Secretary and Treasurer) and the reference to Jerusalem Prime Homes as a society when it is not, have no bearing in this matter and cannot confer proprietary rights on the Plaintiffs.
23. In the premises, I find and hold that the Plaintiffs have failed to establish a prima facie case with any chances of success. In the absence of demonstration of a *prima facie* case, it is needless for this court to interrogate the issue as to whether the Plaintiffs stand to suffer irreparable injury or where the balance of convenience tilts.
24. The result is that the application dated February 9, 2023 lacks merit and the same is hereby dismissed with costs to the Respondents.
25. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 23RD DAY OF FEBRUARY 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Kirimi for 1st defendant

Mr. Orege for 4th Respondent

Mr. Aunga for Plaintiffs/Applicants

Mr. Mutembei for 2nd Respondent

Josephine – Court Assistant

