



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

E.L.C CASE NO.57 OF 2019

1. JANE KAMENE MULANDI
2. BENARD SILA MUNYWOKI & MONICA NDUKU MULI
3. BONIFACE KISINGU
4. RUTH MBULA NGULA
5. ONESMUS MASILA MUKOSI
6. SIMON KINYUMU MULWA
7. JOSEPH NDAVI KINYUMU
8. BENJAMIN K. MUSYOKI.....PLAINTIFFS/APPLICANTS

-VERSUS-

GERALD MUTUNGA MUTYETUMO.....DEFENDANT/RESPONDENT

RULING

1. What is before this Court for ruling is the Plaintiffs'/Applicants' Notice of Motion application dated 09th August, 2019 and filed in court on 13th August, 2019 for orders: -

1. Spent.

2. Spent.

3. Spent.

4. That a temporary injunction do issue restraining the Defendant/Respondent by himself, his agents, servants, employees, anybody/authority working under him or otherwise howsoever from demolishing, entering, encroaching into, trespassing and or in any other way interfering with the Plaintiffs'/Applicants' quiet enjoyment & proprietary rights over the premises

known as Emali Town Block 1/270, Emali Township/341, Plot No.357, Plot No.396, UNS Residential Plot No. 'A' – Emali, UNS Residential Plot No. 'B' – Emali, Plot No.364C Emali Market, Plot No.364B Emali Market, UNS Residential Plot No. 'D' – Emali & UNS Residential Plot No. 'H' – Emali (and the improvements thereon) pending the hearing and determination of this suit.

5. That the costs of this application be provided for.

2. The application is predicated on the grounds on its face and is supported by the affidavit of Boniface Kisingu, the 3rd Plaintiff/Applicant herein, sworn on 09th August, 2020 at Emali with the authority of his co-Plaintiffs/Applicants and filed in court on 13th August, 2019.

3. The application is opposed by Gerald Mutyetumo, the Defendant/Respondent herein, vide his replying and further replying affidavits sworn at Makindu on 30th October, 2019 and 19th February, 2020 respectively.

4. The application was canvassed by way of written submissions.

5. The 3rd Plaintiff/Applicant has deposed in paragraphs 2, 3, 4, 5, 6, 8 and 10 of his supporting affidavit that they are the registered owners of parcels of land (together with the improvements thereon) as follows: -

a. Jane Kamene Mulandi Emali Town Block 1/270

b. Benard Sila Munywoki

& Monica Nduku Muli Emali Township/341

c. Boniface Kisingu Plot No. 357

d. Ruth Mbula Ngula Plot No.396

e. Onesmus Masila Mukosi UNS Residential Plot No. 'A' - Emali

..... UNS Residential Plot No. 'B' – Emali

f. Simon Kinyumu Mulwa Plot No. 364C Emali Market

g. Joseph Ndavi Kinyumu Plot No. 364B Emali Market

h. Benjamin K. Musyoki UNS Residential Plot No. 'D' - Emali

..... UNS Residential Plot No. 'H'– Emali, that the Defendant/Respondent and themselves as the Plaintiffs/Applicants have been neighbours each owning and occupying their respective parcels of land all developed and with tenants therein, that the County Government of Makueni is currently demolishing buildings constructed on road reserves within Emali town to clear the said reserves of any encroachment, that on 27th July 2019, part of the Defendant's/Respondent's building was demolished by the County Government bulldozers for encroaching on a road reserve, that the Defendant/Respondent, without any colour of right whatsoever, immediately came to their respective properties (which immediately neighbour the Defendant's demolished building) claiming ownership saying that his mother used to farm thereon in the years gone by, that a very bitter exchange ensued between the Defendant on one hand and themselves on the other hand, that on the following day, i.e. 28th July, 2019, the Defendant returned to the site with his workmen ready to start construction of perimeter wall round their respective developed and occupied premises, that he marked the perimeter wall exterior dimensions before violence broke out between the Defendant and his workmen on one hand and themselves on the other and it took the intervention of the Kenya Police Station Emali to diffuse the situation and bring calm, that these illegal and irregular acts by the Defendant should be stopped by this Court, that their respective premises in question are

developed and are in use as rental units from where they earn their livelihood and if the threatened demolition and fencing off happens, the Defendant will have effectively forcefully evicted them and their respective tenants, the said demolition and fencing if were it to happen could lead to them losing their only source of income/livelihood hence occasioning them irreparable loss and damage, that in the circumstances, it is only meet (sic) and just that an injunction do issue restraining the Defendant by himself, his servants, agents, employees or otherwise howsoever from demolishing, entering, encroaching into, trespassing and or in any other way interfering with their respective premises pending the hearing of this application and suit.

6. On the other hand the Defendant/Respondent has deposed in paragraphs 5, 6, 7, 8 and 9 of his replying affidavit that it is the Plaintiffs who have trespassed on his land parcel number 585 Emali Township and put up illegal structures, that even before the Plaintiffs came to court, he had severally warned them about the said trespass and demanded that they leave his premises but they did not heed, that at the time he was allocated his plot, he was showed the beacons by surveyors and he has strictly observed the boundaries, that he has been paying dues to Makueni County promptly, that he believes it is the Plaintiffs who do not know the position and/or boundaries of their plots and who have wrongfully sued him in an attempt to deny him his quiet enjoyment of his plot.

7. And in his further replying affidavit, the Defendant/Applicant has deposed in paragraphs 3, 4, 5, 6, 8, 9 and 11 that he sent letters to Lands Department Makueni County, the Registrar of Lands Makueni and the National Land Commission with a view to confirm whether the documents of title exhibited by the Plaintiffs are genuine, that Makueni County Lands Department have informed him which information he verily believes to be true that letters of allotment exhibited in exhibit BK1 (-letter of allotment from Makueni County Council for plot No.364C Emali Market and allotment letter for plot No.364B Emali to Joseph Ndani Kinyumu) and they have indicated that the same are not genuine as they are not reflected in the minutes of Makueni County, that even if the 3rd Defendant lost his allotment letter he ought to have annexed documents from Lands Department to show that he owns the plot, that an abstract of report is not in itself evidence of ownership, that he also requested the County Lands Department Makueni County to furnish him with letters of confirmation with regard to certificates of lease for land parcel Emali Township No.1/270 and Emali Township/341 which information he verily believes to be true from their description that these parcels of land cannot be in the same zone as their description is different and their payable rates 1,200 and 12,000 are different, that he has genuine documents of ownership to his parcel of land, that when he was allocated (sic), he was shown his plot by a Surveyor from Makueni County and shown the beacons delineating his plot and further the same boundaries were shown to him recently by Makueni County Surveyors when they were reclaiming a portion of land 3 meters wide which they said was on a road reserve, that his plot No.585 is also captured in the valuation roll for rating prepared by Makueni County.

8. In his written submissions, the Counsel for the Plaintiffs/Applicants framed three issues for determination but in my view the issues can be condensed to one namely whether or not the Plaintiffs/Applicants have satisfied the conditions for the grant of interlocutory injunction as set out in the case of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358**.

9. The Counsel was of the view that the evidence on record speaks for itself by virtue of **Section 34(1) of the Evidence Act** and that the Plaintiffs/Applicants have established a prima facie case with high chances of success.

10. The Counsel further relied on the case of **Mrao Ltd. vs. First American Bank of Kenya & 2 others [2003] eKLR 125** where the Court of Appeal had this to say regarding what constitutes a prima facie case in a civil application;

“A prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

11. The Counsel also relied on the case of **Kenleb Cons Ltd vs. New Gatitu Services Station Ltd & Another [1990] eKLR** where the Court of Appeal stated thus: -

“To succeed in an application for injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application, but must also show he has a right, legal or equitable, which requires protection by injunction.”

12. Arising from the above, the Counsel was of the view that the Plaintiffs/Applicants have a prima facie case with high chances of success because: -

- They have ownership papers/documents in respect of their respective properties which they have exhibited as annexures “BK1”.
- They have also developed their respective properties as is evident from annexures “BK2”. The suit premises herein are therefore owned and occupied/possessed by the Plaintiffs/Applicants herein.
- The Respondent on the other hand has no ownership document in respect of the suit premises. The Respondent is very loud in saying that it is the Plaintiffs/Applicants who have trespassed on his parcel of land known as Plot No.585 Emali. He has not exhibited anything to show that indeed plot No.585 Emali exists and if it does that he owns the same. It is also unclear when the Plaintiffs/Applicants trespassed on his alleged land. The demand letter by the Respondent dated 12th September, 2019 was done after being served with the suit papers in this case and was basically an afterthought. The Respondent could not have been talking about the Plaintiffs/Applicants trespassing in September 2019 while the developments done by each respective Applicant are aged and appear to have been done some time back and not in September, 2019.
- The Respondent desires to dispossess the Plaintiffs/Applicants of their respective properties and demolish the developments thereon. It is this threat that the Plaintiffs/Applicants seek to stop. The threat is real and imminent. It is also unlawful and would, if allowed to proceed, completely destroy the substratum of this case and render the main suit superfluous and academic. Since the Plaintiffs/Applicants have ownership documents, are in possession and have developed the suit premises herein, it is only meet and just that an order of injunction do issue restraining the Respondent as prayed. The Applicants have made full disclosure of all the information regarding to the disputed plots and taking all this evidence on record into account, it is the Applicant’s submission that they have established a prima-facie case with high chances of success.

13. As for the principle that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages, the Counsel cited the case of **Paul Gitonga Wanjau vs. Gathuthi Tea Factory Company Ltd & 2 others [2016] eKLR** where the Court quoted **Robert Sharpe Injunctions and Specific Performance (Aura on: Canada Law Book, 1992), P 2- 27** as follows: -

“But what exactly is "irreparable harm". **Robert Sharpe**, in "Injunctions and Specific Performance," states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

14. Flowing from the above, the Counsel submitted that the Plaintiffs/Applicants have demonstrated that they are the owners of their respective properties by annexing ownership documents. The Counsel went on to submit that the Plaintiffs/Applicants have further demonstrated that they are in occupation and possession of the suit premises, have developed the same and they derive their source of livelihoods as some of their premises are occupied by rent paying tenants. The Counsel pointed out the Plaintiffs/Applicants would suffer irreparable damage if the injunction is not issued.

15. The Counsel further cited the case of **Paul Gitonga Wanjau’s** case (supra) where the Court observed thus: -

“Where any doubt exists as to the applicants’ right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right. The burden of proof that the inconvenience which the applicant will suffer if the injunction is refused is greater than that which the respondent will suffer if it is granted lies on the applicant”

16. The Counsel was of the view that the balance of convenience in this application lies in favour of the Plaintiffs/Applicants as they had proven that they are in occupation/possession of the suit premises herein which they have developed unlike the Respondent who isn’t in possession and has not shown that he has developed them at all.

17. On the other hand, the Counsel for the Defendant/Respondent submitted that even though the Plaintiffs/Applicants claim ownership of the suit properties and also allege that the former has trespassed on their parcels of land, the Defendant/Respondent has deposed that he is working on his own parcel of land known as plot No.585 Emali Township. The Counsel went on to submit that the Defendant/Respondent has annexed a letter of allotment as GMMS 3a from Makueni County Council dated 13th February, 2002 and a survey report dated 21st January, 2020 (GMMS 3c) showing the position of his plot on the ground complete with GPS

coordinates. The Counsel further submitted that the Defendant/Respondent has annexed a notice of demolition GMMS 4 a & b alluded to by the Plaintiffs/Applicants in their affidavit and development plans for Emali Township which was annexed to the notice by the Director of Lands, Mining, Physical Planning & Urban Development Makueni County clearly showing that plot No.585 is captured on the approved development plan of Makueni County and showing area of road reserve on his plot which was reclaimed by Makueni County thus the Defendant/Respondent has fortified his claim with authentic documents that he is the owner of Plot No.585 Emali and that he is working on the said plot.

18. The Counsel for the Defendant/Respondent went on to submit that the lease certificates annexed by the 1st and 2nd Plaintiffs/Applicants for parcels number Emali Town Block 1/270 issued on 28th May, 2018 and Emali Township/341 issued on 21st September, 2018 show a striking difference in their description of the two suit properties and that there is a big difference in the rent payable per annum. The Counsel was of the view that the discrepancies highlighted greatly affect the credibility of the Plaintiffs/Applicants lease documents.

19. As for the 3rd and the 4th Plaintiffs/Applicants, the Counsel for the Defendant/Respondent submitted that the two had not annexed any documents to prove any proprietary interest of plots numbers 357 and 396 which they claim to be theirs. The Counsel added that an abstract report to the police that a document has been lost cannot be proof of ownership of a parcel of land and should have instead gotten documents from the allotting authorities or their successors in the title. The Counsel went on to submit that allocation registers, minutes and other documents are still available at the County Lands department and hence their non-production (*emphasis are mine*) shows that the two have absolutely no case.

20. As for the 5th Plaintiff/Applicant, the Counsel submitted that the latter has annexed allotment letters for two (2) plots being unsurveyed plots which he describes in the pleadings as plots number A & B which in his view cannot be proof of ownership as they are for unsurveyed plots as opposed to the Defendants/Respondents plot No.585 Emali which is surveyed and has GPS coordinates. The Counsel pointed out that the letter of allotment is dated 15th July, 1999 and to date there is nothing to show that the Plaintiff/Applicant had complied with conditions precedent in the said letter of offer within 30 days thus the offer automatically expired on 16th August, 2000.

21. As for the 6th and 7th Plaintiffs/Applicants, the Counsel submitted that the Defendant/Respondent did write to Makueni County Lands Department regarding the letters of allotment dated 04th March, 2010 for plots described as number 364B and 364C together with full Council and Committee minutes' references pursuant to Makueni County Council purportedly made the allocations and the answer was that the allotments are not genuine.

22. As for the 8th Plaintiff/Applicant, the Counsel reiterated that his submissions regarding the 5th Plaintiff/Applicant apply herein. In brief the Counsel pointed out that there was nothing to show that the 8th Plaintiff/Applicant had complied with the conditions precedent set out in the letters of allotment dated 15th July, 1999 for plot numbers UNS 'D' and 'H' Emali. The Counsel further submitted the letter of offer refer to a plan which was not annexed.

23. Arising from his submissions, the Counsel pointed out that none of the Plaintiffs/Applicants have annexed proper documents to prove they own the properties they claim to be theirs. To buttress his submissions, the Counsel cited the case of **Novapeku (PK) Construction and Engineering Company Ltd & 2 others vs. County Government of Kiambu [2019] eKLR** where the Court clearly set out what constitutes a prima facie case.

24. Regarding the principle that an interlocutory injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages, the Counsel submitted that no irreparable damage has been proved in that all what the Plaintiffs/Applicants have managed to prove is that the Defendant/Respondent is putting up a perimeter wall around his property.

25. On the principle that if the court is in doubt, it will decide an application on the balance of convenience, the Counsel submitted even if the Court were to be in doubt, the balance of convenience clearly tilts in favour of the Defendant/Respondent who has shown that he owns his property within the area in dispute.

26. The Defendant/Respondent further contends that the Plaintiffs/Applicants do not have a case at all against him as they have brought a joint case whereas each one of them has a distinct and separate claim which must be considered on their own merit. The Counsel pointed out that a joinder of causes of actions in the instant suit are not appropriate in that one Plaintiff/Applicant may

succeed while another Plaintiff/Applicant is unable to prove their case. The Counsel went on to submit that the Court would therefore be unable to issue an omnibus order of injunction touching on the properties in dispute. He urged the Court to dismiss the application with costs to the Defendant/Respondent.

27. Having read the application together with the replying and further affidavits as well as the rival submissions by the Counsel on record for the parties herein, as a preliminary issue, I am in agreement with the Counsel for the Defendant/Respondent that the Plaintiffs/Applicants herein ought to have filed separate claims against the Defendant/Respondent for good order of the proceedings herein. However, it would appear that the suit properties that the Plaintiffs/Applicants claim all fall within plot number 585 Emali Township which the Defendant/Respondent also claims. I will however say no more on this issue at this juncture.

28. I further wish to state that no evidence of previous proceedings was presented in this Court so that the same can be held to be admissible in these proceedings and therefore, the Plaintiffs'/Applicants' Counsel is wrong to say that by virtue of section 34(1) of the Evidence Act chapter 80 of the Laws of Kenya, a prima facie case has been established. For the record, section 34 (1) of the Evidence Act deals with admissibility of evidence given in previous proceedings.

29. From the affidavit evidence, the Plaintiffs/Applicants have exhibited documents relating to their parcels of land which each one of them claims were allocated by the defunct County Council of Makueni. The Defendant/Respondent contends that the documents in question are not genuine. That may be so but the question of the genuineness or otherwise of those documents cannot be determined at this interlocutory stage. It will have to await substantive hearing of the main suit. Of importance to note is that the Plaintiffs/Applicants are in occupation of the disputed parcels of land and have carried out some form of development on them. Whereas the Defendant/Respondent has a letter of allotment from the same defunct County Council of Makueni issued on 13th February, 2002, he appears not to have taken any step to assert his proprietary interests over the suit property until he was prompted into action by the demolition notice and/or enforcement notice (GMSS 4) issued by the County Government of Makueni.

30. From the rival affidavits by the parties, it seems to me that there is a serious conflict of facts in this application. In the case of **Ougo & Another vs. Otieno [1987] KLR 1**, the Court of Appeal stated thus: -

“The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute is decided in a trial.”

31. The above being the case, it is my considered view that the most appropriate order to issue under the circumstances is one of status quo accompanied by certain conditions. Consequently, it is hereby ordered that an order of status quo do issue so that the Plaintiffs/Applicants do remain in occupation of the disputed suit properties until this suit is heard and determined on priority basis. It is further ordered that neither the Plaintiffs/Applicants nor the Defendant/Respondent, their agents, servants, employees or anybody working under their authority shall construct new structures of whatever kind in the suit premises pending the hearing of the substantive suit herein.

Signed, dated and delivered at Makueni via email this 17th day of December, 2020.

MBOGO C.G.,

JUDGE.

Court Assistant: Mr. G. Kwemboi



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