



**Kutz International Limited v Gicheru & 4 others; Okoth (Interested Party) (Environment & Land Case E086 of 2022) [2023] KEELC 21389 (KLR) (6 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21389 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE E086 OF 2022  
CA OCHIENG, J  
NOVEMBER 6, 2023**

**BETWEEN**

**KUTZ INTERNATIONAL LIMITED ..... PLAINTIFF**

**AND**

**DAVID GATHUNGU GICHERU ..... 1<sup>ST</sup> DEFENDANT**

**PETER MAINA KARANJA ..... 2<sup>ND</sup> DEFENDANT**

**AMOS MUIRURI ..... 3<sup>RD</sup> DEFENDANT**

**PETER MUSYOKA ..... 4<sup>TH</sup> DEFENDANT**

**THE REGISTRAR OF TITLES ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**FESTUS OKOTH - OCS MLOLONGO POLICE STATION INTERESTED PARTY**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 25<sup>th</sup> November, 2022 where it seeks the following Orders:
  1. Spent
  2. Spent
  3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the Defendants/Respondents whether by themselves, their servants and agents, their buyers/ potential buyers, or anybody claiming under them, including other parties from entering, trespassing, alienating, surveying, transferring, interfering, constructing and in any other way dealing with the property known



as Land Reference Number 23412 Grant IR 77750 situated in Mlolongo, Mavoko Sub – County.

4. That an order do issue for the 1<sup>st</sup> to 4<sup>th</sup> Respondents plus their agents to remove all construction materials brought into the premises.
  5. That the OCS Mlolongo Police Station be directed to take all necessary steps to enforce the orders herein.
  6. That costs be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavits of Khatib Abdullah Ashraf, its Director and Raphael Mutua Kasaam, its property Manager.
  3. In the Affidavit of Raphael Mutua Kasaam, he deposes that on 26<sup>th</sup> October, 2022 he received a call from one Pastor Njue who informed him that there were suspicious activities being undertaken on Land Reference Number 23412 hereinafter referred to as the 'suit land'. Further, that a portion of the suit land had been offered for sale and that the said suit land was being subdivided, with resultant subdivisions being sold to unsuspecting buyers. He confirms that on 28<sup>th</sup> October, 2022, he visited the suit land and found the 4<sup>th</sup> Respondent busy surveying the land in the company of the 3<sup>rd</sup> Respondent. Further, that the Police arrested them and it emerged that the 4<sup>th</sup> Respondent was a Surveyor allegedly instructed by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to subdivide the suit land and they had a title in their name. He explains that the Police sought to investigate the matter and wrote to the OCS Mlolongo Police Station including the Principal Secretary – Ardhi House for details on the title. He reiterates that the 1<sup>st</sup> to 4<sup>th</sup> Respondents reentered the suit land with impunity and continued to put up beacons, brought materials to the site and continue to offer the subdivided parcels to unsuspecting buyers.
  4. In the Affidavit of Khatib Abdullah Ashraf, he deposes that the Plaintiff is the registered owner of the suit land and annexed a Certificate of Title, two Clearance Certificates, Land Rent Payment and Mavoko Sub County Rates Demand Notice to that effect. He further annexed a Title shown to him by the Police after he made a report and insists it is a forgery. He avers that the Respondents are bent of depriving the Plaintiff of its property despite Police reports. He reiterates that the Plaintiff will suffer irreparable harm if the Respondents are not restrained from interfering with suit land.
  5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants opposed the application by filing a Replying Affidavit sworn by Peter Maina Karanja. They contend that they are the registered proprietors of the suit land and insists that a recent search conducted on 10<sup>th</sup> March, 2023 confirmed this position. They claim they have enjoyed quiet possession of the suit land since 2004 until 4<sup>th</sup> March, 2023 when the Plaintiff and its agents invaded it. They insist they are upto date with rates payment and they were issued with a Rates Clearance Certificate to that effect. They claim the Plaintiff has been using goons to terrorize their workers and the Plaintiff's agents have maliciously damaged a chain link fence and interfered with their quiet possession. They challenged the Plaintiff's title insisting it is a forgery. They averred that the supporting affidavits are defective and incompetent. They further challenged the correspondence annexed by the Plaintiff and insisted that the Plaintiff's title is fake.
  6. The Plaintiff filed Supplementary Affidavits sworn by Khatib Abdullah Ashraf and Raphael Mutua Kasaam reiterating its averments and insisting that it has been in exclusive possession of the suit land. Further, that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title is fake. It insists that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are working in cahoots with the OCS Mlolongo.
  7. The Application was canvassed by way of written submissions.



## Analysis and Determination

8. Upon consideration of the Plaintiff's Notice of Motion Application dated the 25<sup>th</sup> November, 2022 including the respective Affidavits as well as rivaling submissions, the only issue for determination is whether the Plaintiff is entitled to orders of interlocutory injunction pending the outcome of the suit.
9. The Plaintiff in its submissions insisted that it had established a *prima facie* case as the owner of the suit land. Further, that there was threat of infringement of its rights in respect to the suit land. It reiterated that it will suffer irreparable harm if the Defendants are left to continue with their acts. To support its averments, it relied on the following decisions: *Mrao Limited v First American Bank of Kenya Limited & 2 others* [2003] KLR 125; *Vijay Morjaria v Robert Obwocha & 4 Others* [2021] eKLR and *John Nzomo Wambua v Joseph Taiti Wambua* [2021] eKLR.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants in their submissions contend that the Plaintiff has not satisfied the threshold for grant of the temporary injunction sought. They insist that the Plaintiff's title is fake as it has not attached a Certificate of Official Search. To support their averments, they relied on the following decisions: *Giella v Cassman Brown* [1973] EA 358; *Mrao Limited v First American Bank of Kenya Limited & 2 Others* [2003] KLR 125; *Kanee v Viridi & 2 Others* (Environment & Land Case E 288 of 2020) [2022] KEELC 2655 (KLR); *Munyu Maina v Hiram Gathiba Maina* [2013] eKLR; *Kinuthia v Munguti & 2 Others* (Environment & Land Case E18 of 2022) [2022] KEELC 15001 (KLR) and *James Muigai Thungu v County Government of Trans Nzoia & 2 Others* [2022] eKLR.
11. On whether the Plaintiff has established a *prima facie* case with a probability of success at the trial, I will rely on the principles as pronounced in the case of *Giella v Cassman Brown & Company* [1973] EA 358 including the description of a *prima facie* case as enumerated in the case of *Mrao Ltd v First American Bank of Kenya & 2 Others* [2003] KLR 125.
12. The Plaintiff claims to be the registered proprietor of the suit land and produced a Certificate of Title to that effect. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants also claim ownership of the suit land and produced a Certificate of Title as well as a Search. The Plaintiff contends that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Title is fake and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants insists likewise. Each of the parties claim to be in occupation of the suit land.
13. On perusal of documents presented by the respective parties, I note the Plaintiff's title was issued on 19<sup>th</sup> June, 1998 while the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' title to land which was initially owned by Arthur Magugu was transferred to them by Amos Muiruri Ngata but the date of transfer is not indicated. I note as per the search conducted on 10<sup>th</sup> March, 2023, it confirmed the 1<sup>st</sup> and 2<sup>nd</sup> Defendants owned the suit land. Both parties have presented rate clearance certificates from the Mavoko Sub County Offices. At this juncture, I note there are two competing titles and hold that one indeed must be fake. Further, since this is an Interlocutory Application, the court cannot determine the genuine title unless *viva voce* evidence is presented. In the case of *Agnes Adhiambo Ojwang v Wycliffe Odhiambo Ojijo*, Kisumu HCCC No.205 of 2000, the Court held that:-

“The purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act.”
14. The Plaintiff claims the Defendants have descended on the land, proceeded to subdivide it and is selling to unsuspecting buyers. The Defendants did not deny this averment. From the photographs presented by the Plaintiff, I note there are indeed fresh beacons put on the land. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim to have been enjoying quiet possession of the suit land since 2004 and that the Plaintiff's agents destroyed their fence.



15. Based on the facts as presented and in the interest of justice, noting that there are two competing titles to the suit land I am of the view that there is an urgent need to preserve the substratum of the suit.
16. In the circumstances, while associating myself with the decisions quoted, I direct that no party should be in possession nor interfere with the suit land as well as dispose of it to third parties, pending the hearing and determination of this suit.
17. It is against the foregoing, that I find the Notice of Motion Application 25<sup>h</sup> November, 2022 compromised.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6TH DAY OF NOVEMBER, 2023**

**CHRISTINE OCHIENG**

**JUDGE**

