



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. E261 OF 2020

GIDEON KYENGO.....1ST PLAINTIFF

BERNARD NZAU.....2ND PLAINTIFF

MERCY MWANGI.....3RD PLAINTIFF

JAMES WAINAINA.....4TH PLAINTIFF

-VERSUS-

NGEI MATIBO.....1ST DEFENDANT

TIMOTHY MUTWIRL.....2ND DEFENDANT

JOHN MURREY.....3RD DEFENDANT

BENEDICT NZANGI.....4TH DEFENDANT

RULING

What is before this court is the Plaintiffs' (Applicants') Notice of Motion application dated 8th December 2020 seeking the following orders against the Defendants (Respondents);

- a) Pending the inter partes hearing and determination of this application and this suit, the Court be pleased to grant an order of injunction restraining the Respondents whether by themselves, their representatives or assigns from implementing the court system or opening Gate B as per the letter dated 5th October 2020 or at all.
- b) Pending the inter partes hearing and determination of this application and this suit, the Court be pleased to grant an order of injunction restraining the Respondents whether by themselves, their agents or assigns from stopping tenants and or their visitors from entering or leaving Muimara Estate on account of non-payment of service charge or at all, sending demands for the payment of service charge to tenants of the Applicants of otherwise harassing or directly engaging with the tenants of the Applicants.
- c) Pending the inter partes hearing and determination of this application, this suit and the resolution of the dispute lodged by the Applicants with the Registrar of Societies, the Court be pleased to grant an order compelling the Respondents to render audited accounts of its expenditure from the effective date of registration of the Association to date.
- d) Pending the inter partes hearing and determination of this application, this suit and the resolution of the dispute lodged by the Applicants with the Registrar of Societies, parties shall mutually appoint an independent firm of auditors within fourteen (14) days from the effective date of this order to examine, assess, verify and report on the true financial position of the Association from inception to date in default of which the institute of Certified Public Accountants of Kenya to appoint the auditor.
- e) The Honourable Court be pleased to refer the dispute herein to the Court Annexed Mediation and order the Mediation Registrar to appoint a duly accredited mediator whose terms of reference shall inter alia be to resolve the dispute to determine the issues raised by the Applicants.

f) Costs.

The Applicants' case:

The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by Gideon Kyengo, the 1st plaintiff on 8th December 2020. The Applicants and the Respondents are residents of MUIMARA ESTATE (hereinafter referred to only as “the Estate”). The Estate comprises of Maisonettes and Flats. The Applicants and the Respondents are members of MUIMARA ESTATE RESIDENTS ASSOCIATION (hereinafter referred to only as “the Association”). The Respondents are the officials of the Association. The Applicants averred that the Respondents had on several occasions purported to make binding unilateral decisions among them a decision that was communicated to the Applicants through a letter dated 5th October 2020 posted in the Association’s WhatsApp group on 15th October 2020 in which the 2nd Respondent stated that the Estate had implemented a court system and that the Association’s Development Committee was already working on the technical details of the Court demarcation points and Gate B works bill of quantities.

The Applicants averred that the said unilateral decisions by the Respondents were aimed at alienating flat owners who were members of the Association by barring them from using the designated main gate to the Estate. The Applicants averred that through the said decisions, the Respondents were also demanding service charge from the tenants of the flat owners a move that had caused tenants to vacate the flats. The Applicants averred that this had posed a challenge to the flat owners who had found it difficult to secure new tenants in view of the prevailing circumstances.

The Applicants averred that if the acts of the Respondents complained of were not stopped, the Applicants would incur irreparable loss of income that the Respondents would not be able to redress.

The Respondents’ case:

The Respondents opposed the application through a replying affidavit sworn on 17th March 2020 by Ngei Matibo, the 1st Respondent. The 1st Respondent is the chairman of the Association. The Respondents averred that the dispute in this suit concerned the management and/or leadership of Association. The Respondents averred that the dispute did not concern a right to own, use or occupy land hence this court lacked jurisdiction over the same. The Respondents averred further that the Applicants had filed a similar suit in the lower court namely, Milimani Commercial Court CMCC No. E1609 of 2020 and had also lodged a complaint over the same issues with the Registrar of Societies.

The Respondents averred that the Applicants must pay service charge for the common services being rendered to the residents of the Estate and that the orders sought if granted will bring the services being rendered by the Association to the residents to a halt a situation that will inconvenience the residents of the Estate and compromise security of the members of the Association.

The submissions:

The Applicants filed submissions dated 22nd July 2021. The Applicants submitted that the court had jurisdiction to handle the matter as the issues raised in the suit arose from use and occupation of land. The Applicants submitted that their complaint was over continued harassment by the Respondents that had resulted in the Applicants’ tenants vacating the flats owned by the Applicants and those that are yet to vacate were finding it difficult to access their houses. The Applicants submitted that the suit at the lower court that was referred to by the Respondents was initiated by the Applicants’ tenants and that the Applicants were not a party to the same.

The Applicants submitted that they had satisfied the conditions for granting the injunction sought. In support of their submissions, the Applicants cited among others; Giella v Cassman Brown & Co. Limited & Another [1973] E.A 358 and Mrao Ltd. v First American Bank of Kenya Ltd. & Others [2003] eKLR.

The Respondents filed submissions dated 10th August 2021 on 14th February 2022. The Respondents reiterated that the court had no jurisdiction to entertain the suit since the dispute between the parties concerned the running and management of a society. The Respondents averred that what was disputed was the mandate of the Respondents as officials of the Association and that there was no dispute over the ownership, use and occupation of any of the properties in the Estate.

The Respondents submitted that the application was an abuse of the process of the court in that the Applicants had through their tenants filed a suit raising similar issues which suit was dismissed for want of prosecution. The Respondents submitted that the Applicants did not satisfy the conditions for grant of the orders of injunction sought. The Respondents submitted that the Applicants being members of a gated community had a responsibility to pay service charge for the services being rendered to them by the Association.

Determination:

I am unable at this stage of the proceedings to grant the orders sought by the Applicants for the Respondents to submit audited accounts, appointment of auditors and reference of the dispute to Court Annexed Mediation. For the first two orders, I doubt if I have jurisdiction to grant the same and even if I have jurisdiction, the same cannot be granted at an interlocutory stage of the proceedings. For the order seeking reference of the matter to mediation, I am of the view that a decision in that regard can only be made after the close of pleadings. It would be at that stage that the court would be able to appreciate the issues raised in the suit and whether the same can be resolved through mediation.

The remaining orders sought by the Applicants are temporary injunctions. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In Giella v Cassman Brown & Co. Ltd.(supra), it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v First American Bank of Kenya Limited & 2 Others(supra) and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

From the material before me, I am not satisfied that the Applicants have established a prima facie case with a probability of success against the Respondents. The Applicants have sought injunction to restrain the Respondents from opening what they have referred to as Gate B in the Estate and from implementing a court system in the Estate. Injunction has also been sought to stop the Respondents from stopping the tenants in the estate and their visitors from entering or leaving the estate on account of non-payment of service charge and from demanding from the said tenants’ payment of service charge or dealing with them directly.

It is common ground that all the parties to this suit live in the Estate in which they share common facilities like roads, gates, security, lighting for common areas, water for common areas, caretakers for common areas and many others. It is common ground that these common amenities are provided and/or maintained at a cost which cost must be shared by all the residents of the Estate. It follows therefore that each resident of the Estate whether a house owner or a tenant must pay service charge to be used in defraying these shared costs. It is common ground that the Estate has an association (“the Association”) that manages the day today common affairs of the Estate. It is common ground that the Association has been registered as a society under the Societies Act, Chapter 108 Laws of Kenya. It is common ground that the Respondents are officials of the Association. That means that the Respondents were elected by the members of the Association in accordance with the Constitution of the Association so that they can look after their common welfare in the Estate.

I am of the view that it is not the business of the court to interfere with the management of societies. It is the members who give the officials of a society the mandate to run its affairs. I am of the view that any dispute arising from decisions made by officials of a society should be resolved by the members who not only have the power to reverse the said decisions but also to remove the officials from office. Some of the disputes can be escalated to the Registrar of Societies. Whether the Estate should have one or five gates is not for the court to decide. Whether service charge should be paid by the tenants in the Estate or their landlords is not for the court to decide. Whether the service charge is high or low is not for the court to decide; the same applies to the appropriate means for enforcement of the obligation to pay service charge. The court can intervene only if there are breaches of the law or the Association’s Constitution. The parties having agreed to live together or having found themselves together must find a way of resolving their internal disputes. Having formed a society, I believe that as much as possible, they must resolve their issues within the legal framework regulating the operations of societies.

The Applicants have not persuaded me that the Respondents have made any decision that is against the Constitution of the Association or beyond the mandate that was given to them by the members of the Association. The Applicants have also not established that the Respondents have violated their rights to the properties that they own in the Estate. A demand upon the tenants of the Applicants to pay service charge when the Applicants fail to make payment cannot be a violation of the Applicants’ right to property. On the issue of the Respondent’s decision to create a new gate for the Estate and to adopt “a court system” in the Estate, again, the Applicants have not satisfied me that the decision was beyond the mandate of the Respondents or that it would interfere with any of the rights of the Applicants.

In the final analysis and for the foregoing reasons, I find no merit in the Notice of Motion application dated 8th December 2020. The application is dismissed with costs to the Respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF FEBRUARY 2022

S. OKONG’O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiffs

Mr. Musyoki for the Defendants

Ms. C.Nyokabi-Court Assistant