



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO. 21 OF 2021

PAUL GETUMA BUNGU

IBRAHIM OMWENGA BUNGU

LOITI MANONO BUNGU

(Suing as the legal representatives of the estate of

JACKSON BUNGU ONGATA-Deceased.....PLAINTIFFS

VERSUS

KISII NATIONAL POLYTECHNIC – (Formerly known as

GUSII INSTITUTE OF TECHNOLOGY).....1ST DEFENDANT

THE COUNTY GOVERNMENT OF KISII.....2ND DEFENDANT

THE LAND REGISTRAR, KISII COUNTY.....3RD DEFENDANT

THE NATIONAL LAND COMMISSION.....4TH DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs are the sons and legal representatives of Jackson Ongata Bungu-Deceased, who was allotted a plot known as UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z & Y). The Plaintiffs claim that they have been in occupation of the said plot for a period of more than 70 years. The said plot shares a common boundary with land parcel no. KISII MUNICIPLALITY/BLOCK 111/252 which is occupied by the 1st Defendant.

2. It is the Plaintiff’s case that on or about the 10th day of October 2021, the 1st Defendant/Respondent without any notice, instructed persons to forcefully evict the Plaintiffs/Applicants from UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y) claiming that the Certificate of Lease for KISII MUNICIPLALITY/BLOCK 111/252 recently issued to the 1st Defendant included the land parcel known UNSURVYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y). The 1st Defendant then commenced the construction of a perimeter wall into the Plaintiffs/Applicants land prompting the filing of this suit.

3. Together with the Plaintiff, the Plaintiffs/Applicants filed an application dated 12th October, 2021 seeking the following orders:

- a) Spent
- b) Spent
- c) Pending the hearing of this suit there be a temporary injunction restraining each and all of the Respondents, whether by

themselves or through their agents, employees, servants or howsoever from entering, trespassing onto, erecting any form of structures, evicting, interfering with or authorizing interference with the Plaintiffs/Applicants' occupation and enjoyment of the land known as UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z & Y);

d) Pending the hearing and determination of this suit, the Land Registrar, Kisii County and Land Surveyor, Kisii County officially visit and inspect the subject lands UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y) and KISII MUNICIPLALITY/BLOCK 111/252 to ascertain the boundaries of the parcels and actual occupation of the Plaintiffs/Applicants and the Defendants/ Respondents and giving all persons an opportunity of being heard, cause to be defined by survey the precise position of the boundaries in question, file a plan containing the necessary particulars and make a note in the requisite register that the boundaries have been fixed, and the plan be deemed to accurately define the boundaries of the parcels.

4. The application is premised on the grounds set out in the Notice of Motion and the Supporting Affidavit of Ibrahim Omwenga Bungu 2nd Plaintiff) sworn on the 12th October, 2021 on his own behalf and on behalf of the 2nd and 3rd Plaintiffs. He depones that his father Jackson Bungu Ongata-Deceased was allotted the suit property and by virtue of being his sons they are seized of rights over the same.

5. It is his contention that they were born and raised on the suit property and they have their homes and businesses thereon, having been in peaceful, uninterrupted occupation of the property for more than 70 years. They have been paying the land rent and rates in respect of the suit property to Kisii Municipality as per the annexed copies of receipts. It is his further averment that the boundaries between the 1st Defendant and the Plaintiffs are well known and respected and they have never been involved in any re-parcellation of the suit property.

6. It is the Plaintiffs' contention that the 1st Defendant acquired a Certificate of Lease in respect land parcel number KISII MUNICIPLALITY/BLOCK 111/252 pursuant to a defective Part Development Plan that was unlawfully prepared and approved by the 2nd Defendant to include the Plaintiffs' land. The Plaintiffs fear that their homes and businesses are on the verge of being demolished and unless an injunction is issued by this court they will suffer irredeemable loss as they will be rendered homeless and destitute.

7. The application is resisted by the 1st Defendant/Respondent through the Replying Affidavit of David Mwangi, the Chief Executive Officer of the Governing Council and Principal of Kisii National Polytechnic.

8. In the said affidavit, he depones that the 1st Defendant is a public institution registered under the Technical and Vocational Education Act No. 29 of 2013 and the legal owner of the property known as KISII MUNICIPLALITY/BLOCK 111/252 measuring 16.95 hectares. It is his contention that the Plaintiffs, particularly the 1st Plaintiff has encroached of the 1st Defendant's land.

9. It is his further averment that the Plaintiffs have grabbed a road reserve and they are on an expansion mission to grab the 1st Defendant's land. He states that being a government institution, the 1st Defendant followed all due process to acquire their land defined as KISII MUNICIPLALITY/BLOCK 111/252.

10. He depones that KISII MUNICIPLALITY/BLOCK 111 was reserved for public use hence the Plaintiffs are illegally in occupation thereof. He denies that the Plaintiffs have any documents to prove ownership of the suit property as the letter of allotment they have exhibited shows that their lease was to run from 1999 whereas the 1st Defendant has been in possession of the suit property since 1980. He refutes the Plaintiff's claim to UNSURVEYED PLOTS NOS. Z & Y as their letter of allotment does mention such a plot. He adds that the said UNSURVEYED PLOTS NOS. Z & Y are on a road reserve belonging to Kenya National Highway Authority and the same could not have been allocated to the Plaintiffs. He claims that this suit is only aimed at delaying the fencing of the 1st Defendant's land which will only serve to increase costs and is therefore against public policy.

11. The application was canvassed by way of written submissions and the Plaintiffs, 1st and 3rd Defendants filed their respective submissions. The 2nd and 4th Defendants did not file any Replying affidavits or submissions.

ISSUES FOR DETERMINATION

12. Having considered the pleadings, Notice of Motion, rival affidavits and submissions, the issues that fall for determination are:

i. Whether the Plaintiffs/Applicants have met the threshold for the grant of a temporary injunction.

ii. Whether the Land Registrar Kisii County and County Surveyor should visit land parcels number KISII MUNICIPLALITY/BLOCK 111/252 and the parcel of land known as UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y) to ascertain the boundaries of the said parcels and the persons in occupation thereof, fix the said boundaries and file a report in court together with a sketch plan containing the necessary particulars.

ANALYSIS AND DETERMINATION

13. The principles that guide the court in the exercise of its discretion to grant injunctive relief are set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** which are as follows:

“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

14. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is one 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”

15. In the instant case the Applicants who are the sons and legal representatives of the estate of Jackson Bungu Ongata-Deceased, claim that the land parcel known as UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y) was allocated to their father and their family has been in occupation thereof for a period of more than 70 years and that is where they were born. They have their homes and businesses on the said property. They also allege that the boundary between their land and the 1st Defendant's land parcel number KISII MUNICIPLALITY/BLOCK 111/252 has always been known and respected until recently when the 1st Defendant entered their land and wanted to evict them.

16. In their Supporting Affidavit sworn by the 2nd Defendant/ Respondent, they have annexed a copy of the allotment letter issued to their late father on 15th August 1999 and a letter dated 15th September 1997 from the Principal, Gusii Institute of Technology which is the predecessor of the 1st Defendant, stating the boundary separating the college and Mr. Bungu be maintained and respected as the government had allocated the land to Mr. Bungu. They have also annexed copies of receipts of payment of land rent to Kisii Municipality as well as photographs of the developments they have made on the suit property.

17. It is not in dispute that the Plaintiffs have been in occupation of the suit property for many years. Counsel for the Plaintiffs contends that the Plaintiffs have demonstrated that they have a right over the suit property which deserves to be protected and they have therefore established a *prima facie* case with a probability of success.

18. On the other hand, learned counsel for the 1st and 3rd Defendants contends that the Plaintiffs have no valid claim to the suit property in view of the title issued to the 1st Defendant in respect of land parcel number KISII MUNICIPLALITY/BLOCK 111/252 which according to the acreage on the title seems to extend to part of the land occupied by the Plaintiffs. The 1st Defendant contends that KISII MUNICIPLALITY BLOCK 111 was reserved for public use as per the Part Development Plan exhibited by the Plaintiffs. They also allege that the Plaintiffs have encroached on a road reserve.

19. In determining the first question as to whether the Plaintiffs have a *prima facie* case with a likelihood of success, I must be alive to the fact that at this stage I am not called upon to determine the rights of the parties as this will only become clear after a full hearing. I am guided by the case of **Mbuthia Vs Jimba Credit Corporation Ltd (1988) KLR1**, where the court held as follows: -

“in an application for interlocutory injunction, the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties' cases,”

20. On the material placed before the court, I am persuaded that the Plaintiffs/Applicants have demonstrated that they have a *prima facie* case with a probability of success as they have shown that they are in occupation of the suit property and their rights to the suit property are under serious threat as they are faced with imminent eviction.

21. The second question I must determine is whether the Plaintiffs/Applicants have demonstrated that they will suffer irreparable loss if the order of injunction is not granted.

22. The test for irreparable loss is defined in **Halsbury's Laws Of England, Third Edition Volume 21, P.352** as follows:

“Where the court interferes by way of injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds; first that the injury is irreparable and second that it is continuous. By irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter.”

23. The 2nd Applicant has stated on oath that he and his Co-Plaintiffs were born on the suit property and they have lived there all their lives. The photographs of permanent houses and mature trees on the suit property that are annexed to his affidavit are testimony to this. No doubt if the Applicants are evicted from the only place they have known as home, before they are accorded a hearing, they will suffer irreparable loss which cannot be compensated by damages. In any event the purpose of an interlocutory injunction is to preserve the subject matter before the suit is heard and determined and that purpose would be defeated if a temporary injunction is not granted. It is therefore my finding that the Plaintiffs have demonstrated that if a temporary injunction is not granted they will suffer irreparable loss.

24. As I have already held that the Applicants have satisfied the first and second conditions, I need not consider the balance of convenience. Be that as it may, even if I was to consider the same I hold that the balance of convenience tilts in favour of the Plaintiffs/Applicants who have demonstrated that they have been in possession of the suit property for many years. It therefore in the interest of justice that the subject matter of the suit property be preserved until the rights of the parties are determined.

25. I will now move on to the second issue for determination which is whether the Land Registrar, Kisii County and County Surveyor should visit land parcels number KISII MUNICIPLALITY/BLOCK 111/252 and the parcel of land known as UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y) to ascertain the boundaries of the said parcels and the persons in occupation thereof, fix the said boundaries and file a report in court together with a sketch plan containing the necessary particulars.

26. Under Sections 18 and 19 of the Land Registration Act, the power to determine and fix boundaries is vested in the Land Registrar. It is trite law that where law vests power in a certain body or institution, the said body or institution should be permitted to perform its duty before the matter is determined by the court.

27. As the 1st Defendant is agreeable to the proposal by the Plaintiffs, I need not belabour the point.

The upshot is that the application has merit and I grant it and make the following orders.

a) A temporary injunction is hereby issued restraining the Respondents whether by themselves, their agents, servants or employees, or howsoever from entering, trespassing onto, erecting any structures, evicting or interfering with the Plaintiffs/Applicants' possession, occupation and enjoyment of the parcel known as UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y) pending the hearing and determination of the suit herein.

b) The Land Registrar, Kisii County and County Surveyor are hereby directed to visit land parcels number KISII MUNICIPALITY/BLOCK 111/252 and the parcel of land known as UNSURVEYED RESD PLOT-KISII MUNICIPALITY (INCLUSIVE OF UNSURVEYED PLOTS NOS. Z&Y) in the presence of the parties concerned and do the following:

- i. Ascertain the boundaries of the said parcels and the persons in occupation thereof,
- ii. Cause to be defined by survey, the precise position of the boundaries between the said parcels of land and fix beacons
- iii. Make a note in the requisite register that the boundaries have been fixed.
- iv. File a report in court together with a sketch plan containing the necessary particulars in court within 60 days.
- v. The costs of the survey shall be shared equally by the parties.

c) The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 24TH DAY OF FEBRUARY, 2022.

J.M ONYANGO

JUDGE