



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERUGOYA
ELC CASE NO. 94 OF 2014

CHARLES MBARIA KAIMURU1ST PLAINTIFF

DANIEL GITHIOMI MBARIA2ND PLAINTIFF

VERSUS

JOHN RUARA GACHERUDEFENDANT

MURANG'A COUNTY GOVERNMENT.....INTERESTED PARTY

RULING

The plaintiffs/applicants herein filed this suit against the defendant/respondent seeking the following remedies:-

- 1. The defendant, his servants, agents, and/or any other person(s) claiming through her be restrained by permanent order of injunction from entering, attempting to enter, trespassing, attempting to trespass, depositing any waste material and debris and/or in any manner whatsoever from interfering with the plaintiff's use and possession of the suit premises number LOC 19/GACHARAGE-INI/1966/34 and 35***
- 2. Special damages for acts of waste and trespass to be assessed***
- 3. Costs of this suit***
- 4. Any other relief just and equitable to grant.***

The genesis of the claim was that the plaintiffs/applicants are the registered owners of all that parcel of land known as LOC 19/GACHARAGE-INI/1966/34 and 35 (hereinafter the suit properties) on which the defendant has trespassed and is in the process of developing the same.

Simultaneously with the filing of the suit, the plaintiffs/applicants filed a Notice of Motion dated 21st March 2014 seeking injunctive orders to restrain the defendant from interfering with the suit property in terms of the pleadings in the plaint until this suit is determined. That application which is the subject of this ruling was supported by the affidavit of the 1st plaintiff CHARLES MBARIA KAIMURU also sworn on behalf of the 2nd plaintiff DANIEL GITHIOMI MBARIA in which it is deponed, inter alia;

- That the plaintiffs/applicants are the registered proprietors of the suit property and annexed to***

the affidavit were the certificates of lease (annexture CMK 1).

- *That the defendant/respondent is encroaching onto the said suit property and engaging in acts of waste, destruction and removing their structures*
- *That there is therefore need to injunct the defendant/respondent from committing further wastes.*

On his part, the defendant/respondent filed a replying affidavit saying that he has been wrongly enjoined in the suit as his land parcel No. LOC 19/GACHARAGE-INI/1965 on which he lives is infact one and a half kilometer away from the suit property and he cannot possibly interfere with the same and that perhaps the only reason he has been sued is because he was at one time the chairman of Gacharage-ini Dispensary Committee a position from which he has since resigned.

On 2nd July 2014, the Murang'a County Government was allowed to be enjoined in these proceedings as an interested party and they filed grounds of opposition to the application raising the following issues:-

1. *That the said property is public utility plot*
2. *That the said land belongs to a local dispensary*
3. *That the application is un-merited and an abuse of the Court process*

Submissions were invited and although the plaintiffs/applicants filed theirs on 30th September 2014, the defendant did not file any and on his part, Mr. Kimwere for the interested party filed submissions on 22nd January 2015 but the same relate to the application dated 12th June 2014 seeking to enjoin the interested party herein and which application was, as stated earlier, allowed on 2nd July 2014. I toyed with the idea of adjourning this ruling so that Mr. Kimwere can file proper submissions but I decided that the application could easily be determined on the pleadings and the law and that there would be no need to further delay this matter. In any event, even the defendant did not file any submissions and was content with his replying affidavit.

I have considered the application, the rival affidavits, the grounds of opposition, the plaintiffs/applicants submissions and the law.

Being an application for injunction, the same has to be considered in light of the principles laid down in the case of *GIELLA VS CASSMAN BROWN LTD 1973 E.A 358* which are:-

- a. *First, the applicant must make out a prima facie case with probability of success at the trial*
- b. *Secondly, an injunction will not normally be granted unless it can be shown that the applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages and,*
- c. *If the Court in doubt, it will decide the matter on a balance of convenience.*

It is clear from the copies of certificate of lease attached to the supporting affidavit of CHARLES MBARIA KAIMURU the 1st plaintiff/applicant herein that the suit properties are registered in the names of the two plaintiffs/applicants. The 1st plaintiff/applicant is the registered proprietor of Loc 19/GACHARAGE-INI/1966/35 and the certificate was issued to him on 9th September 1999 for a 99 year lease from the County Council of Murang'a. The 2nd plaintiff/applicant on the other hand holds the certificate of lease in respect of parcel of land No. LOC 19/GACHARAGE-INI/1966/34 issued on 13th November 1999 – see annexture **CMK 1**. It has not been suggested either by the defendant or the interested party that the plaintiffs/applicants obtained registration of those parcels in their names through fraud or misrepresentation. Indeed the defendant's defence and replying affidavit are to the effect that his land is a considerable distance from the suit properties while the interested party has alleged that the suit properties are infact public utilities. As to whether or not the suit properties are indeed public utilities is a matter that will be determined at the trial by viva voce evidence. As for now, what this Court has to determine is whether or not the plaintiffs/applicants have established a prima facie case with a probability of success.

A prima facie case was defined in the case of *MBAO VS FIRST AMERICAN BANK OF KENYA LTD*

& TWO OTHERS C.A CIVIL APPEAL NO. 39 of 2002 (2003 e K.L.R) as follows:-

“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”

On the material placed before me, have the plaintiffs/applicants established that they have a prima facie case with a probability of success as defined in the **MBAO** case (supra)? The answer is in the affirmative. Firstly they have demonstrated that they are the registered proprietors of the suit properties. The titles to those properties were issued under the now repealed **Registered Land Act (Chapter 300)** and such registration conferred upon the plaintiffs/applicants the absolute ownership of the suit properties together with all rights and privileges belonging or appurtenant thereto subject only to the other interests recognized in law. As stated above, the defendant/respondent’s response to this is that infact his land is very different from the land subject of this suit. He has infact not challenged the plaintiffs/applicants claim to ownership of the suit properties. The interested party on the other hand claims that the suit properties are infact public utilities but this, as I have mentioned earlier, is a matter for trial. Therefore, by virtue of being the registered proprietors of the suit properties, the plaintiffs/applicants have laid before this Court sufficient evidence of ownership of the suit properties and in my view, subject to any challenge that may be raised about that registration, they have established a prima facie case with a probability of success and accordingly they have met the first principle in the **GIELLA** case (supra).

On the issue of adequacy of damages as compensation for any injury that the plaintiffs/applicants may suffer, it is clear that **Article 40 of the Constitution** protects one’s right to property. The plaintiffs/applicants have annexed to their application photographs of their demolished structures – annexure **CMK 2**. If no injunctive orders are issued, the defendant and the interested party may carry out acts on the land which may alter its character leading to irreversible consequences that may not be compensated in damages. Besides, what the plaintiffs/applicants are alleging would amount to a clear transgression against the law and I would agree with Waki J. (as he then was) in **MOHAMED VS COMMISSIONER OF LANDS & FOUR OTHERS K.L.R (E & L) 1 Page 217** that it can be no answer to such application that the applicant can be compensated by an award of damages in such circumstances. The Court of Appeal also had occasion to deal with a similar issue in **MUIRURI VS BANK OF BARODA (KENYA) LTD K.L.R 2001 183 at page 188** where while dealing with an injunction relating to land, it said:-

“Besides, disputes over land in Kenya evoke a lot of emotion and except in very clear cases, it cannot be said that damages will adequately compensate a party for its loss”

The Court of Appeal in the **MUIRURI** Case (supra) was therefore alive that while in some land disputes, damages may be adequate remedy, perhaps where the land has been used for commercial purposes like say mortgages, it is not always the case.

Taking all the above into account and particularly considering that what is alleged amounts to a transgression of the plaintiffs/applicants right to property, I find that the Notice of Motion dated 24th March 2014 seeking injunctive reliefs is well merited. I therefore grant the orders sought therein with an order that costs be in the cause.

B.N. OLAO

JUDGE

24TH APRIL, 2015

24/4/2015

Before

B.N. Olao – Judge

Gichia – CC

1st Plaintiff – present

Defendant – present

COURT: Ruling delivered in open Court this 24th day of April 2015

1st Plaintiff present

Defendant present.

B.N. OLAO

JUDGE

24TH APRIL, 2015