



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1441 OF 2014

JIDRAPH MWANGI.....1ST PLAINTIFF

KANINI NGURURU.....2ND PLAINTIFF

VERSUS

REGINA NAYA.....1ST DEFENDANT

GUREC SECONDARY SCHOOL.....2ND DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 13th November 2014 in which the Plaintiffs/Applicants seek for orders of temporary injunction restraining the Defendants from entering upon, wasting away, dumping, constructing, alienating or in any way interfering with the parcels of land known as Plot Nos. Y and Z located along Kinyanjui Street, Ziwani (hereinafter referred to as the “suit properties”) pending the hearing and determination of this Application and suit. They also sought for orders directing that the OCPD Pangani do assist in the enforcement of the orders and that the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1st Plaintiff/Applicant, Jidraph Mwangi, sworn on 13th November 2014 in which he averred that at all material times he was the owner of Plot Y allotted to him by the City Council of Nairobi (as it then was) through Letter of Allotment dated 25th February 1999, a copy of which he produced. He also produced a Beacon Certificate dated 18th May 2010 and receipts evidencing payment of rates and rent for Plot Y. He stated further that he had fulfilled the required conditions in the Letter of Allotment and was now awaiting processing of the title deed. He further averred that Plot Z was allotted to his father who is the 2nd Plaintiff/Applicant, Kanini Ngururu, also by the City Council of Nairobi (as it then was) vide Letter of Allotment dated 25th February 1999, a copy of which he produced. He also produced a Beacon Certificate dated 18th May 2010 for Plot Z in the name of Kanini Ngururu. He further stated that he was granted a General Power of Attorney by the said Kanini Ngururu to act in his behalf in this matter. He stated further that his father settled on Plot Z on or about the year 1985 and that he later joined him in the year 1990 and that they have lived there ever since. He further averred that the 1st

Defendant is the owner and proprietor of the 2nd Defendant and that the Defendants were in occupation of the suit properties and were to move out after the same were allotted to the Plaintiffs but that they refused to do so. He averred that after several attempts to have the Defendants vacate the suit properties, he wrote to them on 6th December 2013 while copying the letter to the Chief, Kariokor Location and the OCS, Kamukunji. He further stated that he sought the security assistance of the Deputy Sub-County Commissioner, Starehe when fencing the suit properties on 10th April 2014 but this was not accorded to them. He further stated that on 12th November 2014, he discovered that the Defendants had embarked on constructing permanent buildings on the suit properties without any consent from him.

The Application is contested. The 1st Defendant/Respondent, Regina Naya, filed her Replying Affidavit sworn on 26th November 2014 in which she averred that she is the founder and director of a program called GUREM which runs the 2nd Defendant/Respondent which is a secondary school for destitute and orphaned children on the suit properties since the year 1999. She further averred that the Respondents have since erected structures such as dormitories and classrooms thereon including connecting amenities such as water and electricity thereto. She denied that the Plaintiffs/Applicants were allotted the suit properties and stated that the Letters of Allotment produced by them are forgeries. She further averred that the Defendants/Respondents were allocated the suit properties in 1999 when the land was allocated to the Christ Covenant Church. In proof of that assertion, she annexed a Letter of Allotment addressed to Christ Covenant Church dated 25th February 1999 for Plot J, Kinyanjui Street, Ziwani and a Beacon Certificate dated 25th February 1999 also in the name of Christ Covenant Church for Plot J. She further averred that it is the Defendants/Respondents who have been paying rates and rents for the suit properties and produced various receipts in the name of Christ Covenant Church. She added that facilities on the suit properties are used by students who are destitute from the surrounding slums who have nowhere else to study, eat or sleep. She further stated that if the Application is allowed, these students will suffer irreparable loss. She also stated that even if the Plaintiffs/Applicants were the owners of the suit property, they admitted that as at 1999, the Defendants/Respondents were in occupation thereof and that because they never filed suit at that time to recover the land, their right to sue lapsed after 12 years and they have acquired the suit properties by way of adverse possession.

The main issue that emerges from this Application for my determination is whether or not to issue the temporary injunction that the Plaintiffs/Applicants seek. In deciding whether or not to grant the interlocutory injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

Have the Plaintiffs/Applicants established a prima facie case? This heavily depends on whether the Plaintiffs/Applicants have been able to convince this court, albeit on an interlocutory basis, whether they are the proprietors of the suit properties. In support of their assertion of being the owner of the suit properties, the Plaintiffs/Applicants produced to this court copies of their Letters of Allotment both dated

25th February 1999 and accompanying Beacon Certificates both dated 18th May 2010. On the other hand, the Defendants/Respondents, who also claim to be the owners of the suit properties, relied on a copy of a Letter of Allotment dated 25th February 1999 and a Beacon Certificate of the same date both in the name of Christ Covenant Church and in respect of Plot No. J, Kinyanjui Street, Ziwani. The Defendants also claimed to have been in possession of the suit properties for a period exceeding 12 years and that as a result they had acquired ownership rights over the suit properties by operation of the doctrine of adverse possession. My observation at this stage of this suit is that the Letter of Allotment and Beacon Certificate sought to be relied upon by the Defendants is in the name of Christ Covenant Church, not in the name of the Defendants. Further, those documents relate to Plot No. J and not the suit properties. Further, the Defendants' claim to be entitled to the suit properties by way of adverse possession is just that, a mere claim. There has been no pronouncement by any court that the Defendants have acquired ownership rights over the suit properties. After carefully studying the Letters of Allotment and Beacon Certificates produced by the Plaintiffs/Applicants, I am inclined to find that they do actually show that the Plaintiffs/Applicants do have a valid claim to ownership of the suit properties. To my mind therefore, I find that the Plaintiffs/Applicants have established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiffs/Applicants? Land is unique and no one parcel can be equated in value to another. The value of the suit properties can be ascertained. However, it would not be right to say that the Plaintiffs can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiffs have established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**. This position finds further support in the case of **Sharok Kher Mohamed Ali & Another versus Southern Credit Banking Corporation Ltd (2008) eKLR** where Warsame, J. (as he then was) stated as follows:

“I am satisfied a party deprived of his property through an illegal process would suffer irreparable loss and/or damage. In any case a party entitled to a legal right cannot be made to take damages in lieu of his right. In essence, the damage and/or loss that would be suffered by the plaintiffs would be significant if an injunction is not granted. My position is that a party in contravention of the law cannot be rewarded for his contravention.”

Finally, I must determine in whose favour the balance of convenience tilts. The circumstances of this particular case are that there is a secondary school being operated from the suit properties. The Plaintiffs/Applicants admitted that this school has been going on at the suit properties from the time they were allotted to them. There are classrooms and dormitories which are being used by students. Issuing an interlocutory injunction at this stage of these proceedings will effectively amount to an eviction order of the students and the school. I consider this undesirable prior to the final conclusion of this suit. In the circumstances, I do find that the balance of convenience tilts in favour of the Defendants and further find that the Plaintiffs/Applicants have not satisfied all the 3 conditions for the grant of an interlocutory injunction.

Arising from the foregoing, I hereby dismiss the Application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MAY 2015.

MARY M. GITUMBI

JUDGE