



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 37 OF 2019

TUESDAY GICHUKI.....1ST PLAINTIFF
 HILARY NG'ENO.....2ND PLAINTIFF
 JAMES KAMAU.....3RD PLAINTIFF
 ELIZABETH WANGARI GICHIMU.....4TH PLAINTIFF

(All suing in their behalf and on behalf of the owners of flats in Southend Estate in
 South C as well as members of Southend Residents Self Help Group)

=VERSUS=

SOUTH-END PROPERTIES LIMITED.....1ST DEFENDANT
 CHIEF LAND REGISTRAR, NAIROBI COUNTY.....2ND DEFENDANT
 SOUTH-END PROPERTIES (MANAGEMENT) LIMITED.....3RD DEFENDANT
 TURBISLAM COMPANY LIMITED.....4TH DEFENDANT

RULING

1. There are two applications for determination. The Notice of motion dated 8th April 2019 (amended on 9th December 2019) and the Notice of Motion dated 11th December 2019. The Notice of Motion dated 11th December 2019 was abandoned.
2. The two applications seek the following orders;

(a) A temporary/interim injunction from trespassing, attempting to construct, constructing, dumping/storing any building materials, wasting, alienating and/or interfering in any manner whatsoever with the suit property, disturbing, trespassing on, alienating by way of subdividing or by interfering with boundary marks, authorizing construction of any structure or in any way whatsoever interfering with the Plaintiff's quiet possession, peaceful enjoyment and or ownership on all that suit property known as LR NO 209/10775, LR NO 209/10775/1 and LR NO 209/10775/2, located along Popo Road off Mombasa Road, South C within Nairobi County.

(b) A mandatory injunction be issued against the 1st and 4th Respondents/Defendants compelling them to pull down, demolish and or remove any structure and or buildings they have erected or caused to be put up on the suit property known as LR NO 209/10775, LR NO 209/10775/1 and LR NO 209/10775/2, located along Popo Road off Mombasa Road, South C within Nairobi County in lieu of which the Plaintiffs be at liberty to pull down, demolish and or abate the nuisance created by the Defendants at the Defendants costs.

(c) That the Officer Commanding the nearest police station be directed to assist and ensure compliance by the Defendants with any orders issued by this court.

(d) That this honourable court be pleased to amend its ex parte orders dated 11th April 2019 to include LR NO 209/2170 and LR NO 209/21710 which is part of the suit property herein.

(e) That honourable court issue a temporary injunction over the suit property known as LR NO 209/10775 Grant NO IR 44312, LR NO 209/21709 and LR NO 209/21710 located along Popo Road off Mombasa Road, South C within Nairobi County.

(f) That costs of this application be provided for.

3. The grounds are set out in paragraphs 1 to 21 of the applications.

4. The applications are supported by the affidavit of Hassan Musa Hassan, one of the Plaintiffs sworn on the 8th April 2019. In the amended notice of motion dated 9th December 2019, the affidavit in support is sworn by Tuesday Gichuki, one the Plaintiffs herein. The averments appear to be the same.

5. The applications are opposed. There is a replying affidavit sworn by Davinder Singh Devgun sworn on the 1st April 2019. This was before the notice of motion of 11th February 2019 was abandoned.

6. The 4th Defendant also filed a replying affidavit though Mohamud Hassan Turbi Managing Director, on the 7th June 2019.

7. The 2nd and the 3rd Defendants/Respondents did not file any responses.

8. On the 24th November 2020, the court with the consent of the parties directed that the applications be canvassed by way of written submissions.

The Plaintiffs' Submissions

9. They are dated 29th October 2021. They submit that they have met the grounds upon which a court may grant a temporary injunction. The suit property is in danger of being wasted, damaged or alienated by the Defendants/Respondents. The 1st Defendant has done an illegal subdivision and registered an illegal Deed Plan at the lands registry in total disregard of the applicants' rights over the property. By virtue of the long term leases the 1st and 3rd Defendants were trustees of the Plaintiffs.

10. The 4th Defendant/Respondent will undoubtedly continue with construction works on the suit property if these orders are not granted.

11. An injunction is necessary to stop the Defendants/Respondents from further breaching the contract with them as they have demonstrated. They have put forward the case of **Giella vs Cassman Brown [1973] EA 358**.

12. The Respondents have not disputed that the Applicants are the owners of the various sectional properties built on the suit property as a result of valid contracts between them and the 1st and 2nd Defendants. The Respondents have breached their duty to deliver the amenities contracted for including ample parking spaces, children's playground, a shopping Centre e.t.c because they have illegally subdivided the suit property for their own benefit. The Applicants have a prima facie case with a high chance of success at the trial.

13. The 4th Defendant was aware of the Applicants' leases registered against LR NO 209/10775 as sectional properties. The Applicants will permanently have poor drainage systems, insufficient parking lots, lack of playing ground for their children. This is because the initial plan of the estate did not consider the proposed development by the 4th Defendant/Respondent.

14. The balance of convenience tilts in favour of the Applicants. The Defendants/Respondents do not stand to lose any lawful rights they have over the suit property as opposed to the Applicants who will bear immense suffering and inconvenience if these orders are not granted.

15. The Applicants submit that there are special circumstances warranting the issuance of a mandatory injunction because they have demonstrated that the rights of at least 112 people are being infringed upon by the Defendants/Respondents.

16. There is a purported subdivision of LR NO 209/10775 into LR NO 209/21709 and LR NO 209/21710. This has been admitted by the Defendants/Respondents. They (Defendants) have no objection to the proposed amendment. It is therefore necessary to amend the court order to reflect the real and purported land reference number in the interest of justice. They have put forward the case of **Angela Kageni vs Susan Adhiambo Odongo & Another [2019] eKLR**.

17. They pray that the Applications be allowed.

18. It appears the 1st and 3rd Defendants did not file written submissions.

The 4th Defendant's Submissions

19. They are dated 22nd October 2021. It is now well established that for an applicant to be granted as injunction, one must satisfy the three conditions enunciated in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. It has also put forward the case of **Mrao Ltd vs First American Bank Ltd & 2 Others [2003] KLR 125; Nguruman Ltd vs Jan Bonde Nielsen & 2 Others [2014] eKLR**.

20. The Plaintiffs assert that they are the registered and beneficial owners and are entitled to the possession of all that piece of land known as LR NO 209/10775 yet they have failed to produce any documents of titles to the said property. They have not shown that the leases were endorsed on the certificate of title of LR NO 209/10775 (head title).

21. The history of the LR NO 209/10775 has been captured by the 1st Defendant's replying affidavit. The Plaintiffs did not acquire or purchase the entire LR NO 209/10775.

22. The Sub-Leases held by the Plaintiffs do not confer any enforceable obligation on the part of the 4th Defendant, who is not a party to the said subleases. It has put forward the case of **Savings & Loan (K) Ltd vs Kanyenje Karangaita Gakombe & Another [2015] eKLR**.

23. The 4th Defendant/Respondent has exhibited a certificate of Title showing that it is the lawful registered proprietor of LR NO 209/21709 following registration as proprietor as lessee from the Government of Kenya on 7th December 2017. That it is an innocent purchaser for value without notice of LR NO 209/21709. It has put forward the case of **Microsoft Corporation vs Mitsumi Garage Ltd [2001] 1EA 129**.

24. The Plaintiffs have failed to sufficiently demonstrate a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained. From the material presented to this court, it cannot be said that there exists a right on the part of the Plaintiffs which has apparently been infringed by the 4th Defendant to call for an explanation or rebuttal from the 4th Defendant.

25. In order to show irreparable harm an applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. It has put forward the case of **Pius Kipchirchir Kogo vs Frank Kimeli Tenai [2018] eKLR**.

26. The Plaintiffs have failed to show that the alleged construction by the 4th defendant has irreparably damaged or interfered with their quiet enjoyment of their portion of the suit property.

27. The balance of convenience does not lie with the Plaintiffs. It has put forward the case of **Pius Kipchirchir Kogo (Supra)**. The balance of convenience lies in favour of the 4th Defendant since the Plaintiffs have failed to either demonstrate any legal right of ownership to LR NO 209/21709 or establish a prima facie case, whereas the 4th Defendant has sufficiently demonstrated that it is an innocent purchaser for value without notice of LR NO 209/21709. The inconvenience to the 4th defendant far outweighs the inconvenience caused to the Plaintiffs if the injunction was granted.

28. In an application for mandatory injunction an applicant must establish the existence of special circumstances. An applicant must prove his case on a standard higher than the standard in prohibitory injunctions. It has put forward the cases of **Kenya Breweries Ltd vs Washington O. Okeyo [2002] Eklr; Nation Media Group & 2 Others vs John Harun Mwau [2014] eKLR**. The Plaintiffs have failed to demonstrate the existence of any special and exceptional circumstances that would warrant the grant of orders of mandatory injunction.

29. The Plaintiffs are not entitled to the reliefs sought and the application ought to be dismissed with costs.

30. I have considered the Notice of Motion and the affidavits in support. I have also considered the affidavits in response. The rival submissions and the authorities cited. The issues for determination are:-

(i) Whether the Plaintiffs'/Applicants' application meets the threshold for grant of temporary injunction.

(ii) Has it met the threshold for grant of mandatory injunction?

(iii) Who should bear costs of this application?

31. At this juncture, it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for injunction the onus is on the Applicant to satisfy the court that it should grant an injunction. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

32. It is the Plaintiffs'/Applicants' case that they are owners of various sectional properties erected on the suit property as a result of valid contracts between them and the 1st and 3rd Defendants/Respondents. Further that the 1st and 3rd Defendants/Respondents have breached their duty to deliver the amenities contracted for including ample parking space, children's playground, shopping centre e.t.c because they have illegally subdivided the suit property for their own benefit.

33. In response, the 1st Defendant filed a replying affidavit sworn by Davnder Singh Devgun. In paragraph 7 he depones:

"That I confirm that the Plaintiffs have never at anytime had any interest in the 1st Defendant and/or any proprietary and or enforceable right over the 1st Defendant's property known as LR NO 209/10775 (IR 44312/1"

In paragraph 11 he depones:

"That the Plaintiffs acquired by way of subleases various flats built on LR NO 209/10775 in phase one of a project dubbed

“South End Flats”.

I confirm that the Plaintiffs did not purchase the entire LR NO 209/775 (IR 44312/1”

I find that these averments have not been controverted by the Plaintiffs/Applicants.

34. Of course the Plaintiffs/Applicants would at the trial tender evidence to support their claim that they purchased the entire LR NO 209/10775.

35. The 1st Defendant’s replying affidavit captured the history of LR NO 209/10775 (IR NO 44312/1). It is not in dispute that the said parcel has now been subdivided.

36. It the 4th Defendant’s case that it is the registered proprietor of LR NO 209/21709 from 7th December 2017. The same is a subdivision of LR NO 209/10775. It contends that it is an innocent purchaser for value without notice.

37. I have considered the rival submissions and I find that the Plaintiffs/Applicants have failed to establish a prima facie case with a probability of success at the trial.

38. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Limited & Another [1990] KLR 557** (Bosire J as he then was) held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

The Plaintiffs/Applicants have stated that the 4th Defendant/Respondent is constructing on a portion which is a sub-division of LR NO 209/10775. I find that they (Plaintiffs) do not deserve this courts protection.

39. The Plaintiffs/Applicants confirm that the 1st Defendant/Respondent has subdivided the suit property and registered a Deed Plan at the lands registry in total disregard to their right over the suit property.

40. This confirms that the 4th Defendant’s/Respondent’s assertion that it is the registered owner of LR NO 209/21709 (a subdivision of the LR NO 209/10775).

41. The Plaintiffs/Applicants also seek that the 4th Defendant/Respondent be compelled to pull down, demolish and remove any and all structures and or buildings they have erected or caused to be placed on all that property known as LR NO 209/21709 and LR 209/21710 pending the hearing and determination of this suit. In the case of **Kenya Breweries Ltd & Another vs Washington O. Okeyo [2002] eKLR**, the Court of Appeal quoted with approval the English decision in the case of **Locabail International Finance Ltd vs Agro export and Others [1986] 1 ALLER 901** where it was stated:-

“A mandatory injunction ought not to be granted on an interlocutory application in the essence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction, the court had to feel a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than wan required for a prohibitory injunction”.

42. Similarly in **Nation Media Group & 2Others vs John Harun Mwau [2014] e KLR** the Court of Appeal stated:-

“It is trite law that for an interlocutory mandatory injunction to issue, an applicant must demonstrate existence of special circumstances..... A different standard higher than that in prohibitory injunction is required before an interlocutory mandatory injunction is granted. Besides existence of exceptional and special circumstances must be demonstrated as we have stated a temporary injunction can only be granted in exceptional and in the clearest cases”.

43. I am guided by the above authorities in finding that the Plaintiffs/Applicants have not demonstrated any special circumstances to warrant this court to issue orders to compel the 4th Defendant/Respondent to pull down and or demolish the structures.

44. I also find that the Plaintiffs/Applicants case is not a clear case that it ought to be decided at once.

45. All in all, I find no merit in the application and the same is dismissed. The Plaintiffs/Applicants are however at liberty to amend the Plaint to reflect the Land Reference Numbers upon sub-division. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 10TH DAY OF FEBRUARY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Ms Mukala for the Plaintiffs

Mr. Kivindyo for the 1st Defendant

Mr. Njokaiti for Mr. Busaidy for the 4th Defendant

No appearance for the 2nd and 3rd Defendants

Steve - Court Assistant