REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC NO. 352 OF 2012

MWAMBU MBUVI MAINGI & 15 OTHERS…….....……..PLAINTIFF

=VERSUS=

KENYA EDUCATION MANAGEMENT INSTITUTE…….....
……1ST DEFENDANT ATTORNEY GENERAL…….....…….……2ND DEFENDANT

RULING

Application

The Plaintiffs filed an application dated 21/6/2012 seeking an order that there be a temporary order of injunction restraining the Defendants from evicting, demolishing or otherwise interfering with the Plaintiff's suit premises on L.R. 16124 Soweto Resettlement Scheme pending the hearing and determination of the suit. The application is premised on grounds that the Plaintiffs are under reasonable apprehension that the Defendant is making discreet attempts without proper notice to evict or demolish the Plaintiffs' properties which is imminent. Consequently the Plaintiffs avers that they stand to suffer irreparably unless the Defendants are restrained and further that the suit would be rendered nugatory but for the intervention of the Court.

Mwambu Mbuvi Maingi, duly authorized by the residents of Soweto resettlement scheme, swore the affidavit in support of the application on 21/6/2012. He deposed that L.R. 16124 (*hereinafter the suit property*) registered in the name of Highridge Teachers College, was allocated to them between 1990 to 1996 when the Government located temporary plot sub-divided from the suit property and that they lawfully entered and took actual possession where they have remained uninterrupted since then. The deponent stated that there have been several confrontations between the Plaintiffs and the 1st Defendant by virtue of the Plaintiffs' occupation, which have been referred to the local administration officer who have convened several public gatherings in a bid to resolve the conflicts. It was the deponent's disposition that sometime in 1996 one such public gathering was held where it was resolved that the Plaintiffs would continue in occupation of the suit property and title issued to their respective plots. However the Plaintiffs occupation would not have any prejudice to the Defendant's right to ownership and right to have possession and occupation thereof. The deponent stated that it was also resolved that the

1st Defendant would review its boundaries on the understanding that there will no trespass to beyond the erected beacons.

The deponent outlined the following conditions agreed to govern both parties' occupation on the suit property:

a. *The Plaintiff would not trespass or put up any structures beyond the erected beacons.*
b. *The 1st Defendants would not extend the boundaries to the area which is occupied by the Plaintiffs without knowledge and express consent and authority of the Plaintiffs;*
c. *The Plaintiffs in occupation of the suit property would be duly registered and such a register would specify, inter-alia, the acreage of each plot, the number of houses in each homestead, and subsequently issued with a title deed.*
d. *The Plaintiffs and the Defendants would execute a statement to the effect that they agreed to be bound by the terms and conditions failing which they would be evicted from the property.*

The deponent contended that the Plaintiffs were to acquire exclusive rights either as to possession or ownership of the suit property and as a result, the Plaintiffs developed semi-permanent and permanent residential houses. The deponent states that the Defendant's action therefore is malicious and unlawful and thus unless the Court issues orders restraining the Defendants, the Plaintiff shall suffer irreparable loss. In support of the application, the deponent annexed several letters of diverse dates between 1990 – 1994 addressed to members formerly of Gitau and Kibagage Villages Resettlement Scheme. The letters are signed by the District Officer, Embakasi Division allocating plots at Soweto to the said members on a temporary basis, subject to the City Commission By-Laws in force. The deponent also annexed photographs to show the permanent and semi-permanent structures constructed on the suit property and a survey plan.

Response

Dr. Wanjiru Kariuki, Director /Chief Executive Officer of the 1st Defendant swore a Replying Affidavit on 18/10/2012 in response to the application. The deponent stated that the 1st Defendant is the successor of Kenya Education Staff Institute, vide Legal Notice No. 163/2011 contained in the Education (Kenya Education Management Institute) Order, 2011. The deponent referred to a Title document for L.R. No. 16124 I.R73320 measuring 15.45 hectares and deposed that the suit premises was allocated and registered in the name of the Board of Governors of Highridge Primary Teachers Training College by the Government and it is now vested in the 1st Respondent. Further that it has never been sub-divided and has never been available for allocation, allotment or alienation to third parties including the Plaintiffs. It was the deponent's averments that on diverse dates material to the suit, the Plaintiffs unilaterally and unlawfully encroached on the suit premises comprising of 1.4 hectares and erected temporary, semi-permanent and permanent structures thereon. The deponent referred to a Notice placed by the 1st Defendant on the Kenya Times Newspaper of 23/11/2009 (annexed and marked "KEMI-2") deposing it warned the Plaintiff that their occupation on the part of the suit premises was unlawful and amounted to trespass.

The deponent denied the Plaintiff's claim that the 1st Defendant had participated in a public gathering in 1996 which resolved that the Plaintiffs would be deemed to occupy part of the suit property and titles issued to their respective plots. She deposed that if there were any meetings between the 1st Defendant, the Applicant and the local administration, it was meant to facilitate a peaceful removal of the Plaintiffs from the suit property.

The deponent deposed that the user under the Grant is for educational purposes and no sub-division is allowed and consequently, any alleged agreement is therefore null and void *ab initio*. Further that the construction of residential houses is pertinently illegal and in clear breach of the special conditions and terms of the registered Grant. It was her disposition that the 1st Defendant is at liberty under law to evict trespassers including the Plaintiffs and that in the event that they suffer loss and damage, then they are the authors of their own misfortune as their continued occupation is unlawful and therefore amounts to

trespass on the suit premises. The deponent stated further that the Plaintiffs had failed to show the portions they claim to have been surveyed, demarcated and excised from L.R. 16124.

Submissions

The application was canvassed by way of written submissions. Oduor Henry John Advocate for the Plaintiff filed submissions dated 13/2/2013 wherein Counsel submitted that the 2nd Defendant who allocated the property to the Plaintiff has not opposed the application and documents annexed thereto. Counsel submitted that the Plaintiffs had demonstrated that they have a prima facie case which chances and that the orders sought ought to be granted to allow the Plaintiffs to ventilate their issues at the main hearing. Counsel submitted further that the 1st Defendant will suffer no prejudice as on its own admission, the Plaintiffs have resided thereon for a long period of time and that the 1st Defendant has never moved to court to challenge the occupation. Counsel submitted that the balance of convenience tilts in favour of the Plaintiffs who stood to suffer irreparably if the orders sought are not granted.

Gathumbi & Company Advocates for the 1st Defendant filed submissions dated 15/4/2013. Counsel submitted that it is trite that a party claiming the right to own or occupy land by virtue of the long stay or occupation thereof must identify the portion of land in question and show location of the distinct portion of the land claimed. Counsel submitted that there was no evidence adduced by the Plaintiffs of sub-division or demarcation of the suit property. Counsel submitted that **Order 37 Rule 7(2) of the Civil Procedure Rules** requires that a certified extract of the title to land in question should be annexed to the affidavit in support of the application. In support of this submission counsel cited the case of **Kasuve v Mwaani Investments Limited & 4 Others 2004 1 KLR 184** where the Court of Appeal held:

"*the identification of the land in possession of an adverse possessor is an important and integral part of the process of proving adverse possession.*"

On the form of the application, counsel submitted that the application for injunction is grounded on a claim for adverse possession but disguised as a claim to occupy and own land. Further that the claim is brought by way of a Plaint which does not meet the requirements of Order 37 Rules 1 & 2 of the Civil Procedure Rules, to wit the claim shall be made by Originating Summons, and the summons shall be supported by an affidavit to which a certified extract of the title to the land in question should be annexed. It was counsel's submission that the Plaintiffs have a defective claim having failed to meet the requirements of Order 37 and hence must fail. Counsel also submitted that the property is vested in the 1st Defendant, a State Organ and is public land pursuant to Article 62(1)(b) of the Constitution which provides:

"*Land lawfully held, used or occupied by any state organ except such land that is occupied by the state organ as lessee under private lease*."

Consequently, counsel submitted, there can be no right to claim adverse possession or right to occupy public land however long the adverse occupation has been without let or hindrance from the Government. Counsel referred the Court to the case of **Faraj Maharus (Administrator of the Estate of Khadija Rajab Suleiman) v J.B. Martin Glass Industries & 3 Others C.A No. 130/2003** where the Court held,

"*…there can be no adverse possession on public land or Government Land however one may have been squatting thereon without let or hindrance from the Government. Therefore the Applicant cannot benefit from the period of this occupation of the disputed property*."

Counsel submitted that on the Plaintiffs' own admission, the moved into the property on the strength of temporary letters of allocation and as such, they cannot claim title to the same. Counsel relied on the **Faraj Maharus case** (supra) where the Court held:

"*It is indeed trite law in Kenya that a temporary Occupation License to occupy Government Land is not sufficient to create or transfer title to the grantee or his personal representative*."

On whether the Plaintiffs had met the threshold of obtaining an injunction order as established in **Giella v Cassman Brown & Co. Ltd (1973) EA 358,** counsel submitted as follows. First, the Plaintiffs had failed to show that they are owners or have a better title to the suit property and have acquired proprietary interest known in law. Further that the Plaintiffs must adduce evidence which show an infringement of their right and the probability of success on trial. Thus, it is not sufficient to avail discredited evidence or raise unsubstantiated claims as those contained in the Plaintiffs' annexures. Secondly, the Plaintiffs had not shown that they would suffer irreparable loss if the injunction is not granted. Counsel submitted that it is evident that the Plaintiffs place reliance on the temporary letters of allocation which by their very nature limits what a holder can do such as a holder thereof cannot erect permanent buildings on such land. Counsel also submitted that there is no evidence adduced that the Defendants will be incapable of paying damages should the court award damages to the Plaintiffs. Thirdly, counsel submitted that injunction is an equitable relief and therefore the Court is called to consider the circumstances obtaining in considering the balance of convenience. Counsel submitted that the balance of convenience tilts in favour of the 1st Defendant as the suit property is vested in it for use of educational purposes. Further that title thereto can only revert to the Commissioner of Lands or the National Land Commission but not the Plaintiffs. Counsel urged that the application be dismissed with costs.

Determination

In determining an application for grant of injunctive reliefs the Court is guided by the principles enunciated in **Giella –V- Cassman Brown Co. Ltd (1973) EA 358** that:

"*First, an applicant must show 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 an award of damages. Thirdly if the court is in doubt, it will decide an application on a balance of convenience*"

Silas Munyao J. in *Ngamate Wandongu V Esther Njoki Kibunja [2013] eKLR* observed that

*"In order to determine whether the plaintiff has laid out a prima facie case, an assessment must inevitably be made of his case, as pleaded, and as buttressed by the supporting material in the supporting affidavit. Where a response has been filed by the respondent, such response must be factored in when considering whether a prima facie case has been laid out.***"**

The Plaintiffs seek injunction orders to restrain the 1st Defendant from evicting them and demolishing their structures pending the outcome of the suit. It is their contention that if the orders sought are not granted, they shall suffer irreparable loss and the suit shall be rendered nugatory. The Plaintiffs base their application on letters executed by the District Officer Embakasi allocating plots to them albeit on a temporary basis. The Plaintiffs also stated that in a public gathering meeting, it was resolved that they would continue in occupation of their respective plots but not encroach beyond erected beacons that mark the boundaries of the 1st Defendant's section of the property.

These allegations are vehemently denied by the 1st Defendant who avers that no such meetings took place and if it did take place, it was purposely to have the Plaintiffs vacate the property peacefully. The 1st Defendant is a state organ and avers that the title to the suit property was vested in it. The deponent on behalf of the Plaintiffs in the Supporting Affidavit deposed that the Plaintiffs and Defendants mutually agreed on conditions governing the occupation of the suit property by the Plaintiffs and 1st Defendant and that the same would be reduced into writing and executed as an indication that both parties were bound by such an agreement. The Plaintiffs however did not avail these statements and subsequently in November 2009, the 1st Defendant issued a Notice to all that the suit property is not for sale. The Court is therefore unable to conclusively determine that the meeting took off and binding conditions mutually agreed as alleged by the Plaintiff.

Other than the letters of allocation of plots on a temporary basis, there is nothing else going for the Plaintiffs. It matters not that the Plaintiffs were issued with temporary allocation letters by the provision

administration and the Attorney General who has been sued herein has not filed a response objecting to the same. I agree with the submissions made by counsel for the 1st Defendant that temporary allocation letters do not confer proprietary interests on a property. In effect therefore the Plaintiffs are trespassers on the 1st Defendant's property, the latter being an absolute and indefeasible owner thereof pursuant to Section 23(1) of the Registration of Titles Act (now repealed). In the circumstances, I find that the Plaintiffs have not established a prima facie case and I therefore decline to issue a temporary order of injunction.

I am however conscious that the resultant effect of this ruling is that the Plaintiffs will be evicted and their structures demolished from the suit premises, rightly so because *a trespasser must give way to a title holder*. See **Lucy Nduta Kamau v Machithi Autospares & 2 others [2010] eKLR.** However, I take judicial notice that the Plaintiffs have resided on the suit property for over 20 years now and it is only just and fair that they be given sufficient notice to move out of the property. Sufficient notice has been subject of litigation in the Constitutional and Judicial Review Divisions of the High Court. See the cases of **Ibrahim Sangor Osman & Another –vs- Minister for State for Provincial Administration & another Embu HCCC No. 2 of 2011** *the court held that a notice to vacate within 21 days issued to the petitioners in that case was unreasonable***,** and **Susan Waithera Kariuki & 4 Others –vs- Town Clerk Nairobi City Council & 2 Others Petition No. 66 of 2011** where the Court held: *It is unreasonable and indeed unconstitutional for the respondents to give the petitioners one or two day notice to move out of their respective homes even without giving them any reason thereof and immediately upon expiry of the short notice embark on forceful eviction and demolition of their homes.* The problem is further aggravated by the lack of legal guidelines governing evictions in Kenya. The Courts have called upon state organs to carry our evictions in a humane manner. See the case of **Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 2 others [2011] eKLR** where the Court held**,** *At some particular point in time the tenants will have to move out of the estate but when that time comes, that ought to be done in a humane manner…"*

From the foregoing, and in exercising the discretion pursuant to the provisions of **Section 3A of the Civil Procedure Act,** I direct that the 1st Defendant shall serve a 5 month notice to the Plaintiffs and other residents of Soweto Resettlement Scheme, with a reminder on the last month for the said residents to voluntarily leave the suit property. In default, the 1st Defendant shall be entitled to evict the Plaintiffs in a humane manner. On the subject of costs, I order that each party shall bear their own costs.

Dated, signed and delivered this 25th day of March, 2014

L. GACHERU

JUDGE

In the Presence of:-

…….For the Plaintiffs

…….For the 1st Defendant

……..For the 2nd Defendant

Lukas: Court Clerk

L. GACHERU

JUDGE