



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

PETITION NO. 143 OF 2012

JOHN OCHIENG OCHOLLA.....1ST PETITIONER

LYDYA OKOTH.....2ND PETITIONER

(Suing as the Chairman and Secretary of the Langata K.P. A. Nairobi West Self Help Group)

VERSUS

WOOLMATT LTD.....1ST RESPONDENT

DEPAL DEVELOPMENT LTD.....2ND RESPONDENT

CITY COUNCIL OF NAIROBI.....3RD RESPONDENT

COMMISSIONER OF POLICE.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

RULING

1. The Petitioners are said to be the leaders of an entity known as Langata K.P.A Nairobi West Self Help Group and have brought this Petition heren on their own behalf and on behalf of eighty (80) other members of the said Self Help Group. In their Chamber Summons Application dated 10th April 2012, they seek orders against the Respondents restraining them from advertising for sale, selling, transferring, charging or dealing with LR Nos. 209/10636 and 35 pending the hearing and determination of the Application and the Petition herein. They also prayed to be awarded costs.

2. On 5th November 2012, parties appeared before me and recorded a consent order withdrawing the Petition as against the 1st and 2nd Respondent.

3. The 5th Respondent has failed to file any reply to the application before me. And so I do not know what its position as regards the matters in contest are.

4. In his affidavit sworn on 10th April 2012, the 1st Petitioner contends that on the morning of 2nd April 2012, at 3 a.m, the 3rd Respondents' agents, employees abd or officers under the supervision of police officers led by the Nairobi Deputy Provincial Police Officer one Jasper Ombati demolished residential houses of the Petitioners and other members of the Langata K.P.A Nairobi West Self Help Group in L.R NO. 209/10636 and 35 (suit land) without notice and when **HCCC No. 464 of 2011** is still pending in court.

5. They claim that they have been living on the suit land without interruption or disturbance for a period of over 23 years and they allege that they have as a result acquired title by way of adverse possession.
6. They further contend that the demolition has destroyed their houses and livelihoods and the actions above have violated their constitutional right to own property since they have been deprived of their property without the Respondents following the due process as provided by the Constitution. They also allege that their right to fair administrative action as provided under Article 47 of the Constitution has been violated because their houses were demolished without prior notice of intention to demolish being given, demolitions were done at night and there is still pending a court case, **HCCC No.464 of 2011** in court to resolve the ownership dispute.
7. In his submissions, the 4th Respondent alleges that the Petitioners have failed to disclose which of their constitutional rights have been violated. They claim that it is not sufficient to merely state the Articles of the Constitution that have been violated without proving how they have actually been violated.
8. They also contend that the Provincial Police Officer and police officers never participated in the demolition and that if they were at the scene their presence was for the purpose of maintaining peace and security only.
9. In response to the Petitioner's claim on adverse possession, the 4th Respondent contends that the Petitioner has failed to follow the laid down legal procedure in that regard and has totally misapprehended the law since no title to land can be acquired by way of adverse possession without following the requisite procedure for proving such a claim.
10. Having set out the parties contention as above, it is clear to my mind that the primary issue for determination is whether this court can issue the conservatory orders sought.
11. The Petitioners seek to restrain the Respondents from advertising for sale, selling, transferring, charging or dealing with LR No. 209/10636 and 35 in any manner pending the hearing and determination of the application and the Petition herein. They peg their case on adverse possession which order they have also sought in prayer (a) of their Petition dated 10th April 2012.
12. The conditions for granting an interlocutory injunction are now settled in **Giella -vs- Cassman Brown & Co. Ltd [1973] EA 358** are as follows; first an applicant must show a *prima facie* case with 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 and thirdly that if the court is in doubt it will decide the application on a balance of convenience.
13. Applying these principles in the present case I am not satisfied that the Petitioners have established a *prima facie* case with a probability of success. They have no title to the suit land, they are claiming title to the suit land by way of adverse possession in a Constitutional Petition for alleged violation of rights. I am also certain that, the order of adverse possession has also been sought in **HCCC No.464 of 2011**. The Petitioners have not told me the status of **HCCC No.464 of 2011** and whether any conservatory orders were issued therein or not. They have also failed to show that as the present time they are actually in occupation of the suit premises. I have seen pictures attached to the affidavit of the 1st Petitioner and they clearly indicate that the structures on the land have been flattened. Any orders issued without being in the nature of a mandatory injunction to return them to possession would be in vain.
14. It is also clear to my mind that an interlocutory injunction will not be granted unless the applicant might suffer irreparable injury, which would not adequately be compensated by an award of damages. I say this because a valuation report dated 24th August 2012 has been filed and the value of the demolished structures has been put at Ksh. 27 million. If so, the damages have been quantified and it cannot be said to be irreparable. In the circumstances I decline to grant a conservatory injunction as prayed.

15. I must however address one more issue. The Petitioners contends that there is another suit being **HCCC No.464 of 2011** pending in court over the same subject matter. In the circumstances I am of the view that these two matters need to be resolved together in order to avoid multiplicity of suits and also to avoid the issue of forum shopping. Furthermore, I see no prejudice or injustice that may be occasioned on either parties by consolidating, **HCCC No.464 of 2011** and **Petition No. 143 of 2012** for their quick disposal. And this is in line with the edict in the Constitution at **Article 159 (2) (b)** that justice shall not be delayed.

16. For the reasons stated above, I decline to grant any of the prayers sought in the application before me and order that the proceedings in **Petition No. 143 of 2012** be consolidated with **HCCC No.464 of 2011** for hearing and determination. I will also make no order as to costs which shall abide the Petition.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF JANUARY, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Wamosa holding brief for Mr. Wakori for 4th and 5th Respondent

No appearance for other parties

Order

Ruling duly delivered.

ISAAC LENAOLA

JUDGE