



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 26 OF 2012

**JOSEPH KAMAU
MBURU MWANGI
ESTHER WANGUI
NJOKI WANJIE
MARY NJERI
MWANGI MACHARIA
ERASTUS WAINAINA
FELIX MAINA.....APPLICANTS**

VERSUS

**ATTORNEY GENERAL.....1ST RESPONDENT
CITY COUNCIL OF NAIROBI.....2ND RESPONDENT**

AND

**BENSON KIMANZI.....1ST INTERESTED PARTY
OBADIAH KIMANZI.....2ND INTERESTED PARTY
BONIFACE KIVUNZI.....3RD INTERESTED PARTY**

RULING

Introduction

1. The Applicants in this case are all residents of the Ex-Grogon Village in Nairobi and bring the suit on their own behalf and that of other residents in the area. The Interested Parties are officials of an entity known as Christ Chapel Ministries and the Applicants contend that the allocation of letters of allotment in respect of a parcel of land known as x42, in Huruma Estate, Nairobi to the Interested Parties was unlawful and they want the court to uphold and sanction their rights under the Constitution to adequate and accessible housing and livelihood. The Applicants also claim that approximately 300 families have enjoyed quiet uninterrupted occupation on the land in question from 1979 to date and they will suffer immensely if the court does not intervene.

Case for the Applicants

2. In their Notice of Motion dated the 20th January, 2012, the Applicants seek the following reliefs;

i. *That an interim injunction be issued restraining the 1st, 2nd and 3rd Interested Parties, their servants or agents from harassing, evicting or otherwise interfering with the Applicant's occupation and use of all that piece of land allegedly known as plot or parcel number X42 in Huruma area, currently occupied by the Applicants and the members of the Ex-Grogon Slum Welfare Self Help Group and members of the Ex-Grogon Slum and Land and Housing Co-operative Society.*

ii. *That this Honourable Court do issue a declaration that any alleged allocation, or any purported allocation, by the City Council of Nairobi, the 2nd Respondent herein, of all that piece of land allegedly known as plot number X42, Huruma and the surrounding land occupied by the Applicants and the other members of the Ex-Grogon Slum Welfare Self-Help Group and members of the Ex-Grogon Slum and Land Housing Co-operative Society that is being claimed by the 1st, 2nd and 3rd Interested Parties in High Court ELC 411 of 2011 is invalid and is in violation of the Applicant's Constitutional right to adequate and accessible housing.*

iii. *That this Honourable court do issue a declaration that the alleged alienation and/or allocation to any individual or any other party of the land allegedly known as plot or parcel number X42 or any Part of the land on which the Applicants' reside is in breach of government policy of upgrading informal settlements and ensuring access to adequate and accessible housing to residents of informal settlements, including the Applicants.*

iv. *That this Honourable Court do issue a declaration that the alleged alienation and/or allocation to any individual of the land allegedly known as plot or parcel number X42 or any part of the land on which the Applicants' reside is unlawful, null and void;*

v. *That this Honourable Court do issue a declaration that the land allegedly known as plot or parcel number x42 and any other land on which the residents have been residing in Huruma estate is community land as contemplated by Article 63 of the Constitution of Kenya.*

3. The Application was supported by the Affidavit of Joseph Kamau, a resident of Ex Grogon Slum in Huruma sworn on the 20th January, 2012. In that Affidavit, the Applicants contend that the land in question is public land where the 2nd Respondent, the City Council of Nairobi had allowed the Applicants to build structures which they could rent and even transfer to third parties.

4. According to the material before court, the Applicants and their families were originally squatters who occupied the area along the Nairobi River on Kirinyaga Road, also known as Grogan area. They were evicted in 1979 and were later resettled on the land forming the suit property in Huruma, Nairobi. The Applicants, together with other former residents of the Grogan area, upon being resettled in Huruma organized themselves and formed a group known as the *Ex-Grogan Slum Welfare Self Help Group*. That for a long time, the Applicants lived in deplorable conditions, devoid of social amenities such as roads, sewers and toilets and the situation obtain to date.

5. It is the Applicants' averment that an upgrading project was began by the City Council, various civil society organizations and the residents of five settlements of the Huruma area, namely, Kambi Moto, Mahira, Redeemed, Ghetto and Gitathuru. These parties worked closely to upgrade the dwellings and living conditions of the residents of the Huruma area in a co-ordinated fashion.

6. Under the Slum upgrading initiative, the City Council of Nairobi undertook to provide sanitary facilities and street lighting for the benefit of the residents. That indeed, the City Council entered a **Memorandum of Understanding** with the Applicants and some civil society groups in which it undertook to facilitate the upgrading initiative and allocate the subject parcel of land to the Applicants on a communal basis. The Memorandum is annexed to the affidavit in support of the Application.

7. The Applicants also rely on a letter dated May, 2007 in which the City Council gave written approval to the Community's request to upgrade the area as part of the on-going slum upgrading process. The Applicants claim they have abided by the City Council's stipulated requirements and even proceeded to survey the land and enumerate its occupants and obtained Part Development Plan and submitted plans for the permanent structures they would build. They contend that they are deserving of the orders sought.

1st & 2nd Respondent's Case

8. The 1st and 2nd Respondents ("Respondents") filed grounds of opposition on 7th March, 2012, while the 2nd Respondent filed a Replying Affidavit dated 2nd March, 2012 respectively. The Respondents opposed the Petition on the grounds that it does not disclose any violation or threat of violation of the Petitioner's rights and freedoms.

9. By a Replying Affidavit sworn by A.J. Owuor, the acting Director, Legal Services of the 2nd Respondent dated 2nd March, 2012, the Respondent, contested this court's jurisdiction in hearing the matter arguing that the matters ought to be litigated elsewhere.

10. It is also the 2nd Respondent's case that the Applicants ought to be evicted because they illegally invaded the 2nd Respondent's land and that this court cannot sanction an illegality by allowing the Applicants to remain on the suit property. It was also contended that the Applicants were trespassers who had been carrying out illegal activities of building temporary structures, letting and/or selling them without the knowledge or permission of the 2nd Respondent and cannot be allowed to benefit from their illegal actions.

11. Further the 2nd Respondent's case is that the suit land belonged to the City Council of Nairobi and that the Applicants have never been its owners and lacked any documents to support their claims that the Council allocated them the said parcels of land. It discounted the Applicants' reliance on the Slum upgrading project arguing that such initiative could not pass ownership of the said piece of land to the residents of the area. That it was not a legally binding document and that it was wanting in its execution therefore unenforceable.

12. It was further pointed out that the present matter is an abuse of the court process as in ELC No. 411 of 2011, the Interested Parties had sued some of the Ex-Grogan Slum Welfare Members claiming they had been allocated part of the suit property. The Respondent thus maintains that the present application is *res judicata* as the parties seek similar reliefs and it is between the same parties as that in the ELC No. 411 of 2011. The 2nd Respondent cited the case of Fleur Investment Ltd v the Permanent Secretary Ministry of Roads & 4 others, Nairobi Petition No. 173 of 2011 in support of this proposition. It is the Respondent's case that if this Petition is allowed to go on, there will be a multiplicity of suits which may lead to conflicting decisions and which may bring the administration of justice into disrepute.

13. In their Supplementary Affidavit dated 17th April sworn by Mr Joseph Kimani, a resident of Ex-Grogan Slum in Huruma the Applicants maintained that the suit was properly before this Honourable court as the Applicants' grievances could only be ventilated in this court. They maintain that the 2nd Respondent is an agent of State and therefore owed them the duty of providing accessible and adequate housing.

Determination

14. The twin issues for my determination at this point is whether this matter is properly before this court in view of a pending suit in the Environment and Land Division being as in ELC No. 411 of 2011, and secondly whether the Applicants are entitled to the orders sought.

15. **Section 7** of the Civil Procedure Act (Chapter 21, of the Laws of Kenya) provides as follows:

No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant relief claimed.

16. As was stated in **Alliance Media (Kenya) Ltd & another v Magnate Ventures Ltd & another Civil Case No. 528 of 2012**; “the doctrine of *res judicata* has three ingredients. First, the issue in the first or previous suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (See also **Karia and Another v Attorney General and Others [2005] 1 EA 83, 89, Pop-In (Kenya) Limited and Others v Habib Bank AG Zurich [1990] KLR 609**).

17. In the ELC matter pending in the Environment and Land Division relates to the same or part of the suit property in question before this court. The issue of ownership and evictions from the suit property is a subject substantially or directly in issue in that suit, the parties in that case are largely the same parties as in this Application. It has been held that parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit (See **Omondi v National Bank of Kenya Limited and Others [2001] EA 177**).

18. The key barometer, in determining whether or not to proceed with this matter is whether holding that the suit is an abuse of the court process impedes the Petitioners’ due right of access to this court to vindicate their constitutional rights (See **Fleur Investment Limited v Permanent Secretary, Roads and Another Nairobi Petition No. 173 of 2011 (Unreported)**). In this case, it is my finding that the court seized of the matter in the **ELC No. 411 of 2011** is a superior court of equal jurisdiction competent to hear and determine any allegations of breach of constitutional rights including the issues raised in this Petition on access to adequate housing.

19. Multiplicity of suits is not only an abuse of the court process, it takes toll on judicial time and resources, and is therefore uneconomical not to mention the potential risk of having conflicting decisions by court which is needless to say undermines of a robust justice system.

20. My view is that since the issues canvassed in that matter, i.e **ELC No. 411 of 2011** are also directly in issue in this application, proceedings before this court will be tantamount to lodging a preemptory attack or parallel jurisdiction on the already pending proceedings before the court of equal and competent jurisdiction. If from a practicality angle, any orders or determination issued by this court regarding the matter will in one way or another stand in the way of issues which are already raised for determination in the Civil Suit and vice versa. It is for these reasons that I am not inclined to allow this application to proceed further.

I see no reason to go to the second issue framed above ,at all.

21. The Notice of Motion dated 20th January, 2012, is hereby struck out with no order as to costs.

22. Parties should now take directions on whether to consolidate the two suits or not.

23. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI TH IS 22ND DAY OF FEBRUARY, 2013

**ISAAC LENAOLA
JUDGE**

In the presence of:

Irene – Court Clerk

Mr. Owino holding brief for Mr. Opondo for Respondent and for Mr. Mose for 2nd Respondent's

Further Order

Mention on 7/3/2013 for directions.

Notice to issue.

**ISAAC LENAOLA
JUDGE
22/2/2013**