



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 210 of 2012

SEVENTH DAY ADVENTIST CHURCH (E.A) LTD.....PLAINTIFF

VERSUS

COUNTY COUNCIL OF MARAGUA..... DEFENDANT

RULING

The application before this court for determination is by way of Notice of Motion dated 5th of October, 2012. The application was certified urgent and prayer 2 granted for 14 days pending *interparte* hearing. The interim orders have always been extended until the hearing of the same.

Basically, the plaintiff is seeking for an order of injunction pending the hearing and determination of the suit. The said orders are clearly spelt out in the Notice of Motion.

The main grounds of the application are *inter alia*, that on or about the 8th of August 1977, the plaintiff was allocated 11.8 Ha of land by Murang'a County Council as it then was. He duly paid the requisite fees whereafter he was shown the parcel of land in question and took possession of the same and has since massively developed it. The lease was for 33 years and the same has lapsed. The plaintiff applied for extension of lease which was granted on 6th of December, 2011. However, the defendant later cancelled the intended extension of the lease without any authority or basis. The plaintiff further states in the grounds that the defendant is interfering with the green card and is also inciting the local community to demonstrate against him. The defendant is in the process of registering other parties as lessees against the law leaving out the plaintiff. The plaintiff states lastly that the defendant will not suffer any prejudice if the orders are granted.

The application is supported by the affidavit of *Charles Kibereta Kamutu* sworn on 5th October 2010 and filed on the same date. The gist of the affidavit is that the plaintiff was allocated 10.11 Ha in 1977 and thereafter a lease was issued for 33 years with effect from 1st of May 1979. In the affidavit it is asserted that the land was reserved for a secondary school and the plaintiff has always applied the land for that purpose. Mr Kamutu states that the plaintiff has made massive development on the parcel of land.

Upon expiry of lease, the plaintiffs applied for extension of lease on 6th December, 2011 and the same was approved by the full council meeting. However on the 1st of February, 2012 the defendant questioned the plaintiffs right to own the land in issue, which is a public utility land. On the 12/4/2012 the plaintiffs received another letter written to the Commissioner of Lands but copied to him requesting the cancellation of extension of lease. The defendant alleged that the land in issue was reserved for Githunguri secondary school.

The application is opposed by the defendant on grounds that the same is pre-mature, misconceived, ill-timed and lacks merit. That the certificates of search and copies of green card filed in the court show

clearly that there is conflict and/or duplex interest on the property and that the plaintiff has no interest as the lease period has lapsed. The grounds of opposition and the replying affidavit both dated 29th October, 2012 were filed on the 30/10/2012. the gist of the replying affidavit sworn by **Danson Ngugi**, the clerk to the County Council of Maragua is that there is a conflict of ownership of the suit property and the Land Registrar, Thika had been directed to investigate.

The clerk to the County Council of Maragua states that the reason for cancellation of the approval of extension of the lease of the suit-land was a complaint over ownership of the suit land lodged by the **Republic of Kenya** and the community of **Gakuyu/Mugumo-Ini Sub-Location**. The Deponent states that the defendant took over the property as trustees for the people of the County Council of Murang'a. The defendant however extended the lease on basis of lease title and green card forwarded by the plaintiff and went further to advice the Commissioner of Lands in a letter dated 6/12/2011 to extend the lease. However, the community of **Gakuyu/Mugumoini sub-location** complained that the property was public utility land and that it was wrongly transferred to S.D.A church. The defendant investigated and discovered that the land had conflict/duplex lease holding interests.

The defendant contends that the official search dated 30/01/2012 indicates that the property is registered in the name of the County Council of Murang'a and reserved for Githunguri Secondary School whilst another search certificate dated 6/2/2012 indicates that the land is registered in the name of the plaintiff. This court is of considered view that the existence of conflicting certificates of search raises serious legal issues that can only be addressed by the Green Card. Both parties have annexed in their affidavit the same green card opened on the 23rd of September 1980 in respect of the **Loc 6 Giathia-Ini/1123** measuring 10.11 Ha. The 1st and 2nd entries were made on the same date being the Registration of a lease in favour of the plaintiff and issuance of certificate of lease. In a nutshell, the defendant's contention is that the property in dispute is a public property and therefore the community's interest should take priority over private interest of the plaintiff.

The plaintiff filed his submission on the 20/11/2012 whose **gravamen** is that the land in question has always been his and the issue of two search certificates is intentional and manufactured to detract the **Commissioner of Lands** from issuing a new lease. The two green cards indicate that the land has always been for the plaintiff.

The defendant filed his submissions on the 6th of December 2012 whose import is that he has demonstrated through Exhibit DNI, the certificate of official search, that **Loc.6/Giatha-ini/1125** is registered in the name of County of Murang'a and reserved for **Githunguri Secondary school**. Moreover that the plaintiff was a lessee whose lease expired on 1/5/1979 after a period of 33 years.

The court has considered the Notice of Motion, the supporting affidavit, the replying affidavit and the submissions by both parties, and do observe that the genesis of the dispute can be discerned from the **green card**. I do find the arguments by the defendant that the Loc.6/Giatha-ini/1125 was registered in the name of the County Council of Murang'a in trust for Githunguri Secondary School unfounded because the purported two green cards are two photocopies of the same green card. I have used **microscopic scrutiny** to see the words **"reserved for"** and another **"Githunguri Secondary School"** however, I have not seen the same.

I have looked at the two certificates of search that are alleged to be duplex and do question the source of the certificate of search indicating that the County Council of Murang'a was holding the land in Trust for the community on behalf of Githunguri Secondary School because a certificate of search is prepared from the green card and in this case the green card does not reflect the certificate of search.

For the court to issue a temporary injunction, the plaintiff must establish a **prima facie case** with the probability of success. I do find that the plaintiff has established a prima facie case with a probability of success on grounds that the green card and certificate of search indicate that before the expiry of lease he was the legal proprietor with a lease of 33 years.

After the expiry of the lease, the defendant **approved** the renewal of the same and therefore giving the

plaintiff a right to claim the property through the legal principle of **legitimate expectation**. In common law the concept of legitimate expectation arises from administrative action and applies the principles of **fairness** and **reasonableness** to the situation where a person has an expectation or interest in a public body retaining a **long standing practice** or **keeping a promise**. The approval by the County Council of **Maragua** of the extension of lease in respect to the suit property might be interpreted as a promise to the plaintiff to which the principle of legitimate expectation would apply.

The second ground for the issuance of temporary orders as held in the *locus classicus* case of **Giella -VS- Cassman Brown and Co. Ltd** is that if the temporary injunction is not issued the plaintiff will suffer irreparable damage that cannot be compensated in monetary terms. I am convinced that the plaintiff has satisfied this ground as the plaintiff is a school offering both primary and secondary education. The school contributes to the three pillars of vision 2030 and therefore if the services of the plaintiff are interrupted, the resultant damage cannot be compensated in monetary terms. In the circumstances, this court is inclined to grant a temporary order of injunction pending the hearing of the main suit in terms of prayer 3 of the Notice of Motion and the same is hereby granted.

Dated, signed and delivered at Nyeri this 13th day of February 2013.

**A. OMBWAYO
JUDGE**