



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO 198 OF 2011

BURTON WACHIRA GITHINJI

JAMES MACHARIA

NANCY MURUGI (Suing as office bearers of Umoja II)

Residents Welfare Association)PLAINTIFFS

VERSUS

HENRY RUHIU.....DEFENDANTS

RULING

The applicants in the Notice of Motion dated 6th May 2011 have moved the court as the officials of Umoja II Residents Association which claims ownership of the stalls standing on Umoja Block 107/1113 (UMOJA II COMMUNITY MARKET) which the defendant is said to have attempted to demolish on 29th April 211, thereby causing damages to some of the stalls and destroying merchandize.

The applicants seek orders of temporary injunction against the Respondent, restraining him, his agents, servants and/or workers from trespassing, destroying, demolishing wasting or in any manner laying claim over the said UMOJA II COMMUNITY MARKET BLOCK 107/1113 pending the hearing and determination of this suit.

The application is perused on the ground that the suit land was allocated to the Umoja Residents by the Nairobi City Council in 1984/85 and set aside as a public utility land and that the residents have constructed a permanent market consisting of 300 stalls from which several owners have been selling their wares for a period of 25 years without interruption. They pray that they be granted the interlocutory injunction sought to forestall any further destruction of the market as threatened by the respondent, stating that they stand to suffer loss and damage which is incapable of compensation in damages.

To support the application, the applicants have filed a supporting affidavit sworn by the 1st applicant on 6th May 2011 to which several documents are annexed to support the applicants claim to the suit premises. To oppose the application the respondent filed grounds of opposition dated 23rd May 2011 to the effect that the application offends section 7 of the Civil Procedure Act in that it raises the issue of ownership of Nairobi Umoja Block 107/1057 which was determined in H.C.C.C No: 1655 of 2000 and is at variance with H.C.C.C No. 1905 of 1998 and C.M.C.C. No. 6888 of 2007 which ordered an eviction of the occupants of the said Nairobi Umoja/107/1057. A replying affidavit explaining the grounds of

opposition was also sworn by the Respondent on 20th May 2011 and filed on 23rd May 2011.

Parties filed written submissions which were later highlighted orally. The same, together with the authorities cited by counsel have been carefully considered. It is not clear from the submissions and documentation filed how the title references No. NAIROBI BLOCK/1113, which the applicants, say constitute the market, and NAIROBI BLOCK 107/1057 which the respondents claims to be belong to him relate. The respondent states that the title claimed by the applicants is not his, yet what the plot he threatens to move into is what the applicants claim to constitute the Community Market.

The suits in which the orders relied upon by the respondent to oppose this application (as seen from the pleadings and court papers produced) do not relate to BLOCK 107/1113 but 107/1057. The parties therein are also different and the applicants do not appear to have been involved. The res judicata principle does not therefore apply to this application.

The respondent does not deny that he has attempted to move into the plot in dispute and caused the partial demolitions represented by the photographic evidence provided by the applicants. Nor has denied that he intends to continue with the same and complete his mission of evicting the market stall owners as per the notice issued on 2nd May 2011. He claims that the land was leased to him by the Nairobi City Council and has produced correspondence exchanged between himself and the City Council to show that he is the rateable owner.

Of the documents produced by the applicants is a copy of Minutes of the Social Services & Housing Committee of the City Council held on 17th July 2007 in which the following is recorded as part of the minuted deliberations.

“17. The Director of Social Services and Housing reported that the area councillor and Umoja II Residents Welfare Association had written to the council seeking formalization of Umoja II Community Market (Block 107/1113) which is now fully developed.

He recommended that the market formalized in consultations with the Director of City Planning.

Resolved:

That the recommendations of the Director of Social Services and Housing be approved”.

That the parties herein are claiming the same parcel of land on the ground but citing different title numbers is not an issue that can be resolved through a court visit as has been requested by the applicants. The Nairobi City Council, as the owner of the parcel of land, who appears to have assigned the same to the Umoja residents/community and therefore leased the same to the respondent is a useful party in resolving the dispute.

The applicants say that they have not sued the City Council as they have no issue with her. In my view, whether sued or not, the City Council has an important role to play in resolving this dispute, being the prima owner of the suit land and the custodian of public land within its geographical limits. She must be called upon to explain who between the applicants and the respondent has the right to possess, occupy and use the parcel of land in dispute. If it is a question of double allocation, then the City Council must be taken to task in which case she is a relevant party in resolving the ownership dispute herein.

I am persuaded that the applicants have established a prima facie case against the respondent and I so find. They may not appear to have demonstrated their actual loss for the court to determine whether or not the same is or is not compensable in damages. However, considering the facts as presented before me, the balance of convenience tilts in their favour, particularly since their claim of possession, occupation of over 25 years is not disputed. Also not disputed is that the livelihood of residents/stall owners is at risk in view of the livelihood of the respondent proceeding to demolish the entire market, which the City Council confirmed in 2007 to have been complete.

In the premises I find that the application succeeds and is hereby allowed. I grant the injunction as prayed in prayer 3 thereof with costs being in the cause.

Dated, signed and delivered at Nairobi this 26th day of January 2012.

M.G. MUGO
JUDGE

In the presence of
for the applicant and
for the respondent.