



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
CIVIL CASE NO. 151 OF 2011
DAVID NGUNJIRI MURIITHI & 3 OTHERS.....PLAINTIFFS
Versus
MUNICIPAL COUNCIL OF NYERI.....DEFENDANT
RULING

The application before this court is that dated 24th October 2011 brought under order 40 rules 1,3,4 and 10 of the Civil Procedure Rules and section 3A of the Civil Procedure Act in which the plaintiff is seeking ORDERS:

That a temporal injunction do issue restraining the Defendant/Respondent by himself his agents or employees from in any manner interfering with the Plaintiff's quite possession and enjoyment of parcel No. NYERI/MUNICIPALITY/BLOCK 111/99 pending the hearing and determination of the suit.

That the Defendant be ordered to issue a clearance certificate to enable the Plaintiff deal with the property as it deems fit.

That costs of the application be provided.

The Application is supported by the Affidavits of one ERASTUS KIAMA GICHUKI sworn on 21st October 2011 and 22nd November 2011. The grounds are stated on the face of the application that is to say that the plaintiffs are the registered proprietors of the suit property, the defendant /respondent has without colour of right have planned to construct the said parcel of land and that the plaintiffs are likely to suffer irreparable loss and damages unless the Respondent is restricted from further interfering with the parcel. The Defendant opposes the application on the facts contained in the affidavit of S.M. Mulunga its Town Clerk sworn on 10th November 2011 and further affidavit sworn on 24th November 2011.

It should be noted that in the main suit the plaintiff is seeking an order that the defendant stop interfering with the suit land NYERI MUNICIPALITY BLOCK 111/99 in any manner whatsoever with the plaintiff's quite possession and more specifically refrain from erecting stall on the said land a permanent injunction as it were.

The conditions for grant of temporary injunctions are well set out in the case of Giella Vs Cassman

Brown (1973) EA 358 which the Court of Appeal applied in its decision in CHARTER HOUSE INVESTMENT LTD vs SIMON K. SANG & ANO. CIVIL APPEAL NO. 3165 of 2005 ELDORET as follows:

“Injunction is an equitable and discretionary remedy given when the subject matter of the case before the court requires protection and maintenance of status quo. The award of a temporary injunction by courts of equity has never been regarded as a matter of right even where irreparable injury is to result to the applicant. It is a matter of sound judicial discretion in the exercise of which the court balances the convenience of the parties and the possible injuries to them and to third parties”

The conditions of Giella vs Cassman Brown are as follows:

- a. ***The applicant must demonstrate a prima facie case with probability of success or***
- b. ***The applicant must show that he/she stands to suffer irreparable damage which cannot be compensated by an award of damages.***
- c. ***If the court is in doubt it will decide on balance of convenience.***

As regards the first and most important condition of prima facie case with probability of success it is the applicant's case that they are the registered trustees of the plaintiff which is the registered proprietors of the suit property for a period of 99 years from 1st October 1960 with special conditions contained therein and that the defendant without any colour of right has constructed or is constructing and has confirmed to encroach to the plaintiffs parcel creating an authority walk paths and directing wastes from the market to the plaintiff's land. That by the budget special for financial year 2011/2012 the defendant included the plaintiffs land and allocated funds for the sole purpose of construction of stalls without the authority of the plaintiff.

Mr. Gori for the applicant has persuaded the court that the action by the Defendant is an act of impunity which the court should not uphold.

The application is opposed by Mr. Wahome for the Respondent and has raised very many technical legal issues:-

First he has submitted that if the plaintiffs are the registered trustees of the plaintiff as stated then they should have sued under the name of the Registered Trustee and not in their names. He has also submitted that the same have not produced the certificate of incorporation to show that they are registered trustees. He has also submitted that there is contradiction as the lease agreement states that the plaintiffs are registered under Societies Act. He has therefore submitted that it is not clear whether the plaintiffs have legal capacity to sue.

It was also submitted on behalf of the Defendant that the plaintiff suit herein is resjudicata Nyeri PM No. 38 of 2005 which was duly dismissed by court of competent jurisdiction on the same issues as those pleaded herein. It was also submitted that the plaintiff have violated the special conditions contained in the lease agreement and that the plaintiffs only remedy if any should have been to go by the provisions of Physical Planning Act Cap 286 Laws of Kenya as per the authorities of Ali and Ali & 3 others vs City Council of Nairobi Civil case no. 520 of 2003 KLR 2003 pg 596 and Mbuthia vs Nairobi City Commission Civil case No. 1252 of 1985 KLR 1986 which I have had the advantage of reading.

From all these submissions and documents in support of the application and in opposition it is difficult for this court to hold at this stage that the plaintiff has established a prima facie case with a probability of success.

As regards the second condition for the grant of injunction I notice that the subject matter of suit is leasehold which has conditions upon which the same is granted and from the annexures produced in opposition of this application it is clear that the plaintiff is in violation of those conditions. It should also be noted that loss of lease hold interest can be adequately compensated by way of damages should at the

end of the day the plaintiff prove that the defendant action herein is illegal.

It should also be noted that the plaintiff while seeking

an equitable remedy has not approached this honourable court with clean hands since it has been alleged that the same were intent in selling the suit property to Kenyatta University though this has been denied by the plaintiff I note that the balance of convenience at this stage tilt against granting the orders sought by the plaintiff.

I therefore decline to grant the orders sought herein and dismiss the plaintiffs application herein dated 21st October 2011 with costs to the Respondent.

Dated and delivered at Nyeri this 10th day of February 2012.

J. WAKIAGA
JUDGE