



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)

PETITION 72 OF 2010

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL UNDER SECTION 20, 22, 23, 40, 43 AND 63 OF THE CONSTITUTION OF KENYA

AND IN THE MATTER OF THE FUNDAMENTAL RIGHT TO ACCESSIBLE AND ADEQUATE HOUSING UNDER ARTICLE 43 (b) OF THE CONSTITUTION OF KENYA

BETWEEN

PETER NJOROGE MUIRURI.....1ST APPLICANT
JAMES INGAIKHA.....2ND APPLICANT
JOHN MUIKDE.....3RD APPLICANT
JOHN MBUGUA.....4TH APPLICANT
STEPHEN MWANGI.....5TH APPLICANT
FRANCIS WAMBUA.....6TH APPLICANT
MARGARET NYIHA.....7TH APPLICANT
DAVID MAKUU.....8TH APPLICANT
NANCY GITAU.....9TH APPLICANT
MARY WAMWERE.....10TH APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

SAMUEL OJOWA ACHIENG.....INTERESTED PARTY

R U L I N G

1. The Notice of Motion dated 22nd August 2011 is premised on the provisions of **Order 40 Rule 2** of the **Civil Procedure Rules** and the Prayers sought are as follows;

“(1) That the matter be certified urgent and heard during the Court vacation.

(2) The service of this Application be dispensed within the first instance.

(3) An interim injunction be issued restraining the Interested party, his agents or servants from continuing with any further development on the suit property, L.R. Number 219/110, pending the hearing and determination of this Application.

(4) An interim injunction be issued restraining the Interested Party, his agents or servants from continuing with any further development on the suit property, L.R. No.219/110, until the hearing and determination of the main suit.

(5) The Officer Commanding Muthaiga Police Station and the District Officer in charge of Starehe Division, and/or the appropriate officer within the District Administration be directed to ensure compliance with these Orders.”

2. I have read the record in the matter and I have also read the Supporting Affidavit sworn on 22nd August 2011 by Peter Njoroge Muiruri. I gather that the Interested Party has an allocation letter but no title to land parcel No.219/110 in Mathare, Nairobi. He had commenced developments thereon and the Applicants claim that they have been living on the said parcel of land for decades (*without title*). That when the dispute came to Court, Rawal, J. on 8th September 2010 ordered parties to maintain the status quo as regards the suit property until the final determination of the dispute but the Interested party continued construction and because of reasons that are not relevant at the moment, the Applicants were unable to have their Application for contempt Orders determined, neither were they able to have the substance of the dispute resolved for a whole year hence the present Application. It is the Applicant’s case that upon finishing one building, the Interested Party then commenced the construction of yet another building on the disputed parcel of land, has fenced it off and has thereby interfered with common amenities on the said parcel of land.

3. In a Replying Affidavit sworn on 1st September 2011, the Interested Party has deponed that his land is adjacent to the one occupied by the Applicants and that L.R. No.209/110 is not occupied by the Applicants at all. That he has no interest in the land occupied by the Applicants and they are obligated to respect his interest in the land aforesaid. He has photographs showing that the plot he is developing is adjacent to “*a sprawling settlement*” that is occupied by the Applicants and there is no threat of eviction at all.

4. That therefore the Application is an abuse of Court process and ought to be dismissed with costs.

5. I must state from the outset that this matter ought to have been resolved one way or the other but for the fact that the parties and the Court registry have been unable to focus on the need to do so. In any event, it is obvious that when Rawal, J. made her Orders of 8th September 2010, she had in mind the need for the Interested Party to stop further construction until the hearing inter-parties. She had ordered as

follows, for avoidance of doubt;

“that the Interested Party [to] maintain the status quo as of today on alleged L.R. No.219/110 – the suit property.”

6. In the Replying Affidavit sworn on 23rd September 2010, the Interested Party deponed as follows at **paragraphs 6, 7 and 8;**

“(6) That by the time Justice Rawal made the Order of 8th September 2010, I had already constructed my premises up to a stage where they are now.

(7) That since I was served with the Court Order of 8th September of 2010, I have not constructed any more.

(8) That my premises are complete and habitable and the Orders of status quo meant that the building remains being complete and the Plaintiffs to remain residing next to my building in their own houses.”

7. The import of the above is that the Interested Party knew what the Order meant and he therefore stopped further construction in obedience to the Court Order. Attached to the said Affidavit are two photographs that show a door and painted walls as well as a window, and whether that denotes a complete building is a matter for determination later.

8. In an earlier Affidavit sworn on 15th September 2010, the Interested Party at **paragraph 8** thereof stated as follows;

“(8) That pursuant to the said approval I started to construct a Warehouse Class Building on the suit premises forthwith which is now complete.”

9. I have seen photographs exhibited by the Parties and I am certain that what the Interested Party has been constructing on the disputed parcel of land is not a warehouse but residential premises. The point is that *prima facie*, there is evidence that he may have continued to construct in spite of the Orders of Rawal, J. and while that is not an issue now, and is best left for the contempt proceedings. I am certain that the Orders sought are warranted, firstly, to clarify the Orders issued by Rawal, J; secondly, to ensure that the Interested Party does not obtain any undue advantage and thirdly, to protect the suit land pending resolution of the dispute. The need to protect property lies at the heart of all injunctive reliefs and is a prime consideration under **Order 40** of the **Civil Procedure Rules**.

10. The above position would then necessitate the need to keep the parties at the position they are at presently and to avoid any confusion, I shall allow the Application dated 22nd August 2011, in the following terms;

“The Interested party, and all the Applicants, shall from today until the determination of the Originating Summons dated 7th September 2010 cease any further developments on L.R. No.219/110 situated in Mabatini Village, Mathare, and any party acting in breach of that Order, shall be penalized to the extent that this Court deems fit and lawful.”

11. In the meantime, since parties have filed Submissions on the Originating Summons, let a date be taken for highlighting those Submissions, and put the whole matter to rest, one way or the other.

12. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 16TH DAY OF MARCH, 2012

ISAAC LENAOLA
JUDGE
CORAM

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mr. Waiyaki for Petitioners

Mrs. Rashid for Interested Party

Miss Thungu hold brief for Mr. Ochieng for 2nd Respondent

ORDER

Ruling duly delivered.

ISAAC LENAOLA
JUDGE
16/3/2012

FURTHER ORDER

Originating summons dated 7th September, 2010 is stood over for hearing by way of oral evidence on 18th July 2012.

ISAAC LENAOLA
JUDGE
16/3/2012