



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT 103 OF 2010

1. MALACHI ORONDO

2. ABDALLA D. MBATI

3. SAMMY MWANGI

4. SAUMU RAMADHAN.....PLAINTIFFS/APPLICANTS

5. IRENE WARAU

6. JESSE MUGO [Suing on their own behalf and on behalf of 252 others also known as VIKOBANI COMMUNITY]

VERSUS

1. MOMBASA WATER PRODUCTS LTD.

2. CITY COUNCIL OF MOMBASA.....DEFENDANTS/APPLICANTS

RULING

The plaintiffs came before the Court by Chamber Summons of **9th April, 2010** brought under ss. 1A, 1B, 3A and 63 of the Civil Procedure Act (Cap. 21, Laws of Kenya) and Order **XXXIX** (Rules 1,2,3) of the Civil Procedure Rules.

The applicants have one substantive prayer outstanding:

“THAT the defendants by themselves, servants and/or employees or agents or any other person acting through them be restrained by way of a temporary injunction from evicting, encroaching, trespassing [upon], removing any building materials [from] or in any other manner interfering [with] the parcel of land [described as] 749/VI/MN, 758/VI/MN and 787/VI/MN [or buildings located thereon], pending the hearing and determination of this suit”.

The application rests on the following grounds:

(i) 1st defendant is unlawfully demolishing the plaintiff’s buildings on plot Nos. 749/VI/MN, 758/VI/MN and 787/VI/MN without any colour of right, with a view to evicting the plaintiff from the parcel of land without notice;

(ii) the plaintiffs are the bona fide owners of parcels of land Nos. 749/VI/MN, 758/VI/MN and

787/VI/MN situate at Miritini and have been in possession of the same for over 40 years, uninterrupted;

(iii) the plaintiffs developed the whole suit land and have erected permanent houses on the same, and only recently has 1st defendant raised questions over their occupation;

(iv) the defendants have embarked upon demolition of the plaintiffs' permanent houses situate on the suit land;

(v) the plaintiffs are destined to suffer immense loss and damage, unless the acts of the defendants are restrained.

The 1st plaintiff deposes in the supporting affidavit sworn on **9th April, 2010** that, sometime in **April, 2010** the respondents commenced a demolition task on the plaintiffs' houses, under the supervision of armed police officers; that the plaintiffs had been in continuous occupation of the suit lands for 40 years and, during that period, have not been disturbed by the Municipal Council of Mombasa (2nd defendant); that prior to the act of demolition, there had been a discussion and an understanding between the plaintiffs and 1st defendant, regarding the upgrading of an access road in the area; that the plaintiffs had not been served with any notice, prior to the works of demolition; that the plaintiffs live on the suit lands with their families and will suffer immensely, unless restraint orders are made against the defendants; that the plaintiffs are destined to suffer irreparable loss and damage, and their suit would be rendered nugatory, unless restraint orders are granted at this stage.

Joseph Mbugua Gichanga, the Managing Director of 1st defendant, swore a replying affidavit on **19th April, 2010** deponing that 1st defendant does not own the suit premises, Plot. Nos. **749/VI/MN, 758/VI/MN and 787/VI/MN**; and that it is 2nd defendant who had been ordered, in **H.C. Misc. Civil Application No. 9 of 2010** to open up the Miritini - Vikobani access road; and 2nd defendant in complying with the order, "had to demolish the structures which had been illegally constructed on the said Miritini - Vikobani access road." It is deponed that the said construction work only affected those persons whose structures had been illegally constructed on the planned road.

Tubmun Otieno, the 2nd defendant's Town Clerk, swore a replying affidavit on **28th April, 2010** averring that 2nd defendant was required under Court Order of **5th March, 2010** (in **Mombasa H. C. Misc. Civil Application No. 9 of 2010**) to open up the Miritini - Vikobani access road; and in complying with the Order, 2nd defendant had to demolish illegal structures constructed at the **locus in quo**; that the Miritini - Vikobani road is a public road, and plans to open it up had been in place since **7th June, 1998**; that, at the time of road construction it was found that there were already built structures in the road reserve; that the built structures belonged to the plaintiff and had been constructed illegally and without the required approval of 2nd defendant; that the road construction did not affect the suit parcels of land – plot Nos. **749/VI/MN, 758/VI/MN and 787/VI/MN**; that "the houses and/or structures which were affected and demolished were those which were [encroaching] on the said road.....reserve"; that the offending structures were first marked for demolition, and notices sent out to the persons concerned; that "the said illegally-constructed houses on the road reserve were constructed without following the requirement of the building code"; that 2nd defendant in opening up and constructing the Miritini - Vikobani access road, was exercising its statutory duty of opening up and maintaining roads.

Counsel for the plaintiff, in his submissions, did not address the basic question of **legal obligations and entitlements**: the Court, obviously, wishes to know what rights the applicants have, as against the legal entitlements of the respondents – given in particular the fact which is not disputed, that the public interest is a central element in the management of the properties in question. It is not possible to perceive the essential argument in a submission such as the following:

“.....amazingly, 2nd respondenthas confirmed that the road was to be opened since 1988; and the question is why it took 1st respondent to move to Court for a declaratory order before 2nd respondent

[took action].....This was.....bad faith on the part of the defendants/respondents.....”

I note also the following contention by counsel which has rather blurred outlines in terms of legal character:

“The defendants may [contend] that they were acting by an Order of the Court, and that 2nd defendant was performing its statutory duty, but for whose benefit? The duty performed was only [for the purpose of benefiting] a private individual at the expense of so many residents.....”

But learned counsel went ahead to urge that his clients’ case fell within the principles set out in the guiding decision, ***Giella v. Cassman Brown & Co. Ltd*** [1973] EA 358, for the grant of interlocutory injunctions.

Counsel for 1st defendant submitted that, for an order of injunction to issue, the applicant had to show a ***prima facie*** case – but this had not been shown: “the plaintiff’s alleged right to occupy Plot Nos. ***749/VI/MN, 758/VI, MN*** and ***787/VI/MN*** is not premised on any law”. Counsel urged that: “No document of title has been exhibited to show that the plaintiffs are entitled to occupy the said plots of land. The plaintiffs may ...be trespassers upon the said plot of land. To the extent that the plaintiffs have not demonstrated that they are in lawful occupation of the said plots of land, equity cannot come to their aid since equity follows the law. A court of equity cannot be used to protect an illegality”.

Counsel urged from the evidence, that the houses on the suit lands which had been demolished were those constructed on the Miritini -Vikobani access road, and the demolition was necessary to open up the road; when the plaintiffs came to Court the said demolition had already taken place – and this is why ***Mr. justice Azangalala*** had refused the plaintiffs’ application for injunctive orders. Counsel submitted that this Court would be acting in vain if it now made an order of injunction to stop something which has already taken place; for it is admitted in the affidavit in support of the application that the said demolition was carried out on ***3rd April, 2010***.

For 2nd defendant, counsel invoked the Court order of ***5th March, 2010*** in ***H.C. Misc. Civil Application No. 9 of 2010*** which required 2nd defendant to open up the Miritini - Vikobani access road; and in compliance, 2nd defendant demolished “the illegally constructed structures” which occupied the road reserve.

Counsel submitted: “The Miritini - Vikobani access road is and has always been a public road.....” It was submitted, from the evidence, that “notices were properly issued before eviction [for] all illegally constructed houses on the road reserve”.

In the course of time, the Court will have an opportunity to hear the main cause lodged by the plaintiffs herein, by way of plaint dated ***9th April, 2010***. With the benefit of the most detailed evidence, and of full arguments on law, such a determination of the case will surely reward the eventual winner appropriately, whether it is the plaintiffs or the defendants.

The question before the Court at this stage, essentially belongs to the scheme of ***prima facie*** perceptions, and the dictates of equity at the preliminary stage. Such momentary scenarios, however, do indicate whether or not an applicant has come up with a ***prima facie*** case, with good chances of success at the main trial.

From the assessment in this Judgment, the applicants have been unable to show the solid ground ***in law*** upon which they stand, as they ask for equitable dispensations in the form of interlocutory injunctions. In particular, the applicants were not able to show the legal basis of their claim to the suit lands. It follows that the applicants have not shown a ***prima facie*** case with probabilities of success; and consequently, they are not entitled to the interlocutory relief which they seek.

I dismiss the applicants’ application by Chamber Summons of ***19th April, 2010***, with costs to the

respondents.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 6th day of *May*, 2011.

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J. B. OJWANG

JUDGE