



1. JULIUS MONZI MUIA

2. EUNICE NDINDA MONZI

3. JOHN NZIOKA MUTETI APPLICANTS

VERSUS

THOMAS NZIOKA NZINGI RESPONDENT

(Being an application for injunction)

RULING OF THE COURT

1. By their application dated 18/09/2003, the three applicants seek injunctive orders against the Respondent. The applicants pray that the respondent, his agents, assigns, servants and/or beneficiaries be restrained from entering, trespassing, developing and/or dealing in any way with the plaintiffs' plot number EMALI/BLOCK 11/4 until the suit is heard and determined.

2. The application is based on the grounds that the 1st and 2nd applicants are the registered owners of plot No. EMALI BLOCK 11/4 while the 3rd applicant is the registered owner of plot No. EMALI/BLOCK 11/3, and that the defendant/respondent has unlawfully trespassed into the applicants' said plots and put up structures thereon and have prevented the plaintiffs from carrying on developments on the plots.

3. The affidavit in support of the application is sworn by JULIUS MONZI MUIA, the 1st plaintiff/applicant and he says that he has the authority to swear the affidavit on behalf of himself and the 2nd plaintiff/applicant. He says in the said affidavit that he and the 2nd plaintiff/applicant are jointly registered as proprietors of Plot No. EMALI BLOCK 11/4 which is situate within the Emali Township Annexure "JMMI" is a copy of a Certificate of Lease which certified that JULIUS MONZI MUIA, ID Number 4827415 AND EUNICE NDINDA MONZI – ID Number 7277629 are registered as proprietors of the said plot. He also says that adjacent to their plot lies No. EMALI BLOCK 11/3 which is owned by the 3rd plaintiff/applicant JOHN KENNEDY MUTETI. Muia also says that the defendant/respondent has trespassed onto the said two plots and put up some buildings which stretch across the boundary and cover both plots and that the defendant/respondent intends to put up a school which has completely altered the landscape of the said two plots.

4. Muia also says that though the defendant/respondent was informed of the fact that the plaintiffs'/applicants' are the registered owners of the two plots, the information has fallen on deaf ears and that the defendant/respondent has proceeded with the construction. Annexures JMM2 and JMM3 are copies of Letter of Allotment to the original owners of plot No. EMALI TOWNSHIP/BLOCK 2/1, of which the two plots that are now in dispute were subdivisions.

5. Muia also says that because of the interference and trespass by the defendant/respondent, the plaintiffs/applicants have been unable to carry out any developments on the plot and that as a result, they have suffered and continue to suffer irreparable loss and damage. Finally, Muia asks the court to make an

order of eviction against the defendant/respondent who has refused to move out voluntarily.

6. The 3rd applicant also swore an affidavit in support of the application in which he says that he is the registered proprietor of plot Number EMALI BLOCK 11/3 within Emali township as per Certificate of Lease marked “JKM1” annexed to his affidavit. He also says that the defendant/respondent has unlawfully trespassed onto the said plot as per the facts deposed to in Mr Muia’s affidavit in support. The 3rd plaintiff/applicant wants an order of eviction to issue against the defendant/respondent.

7. Contemporaneously with the application, the plaintiffs/applicants filed a plaint against the defendant in which they contend that between the years 2002 and 2003 the defendant unlawfully, wrongfully and illegally entered into and trespassed onto the plaintiffs’ plots without the latter’s authority and/or consent. The plaintiffs jointly and severally pray for judgment against the defendant for:-

- i. An order of permanent injunction.
- ii. General damages for trespass.
- iii. An eviction order from both plots No. EMALI TOWN BLOCK 11/3, and EMALI TOWN BLOCK 11/4 respectively.
- iv. Costs of the suit and interest.
- v. Any other or further relief that this Honourable court may deem fit to grant.

8. The application is opposed. The defendant/respondent filed his Replying Affidavit on 29/09/2003. The defendant says that his proper names are THOMAS MUTHIANI NZYOKA and not THOMAS NZIOKA NZINGI as per the plaint. He denies the applicants’ averments and says that he owns two commercial plots being numbers 786 and 417 and two residential plots being numbers 248 and 289 all of which are situated within Kajiado District as opposed to the applicants’ plots which are situated within Makueni District. Annexures TMN I, II and III are copies of development plans duly approved by Olkejuado County Council of plot Numbers 248, 417 and 786 respectively. Annexure TMN VI is a copy of a letter from the Clerk Olkejuado County Council addressed to M/S Muia V.M. & Co. Advocates in response to the latter’s letter dated 5/06/2003. The letter says that plot No. EMALI II/3 and III/2 did not exist in the council’s records and that the council had never issued any title documents in respect of the same. The defendant/respondent also says that the plaintiffs/applicants have not demonstrated that they have a prima facie case with the probability of success.

9. At the hearing of the application, Mr Muia for the plaintiffs/applicants reiterated the averments contained in the two supporting affidavits and cited two authorities in support of his clients’ case:-

- i. *GIELLA VS CASSMAN BROWN & CO LTD* (1973) EA 358 and
- ii. *SHARIFF ABDI HASSAN VS NADHIF JAMA ADAN* – Court of Appeal at Nairobi Civil Appeal No. 121 of 2005.

10. The *GIELLA* Case (above) stipulates the three conditions to be fulfilled by an applicant before an order of injunction is issued in his favour and these are:-

- a. an applicant must show a prima facie case with a probability of success;
- b. an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury;
- c. when the court is in doubt, it will decide the application on the balance of convenience.

11. The *HASSAN* Case (above) dealt with the issue of mandatory injunctions. In the present case,

prayer number 2 of the application seeks a mandatory injunction against the defendant/respondent and it is therefore appropriate that the principle(s) governing the issuance of mandatory injunctions be enunciated here. The GIELLA Case (above) sets out the principles to be applied when dealing with standard applications. In deciding the HASSAN Case (above) the Court of Appeal referred to the case of LOCABAIL INTERNATIONAL FINANCE LTD VS AGRO-EXPORT AND ANOTHER (1986)/ALL ER 901 for principles applicable in cases of mandatory injunctions and these are that:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction.”

12. What is clear from the stated principles is that where a party establishes prima facie, that the party against whom the mandatory injunction is sought is on the wrong, then the injunction can be issued to ensure that justice is meted out without the need to wait for full hearing of the entire case. In the HASSAN Case (above) the court also held that the same position could be taken by the courts in such cases as those of alleged trespass onto property as was held in the case of JAJ SUPER POWER CASH AND CARRY vs NAIROBI CITY COUNCIL & 2 OTHERS– Civil Appeal No. 111 of 2002 (Unreported) IN which it was held:-

“It is clearly the law that the grant or refusal to grant interlocutory relief is in the discretion of the court seized of the matter.This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”

13. Mr Muia contended that the applicants had established a prima facie case with a probability of success for the reason that the three applicants are the registered owners of their respective titles.

14. Mr Matata for the defendant/respondent did not appear at the hearing. Mr Nyakeri for the 3rd Party relied on the 3rd Party’s defence and Grounds of Opposition dated 30/03/2007 and filed in court on 3/04/2007. These are that:-

- a. the application is misconceived, frivolous, vexatious and an abuse of the court process;
- b. the application is incurably defective, incompetent, misplaced and lacking in merits;
- c. the plaintiff/applicant has no capacity or locus standi to bring or maintain this suit. The suit as filed does not disclose any reasonable cause of action at all and ought to be struck off. The plaintiff as an alleged allottee without title has no proprietary rights to the suit premises known to law. The alleged allotment is ultravires, inconsequential and illegal as detailed in the Third Party’s Defence (sic);
- d. The Plaintiff/Applicant has come to court with unclean hands;
- e. The Plaintiff/Applicant has not shown a prima facie case with probabilities of success or irreparable loss that cannot be compensated by way of damages.

15. I have carefully considered the facts and the law as spelt out above and have reached the conclusion that I will decide this case on a balance of convenience. The plaintiffs/applicants have produced Certificates of Lease in their favour showing that the suit properties are duly registered in their names. The respondent on the other hand has shown that he is the registered owner of properties that are completely different from the applicants’ plots and that the said properties are situate in Olkejuado County council within Kajiado District as opposed to the applicants’ plots which are situate in Makueni

Town Council within Makueni District. The respondent has said nothing substantive about the allegations that he has put up structures upon the plaintiffs' plots, though he has produced evidence through his annexure marked TMN VIII that he had the authority to put up a Technical Training Centre known as EMASNES. The applicants have alleged that the said Training Centre is being put up astride their two plots and that the plaintiff ought to be stopped from doing so until this suit is heard and determined.

16. I am satisfied that the balance of convenience tilts in favour of the applicants and I therefore find and hold that both the prohibitive and mandatory injunctions are merited in this case. Accordingly, I do allow the applicants' application dated 18/09/2003. There is no doubt that if the alleged construction is not stopped, the applicants will be unable to develop their plots which they have shown belong to them and which plots the respondent says are strange to him. The applicants shall also have the costs of their application.

17. It is so ordered.

Dated and delivered at Machakos this 29th day of January, 2008.

R.N. SITATI

JUDGE