



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MACHAKOS

Civil Suit 40 of 2005

PATRICK MUTHUI MAILU.....1ST PLAINTIFF

JOHN MUTUNGA NZAU.....2ND PLAINTIFF

PIUS M. MWAKA.....3RD PLAINTIFF

FREDRICK SYULU MUSIVA.....4TH PLAINTIFF

DAVID NYAMU MUTISYA.....5TH PLAINTIFF

VERSUS

THE COUNTY COUNCIL OF KITUI.....DEFENDANT/RESPONDENT

RULING

1. The applicants filed their chamber summons application brought under section 3A of the Civil Procedure Act Cap, cap 21 Laws of Kenya, Order 39 Rules 1, 2 and 9 of the Civil Procedure Rules and all enabling provisions of the law seeking ORDERS:-

1. *Spent*

2. *Spent*

3. ***THAT a temporary injunction do issue restraining the defendants whether by themselves, their agents, servants or employees from re-allotting, wasting, disposing off or in any whatsoever (sic) interfering with the subject parcels of land in Mwakini Nduiyu Trust Land pending the hearing and final determination of the suit herein.***

4. ***THAT a temporary injunction do issue restraining the defendants whether by themselves, their agents or employees from revoking, canceling, nullifying or otherwise invalidating the allotment letters given to the Plaintiffs/Applicants pending the hearing and determination of this suit.***

5. ***THAT a temporary injunction do issue restraining the defendants whether by themselves, their agents, servants or employees from re-allotting, issuing titles to third parties, alienating or in any other way conferring possession and/or ownership to third parties pending the hearing and final determination of this suit.***

6. ***THAT this Honourable Court do issue an order compelling the defendants, their agents, servants and/or employees to cease any interference and commission of all acts of dispossessing the plaintiffs of the suit parcels of land.***

7. ***THAT the costs of this application be provided for.***

2. The application is supported by the affidavit sworn by John Mutunga Nzau, the 2nd plaintiff and on the following

grounds:?

- (a) **THAT the Applicants were on diverse dates between the 14th day of May, 1997 and 18th July, 1997 (both dates inclusive) allotted parcels of land by the defendant upon payment of prescribed sums of money.**
- (b) **THAT the Plaintiffs/Applicants were issued with provisional letters of allotment by the Defendant and the Defendant convanted to facilitate the procurement of title deeds to the respective parcels of land in favour of the Plaintiffs.**
- (c) **THAT the Defendant has failed to facilitate the procurement of title deeds and/or put the Plaintiffs/Applicants in possession of the subject parcel of land.**
- (d) **THAT further and in blatant disregard of the validity of the allotments, the Defendant subdivided the Ndiuyu area for purposes of re-allotting the parcels of land and the area where the parcels are situate is now being called Kitukuni and Ndwila**
- (e) **THAT the Defendant and/or it's agents, servants and/or employees have publicly threatened/declared their intention to re-allot the parcels of land the subject of this suit to other persons other than the Plaintiffs/Applicants and issue titles to those persons.**
- (f) **THAT should the Defendant make good it's threat to re-allot the parcels to other persons, the instant suit will be rendered nugatory and Plaintiffs/Applicants will suffer irreparable harm and damage."**

3. Mr. John Mutunga Nzau swears his affidavit in his capacity as the Secretary of the Mwakini/Ndiuyu Plot Owners Self Help Group (the group) which was registered under the Ministry of Home Affairs, Heritage and Sports under the Department of Social Services as evidenced by the annexure marked "**JMN-1**" being copy of Certificate of Registration No.12786 dated 8/04/2002, and Department Registration No.12080. He says that on diverse dates in 1997, the members of the Group individually applied for plots from the defendant within the Mwakini/Ndiuyu Trust land and that at its full Council Meetings held between 14/05/97 and 18/07/97, the defendants allotted plots to the members of the group as per copy of the minutes of the defendants annexed and marked "**JMN-2**". At these meetings, a total of 1496 applications were considered, whereupon, the group members paid the requisite moneys to secure their respective plots on the understanding, according to the deponent, that the defendant would procure title deeds for each of the paid up Group members. The deponent says that contrary to the covenant entered into by the defendant, there is intention to issue title deeds to third parties in the newly subdivided Mwakini/Nduwyyu trust land known as Kitukuni and, Nduila sections as communicated at a public baraza (meeting) in the months of March and April 2007.

4. The deponent also says that he and other group members are apprehensive that if the defendant is not enjoined as prayed, the letters of allotment held by members of the group shall be disregarded as title deeds are issued to third parties. In his Supplementary Supporting Affidavit, Mr. Nzau annexed a copy of the map of Ndiuyu Ranch showing the subdivision of the subject land which he marked "**JMN-1**".

5. The application is opposed. The Replying Affidavit is sworn by Edward Mwamburi, the defendant's County Clerk. Mr. Mwamburi depones that the land allegedly known as Ndiuyu Trust Land no longer exists and that none of the applicants has any piece/parcel of land in the alleged Trust Land. The reason for this, Mr. Mwamburi says is Minute No.40 of 2004 passed on 6/02/2004 which revoked all previous plot allocations of Ndiuyu Council that had been done illegally. According to annexure marked "**EM1**" attached to Mr. Mwamburi's affidavit, which is an Extract of "**Minutes of Special Education Housing and Social Services Committee Meeting held on 6/02/2004 at 10.00 a.m.**", the Council resolved to revoke the earlier allocations in favour of the Catholic Dioceses of Kitui for their GASP project at Ndiuyu. Mr. Mwamburi also depones that at an earlier meeting held on 16/09/2003, vide Minute No.28 of 2003, the Council leased the suit property to the Catholic Diocese of Kitui for the latter's sheep and goats project for 33 years. According to paragraph 5 of the Replying Affidavit the lease was part of an out of court settlement of two civil cases between the Diocese and the Council.

6. It is further deponed that on 21/01/2005, at its Special Education, Housing and Social Services Committee Meeting, the Council resolved to grant 1000 acres of Ndiuyu Council Land to Nyumbani Children of God Relief Institute and that a children home has already been established on the land, with a capacity for 7000 destitute children. Further, it is deponed at paragraph 7 of the Replying Affidavit that on 16/03/2005, an ordinary meeting of the Education Housing and Social Services Committee Meeting resolved vide its minute number 12 of 2005 to grant an additional 100 acres from Ndiuyu Council land to the Nyumbani Children of God Relief Institute for the establishment of a market, a secondary school and a dispensary. A copy of that minute is annexed to Mr. Mwamburi's affidavit and marked "**EM4**". A similar meeting held on 29/06/2007, apparently resolved, vide minute number 1 of 2007 to allocate the remaining portion of the former Ndiuyu Council land for the establishment of a settlement scheme known as Kwa Mutunga Settlement Scheme with the final allocations coming out as per the map annexed to the affidavit and marked EM6 and that for these reasons,

Mr. Mwamburi contends that the applicants' plea for orders of injunction are all in vain since the process of revocation and re-allocation is now complete. Mr. Mwamburi contends further that the applicants have never possessed the land in question and therefore the alleged issue of dispossessing the applications of land does not arise.

7. Mr. Nzau swore a "Further Affidavit in Reply" though this should be a Further Affidavit in support of the application. Mr. Nzau says that the Defendant's Replying Affidavit is a sham for the reason that the same contradicts the defendant's defence on record in that:?

- ***While the defendants do not deny that the applicants had been allotted parcels of land, the Replying Affidavit says Nduiyu Trust Land no longer exists;***
- ***The defendant's defence does not say anything about the allocations/lease of the suit land to the Catholic Diocese Kitui and the Nyumbani Children of God Relief Institute.***
- ***The authenticity of the Council minutes relied upon by the defendants cannot be guaranteed.***
- ***The defendant did not have any capacity to allocate any lands to the Catholic Diocese Kitui or the Nyumbani Children of God Relief Institute***
- ***Since the defendants do not deny receiving money from the applicants, the defendant is therefore estopped from denying that the applicants have rights in the suit land.***

8. At the hearing of this application, Mr. Muli who appeared for the applicants contended on their behalf that the applicants are entitled to the orders sought for the reasons given on the face of the application and the supporting and supplementary affidavits. He argued that the defendant was guilty of breach of the express terms of the allotment. He said that the defendant has contradicted itself by putting forward particulars in the Replying Affidavit that are in direct contradiction with the Statement of Defence.

9. To appreciate the contentions between the plaintiffs/applicants and the defendant, it is worthwhile to look at the pleadings. In their representative suit the plaintiffs aver that the defendant allotted various parcels of land on diverse dates between 14th May 1997 and 18th July 1997 vide minutes of the full Council meeting held on these days on condition that:?

- (i) The plaintiffs pay certain sums of money in consideration within the time specified in the letters of allotment issued to the plaintiffs by the defendant;***
- (ii) The defendant would procure title deeds in the names of the respective allottees, including the plaintiffs.***
- (iii) The said allotments were irrevocable by the defendant.***

10. The plaintiffs averred further that the defendant breached the above conditions by failing to facilitate the procurement of the title deeds and by failing to put the plaintiffs in possession of the suit property and re-allotting the same suit property to other allottees. The plaintiffs thus seek judgment against the defendant for:?

- (a) Specific performance***
- (b) Declarations that:-***
 - (i) the allotment of the subject parcels of land are irrevocable (sic)***
 - (ii) the defendant has no authority to re-allot the subject parcels of land to other persons;***
- (c) A permanent injunction to restrain the defendant from re-allotting the subject parcels to other persons or otherwise revoking the allotments made to the plaintiffs.***
- (d) Costs of this suit and interest thereon.***

11. In its defence filed in court on 18/10/2006, the defendant admitted that it made allotments as alleged by the plaintiffs in paragraph 5 of the plaint that states that such allotment was subject to the determination of several civil cases touching on the suit land that had been filed against the defendant by other claimants and in particular:?

- **Mks HCCC No.263/96 – Catholic Diocese of Kitui –vs- Kitui County Council**
- **Nairobi – Court of Appeal Civil Appeal No.38 of 1997 – The Catholic Diocese of Kitui –vs- The County Council of Kitui**
- **Nairobi HCCC No.5106 of 1993 – Mwakini Ranching (D.A) Company Limited –vs- The County Council of Kitui**

12. The defendant averred that since the suits referred above had not been concluded, the plaintiff's instant suit was premature. The defendant also contended that it had powers under the Local Government Act, Cap 265 of the Laws of Kenya to revoke any allotment. The defendant also questioned the validity of the entire suit which it alleged was filed in contravention of Order 1 of the Civil Procedure Rules (CPR).

13. In his further submissions, Mr. Muli cited the well known case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358** in which the Court set out the three principles while a court must apply for the granting of injunctions under Order 39 of the Civil Procedure Rules:?

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

14. On whether or not an injunction can issue against a local authority, Mr. Kalili for the respondent cited the persuasive authority of **Ali & 3 Others v City Council of Nairobi** in which it was held under holding number 2 that:?

“2. The City Council of Nairobi is a local authority and just like the government no injunction can lie against it and its officers. The proper remedy in such course would be with an application by way of judicial review”.

15. There are three issues that arise for determination:- (a) whether an order of injunction can issue against the defendant, (b) if the answer to (a) one in the affirmative, whether the applicants have satisfied the conditions set out in the case of **Giella vs Cassman Brown & Co. Ltd.** (above) for the granting of an order for injunctions and (c) whether the Supporting Affidavit meets the requirements of Order 1 Rule 12(2) of the Civil Procedure Act.

16. I shall start with the last issue. Order 1 Rule 12(2) of the Civil Procedure Rules provides that a deponent who swears an affidavit on the behalf of others must obtain the authority of those others to do so, and that such authority shall be filed in the cause. In the instant case, there is no evidence by John Mutunga Nzau that he obtained authority from GSA co-plaintiffs to swear the supporting affidavit and if he did, there is no evidence that such authority was given in writing and that it was filed in the cause. On that basis both the supporting affidavit and the Further Affidavit are incompetent and are consequently struck off from the record.

17. The second issue is whether the applicant's prayer for an order of injunction against the defendant can succeed. In my view and on the basis of the **Ali & 3 Others** case which restates the law on junction applications for orders against a local authority, I am persuaded that the applicant's application cannot succeed.

18. Having reached the above conclusions, I do not think that it is necessary to go into the question as to whether or not the applicants have fulfilled the three requirements for the granting of an order for injunction. Briefly though, it is my view that any damage that may be or has been suffered by the applicants is one that can be adequately compensated for by way of damages. Both the plaintiffs and the defendant agree that none of the applicants has ever taken possession of the various parcels of the suit land. That being the case, the defendant can comfortably put the applicants back in the position they were before the breach by refunding the moneys that were paid by the applicants and such other damages as the court may order. In any event even if I were to consider the balance of convenience the same would tilt in favour of the defendant, who has had possession of the suit land all along.

19. For the above reasons, I am not persuaded that the applicants are entitled to the orders sought. In the result I decline to grant the orders sought and dismiss the application for injunction in its entirety with costs to the defendant/respondent.

It is so ordered.

Dated and delivered at Machakos this 14th day of May 2008.

R.N. SITATI

JUDGE

22/04/08

Delivered by Lenaola J

In the presence of:-

No appearance for the Plaintiff

Mr. Kilonzi holding brief for Mr. Kalili for Defendant

I. LENAOLA

JUDGE