



REPUBLIC OF KENYA



KENYA LAW
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Kutuk & another (Suing as Registered Trustees of Kenya Evangelical Lutheran Church and on behalf of Evangelical Lutheran Church in Tanzania) v Pennie Agency Limited & 6 others (Environment and Land Case Civil Suit E362 of 2021) [2022] KEELC 13481 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13481 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT E362 OF 2021

SO OKONG'O, J

OCTOBER 13, 2022

BETWEEN

JOHNES KUTUK & JULIUS MOKUA (SUING AS REGISTERED TRUSTEES OF KENYA EVANGELICAL LUTHERAN CHURCH AND ON BEHALF OF EVANGELICAL LUTHERAN CHURCH IN TANZANIA) PLAINTIFF

AND

PENNIE AGENCY LIMITED 1ST DEFENDANT

ANTHONY KARURU WACHUGA 2ND DEFENDANT

SUCHA SINGH 3RD DEFENDANT

HIMAT SINGH 4TH DEFENDANT

CHIEF LAND REGISTRAR 5TH DEFENDANT

NAIROBI METROPOLITAN SERVICES 6TH DEFENDANT

NAIROBI CITY COUNTY 7TH DEFENDANT

RULING

1 What is before me is the plaintiff's application brought by way of notice of motion dated October 22, 2021 seeking the following orders;

1. That the chief land registrar be directed to put a restriction on all that parcel of land known as LR No 209/3271/103(hereinafter referred to as 'the suit property').
2. That pending the hearing and determination of this suit a temporary injunction do issue restraining the 1st, 2nd, 3rd and 4th defendants from continuing to harass, interfering with or



doing any other act which is prejudicial to the plaintiffs' peaceful and quiet occupation of the suit property.

3. That pending the hearing and determination of this suit a temporary injunction do issue restraining the 1st, 2nd, 3rd and 4th defendants from continued acts of trespass, conversion and encroachment by way of fencing and demolition of the structures that affects among others the suit property or in any way whatsoever physically interfering with the current status of the suit property.
 4. That pending the hearing and determination of the suit a temporary order be issued compelling the 5th defendant to register a restriction against the title of the suit property to restrain the 1st, 2nd, 3rd and 4th defendants or their successors and agents from dealing with the suit property in any way.
 5. That the defendants be condemned to pay the costs of the application.
- 2 The application has been brought on the grounds set out on the face thereof and on the supporting affidavit of Johnes Kutuk and Cecilia Ndakalu sworn on October 22, 2021. The plaintiffs have averred that Evangelical Lutheran Church in Tanzania (hereinafter referred to only as 'the church') through its trustees is the registered owner of all that property known as LR No 209/3271/103 situated at Pangani, Nairobi (the suit property) having been so registered as such on February 5, 1974. The plaintiffs have averred that the suit property is used primarily to host a children's centre known as Pangani Lutheran Children Centre (hereinafter referred to only as 'the Centre') run by the interested party since February 27, 1997.
- 3 The plaintiffs have averred that on or about July 2, 2021, the 3rd and 4th defendants unlawfully entered and encroached onto the suit property and fenced it along its perimeter wall using corrugated iron sheets in the pretext that they were the owners thereof. The plaintiffs have averred that following the illegal fencing, the 3rd and 4th defendants have threatened to demolish some of the structures on the suit property and to renovate some. The plaintiffs have averred that they sought explanation from the 3rd and 4th defendants of their actions but none came forth. the plaintiffs have averred that on August 4, 2021, the 3rd and 4th defendants brought fencing materials to the suit property with the intention of erecting another fence around the property. The plaintiffs have averred that they were apprehensive that the 5th, 6th and 7th defendants were in the process of issuing a lease to the 1st, 2nd, 3rd and 4th defendants in a bid to defeat the plaintiffs' claim over the suit property. The plaintiffs have averred that on October 22, 2021, the 1st and 2nd defendants in the company of a group of hooligans invaded the suit property and threw out the occupants thereof and locked the premises. The plaintiffs have averred that the 1st and 2nd defendants thereafter engaged in the destruction of goods in the premises which acts were reported to the police leading to the arrest of the 2nd defendant. The plaintiffs have averred that the 5th, 6th and 7th defendants have issued the 1st, 2nd and 3rd defendants with fraudulent letters of allotment of the suit property which the 1st, 2nd and 3rd defendants are using to carry out the said forceful demolitions of the plaintiffs' houses and other properties on the suit property with the intention of evicting the plaintiffs from the suit property that they have occupied since 1974.
- 4 The plaintiffs have averred that damages would not be adequate remedy for the destruction being caused by the 1st, 2nd, 3rd and 4th defendants on the suit property and that the defendants would not suffer any prejudice if the orders sought are granted.
- 5 On November 8, 2021, the court directed that the plaintiff's application dated October 22, 2021 shall be heard by way of written submissions. The court gave timelines within which the defendants were to file their responses to the application after which the parties were to exchange submissions. By January



24, 2022, the defendants had not responded to the application. On application by the defendants, the court granted them more time to file their responses to the application and extended the time within which the submissions were to be filed. By March 2, 2022, only the 7th defendant had filed grounds of opposition to the application. On that day, the court ordered the defendants who had not responded to the application to do so within 7 days and the time of filing of submissions was extended. As at the time of writing this ruling, only the 7th defendant had filed grounds of opposition and submissions in response to the plaintiffs' application.

6 In its grounds of opposition, the 7th defendant has contended that the functions of the 7th defendant in relation to the acts complained of by the plaintiffs were transferred to the 6th defendant and as such the 7th defendant is incapable of complying with the judgment that may be passed by the court. The 7th defendant has contended further that the plaintiffs' application is incompetent and incurably defective. In its written submissions, the 7th defendant has reiterated that the services the subject of the plaintiff's complaint against the 7th defendant were transferred to the 6th defendant. The 7th defendant has submitted that it cannot enforce orders or undertake functions that were transferred to the 6th defendant and as such it is not capable of enforcing any judgment that may be given by the court in the suit herein. The 7th defendant has urged the court to find that the plaintiffs' application has no merit.

7 I have considered the application before me together with the affidavit filed in support thereof. I have also considered the grounds of opposition and written submissions filed by the 7th defendant in opposition to the application. The plaintiffs have sought temporary prohibitory and mandatory injunctions pending the hearing and determination of the suit. The principles upon which the court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v Cassman Brown & Co Ltd [1973] EA 358*, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

8 In *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* the Court of Appeal stated as follows:

The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.'

9 For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court applies in applications for interlocutory



mandatory injunction were set out in *Locabail International Finance Limited v Agro-Export (1988) 1 All ER 90*, where the court stated 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 thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.'

10 In *Shepherd Homes Ltd v Shandabu [1971] 1 Ch 304*, Meggery J stated as follows:

It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation'.

11 It is on the foregoing principles that the plaintiffs' application falls for consideration. From the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the 1st, 2nd 3rd and 4th defendants against whom the temporary injunction sought is directed. The plaintiffs have established that they are lawfully in occupation of the suit property pursuant to a lease that was issued in their favour by the Government of Kenya. Although the lease appears to have expired, the plaintiffs have a right to be given first priority to apply for the renewal of the said lease. The 1st, 2nd 3rd and 4th defendants have not responded to the application. They have not told the court what right they have over the suit property. Even if they had any proprietary right over the suit property, the 1st, 2nd 3rd and 4th defendants had no right to forcefully take over possession of the suit property. There is in existence substantive legislation on eviction of trespassers. The 1st, 2nd 3rd and 4th defendants were obliged to comply with the law on evictions in case they had ownership rights over the suit property. It was not open to them to take the law into their own hands by using the help of hooligans to force their way into the suit property.

12 I am also satisfied that the plaintiffs stand to suffer irreparable harm if the orders sought are not granted. The plaintiffs have shown that the 1st, 2nd 3rd and 4th defendants intend to evict them from the suit property unless they are restrained by the court. The plaintiffs have also shown that the suit property is being used as a children's centre and that the services offered at the centre will suffer unless the orders sought are granted. I am persuaded that the loss and damage likely to be suffered by the plaintiffs if the orders sought are not granted cannot be compensated in damages.

13 Having found that the plaintiffs have established a prima facie case against the 1st, 2nd 3rd and 4th defendants and have also demonstrated that they stand to suffer irreparable harm unless the orders sought are granted, it is not necessary for me to consider the balance of convenience. I find merit in the plaintiffs' notice of motion application dated October 22, 2021. The same is allowed in terms of prayers 5, 6 and 7 thereof. The plaintiffs shall have the costs of the application to be paid by the 1st, 2nd, 3rd and 4th defendants.

DELIVERED AND DATED AT KISUMU THIS 13TH DAY OF OCTOBER 2022



S OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:
for the Plaintiffs

Mr Dingi h/b for Mr Chacha for the Plaintiff

Mr Muganda for the 1st Defendant

N/A for the 2nd, 3rd, 4th, 5th and 6th Defendants

Mr Ondieki for the 7th Defendant

Ms J Omondi-Court Assistant

