



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

CIVIL SUIT 46 OF 2007

SAMUEL KITHOME KITONYOPLAINTIFF

VERSUS

PAUL WANDERI1ST DEFENDANT

OBADIAH MWANGI GITAU.....2ND DEFENDANT

JAMES MUSYOKA MUNGUTI.....3RD DEFENDANT

CHARLES WAWERU.....4TH DEFENDANT

DAVID IRUNGU.....5TH DEFENDANT

NJERI.....6TH DEFENDANT

KINYUA.....7TH DEFENDANT

RULING

The application dated 3rd April, 2007 and filed in Court on 19th April 2007 seeks two orders of temporary injunction against the Defendants, to restrain them from interfering and/or subdividing the Plaintiff's *plot L.R. No. 320 Shauri Moyo River Bank* until the hearing and determination of the pending suit.

There is also a prayer for costs of the application.

The application is based on the grounds set out on the body thereof and the annexed affidavit of the Plaintiff.

The grounds set out on the body of the application are that the Plaintiff is the owner of the said plot after the same was allocated to him by Nairobi City Council in a letter *ref. No. GPD/3797* dated 21st September 2002; that the Defendants had unlawfully trespassed thereon and that as a result the Plaintiff will suffer irreparable loss and damage if the orders sought are not granted.

The supporting affidavit outlines how the Plaintiff was allocated this plot by Nairobi City Council on 21st September 2002 and annexes on it annexure *SKK 1* which is the letter of allotment.

That after this allocation the Plaintiff paid the required fees and attaches on the affidavit a receipt for Kshs.8,000/= being stand premium and ground rent.

The Plaintiff also attaches onto the affidavit a Beacon Certificate signed by the Chief Land Surveyor dated 16th February 2007.

But then the Plaintiff complains that since 19th October 2006 the Defendants had been interfering with the Plaintiff's quiet enjoyment of the suit property and that his attempt to get assistance from the Provincial Administration had not yielded any fruits.

That in the recent past the Defendants had illegally invaded the Plaintiff's plot and were trying to put up illegal structures thereon. The Plaintiff attached the complain letters and the photographs showing the structures erected on the suit plot by the Defendants.

The Plaintiff also filed a further affidavit on 25th May 2007 after being served with replying affidavits.

In it he disputes the averment in **Kataka's** replying affidavit that people are being resettled on the suit plot and that this affidavit mentions names of **Henry Mwangi, Sarah Muthoni** and **Beatrice Njeru Mathu** – who are not parties to the case and/or application and that the applicant had never harassed the owner of sub-division **plot number 320**.

In the further affidavit the applicant affirms that the allotment letters issued to him over the suit plot were genuine and that share certificates annexed to the replying affidavit of **Wycliffe Ashiruma Okunda** belong to parties who have nothing to do with the present suit.

The applicant affirms he is the registered owner of plot number 320 and not **Mbauru Warutumo**.

The replying affidavit of the 1st Defendant/Respondent states that he had been informed by his advocates which information he believes to be true that the applicant's application is incompetent and it ought to be struck out with costs.

He denies that the applicant is the registered proprietor of the suit plot and that he is not a stranger to the facts of this case

He states that the suit plot was sub-divided sometimes in 2002 into 26 (twenty-six) plots which were given plot numbers including **plot number 320** which now belongs to one **James Mbauru Warutumo**.

That he was one of the people settled on the suit plot by Shauri Moyo River Bank Settlement Scheme as supported by Share Certificates annexed to the said replying affidavit and that he has been so settled since the year 2002; that therefore he is not a trespasser thereon. The documents they annex on their replying affidavit do not confer ownership of the suit plot to them.

Other replying affidavits have been deposed to by **Aggrey Kataka** and **Wycliffe Ashiruma Okunda** who describe themselves as the Secretary of Shauri Moyo River Bank Settlement Scheme and former Councillor of Shauri Moyo Division respectively.

The two have not applied to enjoin themselves as Defendants in this case and/or respondents and I do not know in which capacity they have sworn these affidavits in opposition to the application.

What is this Shauri Moyo River Bank Settlement Scheme? Is it a body corporate which can sue or be sued? If so why has it not applied to be enjoined as a Defendant/Respondent to this suit?

And when was **Ashiruma Okunda** Councillor of Shauri Moyo Division or what was his reason for involvement in **Plot Number 320**, other than as a politician?

I think counsel for the Plaintiff was right in applying that replying affidavits of these deponents be struck out from these proceedings.

I even find these affidavits are mentioning names of people who are not parties to this case! Like when **Kataka** in his affidavit says **plot Number 320** belongs to **James Mbauru Warutumo** and yet **Warutumo** himself does not swear an affidavit to claim the said plot!

The 1st Defendant says he had authority of other Defendants to swear the affidavit on their behalf and on his own behalf but does not annex such authority to his replying affidavit, thus the other Defendants do not oppose the Plaintiff's application for an interlocutory injunction!

The Plaintiff has annexed copy of lease and deed plan of the suit plot to his supporting affidavit but the Defendants' have none to show for their claim over the ownership thereof.

In these circumstances, the Plaintiff's claim is authentic and the balance of convenience tilts in his claims' favour.

In the ultimate result I strike out the replying affidavits of **Aggrey Kataka** and **Wycliffe Ashiruma Okunda** and all the annexures thereon and find that the replying affidavit of the 1st Defendant and submissions of defence counsel do not satisfy as to the reasons for the Defendants claim to the ownership of the suit plot at this stage and that I shall make orders in favour of the Plaintiff on prayers 2 and 3 of the application dated 3rd and filed in Court on 19th April 2007, which I hereby do.

Costs of the application to the Plaintiff.

Orders accordingly.

Delivered, dated and **signed** by me at Nairobi this 28th day of June 2007.

D. K. S. AGANYANYA

JUDGE