



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MOMBASA ELC CASE NO. 91 OF 2020

CATHERINE ALUVISIA OCHOKI (Suing as the legal

Representative of the Estate of James Onami Michieka..... 1ST PLAINTIFF

JOEL ONAMI MICHIEKA.....2ND PLAINTIFF

VERSUS

SPINA BIFIDA HYDROCEPHALUS ASSOCIATION OF

KENYA1ST DEFENDANT

LAND REGISTRAR OF MOMBASA.....2ND DEFENDANT

COUNTY GOVERNMENT OF MOMBASA.....3RD DEFENDANT

RULING

(Application for an injunction; plaintiffs contending to be the owners of the suit land and alleging that the 1st defendant has encroached and is building on it; 1st defendant claiming that the lease of the plaintiffs had expired and was permitted by the 3rd defendant to undertake developments; plaintiffs displaying evidence of title and extension of lease; no competing title shown by the defendants; prima facie case established and plaintiffs stand to suffer loss if the construction continues; orders of injunction issued in favour of the plaintiff)

1. The Application under consideration is the Notice of Motion dated 27 July 2020 which was filed contemporaneously with the plaint. The Plaintiffs/Applicants seek the following orders:

- (i) Spent (certification of urgency);
- (ii) That the 1st and 3rd defendant/respondent either by themselves, their agents, servants, representative or any other person or body acting pursuant to their instruction be restrained by a temporary injunction from encroaching and or carrying out construction on the property known as Mombasa/Ms/Block 1/331 pending the hearing and determination of this suit.
- (iii) That the OCS Likoni do confirm compliance of the orders.
- (iv) That this Honorable Court do give any such or further orders as may be necessary to enable the end of justice be met.
- (v) The cost of this Application be in the course.

2. The application is supported by the Affidavit of Catherine Aluvisa Ochoki the 1st plaintiff herein who has described herself as the administrator of the estate of James Ondimu Ochoki (deceased). She avers that the deceased was a joint co-owner with the 2nd plaintiff of the property known as Mombasa/Ms/Block 1/331 (hereinafter referred to as "suit land") which she contends was purchased in 1995. She deposes that the deceased and the 2nd plaintiff applied for an extension of lease and the same was approved by the 2nd and 3rd defendants and they were subsequently issued with a Certificate of Lease on 20 March 2012. The deceased, who was her husband, died in July 2018, and after laying him to rest, she applied for and obtained letters of administration over his estate. She then in collaboration with the 2nd plaintiff and a surveyor, went to find the location of the suit land in Likoni. They obtained the map that was used in the extension of lease and carried out a search at the lands office. They noted that the suit land had been encroached by the 1st Defendant who had started a construction project on it

named "House of Hope." Upon this realization, the plaintiffs instructed their counsel to do a demand letter to the 1st Defendant. The letter was also served to the 2nd and 3rd defendants (Land Registrar, Mombasa and the County Government of Mombasa respectively).

3. She has continued to depose that upon receipt of the demand letter, one Brian Odoyo, from the Land and Housing Department of the 3rd defendant, called their (plaintiffs') counsel, seeking to be taken to the site for purposes of preparing a report. The plaintiffs' counsel contacted the surveyor while the 3rd defendant contacted the Area Ward Manager one Mr. Stephen Odindo and they proceeded to visit the site on 24 February 2020. The plaintiffs contend that there was no sign board on site (to indicate the particulars of the construction) and that the 3rd defendant did not claim ownership of the suit property. The construction in the suit property was ongoing.

4. She has deposed that the search at Lands Office shows that the deceased and the 2nd plaintiff are the registered owners of the suit property. She further added that they (the plaintiffs) were the ones paying land rent and land rates.

5. She has stated that in a subsequent visit in July 2020, a notice board had now been placed stating that the 3rd defendant is the developer of the project though no land reference number was displayed. The plaintiffs aver that the 1st defendant's construction on the suit land is illegal and unlawful, and the illegality is now being perpetuated further with the collaboration of the 3rd defendant.

6. The 1st defendant opposed the application and filed a replying affidavit sworn by Esther Nyaguthi Khamis. She is the Chairlady of the 1st defendant and she has described the 1st defendant as a registered Self Help Group under the Department of Social Services engaged in the rehabilitation of children with spinabifida and hydrocephalus conditions. She first argued that the 1st plaintiff has no capacity since the estate of the late Ondimu has already been distributed pursuant to the confirmed grant that she (1st plaintiff) annexed. She contended that the suit property is registered in the name of Likoni Development Limited and that the plaintiffs had no capacity to apply for renewal of lease. She claimed further that the conditions set before renewal of the lease were never fulfilled by the plaintiffs. She thus argued that the Certificate of Lease issued to the plaintiffs by the 2nd defendant was unprocedural and irregular. She stated that they (1st defendant) applied for and obtained permission to construct a fence and also their building plans were approved. They then commenced construction works. She stated that the 3rd defendant confirmed that the suit property belonged to Likoni Development Limited whose lease had expired. She added that this application for injunction has been overtaken by events as it has been filed when they are about to complete construction. She annexed various documents to support her position.

7. No replying affidavit was filed by either the 2nd defendant nor the 3rd defendant. However, in a supplementary affidavit filed by the plaintiffs, the plaintiffs have referred to the 3rd defendant's defence, and have pointed out that the 3rd defendant has inter alia denied knowledge of the subject project and that the property belongs to a private individual of which the 3rd defendant has no capacity to investigate.

8. The plaintiff and the 1st defendant's counsel filed their respective submissions which I have considered.

9. What the plaintiffs ask of this court is an order of injunction the principles of which were set out in the case of **Giella Vs Casman Brown (1973) E.A 358**. One needs to demonstrate a prima facie case with a probability of success; further demonstrate that he/she stands to suffer loss that cannot be compensated by an award of damages unless the injunction is issued; and finally, where the court is in doubt, it will determine the application based on a balance of convenience.

10. From the material before me, I observe that the plaintiffs have displayed title to the suit land. I have seen the Certificate of Lease and the official search and they both show that the registered owner is James Ondimu Ochoki (deceased) and Joel Onami Michieka (the 2nd plaintiff). The plaintiffs have also given an elaborate explanation of how they got title. They have stated that they purchased the land and subsequently sought an extension of lease. I have seen the documents that they have displayed to show this. I am aware that the 1st defendant contends that the plaintiffs did not get title rightfully but there is no evidence displayed to support this allegation. Certainly, the 1st defendant does not pretend to have title to the suit land. All it has displayed is a letter dated 23 December 2014, from the 3rd defendant, which letter is addressed to the National Land Commission. The letter claims that the lease expired on 1 April 1994. However, as I have stated, there is a wealth of evidence that the lease was renewed in favour of the deceased and the 2nd plaintiff.

11. My view is that the plaintiffs have demonstrated a prima facie case with a probability of success, since they have displayed title, whereas the defendants have not demonstrated any competing title to the suit land. On the second principle, that is, whether the Plaintiff stands to suffer irreparable loss which cannot be compensated by way of damages, I can see that the 1st defendant has been constructing a building on the suit land. If further construction continues, then the character of the land may very well change to the detriment of the plaintiffs, and the land may be made unsuitable for any purpose that the plaintiffs intended. Even if I was to consider the balance of convenience, the same would tilt towards suspending any further construction of the suit land, pending determination of the case.

12. I find this application merited and I allow it. I issue an order of injunction stopping the 1st and 3rd defendants or their servants and agents, from entering, being upon, constructing, further constructing, or in any other way interfering with the land parcel Mombasa/MS/Block 1/331 pending the hearing and determination of this suit. If the defendants have any workmen or personnel or movable items from the suit land, they need to carry them out of site. For the duration of this suit, the suit land will remain in the possession of the plaintiffs. There will however be no further development undertaken by the plaintiffs and the property will remain as it is until this case is concluded. The plaintiffs will have the costs of this application as against the 1st and 3rd defendants.

13. It is so ordered.

DATED AND DELIVERED THIS 11 DAY OF FEBRUARY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA