



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO.2299 OF 1999**

**E MBAKASI DEVELOPERS LTD.....PLAINTIFF**

**VERSUS**

**COUNCILLOR SIMON MWOTOLO MUTETI & 4 OTHERS.....DEFENDANTS**

**CONSOLIDATED WITH CIVIL CASE NO. 116 OF 2000**

**MAKAU MUTIE & 2 OTHERS (SUING ON BEHALF OF MUKURU**

**EMBAKASI JUA KALI ASSOCIATION.....PLAINTIFF/APPLICANT**

**VERSUS**

**CONCRETTERS LIMITED & ANOTHER.....DEFENDANTS**

**R U L I N G**

By its plaint, filed on 1st December 1999, Embakasi Developers Ltd. (hereinafter referred to as the company) averred that the 2nd, 3rd 4th and 5th defendants had without its consent or knowledge proceeded and erected structures on its proprieties. These are the properties known as LR Nos. 7109/3, 7109/4, 7109/5 and 7109/7, all situated in the Embakasi area of Nairobi: The suit against the 2nd defendant has since been withdrawn. The structures were serving as church buildings. Upon enquiry the company had been informed that the said land had been allocated to the four defendants by one Simon M. Muteti the 1st defendant herein, who is a councilor with the Nairobi City Council. The company averred that despite its notice, the four defendants have refused to pull down the structures and continue to occupy the subject property thereby interfering with its quiet user and possession of the said premises. It therefore prays for, inter alia, a mandatory injunction compelling the four defendants to vacate the said premises, an injunction to restrain all the defendants from interfering in any way whatsoever with its quiet user, possession and ownership of the said premises.

The second suit filed by The Mukuru Embakasi Jua Kali Association (hereinafter called The Association) suing by its office bearers against Concreters Ltd and Embakasi Development Ltd. It claims to have membership of over 200.

The Association avers that it was allocated land parcel No. 7109/7 by the Commissioner of Lands on 2nd January 1993, having prior thereto obtained permission from the director of City Planning to construct temporary Jua Kali structures thereon. Further, that on 24th July 1995, it obtained leave to subdivide the property amongst its members. It prays for a permanent injunction to restrain the company and Concreters Ltd., who are the defendants therein, who it claims have trespassed on the land and attempted to erect some structures thereon.

I have now before me two applications one by the company against three respondents, and one by the Association against Concreters Ltd., and the company.

Both the applications were consolidated by court by consent of all the parties on 21st March 2000. Both the applications are made under order XXXIX Rules 1 & 2 of the Civil Procedure Rules. The issue that arises in both the applications is who has a better title to the subject premises. While the Association and the church organisations, each claim that the land was allocated to them by the Commissioner of Lands and councilor Muteti respectively, none has been able to provide sufficient proof that they are the registered proprietors of the subject parcels.

Councilor Muteti admits having authorised the three defendants to occupy the subject land. It is not indicated under what powers he granted the said authority.

In any event, the issue that would arise is whether a councilor of the City Council is empowered to “allocate” land? In my opinion, no! Land can only be allocated by one in whom proprietary interests are vested. He did not disclose what interest he had in the land and that being the case, he had not authority to take the measure that he did. In any event, the Company was at all subject material times the registered proprietor of the premises. On the other hand, the company has demonstrated and satisfied the court that it is the registered proprietor of all the subject parcels of land by virtue of transfers to it by Concreters Ltd., on 23rd October 1992. Concreters Ltd. were the original allottees of the same.

The subject properties are all registered under the Registration of Titles Act (Cap 281) of the Laws of Kenya, hereinafter called “the Act”)

Section 23(1) of the Act, gives an absolute and indefeasible title to the owner of the property. That title can only be and challenged on grounds of fraud or misrepresentation to which the registered owner is proved to be a party such sanctity of title is given by law to protect the ownership of property which would otherwise be placed in jeopardy. In view of the above, I find that the said Letter of Allotment over LR 7109/7, which was dated 22nd January 1993, is inconsequential as by that time, the Commissioner of Lands was not vested with the subject property and was thus not in a position or empowered to allocate it.

Neither fraud nor misrepresentation has been alleged in any of the suits. As such the titles have not been challenged.

In the absence of the challenge in the aforesaid manner, I find that the company has indefeasible Titles to the subject parcels, and both the Association and three defendants are thus squatters on the land.

I thus dismiss the application in CC 116/2000 with costs. I likewise dismiss the suit with costs as it does not disclose a cause of action against the defendants.

Having found as I do, and being convinced that the company has a prima facie case with a probability of success, I shall now deal with the prayers as contained in the second application. Is this a clear case for granting a mandatory injunction?

**“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However if the case is clear and one which the court thinks ought to be decided at once or if the act done is a simple and summary one which can be easily remedied or if the defendant attempts to steal a march on the plaintiff, such as where on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted in an interlocutory application”.I have referred to Halsbury’s Laws of England 4th Ed. Vol 24 par 948.**

I am also guided by The Despina Pontikos [1975] EA 38, where the issue of whether a mandatory injunction could be granted where there was an adequate remedy. It was held that

**“where there is no assurance that an award of damages would be recovered an interlocutory mandatory injunction may be granted. Where there is no reasonable prospect, or the facts of the case, as damages proving recoverable the factor must weigh heavily with a court of equity.**

It is my humble opinion damages would not in any way be an adequate remedy to the company, which has established that it has indefeasible titles to all the subject parcels of land. It is a very clear case, and this case raises very special circumstances. The company is thus entitled to the mandatory order that it seeks.

I therefore grant orders to prayers (b) and (c) in HCCC No. 2299/99 against the 3rd, 4th and 5th defendants. The company shall have the costs of the application.

Dated and delivered this 29th day of January 2000.

**JEANNE GACHECHE**

**COMMISSIONER OF ASSIZE**

Delivered in the presence of Mr. Maina for the plaintiff in HCCC 2299/99, Miss

Wachira for plaintiff/respondent in HCCC 116/2000 and Mr. Ngala for

defendants/respondents in HCCC 2299/99 (except 2nd respondent).