



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. 37 OF 2020

ANIL WALIAPLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAKURU.....DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's Notice of Motion dated 11th June 2020 which seeks the following orders:

1. Spent

2. Spent

3. *THAT pending the hearing and determination of this suit this Honorable court be pleased to issue orders of temporary injunction restraining the Defendants/Respondents, their agents, their servants, employees, contractors, representatives and/or any other person acting under its authority from dealing, entering, taking possession, constructing, demolishing, selling, charging, advertising, transferring, and/or interfering whatsoever with all that parcel of land known as TITLE NO. NAKURU MUNICIPALITY BLOCK 4/395.*

4. *THAT pending the hearing and determination of this application and suit this Honorable court be pleased to issue orders of temporary injunction restraining the Defendants/Respondents, their agents, their servants, employees, contractors, representatives and/or any other person acting under its authority from dealing, entering, taking possession, constructing, demolishing, selling, charging, advertising, transferring and/or interfering whatsoever with all that parcel of land known as TITLE NO. NAKURU MUNICIPALITY BLOCK 4/395.*

5. *THAT costs of this application be borne by the Defendants/ Respondents.*

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he is the registered owner of land parcel No. Nakuru Municipality Block 4/395 and that he was allocated the suit property by the defunct Municipal Council of Nakuru on the 22nd day of January 1997. At the time of allocation, the plot was known as un-surveyed Plot No. 4/C. He deposed further that on 15th October 1997, the defunct Municipal Council of Nakuru issued him with an allotment letter which referred to the suit property as MUNICIPALITY BLOCK 4/C (Hostel). That he was later issued with a lease in respect of the property which lease was registered on 16th January 1998 and a certificate of Lease issued to him which has remained in his possession. He also deposed that sometime in 2017 he applied for change of user of the suit property from a single dwelling to multi dwelling residential which was approved by the defendant and that the defendant acknowledged his ownership of the suit land as it has been receiving rates from him.

3. He deposed further that on or about 6th June 2020, the defendant through its agents began to put a stone wall around the suit property thereby blocking him from accessing it. He also added that he owned the neighbouring parcel of land No. MUNICIPALITY BLOCK 4/396 which he surrendered to the government out of good will after the Kenya Ethics and Anti-Corruption Commission sent a letter to him alleging that the land had been set aside for the establishment of a clinic. He deposed that after conducting investigations the commission concluded that the suit property belonged to him and they then wrote another letter dated the 21st November 2019 to the Nakuru Land Registrar directing them to remove a restriction on the suit property. He also deposed that on or about 6th June 2020, the defendant through its agents trespassed onto the suit property and began erecting a stone wall with the aim of blocking him from accessing it and as an indication of claiming that the plot belongs to it.

4. The defendant responded to the Application through a replying affidavit sworn by Justine Mayaka Nyaroo, a Senior Planner working in the Land, Housing and Physical Planning Department of the defendant. He deposed that the suit property was excised from LR No. 451/851 which later came to be known as Nakuru Municipality Block 4/52. That the whole of LR No. 451/851 belonged to the national government and the Municipal Council of Nakuru only leased it. He deposed further that LR No. 451/851 was later subdivided into five portions and one portion set aside for the construction of a dispensary. That for the Municipal Council of Nakuru to sub-let land belonging to the national government, procedure had to be followed including prior full council meeting resolution, application by the council, approvals by the then Minister of Local Government and advertisement so as to accord members of the public an opportunity to cast ballots on the same. He added that from his records, the procedure was not followed and therefore the title held by the plaintiff can be challenged as it was irregularly obtained and he is therefore not entitled to the orders sought.

5. The application was canvassed through written submissions. The plaintiff addressed the issue of whether he has met the requirements for the grant of an injunction. While relying on the case of **Giella Vs. Cassman Brown** and the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** he submitted that he has a prima facie case as he has a registered right on the property as evidenced by the letter of allotment and Certificate of Lease. He also relied on **Section 24** of the **Land Registration Act** which vests in the proprietor of land absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto. He submitted that the defendant's allegations that the suit land was fraudulently obtained cannot stand as the said claim was raised and investigated by the Ethics and Anti-corruption Commission who are legally mandated to investigate claims of fraud and concluded that the plaintiff acquired the title to the suit property through the right channels. On the issue of irreparable loss, he relied on the case of **Waitthaka v Industrial and Commercial Development Corporation [2001] eKLR** and submitted that should he suffer loss as a result of the defendant's actions, compensation by way of damages could not be sufficient while as regards balance of convenience he reiterated that he is the registered owner of the land and has produced all the documents to that effect and that the defendant has not filed a statement of Defence to controvert the averments of facts set out in the Plaintiff.

6. The defendants filed its submissions and addressed the court on whether the plaintiff is entitled to the orders of injunction sought. It relied on the case of **Giella Vs Cassman Brown & Co. Ltd [1973] EA 358** as restated in **East African Development Bank Vs Hyundai Motors Kenya United [2006] eKLR**. It further relied on the case of **Margaret Njoki Migwi vs Barclays Bank of Kenya Ltd [2016] eKLR** as regards whether or not a *prima facie* case has been established and submitted that the plaintiff has not demonstrated any proprietary rights to the suit property as the suit land is public land under the National Government and that the plaintiff does not possess any documents to show how the allocation of land was done. It also submitted that even if the land was allocated to the plaintiff before devolution, the right procedure was not followed as no documents have been produced to show how the land was acquired from the national government. It submitted that upon the subdivision of LR 451/851 into five portions, the plaintiff claims one of the portions while on the other portion, a dispensary has been constructed which is set to be expanded. Regarding the head of irreparable damage, the defendant relied on the case of **Director of Public Prosecutions v Justus Mwendwa Kathenge & 2 others [2016] eKLR** and argued that the plaintiff will not suffer any loss as he acquired the suit property irregularly even though he has annexed a copy of the title of the property while on the head of balance of convenience, it submitted that the plaintiff did not meet the first two requirements and so the balance of convenience tilts in favour of the defendant.

7. I have carefully considered the application, the affidavits and the submissions. The only issue for determination is whether the plaintiff has met the requirements for the grant of a temporary injunction, as set out in the case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. The court held that:

An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.

8. All the conditions as indicated above have to be met in order for an injunction to be issued. On what a *prima facie* case constitutes, the court in **Shimmers Plaza Ltd v National Bank of Kenya, Cape Suppliers Ltd & another [2014] eKLR**, while relying on the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] eKLR** stated that;

a prima facie case in a civil application includes but is not confined to a genuine and arguable case and that it is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

9. In the case of **Habib Bank AG Zurich vs. Eugene Marion Yakub** Civil Application Number Nairobi 43 of 1982 (unreported), Madan, Law and Potter JJA. held that;

Probability of success means the court is only to gauge the strength of the plaintiffs case and not to adjudge the main suit at the stage since proof is only required at the hearing stage.

10. From the material placed before the court, there is no dispute that the plaintiff is the registered proprietor of the suit property pursuant to a Certificate of Lease issued to him on 16th January 1998. The defendant has not denied that it entered onto the suit property and began erecting a stone wall around it on or about 6th June 2020. As a registered proprietor, the plaintiff is entitled to the rights, privileges and benefits under **Article 40** of the **Constitution** and **Section 24** of the **Land Registration Act**. Further, **Section 26** of the **Land Registration Act** obligates the court to accept the plaintiff's certificate of lease as conclusive evidence of proprietorship, unless of course the provisos under **Section 26 (1) (a)** or **(b)** are alleged and established. Until the plaintiff's title is nullified, the defendant's claims that the suit property is public utility or that it belongs to the national government and that the plaintiff's title was irregularly issued remain just that: mere claims. I am satisfied that the plaintiff has established a *prima facie* case with a probability of success.

11. On whether the plaintiff will suffer irreparable loss that cannot be compensated by an award of damages if the application is not allowed, I note that interlocutory injunctions are meant to preserve the suit property pending the hearing and determination of the suit. In the present

case, it is in the interest of justice that the suit property be preserved in the manner sought in the application.

12. In the result, I make the following orders:

a) An injunction is hereby granted restraining the defendant, its agents, servants, employees, contractors, representatives and/or any other person acting under its authority from dealing with, entering, taking possession, constructing, demolishing, selling, charging, advertising, transferring, and/or interfering in any manner whatsoever with all that parcel of land known as Title No. Nakuru Municipality Block 4/395 pending the hearing and determination of this suit.

b) The plaintiff shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 8TH DAY OF MARCH 2021.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Githui for the plaintiff/applicant

No appearance for the defendant/respondent

Court Assistants: B. Jelimo & J. Lotkomo