



Mwai & 3 others (Suing in their capacity as the official of Chieko Plot Owners Association) v Chieko Housing Limited (Environment and Land Case Civil Suit E220 of 2021) [2022] KEELC 2854 (KLR) (5 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2854 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E220 OF 2021
LC KOMINGOI, J
MAY 5, 2022**

BETWEEN

**JOTHAM KANJA MWAI 1ST PLAINTIFF
BERNADETTE THONGORI KIMANI 2ND PLAINTIFF
JUSTUS KANYENJE MBOGO 3RD PLAINTIFF
MARY MUTHONI GACHANI 4TH PLAINTIFF
SUING IN THEIR CAPACITY AS THE OFFICIAL OF CHIEKO PLOT OWNERS
ASSOCIATION**

AND

CHIEKO HOUSING LIMITED DEFENDANT

RULING

1. This is the Notice of Motion dated 16th June 2021 brought under section 150 of the *Land Act*, 2012; Section 1A, 1B, 3 and 3A of the *Civil Procedure Act* and Order 21 Rule 3 (2) and Order 51 of the Civil Procedure Rules.
2. It seeks orders:-
 1. Spent.
 2. That this honourable court issues an order prohibiting the Respondents from offering for sale, selling or re-allocating various portions of LR Number 8480/1 demarcated for public amenities including Nairobi Block 154/1376 reserved for Chieko Primary School.



3. That the honourable court do issue an order for specific performance compelling the Respondents herein to proceed with the issuance of the leases for the remaining 1084 plots that are yet to be issued with the leases as per the terms of the sale agreements for the property.
 4. That the Deputy Registrar of the honourable court be granted authority to sign the documents necessary to give effect to the order of specific performance sought in 3, above, in the event the Respondent fails to do so.
 5. That in the alternative, that this honourable court be and is hereby pleased to.
 6. That costs of this application be provided for.
3. The grounds are on the face of the application and are set out in paragraphs (a) to (i).
 4. The application is supported by the affidavit sworn by Jotham Kanjah Mwai the 1st Plaintiff/Applicant sworn on the 16th June 2021 and a further affidavit sworn on the 23rd November 2021.
 5. The application is opposed. There is a replying affidavit sworn by Bertha Nyambura Mwangi, a director of the Defendant/Respondent on the 22nd September 2021.
 6. On the 12th October 2021, the court with the consent of the parties directed that the notice of motion be canvassed by way of written submission.
 7. I have considered the notice of motion and the affidavit in support. I have also considered the replying affidavit and the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
 - i. Whether the Plaintiffs/Applicants' application meets the threshold for grant of temporary injunction.
 - ii. Who should bear costs of this application?
 8. The principles for grant of temporary injunction were set out in the precedent setting case of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In the case of *Mrao Ltd v First American Bank of Kenya Ltd* [2003] eKLR, the Court of Appeal stated what amounts to a prima facie case.
 9. It is incumbent for the Plaintiffs/Applicants to prove that they will suffer irreparable damages if the injunction is not granted. It is on record that the Plaintiffs/Applicants are in possession of the suit land while the utility plots are held by the Nairobi City County Government. I agree with the Defendant/Respondent's submissions that there is no threat to the Plaintiffs'/Applicants' proprietary rights.
 10. I have gone through the prayers sought and I find that the prayer for specific performance is final in nature. There would be nothing left to be determined at the trial if this prayer is granted at this stage.
 11. I also note that the prayers sought are of a mandatory nature. In the case of *Rafique Ebrahim v William Ochanda t/a Ochanda & Co. Advocates* [2013] eKLR the court noted that:-
 - “(i) a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and only in clear cases where the court thinks that the matter ought to be decided at once or whether the injunction is directed at simple and summary act which can easily be remedied; and



- ii. a mandatory injunction at interlocutory stage is merely granted, only where the applicant's case is clear and incontrovertible."

12. Similarly in the case of *Lucy Wangui Gachara v Minudi Okemba Lore* [2015] eKLR, the Court of Appeal stated thus:-

".....the court will not grant a mandatory injunction if the damage feared by the Plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross examination of witness must not be sacrificed or substituted by a summary hearing".

13. For the foregoing reasons I find no merit in this application and the same is dismissed. The costs do abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 5TH DAY OF MAY 2022.

L. KOMINGOI

JUDGE

In the presence of:-

Ms Kimiti for the Plaintiffs

Mr. Kariuki for Mr. Kabaiku for the Defendant

Steve - Court Assistant

