



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E188 of 2021

MWANGAZA MINISTRY.....1ST APPLICANT

MUTUINI LAND OWNERS ASSOCIATION.....2ND APPLICANT

VERSUS

JANET NDIRANGURESPONDENT

RULING

1. Coming up for ruling before this court is a Notice of Motion application dated 28th May 2021 filed by the Applicants seeking the following orders:

i. Spent.

ii. THAT a temporary injunction be issued restraining the respondent by themselves, servants, legal representatives, agents or howsoever from entering into, blocking, selling, constructing and or in any manner interfering with land parcel DAGORETTI/MUTUINI/512 pending hearing and determination of this suit.

iii. THAT the respondents be ordered to open the entrance leading to the parcel land DAGORETTI/MUTUINI/512 by removing the temporary fence they have constructed on the parcel of land and allow access to the church by the applicants pending hearing and determination of this suit.

iv. THAT the respondents be restrained from interfering with the Applicant's church service until the final determination of this matter.

v. THAT the OCS Dagoretti Police Station and the Officer in Charge Mutuini Police Post do ensure compliance with the orders above.

vi. THAT the costs of this application be provided for.

2. The application is premised on the supporting affidavit of Daniel Muchiri dated 28th May 2021 who introduces himself as the Head Pastor of the 1st Applicant. He deposes that the 1st applicant was allocated the parcel of land DAGORETTI/MUTUINI/512 by the 2nd Applicant and the area administrators vide a letter dated 12th March 2003. That the Applicant has been using the suit property since 2003 as a place of worship as well as running a Community Based Organization with the knowledge of the local administrators. That the suit parcel is community land and should it be deemed as private property, then they ought to have been served with an eviction notice not less than three months. The Applicants contend that the Respondent demolished the 1st Applicant's fence and put up a perimeter wall denying them access to the land which they have used for more than 20 years.

3. The Respondent /Defendant has opposed the application via her replying affidavit dated 25th June 2021. She avers that the application is an abuse of the court process since she is the legal owner of the suit property. She outlined at length how she became the owner of the land in question DAGORETTI/MUTUINI/512A in 1991, that she was issued with an allotment letter on 31st August 1993 and later a title in year 2018.

4. She averred that the 2nd Applicant wanted to be allocated the same piece of land DAGORETTI/MUTUINI/512A which was then subdivided into 1027 and 1028. The 2nd Applicant was allocated 1027, while the Respondent was allocated 1028. The plot 1027 was under

the name of Ministry of Technical Training & Technology as the allottee and not the 2nd Applicant.

5. The Respondent was to later learn that the suit property had been encroached upon by other persons and subdivided into five plots prompting her to move to court in 2005 to prevent Dagoretti Constituency Development Fund from developing plot 1028. She moved the Commissioner of Lands to resurvey the plot and in 2007, a mutation survey was done on DAGORETTI/MUTUINI/512 which had been divided into 1027 and 1028 which were then registered as 1084 (later renamed 1320) and 1085 (later renamed 1319). She stated that in 2018 she acquired leases for plots 1084 and 1320.

6. She indicated that, despite having constructed a petrol station on part of the land, she had not been able to operate the same due to frustration, interference and threats from the 2nd Applicant which prompted her to flee to Nyandarua. Upon return to Nairobi, she learnt that the 2nd Applicant had assumed possession of her property and allocated it to the 1st Applicant. The respondent thus stated that the application should be dismissed as it is an abuse of court process as the Applicants had occupied her property illegally and ought to be evicted.

Submissions

7. The 1st Applicant vide their submissions dated 19th August 2021 stated that the Applicant has met the grounds set out in the case of **Giella V Cassman Brown (1973) EA 358** for grant of temporary injunctions. While submitting that the Applicants had established a prima facie case, it was averred that the suit land in contention was community land belonging to the community of Mutuini as per search records conducted on 19th December 2001. In the year 2007, the Applicants learnt that the Respondent had been issued with the said land using a map from the Kiambu Registry instead of Nairobi Registry. The Applicant wrote to the National Land Commission complaining that there were attempts to subdivide the land into three parcels Dagoretti/Mutuini/1084, 1085 and 1027. However, NLC was yet to ascertain the legality of the subdivision.

8. On the issue of irreparable harm, it was submitted that the Applicant had been using the suit property since 2003 without any interference until May 2021 when they were denied access to the suit property. They indicated that they operate a church and a Community Based Organisation that seeks to transform lives of the poor and the vulnerable in the community. That demolition of these facilities would make them suffer irreparable harm which cannot be compensated by way of damages because the harm would not only be of a financial nature but also have social effects on the property users.

9. On the issue of balance of convenience, the Applicants submitted that the balance tilts in their favour stating that the National Land Commission had indicated that they would investigate whether a letter of allotment had been issued to the respondent as a private developer.

10. The 2nd Applicant filed their written submissions dated 6th October 2021 through the firm of Gitau S.M Advocates which implies that the application was filed by the 1st applicant. It follows that the 2nd Applicant does not have any foundational pleading in so far as the application is concerned, See- **Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR**. I have therefore disregarded the aforementioned submissions of the 2nd Applicant altogether.

11. The Respondent filed her submissions dated 23rd September 2021 raising the following issues for determination;

i. Whether there exists a parcel of land known as Dagoretti/Mutuini/512?

ii. Whether the parcel of land known as Dagoretti/Mutuini/512 is a community land, public land or private land?

iii. Whether there was an allotment of parcels of land known as Dagoretti/Mutuini/1084 and Dagoretti/Mutuini/1320 to the respondent?

iv. Whether the parcels of land known as Dagoretti/Mutuini/1084 and Dagoretti/Mutuini/1320 belong to the respondent?

v. Whether the respondent lawfully and procedurally acquired the leases for parcels of land known as Dagoretti/Mutuini/1084 and Dagoretti/Mutuini/1320?

vi. Whether the allotment of public land to private land is subject to the authority of the National land Commission or Ministry of Lands?

vii. Whether the applicants encroached on the respondent's parcels of land known as Dagoretti/Mutuini/1084 and Dagoretti/Mutuini/1320?

viii. Whether the respondent is justified to evict the applicants from the parcels of land known as Dagoretti/Mutuini/1084 and Dagoretti/Mutuini/1320?

ix. Who should bear the costs of the suit?

12. On the issue of ownership of the suit land, the Respondent reiterated the averments set out in her replying affidavit in relation to how she acquired the suit land, adding that the documents produced by the Applicants did not confer ownership of property to them.

13. On the issue of what type of land the suit property was, it was submitted that Dagoretti/Mutuini/512 was not a community land as

defined under **Article 63** of the Constitution of Kenya and has never been declared as such by any Act of Parliament. However, the respondent followed the laid down procedure and laws for conversion of land from public to private land as set out in **Section 9 (5)** of the **Land Act, 2012** and the National Land Commission Gazette Land (Conversion of Land) Rules, 2017.

14. To this end, the Respondent cited the case of **Civil Appeal No 181 of 1995 between Charles Ogejo Ochieng and Geoffrey**

Okumu where court held that;

“... Moreover, under Section 23(1) of the Registration of Titles Act the certificate of title in respect of LR 8530/130 and in possession of the Respondent shall be taken by all courts as conclusive evidence that the Respondent is the proprietor of the said land as the absolute indefeasible owner thereof... and title shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party...”

15. The Respondent also made reference to the case; **Advisory Opinion Reference No. 2 of 2014 between the National Land Commission and the Attorney General and 5 others and Kituo Cha Sheria and Another** where the court stated that:

“... The NLC has a mandate in respect of various processes leading to the registration of land, but neither the Constitution nor statute law confers upon it the power to register titles in Land. The task of registering land titles lies with the National Government and the Ministry has the authority to issue land title on behalf of the said Government...”

16. It was also submitted that the Respondent had not been enjoying her proprietary rights for fear of her life and this led the Applicants to encroaching and trespassing into her private land. She relied on the case of **Civil Case No. 74 of 2010 between Philip Ayaya Aluchio Vs. Crispinus Ngayo** where the court stated that:

“... The Plaintiff has succeeded to show that he has title to the suit land... The Defendant had no title to the land... The Defendant came into the property without consent... He is a trespasser who is continuing to trespass... The Plaintiff is entitled to general damages for trespass...”

17. On the issue of whether the Respondent is justified to evict the Applicants, it was submitted that the Respondent is the registered owner of the land and her right to property ought to be protected as outlined in **Article 40 (5)** of the **Constitution** adding that the Applicants were not entitled to three months eviction notice since they were illegal occupiers of the property. To this end, reference was made to the case of **Philip Ayaya Aluchio v Crispinus Ngayo [2014] eKLR**.

Analysis and determination

18. This court has considered the application, affidavits, rival submissions together with the relevant legal framework and the prevailing jurisprudence. The court finds that the issue for determination is: ***whether the ingredients for grant of interlocutory injunctions have been met in the current application.***

19. In determining grant of injunctions, the grounds to be established have been enunciated in the *locus classicus* case of **Giella v Cassman Brown & Co. Ltd [1973] EA** where the following grounds were established: First, the Applicant must demonstrate a *prima facie* case with a probability of success. Second, an interlocutory order will not be granted unless it is demonstrated that the Applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience. This was also reiterated in **Nguruman Limited versus Jan Bonde Nielsen & 2 others (2014)eKLR** where the Court held that;

“... In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

a) establish his case only at a prima facie level,

b) demonstrate irreparable injury if a temporary injunction is not granted and

c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially...”

20. To ascertain whether the applicant has established a *prima facie* case, I make reference to the case of **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** where it was pronounced that;

“In civil cases, a prima facie case is a case in 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Applicant’s case upon trial. (Emphasis mine). That is clearly a standard, which is higher than an arguable case.”

21. The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR** buttressed this point by holding that;

“We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation.”

22. The court also wishes to state that grant or refusal of an interlocutory injunction is a matter of exercise of judicial discretion as was pronounced in the Court of Appeal case of **National Bank of Kenya Limited v Juja Coffee Exporters Limited [2021] eKLR**.

23. From the above analysis, this court finds that for the Applicants to have a *prima facie* case with likelihood of success, the court should gauge the strength of the Applicant’s case to see if on the face value, there is a right which is likely to be infringed without adjudging the main suit. This court is tasked with the duty to ensure that the orders it gives should be in the interest of justice, fair and impartial, and that the orders given should not be injurious to any party.

24. The document which the Applicants have termed as a letter of allotment (DM-3) is certainly not a document which confers any rights and or interests in land. As such, from the application, affidavits and rival submissions filed herein, the court is not convinced that the applicants have established a *prima facie* case with a likelihood of success to warrant the court to issue interlocutory injunctions against the respondent.

25. In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal stated that:

“With reference to the establishment of a prima facie case, Lord Diplock in the case of American Cyanamid vs Ethicon Limited [1975] AC 396 stated thus;“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”(Emphasis mine).

26. As the Applicant has failed to establish a *prima facie* case, then the application dated 28.5.2021 must fail. **The same is dismissed with costs to the Defendant/Respondent.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

..... for the Plaintiff

..... for the Defendant

Court Assistant: Edel Barasa