



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC PETITION CASE NO. 5 OF 2018

MUSA NDALIRO MUCHELULE & OTHERS.....PETITIONERS

VERSUS

NATIONAL LAND COMMISSION & 2 OTHERS.....RESPONDENTS

RULING

The application is dated 15th October 2018 and is brought pursuant to Section 19 of the Environment and Land Court Act No. 19 of 2011, Section 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rule 1, 2, and 3, Order 51 rule 1 of the Civil Procedure Rules, 2010 seeking the following orders that;

1. This application be certified as urgent and be heard ex parte in the first instance.
2. An injunction do issue pending the inter parties hearing this application restraining the 1st respondent by themselves, their commissioners, employees, servants, agents, officers, inspectors, registrars, proxies or howsoever entering upon the suit properties, evicting the petitioners, demolishing, destroying or carting away the developments, crops, plant, machinery and equipment being on the suit properties or in any way interfering with the petitioners' quiet enjoyment of the suit properties.
3. An injunction do issue pending the substantive determination of the petition restraining the 1st respondent by themselves, their commissioners, employees, servants, agents, officers, inspectors, registrars, proxies or howsoever entering upon the suit properties, evicting the petitioners, demolishing, destroying or carting away the developments, crops, plant, machinery and equipment being on the suit properties or in any way interfering with the petitioners' quiet enjoyment of the suit properties.
4. The officer commanding the police station nearest to the suit properties at Mumias, South Wanga/Ekero Area be directed to supervise the implementation of the orders of this honourable court.
5. Such other orders as this honourable court deems just and expedient do issue.
6. Costs of this application be borne by the 1st respondent.

It is premised on the grounds that, on 17th July, 2018 the 1st respondent issued a 90-day Eviction Notice (hereinafter "the Notice") to all residents, occupiers and inhabitants of Mumias Township area (Mumias Plots) to vacate the premises supposedly on account of the fact that all property in that vicinity had been compulsorily acquired by the Government between 1970 and 1972 and that compensation had been made and titles to the properties surrendered. The petitioners are permanent residents, inhabitants and bonafides holders of absolute and indefeasible titles to the land parcels known as title Numbers S/WANGA/EKERO/4777, S/WANGA/EKERO/471, S/WANGA/EKERO/640, S/WANGA/EKERO/638, S/WANGA/EKERO/659, S/WANGA/EKERO/652, S/WANGA/EKERO/1362, S/WANGA/EKERO/624, S/WANGA/EKERO/476, S/WANGA/EKERO/470, S/WANGA/EKERO/620, S/WANGA/EKERO/756, S/WANGA/EKERO/643, S/WANGA/EKERO/737, S/WANGA/EKERO/1557, S/WANGA/EKERO/2204 and S/WANGA/EKERO/741 (hereinafter "the suit properties") situate within Mumias Town and the petitioners are apprehensive that the notice will materially and adversely affect their proprietary interests in the suit properties. The tenor and purport of the notice is to effectively render the petitioners unlawful occupiers of their own land. Contrary to the 1st respondent's allegations as contained in the notice, the suit properties have never been the subject of compulsory acquisition as contemplated under sections 117-135 of the Land Act, No. 6 of 2012, and more specifically. The petitioners have never received a notice of intention to compulsorily acquire the suit properties from either the 1st respondent or their predecessor Commissioner of Lands nor were the suit properties ever acquired for any public purpose. The petitioners have never received any compensation whatsoever either on account of compulsory acquisition or any other form of acquisition either by the respondents or any other third parties and they remain the legally registered owners of the suit parcels. None of the respondents has ever taken possession of the suit properties pursuant to compulsory acquisition and the petitioners have remained in proper and continuous occupation of the suit properties

for the better part of the last 100 years, the land is their ancestral heritage, sole abode and source of livelihood. The petitioners have never received any notification from any of the respondents to surrender their titles to the suit properties and they remain in possession of the originals to date.

The Notice is set to lapse on Monday the 15th of October, 2018 at which time the petitioners are apprehensive that the respondents shall enter upon the suit premises, forcefully take over possession of the same and destroy all developments erected thereon including residential homes, agricultural subsistence crops, trees and family burial sites thereby rendering hundred if not thousands of its inhabitants destitute. The notice threatens the petitioners' sacred and fundamental rights to own property and have human dignity as protected under Article 40 and 28 of the Constitution of Kenya, 2010 respectively. The notice amounts to unfair administrative action and runs against the Fair Administrative Actions Act No. 4 of 2015 in that:-

- (a) Despite written request and demand for particulars of the reasons for the 1st respondent's action as contained in the notice and documentation to support their decision, the 1st respondent has declined to issue any response;
- (b) The 1st respondent has not provided within its notice an opportunity for any party materially and adversely affected by their actions and decision, such as the petitioners, to be heard and make representations respecting the same; and
- (c) The 1st respondent has not provided within the notice any internal mechanism procedure through which any person materially and affected by its action and decision, such as the petitioners can launch a review or appeal against the same.

The 2nd respondent submitted that they have been in occupation and use of the suit land since it was acquired to date as opposed to the petitioners who are not in actual possession of the same but trying to gain entry in the suit land illegally and pretending that they are in occupation and use. That if the 2nd respondent's agents or personnel are doing any activities in the suit land which is denied then it is within the law and in line with the order of status quo that was granted and they are not in any way affecting the respondents who inter alia have not shown the court that they are in possession of the suit land. That it is not true that the orders sought in the main application dated the 15th October, 2018 were granted in interim as alleged by the petitioners save for the orders of status quo aforesaid. That the 2nd respondent and her servants are not trespassing on the suit land as alleged and that they cannot be termed as trespassers on the land they own. That the petitioners are not in actual possession and use of the suit land and therefore the allegations that they are being threatened with eviction by the 2nd respondent's personnel any time from now is misplaced and false given that the 2nd respondent's personnel cannot evict people who are not residing in the suit land but in this case to stop them from continuous trespass and interference on the suit land. That allegations that the petitioners still have proprietary interest in the suit land and therefore this court ought to restrain the 2nd respondent from carrying on their day to day duty as a government are misplaced given that the mere fact that some of the titles are still having the names of the petitioners registered as owners does not mean that their registration as proprietors and their interest in the said titles is absolute as they were paid and compensated when the land was fully acquired by the government to expand Mumias town. That the applicants' certificate is therefore misplaced, it lacks merit and in any event the same is just an act of delay to have the application dated the 15th October, 2018 determined after parties had agreed to file written submissions and fix a date for ruling. That alternative the issues raised in the certificate of urgency and the supporting affidavit herein ought to be ignored as they cannot assist the court and can only be replied upon and substantially canvassed by this honourable court in a formal application where parties can be given a chance to be heard and even be cross examined considering the nature of the averments made by the petitioners and given that the application dated the 15th October, 2018 had been in one way heard and closed and parties were expecting to have a date for ruling after filing submissions; and therefore in the circumstances this honourable court should dismiss the prayers sought in the certificate of urgency and supporting affidavit thereof dated the 29th March, 2019 with costs. The whole suit and all the applications herein are res judicata as many of other cases on the same subject have been heard and determined by various courts as annexed in their previous affidavit dated the 19th February, 2019. The pictures annexed in the supporting affidavit do not show when and where they were taken. That on numerous occasions the petitioners have sought for injunctions in their suit and in this particular one which have been in vain and this is an abuse of the court process and a tactic by the petitioners to delay and frustrate the County government from finalizing the remaining bit of the process of compulsory acquisition. That the Government is supposed to proceed with its work as long as its not in contravention of the law and it's not in any way contrary to the orders issued by the court. That the applicants' certificate of urgency in the circumstances therefore lacks merit, it is frivolous, scandalous, bad in law and the same ought to be dismissed with costs.

This court has carefully considered the submissions and the annexures therein. The principals governing the grant of interlocutory orders are clear. As stated in the case of *Giella vs. Cassman Brown* (1973) EA 358.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* (2003) Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”*

The applicants submitted that on 17th July, 2018 the 1st respondent issued a 90-day Eviction Notice (hereinafter “the Notice”) to all residents, occupiers and inhabitants of Mumias Township area (Mumias Plots) to vacate the premises supposedly on account of the fact that all property in that vicinity had been compulsorily acquired by the Government between 1970 and 1972 and that compensation had been made and titles to the properties surrendered. The petitioners are permanent residents, inhabitants and bonafides holders of absolute and indefeasible titles to the suit properties. The petitioners maintain they have never received a notice of intention to compulsorily acquire the suit properties from either the 1st respondent or their predecessor Commissioner of Lands nor were the suit properties ever acquired for any public purpose. The petitioners have never received any compensation whatsoever either on account of compulsory acquisition or any other form of acquisition either by the respondents or any other third parties and they remain the legally registered owners of the suit parcels. The 2nd respondent submitted that they have been in occupation and use of the suit land since it was acquired to date as opposed to the petitioners who are not in actual possession of the same but trying to gain entry in the suit land illegally and pretending that they are in occupation and use. That allegations that the petitioners still have proprietary interest in the suit land and therefore this court ought to restrain the 2nd respondent from carrying on their day to day duty as a government are misplaced given that the mere fact that some of the titles are still having the names of the petitioners registered as owners does not mean that their registration as proprietors and their interest in the said titles is absolute as they were paid and compensated when the land was fully acquired by the government to expand Mumias town. I find that this matter cannot be determined at an interlocutory stage and needs to go to full hearing. This court has taken judicial notice that there have been numerous law suits touching on this matter in the past. Indeed there is a task force set up by the County Government of Kakamega trying to resolve the issue. I find that the petitioners/applicants has not shown a prima facie case with a probability of success. It has not been shown that the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages if the orders are not granted. The 2nd respondent maintains they are in possession. I find this application is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 4TH JULY 2019.

N.A. MATHEKA

JUDGE