



REPUBLIC C OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 18 OF 2021

MOHAMMED ABDILLAHI SHAIYA.....PLAINTIFF/APPLICANT

VERSUS

BOARD OF MANAGEMENT,

UMOJA PRIMARY SCHOOL.....DEFENDANT/RESPONDENT

RULING

By a Notice of Motion Application dated **10th February 2021**, brought under **Order 40 Rule 1 Sections 1A, 1B and 3A** of the **Civil Procedure Act**, the Plaintiff/Applicant sought for the following Orders that;-

a) The Honorable Court be pleased to issue a temporary injunction restraining the defendant, the defendant school, defendant agents, servants employees or anyone claiming to act under the instructions or authority from the defendant from encroaching, trespassing, building, wasting, damaging, alienating, disposing, selling and or in anyway interfering with Land Reference No.4953/1959 and its adjacent access roads pending the hearing and determination of this suit.

b) The Honorable Court be pleased to issue a temporary mandatory injunction compelling the defendant, defendant school, the defendant agents, servants, employees and/or anyone else claiming to act under instructions or authority from the defendant to forthwith remove the perimeter wall and any other structures erected or encroaching on to Land Reference No.4953/1959 as well as from its adjacent access roads pending the hearing and determination of this suit

c) Upon grant of the above prayers this Honorable court be pleased to fix a time frame within which the Defendant school, the Defendant agents, servants, employees and/or anyone else claiming to act under instructions or authority ought to remove the perimeter wall and any other structures erected or encroaching on to Land Reference No.4953/1959 as well as from its adjacent access roads and forthwith vacate from Land Reference No.4953/1959 as well as its adjacent access roads

d) In default of compliance with the court order issued pursuant to prayers 4 and/or 5 an 6 above, the plaintiff be at liberty to remove the perimeter wall and any other structures erected on or encroaching onto Land Reference No.4953/1959 as well as from its adjacent access roads and evict the defendant, defendant school, the defendant agents, servants, employees and/or anyone else claiming to act under instructions or authority from the defendant from Land Reference No.4953/1959 as well as from its adjacent access roads and in that event, the defendant be ordered to pay the plaintiff all costs attendant thereto.

e) OCS Makongeni Police Station do supervise the implementation and enforcement of Court Orders herein.

f) Costs of this application.

The Application is supported by the Affidavit of **Mohamed Abdillahi Shaiya**, dated **10th February 2021**, who averred that he is the registered owner of the suit property. That he purchased the same from one **Mohamud Ali Saleh** in **2008**, and that the said **Mohamud Ali Saleh**, had been allocated the land by the Government in **1991**, and issued with title deed in **1992**, and had been paying applicable rates to the then defunct Municipal Council of Thika.

He further averred that he did extensive due diligence and also commissioned a private surveyor one **Mr. Mithamo**, who ascertained and confirmed the location of the boundaries. That sometimes in **2007**, the Defendant/Respondent encroached and trespassed and built a perimeter wall within the school compound.

It was his contention that he wrote to the **National Land Commission** to have the dispute resolved amicably. However, the **National Land Commission** issued a report on its finding which concluded that the genesis of the problem could have been a case of double allocation. It was his further contention that he is unable to utilize or develop his property as per his wishes and plans and it is in the interest of justice and

fairness that the Court should grant the orders sought.

The Application is opposed through a Replying Affidavit of **Gerald M.**

Kamau, dated 1st April 2021, who averred that **Land Reference No.4953/1959**, is public land allocated to **Umoja Primary School**. He further averred that the now defunct **Municipal Council of Thika**, converted part of the settlement area to a Public Primary School and he attached Minutes of 2001, marked as GMK3. That in 2011, the **Constituency Development Fund (CDF)** constructed a perimeter fence under the guidance of the then Commissioner of Lands Office and a public surveyor. He contended that the Plaintiff/Applicant's Application should be dismissed.

This Court directed that the instant Notice of Motion Application be canvassed by way of written submissions.

The Plaintiff/Applicant filed his submissions dated 8th June 2021, through the **Law Firm of C.N Ngugi & Associates Advocates** and relied on the cases of; **Giella –vs- Cassman Brown & Co. Ltd (1973 EA 348)**, **Mwambu Mbuvi Maingi & 15 Others vs. Kenya Education Management Institute & Another (2014) Eklr**, **Nairobi Permanent Market Society & others vs Salima Enterprises & others (1997) Eklr**, **Shiva Mombasa Ltd vs Kenya Revenue authority 2005 Eklr**, **Alexander Ngavu Muthee v Esther Muthoni (2006) Eklr**, **Republic vs City Council of Nairobi & another Ex-parte Christopher Mwangi Kioi & 3 Others (2014) Eklr**, **Rukaya Ali Mohamed vs. David Gikony & Another (unreported)**, **Josan Academy vs. David Owino Ondeng & 4 Others (2015) Eklr**, **Maher Unissa Karim vs. Edward Oluoch Odumbe (2015) Eklr**, and **Shariff Abdi Hassan vs Nadhif Jama Adan (2006)**.

On the other hand, the Defendant/Respondent filed its written submissions dated 5th July 2021, through **Benson Njagi, a State Counsel for the Attorney General**, and submitted that the Plaintiff/Applicant has fallen short of meeting the threshold for granting of the orders sought. The Defendant/Respondent relied on the cases of **Mrao vs First American Bank of Kenya Ltd and 2 Others (2003) eKLR 125**, **Stars & Garters Restaurant & Another vs. National Bank of Kenya Limited (2019) eKLR**, **Nguruman Ltd vs. Jan Bonde Nielsen & 2 Others (2014) eKLR** and urged the Court to find the Plaintiff/ Applicant is undeserving of any temporary reliefs sought.

The Court has considered the pleadings in general, the rival written submissions, the cited authorities and the relevant provisions of law and notes that the main issue for determination is **whether the Plaintiff's/Applicant's Application is merited**.

The Plaintiff/Applicant having sought for Injunctive Orders is only entitled to either grant or denial of the same at this stage. The Court is not supposed to deal with the merit of the case at this stage. See the case of **Airland Tours and Travel Ltd...Vs...National Industrial Credit Bank, Milimani HCCC No.1234 of 2003**, where the Court held that:-

“In an Interlocutory application, the Court is not required to make any conclusive or definitive findings of facts or law, most certainly not on the basis of contradictory affidavit evidence or disputed proposition of law”.

In determining whether to grant or not to grant the Orders sought, the Court will be guided by the principles set out in the case of **Giella ... Vs... Cassman Brown Co Ltd (1973)EA 358**, which are:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the 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 might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs...Trufoods (1972) EA 420.”

The Plaintiff/Applicant needed to establish that he has a *prima-facie* case with probability of success. In the case of **Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR**, prima facie case was described as:-

“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 as to call for an explanation or rebuttal from the latter”.

The duty of the Applicant herein is to establish that he has a *prima-facie* case. In the instant case, the Plaintiff/Applicant stated that the Defendant/Respondent allegedly trespassed into his land in 2017. Though the Plaintiff/Applicant has demonstrated that he has a title deed to the suit land i.e. **Land Reference No.4953/1959**, the school has made serious allegations which are now before the **National Land Commission**.

Though the Plaintiff/Applicant alleges that he bought the subject land from one **Mohamud Ali Saleh**, the Defendant's/ Respondent's Replying Affidavit has raised doubts on the manner in which the suit land was allegedly issued to a private developer yet it was public land.

Secondly the Plaintiff/Applicant herein knew the Defendant/ Respondent had been in occupation of his alleged land since 2017. The Plaintiff/Applicant is also aware of their construction. The court is mindful of the fact that this is a school and for that matter, a public Institution. There is no material evidence before the Court to show that the school is about to dispose of the land and or in any way waste or diminish the value of the said land before this matter is heard and determined.

At this juncture the Plaintiff/Applicant has not satisfied the first requirement of establishing a prima facie case. The Court will have no business to delve into the other limbs if the first limb is not fully satisfied. See the case of **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR** where the Court held:-

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates 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.”

The Plaintiff/Applicant has also sought for a mandatory injunction. In the case of **Kenya Breweries Limited & Anor vs Washington O. Okeyo 2002 eKLR** the Court of Appeal stated:-

“A Mandatory Injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a mar..... on the plaintiff. Moreover, before granting a mandatory injunction, the court had to fell a higher degree of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than was required for a prohibitory injunction.”

It is evident that Mandatory Orders of Injunctions are granted in very special and exceptional circumstances at the Interlocutory stage. These are Orders that are sought in the Plaint and if granted at this stage, it would mean that some of the prayers in the Plaint will have been exhausted at the Interlocutory stage without the benefit of hearing evidence of all the parties involved in the suit.

The Court finds that there are unclear issues herein which can only be settled after full hearing of the matter, particularly on the manner of acquisition of the subject land since both parties are laying claim on the same suit property.

The Plaintiff/Applicant herein has not demonstrated to the satisfaction of this Court, any special and/or exceptional circumstances that may warrant granting of the orders of mandatory injunction sought herein.

Having carefully considered the Instant Notice of Motion Application dated **10th February 2021**, and the annexures thereto together with the written submissions, the Court finds that the instant Application is **Not Merited** and the same is dismissed entirely with Costs being in the cause.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF JULY 2021.

L. GACHERU

JUDGE

29/7/2021

Court Assistant – Dominic

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Ngugi for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

L. GACHERU

JUDGE

29/7/2021