



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC PETITION NO. E024 OF 2020

FRANCIS KIMATHI MUTISYA & 173 OTHERS.....PETITIONERS

-VERSUS-

NAIROBI CITY COUNTY GOVERNMENT.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

RULING

INTRODUCTION

1. The Petitioners herein have filed and/or lodged the Notice of Motion Application dated 2nd December 2020, and in respect of which same have sought for the following Reliefs;

i.(Spent)

ii. *Upon hearing of this Application ex-parte, this Honourable court be and is hereby pleased to issue an order of Injunction against the Respondents restraining them either by themselves, servants, agents and/or employees from threatening to evict, evicting, demolishing the Petitioners business structures and/or in other manner interfering with the Petitioners quiet and peaceful possession of what is known as Gacucu Gikomba open air market pending inter partes hearing of this Application.*

iii. *Upon hearing of this Application inter-parte, this Honourable court be and is hereby pleased to issue and order of Injunction against the Respondents restraining them either by themselves, servants, agents and/or employees from threatening to evict, evicting, demolishing the Petitioners business structures and/or in other manner interfering with the Plaintiff quiet and peaceful possession known as Gacucu Gikomba open air market pending the hearing and determination of the Petition.*

iv. *Costs of this Application be provided for.*

2. The subject Application is premised on various grounds which have been enumerated at the foot thereof and besides the subject Application is supported by the Affidavit of Francis Kimathi Mutisya, sworn on the 2nd December 2020, and to which the Deponent has attached numerous Documents in support of the claim therein.

3. Upon being served with the Petition and the Notice of Motion Application herein, the Respondents filed and/or lodged a Replying affidavit, sworn by one Stephen G. Mwangi, who states that he is the Deputy Director in Charge of lands in the Nairobi Metropolitan Services and on this account same has sworn the affidavit on behalf of the 2nd Respondent.

Depositions by the parties

The Petitioners/Applicants Case

4. The Petitioners/Applicants case is contained and/or espoused in the Supporting Affidavit of the 1st Petitioner herein, who states that same has sworn the Affidavit on his behalf and on behalf of 173 others.

5. Vide the Supporting Affidavit, the Deponent states, that rest of the Petitioners and himself are traders who deal in secondhand clothes within Gikomba open air market and same have operated and/or have conducted the said business in the said market for over 40 years.

6. It is the further averment of the 1st Petitioner that the rest of the Petitioners and himself have carried out business at the said open air

market and have been paying the Business Permit fees ,License charges as well as other related levies for the use of open-air market and which payments have been made to the 1st Respondent.

7. Besides, the 1st Petitioner herein have also averred that the said business is what supports the life and livelihood of the Petitioners and their respective families. In this regard, the Petitioners have underlined that the business in question is their source of life and livelihood.

8. Be that as it may, the Petitioners have averred that on or around the 27th November 2020, the Respondents employees gave and/or issued verbal threats to the Petitioners/ Applicants to vacate the open-air market and that in default the Respondents would move in and evict same.

9. It is also the Petitioners case that the Respondents are keen to remove the Petitioners/Applicants and thus demolish their properties without issuing and serving compliant Eviction Notices in line with the Provision of **Section 152 A, B, C, D,E, G and F of the Land Ac,2012, [2016]**. In this regard, it is the Applicants case that such Eviction would not only be irregular and illegal.

10. It is the Petitioners contention, that the imminent demolition of their premises at the said open air market, would affect the live and livelihood and would destroy the business, which the Petitioners, have been carrying therein.

11. Owing to the foregoing, the Petitioners have thus approached the court to obtained conservatory orders or better still orders of temporary injunction. Finally, the Petitioners/Applicants avers that the loss that same are bound to suffer are irreparable and would not be compensable in Monetary terms.

12. In the premises, the Petitioners/Applicants have sought for an order of temporary injunction and prays that the court be pleased to issue.

The Respondents Case

13. On their part, the Respondent have filed a Replying Affidavit, sworn by one Stephen G Mwangi and in respect of which the Respondents have averred that the suit property, upon which the Petitioners/Applicants have operated and/or been operating on, is no doubt a Public property. In this regard, the Respondents have averred that the Petitioners do not have any legal Title and/or claim to the suit property.

14. Besides, the Respondents have further averred that by virtue of being public land, same ought to be used as such and for purposes of enhancing the public good.

15. It is the Respondents further averment that the area in question covers and/or falls within Pumwani Majengo Health Centre and on this account, the area is necessary for purposes of the expansion of the said medical facility, to accommodate the increased demand for health care.

16. Besides, the Respondents have further averred that the Petitioners herein have since encroached onto and/or occupied a substantial chunk of the suit property and as a result of same the Petitioners, have not only blocked access to the said facility, but also the sewerage system that serves the said hospital.

17. At any rate, the Respondents have further averred that as a result of the covid-19 pandemic, there has been a growing need for medical services and hence there has arisen the necessity to upgrade the medical facility to level 3 hospital. Consequently, the expansion is extremely necessary and so the recovery of vacant possession of the suit property, is needed to facilitate the Upgrade.

18. Further, the Respondents have also averred that the Petitioners herein have merely been using the open-air market at the pleasure of the 1st Respondent and in respect of which same have been paying various levy's and/or licenses. In this regard, the Respondents averred that as the licensees of the 1st respondent, the Petitioners/Applicants, cannot be heard to block and or otherwise fetter the right of the 1st Respondent to put the subject property to public use.

19. On the other hand, the Respondents have further stated that the suit property is an open-air place and that the petitioners have merely been using same as such. Consequently, the Petitioners have not built and/or constructed any structures, which can attract any damages and/or loss, in the manner alleged by the Petitioners/Applicants.

20. Finally, the Respondents herein further avers that the Dispute before hand is a competition between private interest and public need and that in such situation the private interest, in this case the open-air activities by the Petitioners/Applicants, ought to give way for the public need and particularly the upgrading of Pumwani Majengo Health Centre into a level 3 hospital to enhance access to universal health care.

Submissions BY THE PARTIES

21. On the 17th December 2020, the subject Application came up for hearing and on which date the honourable court proceeded to and issued Directions as pertains to the manner of hearing and disposal of the subject Application. For clarity, it was ordered and/or directed that the said Application be canvassed and/or disposed of by way of written submissions.

22. Pursuant to and in line with the said directions the Petitioners proceeded to and filed their set of written submissions on the 3rd March 2021. Besides, the Petitioners have also alluded to various case law, in support to their submissions.

23. On the other hand, the 1st Respondent herein filed her written submissions on the 25th February 2021, and same has also attached various decisions in support in the contention therein.

24. On her part, the 2nd Respondent filed her written submissions on the 25th May 2021, and similarly same has also relied on various decisions.

25. This being an Application for grant of orders of temporary injunction, the issues that arise for determination are therefore as hereunder;

i. *Whether the Petitioners/Applicant have established a prima facie case with over whelming chances of success?.*

ii. *Whether the Petitioners/Applicant are bound to suffer irreparable harm?.*

iii. *In whose favor does the balance of convenience tilts?.*

Analysis and determination

Issue Number One

Whether the Petitioners/Applicant have established a prima facie case with over whelming chances of success.

26. It is common ground that any litigant, who seeks to procure an order of temporary injunction, must lay before the honourable court sufficient and credible evidence to establish the existence of a Prima – facie case.

27. In fact, the establishment of a Prima-facie case is so central and or paramount to the grant or refusal of an order of temporary injunction.

28. Consequently, the question then does arise as to what amounts to and/ or constitutes a Prima facie case, which must be established and/or proven before the grant of an order of temporary injunction.

29. Without belaboring the point, it is sufficient to note that what amounts to a prima facie case has variously been defined and in this regard it is sufficient to refer to and invoke the definition supplied in the case of **Nguruman Ltd v Jan Bonde Nielsen & Others (2014) eKLR**, where the honourable court observed as hereunder;

*“Prima facie” is a Latin phrase for “at first sight”, whose legal meaning and application has been the subject of varying interpretation by courts in many jurisdictions. Phrases like “a serious question to be tried”, “a question which is not vexatious or frivolous”, “an arguable case” have been adopted to describe the burden imposed on the applicant to demonstrate the existence of prima facie case. The leading English House of Lords case of the **American Cyanamid Co. Ethicon Ltd [1975] AC 396** is a case in point. The meaning of “prima facie case”, in our view, should not be too much stretched to land in the loss of real purpose. The standard of prima facie case has been applied in this jurisdiction for over 55 years, at least in criminal cases, since the decision in **Ramanlal Trambaklal Hatt V. Republic [1957] E.A. 332**.*

Recently, this court in **Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125** fashioned a definition for “prima facie case” in civil cases in the following words:

“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. That is clearly a standard, which is higher than an arguable case.”

We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. 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. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the applicant’s case is more likely than not to ultimately succeed.”

30. Having supplied the definition of what amounts to a prima-facie case, then what remains is to see whether the claims and/or the issues raised by the Petitioners/Applicants have met and/or established what amounts to a prima-facie case.

31. First and foremost, it is conceded by the Petitioners that the suit property, on which same carryout and/or undertake their secondhand cloths business belongs to and/or is the property of the government of the Republic of Kenya.

32. Put differently, the suit property comprising of the open-air market and wherein the Petitioners operates, is land reserved for public use and or development, in line with the designated reservation.

33. On the other hand, the Petitioners have also admitted that over the period of time that same have used, carried out their business and/or

otherwise operated on the suit property, and same have had to pay various statutory levies including single business permit license as well as cess to the 1st Respondent.

34. In my humble view, the acceptance to pay the single business permit fees as well as the licenses, is a confirmation that the Petitioners have acknowledged that the operations on the suit property is predicated on license, consent and permission of the 1st respondent, during the period of such occupancy and use.

35. To the contrary, the Petitioners/Applicants herein do not have any legal and/or lawful rights and/or interests to the suit property, wherein same carry out and/or conduct their secondhand cloth business. For clarity, no legal right can accrue and/or ensue in favor of the Petitioners out of the public property.

36. Notwithstanding the facts, that the Petitioners/Applicants are aware that the suit property is a public land and their presence thereon has been based on the license at the instance of the 1st Respondent, same have mounted the subject petition and are now keen to procure an order of temporary injunction.

37. The question that I must grapple with is, what is the lawful or legal interest that the Petitioners/Applicants have on the public land, to warrant the issuance of the orders of temporary injunction as sought.

38. In my humble view, the Petitioners/Applicants herein have a right to earn a living and/or livelihood by engaging in the sale of second-hand clothes, but the right to do so does not confer upon the Petitioners/Applicant any entitlement to the public land in question.

39. Besides, the Petitioners/Applicants themselves acknowledged that the land in question is public land and essentially, this is why the Petitioners/Applicants have continued to use same as an open-air market devoid of any permanent structures, but now that the government is keen to expand and upgrade Pumwani Majengo Health facility, can the Petitioners/Applicants herein stand against the Respondent.

40. In my humble view, the grant of the orders of temporary of injunction sought, would be tantamount to restraining the owner of the land from assuming and taking possession of the said land and such kind of a situation, would be inimical to law, public policy and public order and thus same would be unfathomable.

41. Conversely, the grant of the order sought by the Petitioners herein would be tantamount to elevate a licensee and the holder of the license to a pedestal above the legitimate owner and in this case, the owner of the Radical title under the Doctrine of Eminent domain. Such a scenario is clearly uncalled for.

42. By parity of reasoning, I beg to borrow from the Decision in the case of **Faraj Maharus v J. B Martin Glass Industries & 3 Others (2005) eKLR**, where the Court of Appeal observed as follows;

“the Temporary Occupation Licence issued in 1926 could not oust the Certificate of Title granted under the Registration of Titles Act. The appellant does not possess title under the Act.

*It is indeed settled Law in Kenya that a Temporary Occupation Licence to occupy Government Land is not sufficient to create or transfer title to the grantee or his personal representative. As was stated in **RUNDA COFFEE ESTATE LTD V. UJAGAR SINGH [1966] E.A. 564:***

“It is the essence of a licence of this nature that it is personal to the licensee and creates no interest which can be disposed by the licensee. As has been said well over 100 years ago, it creates nothing substantial which is assignable”.

We would agree therefore, with the learned Judge that the licence to occupy the suit property came to an end upon the death of Effendi Maharus and his widow and as the appellant had nothing to show for the continued occupation of the suit land, his occupation as such amounted to trespass as against the registered proprietor.”

43. In my humble view, I am unable to discern any Prima facie case that has been espoused and/or canvassed by the Petitioners, to entitle same to an order of Temporary injunction either in the manner sought or at all.

44. However, I must also observe that whereas the Radical title Owner, namely the Government of the Republic of Kenya, is entitled to Recover vacant possession for purposes of putting same to the designated public use, in this case the expansion and upgrading the Pumwani Majengo Health Centre, same is nevertheless obliged to issue and serve the Petitioners/Applicants with the requisite notices.

45. In the premises, whereas I have found that there is no prima facie case to grant the injunction sought, it is my order that the removal of the Petitioners must only be carried out and/or undertaken in line with the Provisions of **Sections 152 A to F of the Land Act,2012,[2016]**.

46. In support of the forgoing positions, I share the sentiments expressed by the court in the decision in the case of **Susan Waithera Kariuki & 4 Others v The Town Clerk, Nairobi City Council & 3 Others (2013) eKLR**, where the Court held as hereunder;

“I take the view that such right cannot properly be asserted over a public road, as this clearly interferes with the rights and interests of a much larger public. There is clearly therefore a need for the petitioners to vacate the said premises as the public interest in the development of the said roads must outweigh their private interest.

However, the petitioners are entitled to be given adequate notice to vacate the said public road. They cannot be required to vacate the places said to be their homes within a matter of hours. Even though they are in occupation of a public road, they deserve to be given adequate notice to vacate the said premises.”

Issue Number Two

Whether the Petitioners/Applicant are bound to suffer irreparable harm.

47. As pertains to the second issue herein, it was incumbent upon the Petitioners to show unto the court that same are exposed to suffer Irreparable loss, if the order sought are not granted.

48. Perhaps, before venturing to interrogate whether the materials before the court have shown and/ or established the Irreparable loss that the Petitioners are exposed to suffer, is appropriate to ascertain what amount to irreparable loss.

49. In this respect, I can do no better than to borrow from the definition supplied by the Court of Appeal in the same case of **Nguruman v Jan Bonde Nielsen (2014) eKLR**, where the Court of Appeal observed as hereunder;

“On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima face, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.”

50. The Petitioners/Applicants herein have contended that same carry out the sale of secondhand cloths business on the suit property, which has been described as an open-air market. Clearly, for same to be an open-air market, it means that there are no Permanent structures and/or buildings that are erected thereon.

51. On the other hand, the Petitioners have also acknowledged that they continued to pay levies, Fees and Cess to and/or in favor of the 1st Respondent. This confirms the acknowledgement that the 1st Respondent has superior rights and/or claims to the suit property.

52. In my humble view, there being no permanent structures and/or building that have been or were erected on the suit property by the Petitioners/Applicants, there is absolutely no property that would be exposed to demolition.

53. In any event, whatever temporary structures that the Petitioners may have erected and/or constructed, for purposes of sheltering as against sunshine and rain, are in such a state that the Petitioners can relocate same elsewhere, provided that the requisite notices are served in accordance of **Section 152 of the Land Act, 2012, (2016)**.

54. In the premises, I come to the conclusion that the voluntary vacation of the suit premises by the Petitioners, shall not cause and/or occasion any Irreparable loss, whatsoever.

55. On the other hand, should the Petitioners fail and/ or neglect to voluntarily move out and/or relocate from the suit property, the Eviction thereof, shall only entail the removal of the temporary structures, which in humble view, are capable of quantification and thus compensable in Monetary terms, both under special and General damages.

56. I do not hear any of the Petitioners to say that in the event of such removal and if any damages do arise, the Respondents would not be in a position to render and/ or make such compensation.

57. However, in my view whatever loss and/or damage, though remote, are capable of being assessed and being paid by the Respondents, that is if the Petitioners/Applicants declined to voluntarily relocate. Nevertheless, looking at the greater Public good that is bound to arise and/ or ensue, the Petitioners would be well advised to relocate voluntarily and not otherwise.

58. In short, I am afraid that the Petitioners have also not established, a likelihood of Irreparable loss occurring and/or accruing, in the obtaining circumstances.

Issue Number Three

In whose favor does the balance of convenience tilts.

59. On the issue of the balance of convenience, I must say that the situation before hand depicts a conflicts between private rights versus the public interest and/or need, in this case the need to expand and upgrade Pumwani Majengo Health Center into a level 3 Hospital.

60. It must not be lost on me and all Kenyans that owing to the ever-increasing population, the medical facilities that have since been serving the city of Nairobi and elsewhere in the country, are now stretched.

61. No doubt, the President of the Republic of Kenya came up with what is described as the Big 4 agenda, one of which is right to universal health care.

62. Towards and in a bid to achieve the Big 4 agenda, in particular, the enhancement of the right to universal health care, it has become appropriate and/or necessary that Pumwani Majengo Health Center be upgraded and to achieve this, the Petitioners/Applicants who have been using the public land for enhancement of their livelihood, must now look elsewhere.

63. In my humble view, where there is a conflict between private rights and public interests, particularly in an area like the one before hand, where there is need to expand the health facility center, the private must give and/or pave way to public need, the latter which is in the public good for the entire nation.

64. In support of the foregoing position, I adopted and reiterate the stand taken by the court in the case of **James Joram Nyaga & Another v The Hon. Attorney General & Another [2007] eKLR**, where the Honourable Court held as hereunder;

“ Clearly, the rights and freedoms of the individual are not absolute but are subject to other people’s rights and the general public interest at large”

65. Whereas I affirm the Petitioner rights to earn a living and/or livelihood by dealing and/or selling secondhand clothes, it must however be noted that the Petitioners rights to do so is not absolute. In this regard, it suffices to observe that the right to earn a living and carry on business is one which is subject to the Limitation under **Article 25 of the Constitution**.

66. In the premises, I come to the conclusion that the Petitioners right to earn a living and/or livelihood, must not constitute a fetter to the Respondents’ rights to expand and upgrade Pumwani Majengo Health Center into level 3 Hospital.

67. Consequently, the balance of convenience is in favor of the Respondents, whose impugned efforts shall no doubt benefit the entire Country, Petitioners and their households, as well.

Final disposition

68. In my humble view, the grant of the subject Application would militate against the public good and otherwise forestall the realization of right to universal health care, premised on the intended upgrade of the health Centre.

69. Consequently, I am constrained to decline the Application. In this regard, the Application dated 2nd December 2020, be and is hereby Dismissed.

70. As pertains to costs, I take into account the circumstances giving rise to the filing of this Application and particularly, the contention that Eviction Notices were verbally communicated and thus, I direct that either party shall bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant