



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NO. 39 OF 2020

WAVENET KENYA LIMITED.....1ST PLAINTIFF

KENSPRISMU LIMITED.....2ND PLAINTIFF

- VERSUS -

KARURA INVESTMENTS LIMITED.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

RULING

1. This is a ruling in respect of a notice of motion dated 25th February 2020 in which the Plaintiff/Applicants seek the following orders;

1. Spent

2. Spent

3. Spent

4. THAT this Honourable Court be pleased to issue orders restraining the 1 Respondent by itself, its officers, servants, agents or anyone acting on its behalf from harassing, intimidating or interfering with the Plaintiffs' quiet possession of the properties known as LR Nos. 12422/201 LR. No. 12422/202 pending the hearing and determination of the suit filed herewith.

5. THAT this Honourable Court be pleased to issue orders restraining the 1st Respondent by itself, its officers, servants, agents or anyone acting on its behalf from demolishing and / or destroying any structures erected on the properties known as LR Nos. 12422/201 LR. No. 12422/202 pending the hearing and determination of the suit filed herewith.

6. THAT this Honourable Court do award any other orders it may deem just, fit and expedient to award in the interests of justice.

7. THAT the costs of this Application be provided for

2. The Applicants contend that they applied for and were allotted LR Nos.12422/201 and LR No.12422/202 (suit property) on 8th November 1994. The application letter was made on 28th September 1994 and the allotment letters were given on 8th November 1994.

3. The Applicants applied to Nairobi City County for approval to erect a temporary fence using wires and cedar posts and erection of a site house made of iron sheets on the suit properties. The approval was given by Nairobi City County. The Applicants proceeded to put up a site house and posts for the fence but that the 1st Defendant /Respondent came and demolished the site house.

4. The Applicants further contend that the 1st Respondent is laying claim to the suit properties based on a doubtful title and that an attempt to carry out a search on the said title is not possible as there is no correspondence file for it at the Lands Office. It is on this basis that the Applicants are seeking injunctive orders restraining the 1st Respondent from interfering with the suit properties.

5. The 1st Respondent has opposed the Applicant's application based on a replying affidavit sworn on 13th May 2021. The 1st Respondent

has given the history of the suit property which was originally owned by Joreth Limited. Joreth Limited transferred the suit properties to a company called Karemara (1978) limited which Company later changed its name to Keremara Holdings Limited.

6. On 8th December 1994, the suit properties were transferred to the 1st Respondent. The 1st Respondent contends that the suit properties do not exist. What exists is a property known as LR No.12422/21 whose original documents including title are held by the 1st Respondent. There were plans to subdivide LR No. 12422/21 into two portions that LR No. 12422/201 and LR No. 12422/202. Though the subdivision scheme received approval, the plan was not carried through.

7. The 1st Respondent states that it instead applied to subdivide LR No. 12422/21 into a number of sub-plots. The deponent of the 1st Respondent's affidavit who is also a surveyor pursued and obtained 189 deed plans for the sub plots. An application was made to the Commissioner of Lands for approval of a partial release of 55 sub plots to enable the 1st Respondent raise money for meeting the conditions for the subdivision scheme. This request was allowed but the subdivisions scheme was shelved. The 1st Respondent therefore contends that the plot which exists to date is LR No. 12422/21 which is 7.953 hectares.

8. The 1st Respondent contends that the Applicants are purporting to own the suit properties which were allegedly allocated to them in 1994 but for which they paid stand premium 20 years later yet they were supposed to comply with the conditions on the alleged letter of allotments within 3 days from 8th November 1994.

9. The 1st Respondent argues that the site house which was put up at night was demolished by government authorities and that the Applicants tried to put up a new fence when the suit properties had already an existing fence. The 1st Respondent takes issue with the approval by Nairobi City County which gave the Applicants approval on condition that they seek consent from their landlord. The 1st Respondent therefore wonders why consent of the landlord was to be sought if the Applicants claim to be owners of the suit property.

10. The 2nd Defendant / Respondent opposed the Applicants' application based on a replying affidavit sworn on 20th May 2021. This affidavit has been sworn by Gordon Ochieng a Senior Deputy Director Land Administration in the Ministry of Lands and Physical Planning. The 2nd Respondent has given a history of the suit property as per the files held by the lands Office.

11. The origin of LR No. 12422/21 was from LR No. 12422 which measured 294.8 hectares. This land was owned by Joreth limited and was registered as IR 35459. In 1981, LR 12422 was subdivided into a number of parcels ranging from LR 12422/6 up to LR No. 12422/25 as per survey plan (FR 149/33) . This survey plan is what created LR No. 12422/21 which measures 7.953 hectares.

12. LR No.12422/21 was later transferred to Keremara (1978) Limited on 25th March 1985 and a certificate of title was issued. M/s Keremara (1978) Limited instructed its surveyor to apply for subdivision of LR No. 12422/21 into two portions. The subdivision was allowed and LR No. 12422/21 was to be subdivided into two portions i.e LR No. 12422/201 and LR 12422/202. The approval was given vide letter dated 11th October 1988.

13. On 6th September 1993 Keremara (1978) Limited applied to Nairobi Land Control Board for transfer of LR 12422/21 to the 1st Respondent. Consent to transfer was given on 8th September 1993. On 8th December 1994 LR No. 12422/21 was transferred to 1st Respondent and was registered as IR 39545/3.

14. The parties herein had been directed to file written submissions. As at 16th June 2021 when the ruling date was reserved, it is only the Applicants who indicated that they had filed written submissions. The Respondents were given 14 days within which to file their submissions. As at 17th August 2021 when I was writing this ruling, the Respondents had not filed their submissions.

15. I have carefully considered the applicant's application as well as the opposition thereto by the Respondents. I have also considered the submissions by the Applicants. The only issue for determination is whether the Applicants have met the threshold for grant of an injunction. The celebrated case of **Giella Vs Cassman Brown & Co.ltd (1973) EA 358** gives what an applicant must demonstrate before an injunction can be granted. Firstly, an Applicant must demonstrate that he has a prima facie case. Secondly, an injunction will not be granted unless the Applicant will suffer injury which will not be capable of being compensated in damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.

16. In the case of **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** a prima facie case was defined in the following terms:-

“It is a case 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”.

17. In the case of **Nguruman Limited Vs Jan Bonde Nielson & 2 Others (2014) eKLR** the Court of Appeal stated as follows:-

“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”.

18. I have carefully examined the materials placed before me in light of the three cases quoted hereinabove. The applicants contend that they were allottees the suit properties vide letters of allotment given on 8th November 1994. This was pursuant to an application made on 28th September 1994 in which they told the Commissioner of Lands that they had carried out investigations which revealed that the suit properties had not been allocated to anyone.

19. Contrary to the averments made in their letter of application for allotment ; the suit properties which were known as LR 12422/21 had been transferred from Joreth Limited to Keremara (1978) Limited . Before the Applicants applied for allocation in September 1994, already Keremara (1978) Limited had obtained consent to transfer the land to the 1st Respondent. This consent was obtained on 8th September 1993. The transfer to the 1st Respondent was registered on 8th December 1994.

20. The Applicants have stated that they have not had titles arising from the allotment letters given to them. This is so because there cannot be another title issued in respect of a property which is already registered. In the circumstances, the Applicants have not demonstrate that they have a prima facie case.

21. On the issue as to whether the applicant's will suffer loss which will not be compesatable, the suit properties are situate in Muthaiga North . The properties can be valued and the Applicants will be compensated in monetary terms in case they succeed in their suit.

22. Based on the materials presented before the court, I entertain no doubt as to call for the determination of this application on a balance of convenience. The suit properties which are known as LR No. 12422/21 have been in existence as registered property since 25th March 1985 when the same was registered in the name of Keremara (1978) Ltd which later transferred it to the 1st Respondent . I therefore find no merit in the Notice of Motion dated 15th February 2020 which is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 21ST DAY OF OCTOBER, 2021

E.O.OBAGA

JUDGE

In the Virtual Presence of :-

Mr Wamukoya for Okatch for Applicant

Mr Kanyuku for Mr Ngang'a for 1st Respondent

Court Assistant: Mercy

E.O. OBAGA

JUDGE