



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 2 OF 2021

FREE PENTECOSTAL FELLOWSHIP IN KENYA

REGISTERED TRUSTEES (Suing for and on behalf of

FREE PENTECOSTAL FELLOWSHIP IN KENYA

(MAGWAGWA ESANINGE CHURCH).....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NYAMIRA.....DEFENDANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 25th January 2021, the Plaintiff moved the court seeking the following orders:

a) Spent

b) Spent

c) That pending the hearing and determination of the this suit, a permanent injunction be issued directed at the Defendant restraining it whether by itself, its agents, servants, employees or otherwise howsoever, from entering into, occupying, constructing a stadium or any other structure whatsoever or using or abusing howsoever or otherwise interfering with or doing anything that may prejudice the Plaintiff's interest in and quiet possession of title number NORTH MUGIRANGO/MAGWAGWA/2718.

d) That the costs of this application be provided for.

2. The application is based on the affidavit of Walter Ogone Ang'ienda, one of the registered trustees of the Plaintiff Church sworn on 25th January 2021 together with his further affidavit sworn on 8th March 2021. In the said affidavit he depones that the Church acquired the suit property from the defunct County Council of Nyamira. He has annexed an extract copy of the minutes of the County Council dated 25th June 2010 approving the allocation of the suit property to the Church as annexure WOA-2. He further depones that due process was followed and he has annexed copies of the application for consent of the Land Control Board as well as the Letter of Consent issued by the Chairman, Nyamusi Land Control Board on 20th April 2011.

3. The Plaintiff was subsequently issued with a title deed on 26th May 2011. A copy of the title deed and Certificate of Official Search dated 19.1.2021 are annexed to the deponent's affidavit. He depones that the Church has been in possession, occupation and use of the suit property and they have constructed a Church where members of FPFK Magwagwa church have been worshipping. It is his averment that on 20th January 2021 the Governor and officials of the County Government of Nyamira trespassed onto the suit property claiming that it belonged to the County Government of Nyamira and that the Plaintiff should vacate. They went ahead and marked the church with an "X" sign and threatened to demolish it if the Plaintiff did not vacate.

4. It is the Plaintiff's position that being the registered owners of the suit property they are entitled to protection under the Constitution of Kenya. Mr. Ang'ienda avers that if the injunction is not granted the plaintiff shall suffer extreme prejudice.

5. In the further affidavit, Mr Ang'ienda depones that during the pendency of this suit the Defendant has by a letter dated 2nd February 2021 directed the Land Registrar to cancel the Plaintiff's title to the suit property without following due process. I have perused the said letter which is annexed to the deponent's further affidavit and it is actually written by the County Coordinator, Nyamira of the National Land

Commission.

6. The application is opposed by the Respondent through its Grounds of Opposition dated 12th February 2021 in which the Defendant states that the Plaintiff has not proved that it has a prima facie case with a probability of success nor has it demonstrated that it is likely to suffer irreparable loss of the prayers sought are not granted. Additionally, the Defendant has stated that the balance of convenience does not tilt in the plaintiff's favour.

7. The Defendant also filed a Replying Affidavit sworn by Josephat Motanya Gori, the Chief Officer, Lands Housing, Physical and Urban Development of the Defendant. He depones that the Defendant owns a parcel of land which was originally known as NORTH MUGIRANGO/MAGWAGWA/1/1173 measuring 4.4 Hectares which was reserved for Magwagwa playground. The said parcel was sub-divided into parcels no. NORTH MUGIRANGO/MAGWAGW/1/2603 and 2604. Parcel no. 2605 was then further sub-divided to create parcel no. 2717 which was reserved for a playground.

8. He states that the activities on the Defendant's land at Magwagwa are restricted to government activities and he denies that the Plaintiff obtained its title lawfully. It is his further averment that the Defendant has received funding for the construction of a stadium on the suit property and if an injunction is issued, the said project will be delayed and the defendant will miss the funding. He depones that there is no Part Development Plan alienating the suit property and that there was a Government circular in 2008 stopping the alienation of government land. The said circular is annexed to the Defendant's Replying Affidavit as annexure JG2 (a) and (b).

9. The court directed that the application be canvassed by way of written submissions and both parties complied by filing their respective submissions which I have considered.

ISSUES FOR DETERMINATION

10. Having considered the Notice of Motion, Supporting Affidavit and Replying Affidavit, the only issue for determination is whether the Plaintiff is entitled to the order of injunction.

ANALYSIS AND DETERMINATION

11. The principles upon which the court should grant an injunction were set out in the case of **Giella V Cassman Brown & Company Ltd 1973 EA 358** and they are as follows:

“First, the applicant must show that he has 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 be compensated by damages. Thirdly, if the court is in doubt, it will decide the application on a balance of convenience.”

12. In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR** Bosire JA (as he then was) stated as follows:

“A prima facie case is... one 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”

13. In the instant case, the Plaintiff seeks a permanent injunction which cannot be granted at this interlocutory stage as the same can only be granted after hearing the case on merit. See the case of **Kenya Power & Lightning Company Ltd v Sheriff Molan Habib**where the court observed with regards to a permanent injunction that:

“It determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merit of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the Defendant in order for the rights of the Plaintiff to be protected.”

14. It is therefore clear that it would be premature for the court to grant a permanent injunction at this interlocutory stage without having taken the evidence of the parties. Counsel for the Defendant has correctly submitted that parties are bound by their own pleadings. However, it is possible that what the Plaintiff meant to pray for was an order of temporary injunction. I shall therefore consider if the Plaintiff has met the conditions for temporary injunction.

15. The first question I must answer is whether the Plaintiff has demonstrated that it has a prima facie case with a probability of success. Among the documents attached to the supporting affidavit are an extract of the Minutes of the Meeting of the Special Town Planning Committee, County Council of Nyamira held on 25th June 2010 approving the allocation of the suit property to the Plaintiff, a copy of the Letter of Consent of the land Control Board, a title deed in the name of FPFK Magwagwa Esanige Church and a Certificate of official Search dated 19.1.2021 confirming that the title is registered in the Plaintiff's name.

16. The Plaintiff has also attached photos of the Church to confirm that it is in occupation of the suit property. On the face of it, therefore, the Plaintiff is the registered proprietor of the suit property and is in possession thereof. The Plaintiff' has demonstrated that its continued occupation of the suit property title is threatened as the defendant has demanded that they vacate the suit premises and it has gone ahead to mark the plaintiff's church with an "X" sign meaning that if they do not vacate, the structures on the suit property shall be demolished.

17. On its part the Defendant contends that the suit property is part of a larger parcel of land owned by the Defendant which was reserved for a playground before it was unlawfully sub-divided and alienated. The validity of the Plaintiff's title is an issue that can only be determined after a full hearing. The Plaintiff has therefore demonstrated it has a prima facie case with a probability of success.

18. I will now consider whether the Plaintiff has demonstrated that it will suffer irreparable injury that cannot be compensated by damages if an injunction is not granted. Counsel for the Plaintiff has submitted that the subject matter herein is land which is sentimental and no amount of compensation can adequately compensate the Plaintiff for loss of land. He adds that the Plaintiff's rights to land are protected under Article 40(3) of the Constitution. It is his further contention that the Plaintiff uses the suit property for religious purposes and therefore the Plaintiff would suffer irreparable injury if the order of injunction is not granted.

19. Conversely, counsel for the Defendant has submitted that the Plaintiff has not met any of the conditions for the grant of an injunction and the balance of convenience tilts in favour of the Defendant.

20. Having considered the submissions of the parties, it is clear that the Defendant intends to challenge the Plaintiff's title to the suit property. However, the Defendant has not yet filed its defence and the only material before the court that exhibited by the Plaintiff.

21. Furthermore, the decision as to whether or not to impeach the Plaintiff's title can only be made after a full hearing. Before that, it is important to preserve the subject matter of the suit. The interests of justice would therefore be served if the court applies the balance of convenience test.

22. Consequently, I find and hold that the balance of convenience tilts in favour of the Plaintiff and I direct that the status quo obtaining as the date of this ruling be maintained pending the hearing and determination of the main suit. This order shall remain in force for a period of six months to enable the parties to comply with Order 11 of the Civil Procedure Rules so as to expedite the hearing of this case. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT KISII THIS 25TH DAY OF NOVEMBER, 2021.

J.M ONYANGO

JUDGE