



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ELCC No. 88 OF 2019

TSANDRAKANT VIRCHAND SHAH.....1ST PLAINTIFF

KAMLESH VIRCHAND SHAH.....2ND PLAINTIFF

VERSUS

NAKURU COUNTY GOVERNMENT.....1ST DEFENDANT

WILSON WACHIRA MWANGI.....2ND DEFENDANT

MAINA NYAITUGA.....3RD DEFENDANT

SIMON NJUGUNA.....4TH DEFENDANT

LABAN NANZUSHI.....5TH DEFENDANT

JOHN MUTHONI.....6TH DEFENDANT

DENNIS NJOROGE.....7TH DEFENDANT

KENNEDY MAINA.....8TH DEFENDANT

FRANCIS WAITITU.....9TH DEFENDANT

JACKLINE CHEGE.....10TH DEFENDANT

JOYCE WANJIRU.....11TH DEFENDANT

ERICK MBURU.....12TH DEFENDANT

RULING

1. The plaintiffs commenced proceedings herein through plaint filed on 29th July 2019. Contemporaneously, they also filed Notice of Motion dated 29th July 2019, which is the subject of this ruling. The following orders are sought in the application:

1. That service of this application be dispensed with at first instance.

2. That this application be certified as urgent.

3. That pending the hearing of the application herein inter-partes, a temporary injunction do issue restraining the respondents by themselves, their officers, agents, servants and any other persons acting under their directions from entering, remaining thereon or interfering with the applicants' ownership and possession of all those parcels of and known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.

4. That pending the hearing of the application herein inter-partes, a temporary injunction do issue restraining the respondents by

themselves, their officers, agents, servants and any other persons acting under their directions from convening, disseminating, participating or inviting participation, any process intended for the entry, remaining thereon or interference of the applicants' ownership and possession of all those parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.

5. That pending the hearing and determination of the suit herein, a temporary injunction do issue restraining the respondents by themselves, their officers, agents, servants and any other persons acting under their directions from entering, remaining thereon or interfering with the applicants' ownership and possession of all those parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.

6. That pending the hearing and determination of the suit herein, a temporary injunction do issue restraining the Respondents by themselves, their officers, agents, servants and/ or any other persons acting under their directions from convening, disseminating, participating or inviting participation, any process intended for the entry, remaining thereon or interference of the Applicants' ownership and possession of all those parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.

7. That the costs of this application be provided for.

2. Prayers 1 to 4 of the application are spent.

3. The application is supported by an affidavit sworn on 29th July 2019 by the first plaintiff. He deposed that he and the second plaintiff are the registered proprietors of the parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65 (hereinafter "the suit properties"). He annexed copies of certificates of title and added that over the past 12 months, the respondents, their officers, agents and servants evinced a desire to interfere with the applicants' property rights in respect of the suit properties by the first defendant convening a meeting on 9th July 2019 at Menengai Teachers Social Hall. That all the defendants participated in the meeting at which the second defendant who is the Member of the County assembly for Menengai East Ward stated that the suit properties were intended for an upcoming New Menengai Market. That the third, fourth and fifth defendants are administrators of a WhatsApp group known as Menengai Bunge and that the third defendant disseminated discussions of the meeting part of which was to the effect that the second defendant announced that the New Menengai Market was to start operations in the month of July 2019.

4. The first plaintiff further deposed that on 11th July 2019 at 8.57pm, the first defendant posted on its official Facebook page a summary of the minutes of the meeting of 9th July 2019 in which the second defendant was quoted as stating that 24 acres of public land in the area that had been grabbed have been repossessed and would be used to set up public utilities including a market. That on 12th July 2019 and on 22nd July 2019, the respondents invaded the suit properties and claimed that it is public land for use as a market. He added that the fifth and sixth defendants are responsible for dissemination of erroneous information leading to the invasions and further that the applicants are apprehensive of future invasions and being dispossessed of their property.

5. The 5th defendant opposed the application through his replying affidavit sworn on 9th September 2019. He deposed that he attended the meeting of 9th July 2019 in his capacity as a resident of Nakuru County and denied that he was involved in the invasions of 12th July 2019 and 22nd July 2019. He denied disseminating any erroneous information and added that it is in public domain that the parcel of land known as Land Reference Number 12570/188 had been designated for public purposes but had been encroached on. He annexed a copy of a letter dated 18th October 2005 from Director of Town Planning to Commissioner of Lands and a copy of a letter dated 2nd October 2018 from County Coordinator, National Land Commission Nakuru to the Chairperson, National Land Commission. He urged the court to dismiss the application and not to allow the plaintiffs use an injunction to keep the public from its right to the suit properties.

6. The first defendant responded to the application through a replying affidavit sworn on 19th November 2019 by Justin Mayaka Nyaroo, its Acting Director of Planning. He deposed that first defendant does not have any issues with the parcels of land known as Land Reference Numbers 12570/64 and 12570/65. Regarding Land Reference Number 12570/188, he stated that the parcel was reserved for a service station which forms part of public utility plots and that the plaintiffs have unlawfully procured a title in respect thereof. He also relied on and annexed a copy of the letter dated 18th October 2005 from Director of Town Planning to Commissioner of Lands and a copy of the letter dated 2nd October 2018 from County Coordinator, National Land Commission Nakuru to the Chairperson, National Land Commission and added that the plaintiffs fenced off Land Reference Number 12570/188 despite knowing that it is public utility land. In regard to the allegations of invasion on 22nd July 2019, he stated that Land Reference Number 12570/188 is public land and that the first defendant has a right to access and utilize public utilities and that the proprietor of illegally acquired land cannot get relief from a court of law.

7. The plaintiffs also filed further affidavits sworn on 5th November 2019 and 9th December 2019 by the first plaintiff to which he annexed a copy of a letter dated 8th October 2018 from the County Coordinator, National Land Commission stating that the parcel of land known as Land Reference Number 12570/188 is not in the category of public utility. He deposed that although the first defendant states that it has no issue with Land Reference Numbers 12570/64 and 12570/65, those two plots which are adjacent to Land Reference Number 12570/188 were invaded and damaged with the encouragement or acquiescence of the first defendant. He further deposed that the plaintiffs became registered owners of Land Reference Number 12570/188 on 16th August 1988 and that they have since been paying rent to the first defendant. That through letters dated 3rd May 2013 and 22nd July 2013, the first defendant recommended approval of the plaintiffs' building plans for a boundary wall for Land Reference Number 12570/188 together with Land Reference Numbers 12570/64 and 12570/65 which are adjacent to it while on 9th July 2013, the first defendant's survey section issued a beacon certificate and a Notification of Approval of Development permission on 14th July 2015 in respect of Land Reference Number 12570/188. He annexed copies of receipts, the letters, the beacon certificate and the notification.

8. The application was canvassed through written submissions. The applicants filed their submissions on 29th January 2020, the first defendant filed its submissions on 5th March 2020, the applicants filed submissions in reply on 5th May 2020 and the fifth defendant filed his submissions on 2nd June 2020. Additionally, the applicants' counsel made brief oral highlighting of submissions.

9. I have considered the application, the affidavits and the submissions. The plaintiffs seek an interlocutory injunction. They must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. They must establish a *prima facie* case with a probability of success. Even if they succeed on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

10. For an explanation of what constitutes a *prima facie* case, we need look no further than the decision of the Court of Appeal in **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**:

... 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... [it] 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 success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.

11. The applicants have exhibited copies of certificates of title which show that they are the registered proprietors of the parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65. The copies were certified by the registrar of titles on 12th July 2019, about two weeks before the filing of the present application. Whereas the first and fifth defendants have argued that the plaintiffs' title in respect of Land Reference Number 12570/188 is unlawful since according to them the said parcel was reserved for public utility, I note that the plaintiffs have availed a copy of a letter dated 8th October 2018 from the National Land Commission stating that the said parcel is not in the category of public utility. The court is not called upon at this stage to determine ownership of the suit properties. It suffices at this stage that the applicants have demonstrated through the certificates of title that they have a right over the suit properties. The respondents have not shown that the titles have been nullified either on account of being public land or on some other basis. I further note that the applicants' title in respect of Land Reference Numbers 12570/64 and 12570/65 do not seem to be contested. On the contrary, the first defendant has stated that it has no issue with those parcels.

12. Other than the first and fifth defendants, none of the other defendants filed any replying affidavit to challenge the applicants' application.

13. The applicants' complaint is that the defendants have a desire to interfere with their property rights in respect of the suit properties and that toward that end the defendants had a meeting on 9th July 2019 at Menengai Teachers Social Hall whose proceedings were disseminated and discussed in a WhatsApp group where the defendants are members and some of them administrators. The applicants further state that arising from the meeting and the discussions, the defendants invaded the suit properties on 12th July 2019 and on 22nd July 2019 claiming that it is public land. The first defendant has not denied being involved in the raids. If anything, it has emphatically maintained that Land Reference Number 12570/188 is public land and that it therefore has a right to access and utilize it. On his part, the 5th defendant has admitted attending the meeting of 9th July 2019 and being in the WhatsApp group. He equally maintained that Land Reference Number 12570/188 is public land.

14. The court does not condone unlawful acquisition of public land by private individuals or entities. At the same time, land does not become public land through declarations, whether public or otherwise. Whether or not Land Reference Number 12570/188 or any of the other suit properties herein is public land is a question that must be determined lawfully.

15. Based on the material before the court, I am persuaded that the applicants have demonstrated that they have a right over the suit properties and that their right is threatened through the defendants' actions. They have established a *prima facie* case. Damages will not be an adequate remedy to them in the circumstances of this case which involves title to land.

16. I am therefore persuaded that the applicants are entitled to the orders sought in Motion dated 29th July 2019. There is need to preserve the suit properties pending hearing and determination of the suit. I make the following orders:

a) Pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the defendants by themselves, their officers, agents, servants and any other persons acting under their directions from entering, remaining thereon or interfering with all those parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.

b) Pending the hearing and determination of this suit, a temporary injunction is hereby issued restraining the defendants by themselves, their officers, agents, servants and/or any other persons acting under their directions from convening, disseminating, participating or inviting participation in any process intended for the entry, remaining thereon or interference with all those parcels of land known as Land Reference Numbers 12570/188, 12570/64 and 12570/65.

c) That the plaintiffs shall have costs of the application.

Dated, signed and delivered at Nakuru this 29th day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Tugee for the plaintiffs/applicants

No appearance for the 1st defendant/respondent

No appearance for the 2nd to 4th and 6th to 12th defendants/respondents

No appearance for the 5th defendant/respondent

Court Assistants: B. Jelimo & J. Lotkomoi