



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 113 OF 2013
FLORENCE WAIRIMU MBUGUA

(Suing as an Administratrix of the Estate of

the late JOSEPH KIARIE MBUGUA.....PLAINTIFF

VERSUS

ZACHAYO MAINA.....1ST DEFENDANT

JOHN OCHIENG.....2ND DEFENDANT

JOHN MUSILI.....3RD DEFENDANT

PAUL KARIUKI.....4TH DEFENDANT

SIMON KAMAU.....5TH DEFENDANT

JOHN NYAMU.....6TH DEFENDANT

JACOB MAINA.....7TH DEFENDANT

RULING

The Plaintiff is the Administratrix of the Estate of the late Joseph Kiarie Mbugua who is the registered proprietor of the leasehold interest for a term of 99 years with effect from 1st December 1994 comprised in L.R. Nos. NAIROBI/BLOCK 119/574, NAIROBI/BLOCK 119/575 and NAIROBI/BLOCK 119/578 Githurai Nairobi County. The deceased had constructed a petrol station and office block on the said properties. The Plaintiff alleges that on 15th September 2012 the Defendants and other persons unknown to her entered the premises and demolished a portion of the developments thereon, and proceeded to forcefully occupy the premises by using it as a parking for public service vehicles belonging to Inuka Sacco. The said Defendants also allegedly chased away the Plaintiff's agents who were on the suit properties and have barred them from returning.

The Plaintiff has now moved the court by way of a Notice of Motion dated 22nd January 2013 seeking the following orders:-

- i. That pending the hearing and determination of this suit, an injunction be issued against the Defendants, their servants and/or agents or any other authorized person restraining them from interfering with the Plaintiff's ownership and quiet and peaceful possession and occupation of Land Parcel Nos. NAIROBI/BLOCK 119/574, NAIROBI/BLOCK 119/575 and NAIROBI/BLOCK 119/578 which are registered in the name of the late Joseph Kiarie Mbugua and are located at Githurai roundabout in Nairobi County.
- ii. That further, a Mandatory Order of injunction be issued immediately and pending the hearing and determination of this suit ordering the Defendants, their servants and/or agents and any other unauthorized person to remove themselves, their moveable property and any vehicles from the said properties known as L.R Number NAIROBI/BLOCK 119/574, NAIROBI/BLOCK 119/575 and NAIROBI/BLOCK 119/578, Githurai Nairobi County (hereinafter referred to as the suit properties), and to stop any further acts of trespass and if they fail to do so within 14 days of making of this Order, the same be removed therefrom by the Plaintiff and/or her agents and/or servants and the same be delivered to the Area Chief's Office, Githurai Location, for collection by the Defendants at their convenience and cost;
- iii. That compliance of any of the Orders made herein be supervised by the Officer Commanding Kasarani Division Police Station or any other officer in charge of the locality on which the suit property is located.

The Plaintiff's counsel at the hearing of the said Notice of Motion on 20th June 2013 submitted that the deceased's documents of title are not challenged and his right to property is protected by the Constitution and land laws of Kenya. Further, that the Defendants are sued in their individual capacity as trespassers on the suit property.

The Defendants responded to the Notice of Motion in a replying affidavit sworn their behalf on 29th April 2013 by John Ochieng, the 2nd Defendant and which they relied on wholly during the hearing of the Notice of Motion. The Defendant's side of the happenings on the material day is that they are members of Inuka Travellers Savings and Credit Co-operative Society Limited which runs a Matatu dropping zone at the Githurai roundabout next to Kasmart market, and that the Plaintiff should have sued the said Cooperative Society.

The Defendants further denied that they removed any doors/windows and or petrol pumps from the suit properties, and stated that the demolitions were done by the City Council of Nairobi to create room for the construction of the Nairobi – Thika highway. Further, that the place that was demolished was a public utility , and the space next to it a road reserve that had been allocated to Inuka Sacco by the City Council of Nairobi as a passenger pick up point, and was paid for.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. At this stage what I am required to do is determine the application before me on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary prohibitory injunction, and in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** as to the grant of a mandatory injunction.

In the case of a temporary prohibitory injunction, the requirements are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience. For a mandatory injunction to issue there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then such an injunction can only be granted in clear cases where the court thinks that the matter ought to be decided at once.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff brought evidence of the certificates of lease issued to the deceased Joseph Kiarie Mbugua with respect to the suit properties, and her grant of representation with respect to the deceased's estate issued by the High Court on 6th August 2007. The Defendants on the other hand brought evidence of certificate of registration of Inuka Travelers Savings and Credit Cooperative Society Limited issued on 27th January 2011, and a single business permit for the year 2011 issued by the City Council of Nairobi to Inuka Vision Transporters to conduct the business of transporter at the junction of Ngumba Road. The said single business permit was issued on 8th November 2010 and expired on 31st December 2011. There was no evidence brought of allocation of the suit properties to Inuka Travelers Savings and Credit Cooperative Society Limited or the Defendants.

From the evidence produced it is my finding that the Plaintiff has established a *prima facie* case, and that this is not a case where an award of damages can be made as the Defendants have not pleaded that they are able to compensate the Plaintiff. In addition this is a clear case for a mandatory injunction to issue for two reasons.

Firstly, the Plaintiff has shown her title and entitlement to the suit properties, and the Defendant's admit they are in possession of the said properties, and do not dispute that there were demolitions conducted thereon. Their explanation is that this was done because the suit properties are public utility land. The Defendants however did not bring any evidence to show that the suit property is public land. Secondly, an expired single business permit is not a document of title to land and cannot in law rank in priority, or provide better interest in land than that obtaining in a certificate of title. To allow the Defendants to occupy land with no evidence of their entitlement to, or beneficial interest in the same will be a travesty of justice.

The Plaintiff's Notice of Motion dated 27th August 2012 is accordingly allowed and it is hereby ordered as follows:

1. The Defendants, their servants and/or agents or any other unauthorized person be and are hereby restrained from interfering with the Plaintiff's ownership and quiet and peaceful possession and occupation of Land Parcel Nos. NAIROBI/BLOCK 119/574, NAIROBI/BLOCK 119/575 and NAIROBI/BLOCK 119/578 which are registered in the name of the late Joseph Kiarie Mbugua and are located at Githurai roundabout in Nairobi County pending the hearing and determination of this suit or until further orders.
2. The Defendants, their servants and/or agents or any other unauthorized person to immediately and forthwith remove themselves, their moveable property and any vehicles from the said properties known as L.R Number NAIROBI/BLOCK 119/574, NAIROBI/BLOCK 119/575 and NAIROBI/BLOCK 119/578, Githurai Nairobi County and to stop any further acts of trespass within 14 days of the date of this Order, and in default the same be removed therefrom by the Plaintiff and/or her agents and/or servants and the same be delivered to the Area Chief's Office,

- Githurai Location, for collection by the Defendants at their convenience and cost;
3. The Officer Commanding Kasarani Division Police Station to supervise and ensure compliance of the Orders made herein.
 4. The Plaintiff to serve the Chief of Githurai Location and the Officer Commanding Kasarani Division Police Station with the orders herein within 7 days of the date of the orders.
 5. The costs of the Plaintiff's Notice of Motion shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____3rd____ day of ____July____, 2013.

P. NYAMWEYA

JUDGE