



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 725 OF 2011

THE REGISTERED TRUSTEES REDEEMED

GOSPEL CHURCHPLAINTIFF

VERSUS

YUSUF IBRAHIM1ST DEFENDANT

CITY COUNCIL NAIROBI.....2ND DEFENDANT

AS CONSOLIDATED WITH

ELC CIVIL SUIT NO. 727 OF 2011

YUSUF IBRAHIMPLAINTIFF

VERSUS

CITY COUNCIL NAIROBI.....DEFENDANT

RULING

There are two Notices of Motion before the court for determination, both seeking various injunctions. The first is one dated 16th December 2011 brought by the Plaintiff in ELC suit No. 725 of 2011 seeking three substantive prayers:

1. That the 1st Defendant either by his servants, agents, contractors and or employees be stopped from constructing and or continuing with the construction of a structure on L.R. No. 209/19728 as delineated in Deed Plan No. 310431 dated 29th June 2010, pending the hearing and determination of this suit.
2. The 1st Defendant, his nominees, employees, servants, agents, contractors and all persons claiming under him be restrained from entering, constructing, continuing with construction or in any other manner interfering with the Plaintiff's peaceful enjoyment of L.R. No. 209/19728 pending hearing and determination of this suit.
3. The 2nd Defendant therein be compelled to put up beacons on the said property to deter others that

might want to encroach into the plot and for the Plaintiff to be able to erect a fence to that effect.

The second Notice of Motion is dated 15th December 2011 and is brought by the Plaintiff in ELC suit No. 727 of 2011. He is seeking an order of temporary injunction stopping the Defendant therein from demolishing, breaking, destroying or in any way dealing with the structures on the property known as L.R. No. 209/7260/223 formerly known as plot No. ES-30, pending the hearing and determination of this suit.

Both Plaintiffs claim to be the registered proprietors of their respective parcels of land, and have all been issued with grants in this respect. They produced the said grants in evidence together with other supporting documents. The Plaintiff's case in ELC suit No. 725 of 2011 is that they have been in occupation of their parcel of land namely L.R. No. 209/19728 since 21st October 1997 when they were issued with temporary occupation licence by the Nairobi City Council, and were allocated the same on 22 May 2009 and issued with a grant on 25th October 2012. Further, that the 1st Defendant has commenced construction on the said parcel of land, despite revocation of his building plans and orders by the Nairobi City Council to cease construction.

The 1st Defendant's reply is that he is constructing on his parcel of land which is L.R. No. 209/7260/223 and which he bought in 2004 and was allocated title, and that the purported cancellation, reallocation, resurvey and grant of new title of the said land was null and void.

The 2nd Defendant in ELC suit No. 725 of 2011 did not respond to the Plaintiff's Notice of Motion.

The Plaintiff in ELC suit No. 727 of 2011 alleges that the Defendant therein is threatening to demolish the structures he has put up on his land namely L.R. No. 209/7260/223 pursuant to approved building plans. He states that he received a letter dated 7/11/11 from the Defendant informing him that his building plans had been 'recommended for disapproval', and that he should stop further construction and remove all the erected structures.

The Defendant in ELC suit No. 727 of 2011 in opposition to the Notice of Motion stated that the orders sought in the application do not properly lie within the jurisdiction of this Court, and that the proper avenue for the ventilation of the dispute, if any, would lie in the procedure clearly stipulated under the mandatory provisions of the Physical Planning Act, (Chapter 286 of the Laws of Kenya). Further, that the law prohibits any person from carrying out development within the area of jurisdiction of the Defendant without a development permission properly granted, and that any dealing in connection with any development in respect of which no proper permission has been granted is null and void, and such development stands to be discontinued.

The parties prosecuted their respective Notices of Motion by way of written submissions and oral submissions made during the hearing held on 27th May 2013. The counsel for the Plaintiff in ELC suit No. 725 of 2011 filed written submissions dated 15th June 2012 and also made oral submissions. He submitted that the Plaintiff had shown a *prima facie* case based on the facts that his land was public land set aside for religious and educational purposes, and having been first allocated to it was no longer available for allocation by the time it was being allocated to Sophia Wambui who later sold it to the 1st Defendant therein. He relied on the decisions in **Samuel Mbugua Gachuhi vs City Council of Nairobi (2008) e KLR** and **Agnes Wanjiku Kamweti vs Thamia Investments & 2 Others (2009) e KLR** in this respect. Further, that the 1st Defendant's title is tainted as it was fraudulently obtained using stolen deed plans and cancelled survey plans.

The Plaintiff in ELC suit No. 725 of 2011 further submitted that it would suffer irreparable loss as it had been on the site for over 15 years and was running a school thereon, and since the Plaintiff in suit No. 727 of 2011 has built structures in the middle of its property. Further, that the balance of convenience was tilted in its favour as the said structures built by Plaintiff in suit No. 727 of 2011 were the subject of enforcement notices issued by the local authority requiring him to stop construction and demolish the existing structures. It was also argued that the Plaintiff in ELC suit No. 725 of 2011 was on the land

lawfully which was being used for public purposes. Reliance was placed on the decision in **Prof. Samson Kagendo Ongeri vs Greenbays Holdings and 2 Others (2011) e KLR** in this regard

The counsel Plaintiff in ELC suit No. 727 of 2011 filed submissions on the two Notices of Motion before the court dated 20th June 2012 and also made oral submissions during the hearing. She argued therein that the Plaintiff in ELC suit No. 725 of 2011 had not shown a *prima facie* case as it was clear there were two different properties namely, L.R. No. 209/19728 and L.R. No. 209/7260/223, and that the only way the said Plaintiff could succeed is if the title issue to the Plaintiff in ELC suit No. 725 of 2011 is cancelled. Further, that under section 23 of the Repealed Registration of Titles Act the Plaintiff in ELC suit No. 727 of 2011 was taken to be the absolute and indefeasible owner of L.R. No. 209/7260/223 unless fraud or misrepresentation to which he was party could be shown. It was argued that the allegations of fraud made against the Plaintiff in ELC suit No. 727 of 2011 did not hold, as he had followed due process in getting his title.

The counsel of the Plaintiff in ELC suit No. 727 of 2011 further submitted that the Plaintiff in ELC suit No. 725 of 2011 has been aware of her client's claim since 2005, and has been aware that her client has been in occupation and started construction on L.R. No. 209/7260/223 since 2006. The Plaintiff in ELC suit No. 725 of 2011 therefore did not stand to suffer any irreparable damage as a demolition order would be sufficient remedy if he succeeds in his claim. Further, that it would be less expensive, easier and just to preserve the existing structures and *status quo*, than to demolish them, in the event that the ownership dispute is resolved in favour of the Plaintiff in ELC suit No. 727 of 2011.

Lastly, it was also argued by the counsel for the Plaintiff in ELC suit No. 727 of 2011 that this Court has original and unlimited jurisdiction under Article 165 of the Constitution, and that the terms of the enforcement notice issued by the Nairobi City Council provide for appeals to the High Court. It was also argued in this respect that the said enforcement notice that it was issued with respect to L.R. No. 209/19728 and not L.R. No. 209/7260/223.

The 2nd Defendant in ELC suit No. 727 of 2011 filed submissions dated 19th September 2012 which he relied upon during the hearing. He argued that the proper procedure that ought to have been followed by the Plaintiff therein is as stated in sections 38, 13 and 15 of the Physical Planning Act on appeals from enforcement notices and decisions by the local authority. He relied on the decisions in **R vs City Council of Nairobi ex parte Leah Aida Wambete (2010)e KLR**, **Ali & 3 Others vs The City Council of Nairobi Nairobi HCCC No. 820 of 2003** and **Meru County Hotel Travellers Limited vs County Council of Meru Central Meru HCCC No. 42 of 2010** in this regard. It was also argued that the 2nd Defendant has powers under section 30 of the Physical Planning Act and under the Local Government Act to control developments within its jurisdiction.

I have read and carefully considered the pleadings, annexed evidence and submissions made. I will first address the preliminary issue raised as to this Court's jurisdiction to determine the dispute herein. The Environment and Land Courts' jurisdiction is granted by Article 162 (2)(b) of the Constitution which states that the said courts have jurisdiction in matters touching on the environment, and on the use and occupation as well as title to land. This jurisdiction is expounded upon in section 13 of the Environment and Land Court Act of 2011, and includes the jurisdiction to hear and determine disputes relating to land administration and management. The constitutional and legal basis of this court's jurisdiction to hear and determine the dispute herein cannot therefore be contested.

The court however is alive to the position that parties should exhaust all statutory and alternative procedures for redress, before moving this Court for remedies, as held by the by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**. The existence of these statutory or alternative remedies do not oust the jurisdiction of the court, however the court will defer to the same when they are applicable or appropriate. The question to be answered is whether the said alternative procedures and remedies are applicable or appropriate in the circumstances of the suits filed herein.

It is noted in this regard that the main issue arising from the suit filed herein is that of possible double allocation of the suit properties, and ownership of the same. It is also instructive that while the 2nd

Defendant has raised the defence of the procedures and remedies under the Physical Planning Act applying in its response to the Notice of Motion filed in ELC suit No. 727 of 2011, there is no similar response by the said Defendant to the Notice of Motion in ELC suit No. 725 of 2011 in which it is also a party. In light of these facts, it is my finding that the procedures under the Physical Planning Act may not be adequate to address the issue of ownership raised by the two Notices of Motions and suits, nor will they be applicable to the facts of both suits. This court is therefore properly seized of the said Notices of Motion.

I will therefore proceed to determine the Notices of Motion 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 injunction, and also to determine if the Plaintiff in ELC suit No. 725 of 2011 has in addition shown any special circumstances to entitle them to the mandatory injunction sought. The first question I must answer is whether the Plaintiffs in both Notices of Motion have established a *prima facie* case. Both Plaintiffs in ELC suit No. 725 of 2011 and ELC suit No. 727 of 2011 produced evidence of ownership of their respective properties, by annexing copies of the titles issued to them with respect to L.R. No. 209/19728 and L.R. No. 209/7260/223 respectively.

The validity of these titles, and determination of the issue of which allocation and title was the first in time, are issues to be determined after full trial. Likewise, the issue of whether there was any fraudulent dealing with the said properties is a matter that can only be decided after a full hearing of the suit filed herein. I am for these reasons unable at this stage to find a *prima facie* case in favour of the two Plaintiffs on the basis of their title. The Plaintiff in ELC suit No. 725 of 2011 has in addition not shown any special circumstances for the mandatory injunction sought to compel the 2nd Defendant herein to establish the beacons on L.R. No. 209/19728 to issue, and this is not a clear case to warrant such an injunction. These requirements were set by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**

I will therefore decide the Plaintiffs' Notices of Motion on the basis of balance of convenience. It is not disputed that the Plaintiff in ELC suit No. 727 of 2011 has constructed structures on the parcel of land known as L.R. No. 209/7260/223, which is also claimed by the Plaintiff in ELC suit No. 725 of 2011. It is not also disputed that the Plaintiff in ELC suit No. 725 of 2011 is in occupation of the parcel of land known as L.R. No. 209/19728 in which he claims L.R. No. 209/7260/223 is situated and is running a school thereon. The Plaintiff in ELC suit No. 725 of 2011 has brought photographic evidence showing the structures allegedly built by the Plaintiff in ELC suit No. 727 of 2011 on L.R. No. 209/19728. Evidence has also been brought to show that the Plaintiff in ELC suit No. 727 of 2011 was served with an enforcement notice by the Defendant therein to stop construction and demolish the structures he had built on L.R. No. 209/7260/223, which he apparently did not comply with. In light of these facts and circumstances, I direct and order as follows:

1. That pending the hearing and determination of the suits filed herein or until further orders, the *status quo* in the two consolidated suits herein to be maintained as follows:
 - a. Both Plaintiffs in ELC suit No. 725 of 2011 and ELC suit No. 727 of 2011 by themselves or through their representatives, agents or servants are restrained from selling, transferring, leasing, charging or in any other manner alienating or disposing of the land parcels identified as L.R. No. 209/19728 and L.R. No. 209/7260/223 respectively, and from undertaking further construction and/or developments on the said land parcels.
 - b. The Plaintiff and Defendant in ELC suit No. 727 of 2011 either by themselves or through their representatives, agents or servants are restrained from entering into the parcels of land known as L.R. No. 209/19728 and L.R. No. 209/7260/223, and from interfering with the possession and occupation by the Plaintiff in ELC suit No. 725 of 2011 of the said parcels of land.
 - c. That the Plaintiff in ELC suit No. 725 of 2011 and Defendant in ELC suit No. 727 of 2011 either by themselves or through their representatives, agents or servants shall not demolish or in any manner interfere with the structures constructed by the Plaintiff in ELC suit No. 727 of 2011 on the parcels of land known as L.R. No. 209/19728 and L.R. No. 209/7260/223.

2. The consolidated suits herein shall proceed to full trial and the parties to comply with the provisions of Order 11 of the Civil Procedure Rules and to set the said suits for pre-trial conference within 6 months of the date of this ruling. In default the *status quo* orders herein shall lapse.
3. The costs of the Notices of Motion dated 15th December 2011 and 16th December 2011 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____4th____ day of ____July____, 2013.

P. NYAMWEYA

JUDGE