



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 439 OF 2013

1. ISAAC MANGUSHIA
2. JOYCE WANGARI MUGEREKI.....PLAINTIFFS
3. JOHANINA K. MUTIGA
4. LUCY WANGARI MURAGE

VERSUS

ARTHUR MWANIKI GAKUYA.....DEFENDANT

RULING

The application by way of Notice of Motion before the court is dated 8th April 2013, and is brought by the Plaintiffs under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The Plaintiffs are seeking orders that a temporary injunction does issue restraining the Defendant, his servants, employees or anybody else whatsoever from trespassing, constructing, disposing and or in any way interfering with their peaceful enjoyment of land premises known as Mutarakwa Road Jua Kali-Kariobangi South Plots Nos. 182, 183B, 184A, 185, 186, 188, 189, 190, 191, 192 and 195, Nairobi pending the hearing and determination of this suit.

The grounds for the application are detailed in a supporting affidavit sworn by the 1st Plaintiff on 8th April, 2013, wherein the Plaintiffs have stated that they were allocated the suit plots by the City Council of Nairobi through Komarock Mutarakwa Road Jua Kali Association which was registered on 10th March 1995. The Plaintiffs have annexed as evidence a copy of the certificate of registration of the association, and have averred that the plots were given to the association through a presidential decree and were duly allocated to members of the association. Further, the Plaintiffs have stated that they obtained and paid for all the necessary allotment letters from the City Council of Nairobi. According to the Plaintiffs, the association duly obtained a Part Development Plan (PDP) in respect of the said plots from the Director of City Planning, City Council of Nairobi. Further, the Plaintiffs have averred that issues which arose between the Defendant and some members of the association were clarified through the association's letter dated 12th May, 2010 addressed to the Chief Land Surveyor, City Council of Nairobi.

It is the Plaintiffs' case that a ruling delivered in Nairobi ELC HCCC No. 304 of 2010 whose copy has been attached to the affidavit, made it clear that the Defendant's plot is Mutarakwa Road Jua Kali-Kariobangi South Plot no. 193, Nairobi. The Plaintiffs have alleged that sometime in March, 2013 the Defendant trespassed on the suit premises along with unknown assailants, with doctored allotment letters and beacon certificates in plots Nos. 182, 183B, 184A, 185, 186, 188, 189, 190, 191, 192 and 195 Nairobi. The Plaintiffs have stated that they reported the encroachment to the chairperson of the association who wrote a letter dated 20th March, 2013 to the Director of City Planning at the City Council of Nairobi, which was copied to the Director of Investigations, Information and Analysis and the D.O. Dandora Division. The Plaintiffs have enclosed a copy of the said letter as evidence.

The Plaintiffs further averred that the District Officer, Dandora Division wrote to the Director of investigations, Information Analysis (NCC) a letter dated 22nd March, 2013 calling for investigations in a land ownership dispute between the Defendant and Komarock/Mutarakwa Road Jua-Kali Association. According to the Plaintiffs, the Defendant started illegal construction on plots Nos. 182, 183B, 184A, 185, 186, 188, 189, 190, 191, 192 and 195 along Mutarakwa Road Jua Kali-Kariobangi South Nairobi and had hired agents to guard the premises where construction works were taking place 24 hours a day.

The application is opposed by the Defendant who in a replying affidavit sworn on 24th May, 2013 stated that the Plaintiffs were strangers to him and further, he denied knowledge of the existence or the location of the suit premises. While denying that he had trespassed on any of the Plaintiffs' land, the Defendant stated that he was in occupation of his own parcel of land and he annexed as evidence a letter of allotment dated 7th May 1992 issued to him by the Nairobi City Commission in respect to plot no. 78, New Komarock /Mutarakwa Roads Shopping Centre.

It is the Defendant's case that the letters of appointment held by the Plaintiffs have been confirmed by various government departments to be forgeries and the Defendant has attached evidence of copies of letters dated 17th April 2012, 12th May 2003 and 29th April 2003 from the Permanent Secretary, Ministry of Local Government addressed to the Town Clerk, Nairobi City Council calling for investigations in the alleged forgeries of letters of allotment.

The Defendant has contended that the purported letters of allotment exhibited by the Plaintiffs are based on a Minister's letter Ref. No. 1142-01/31 dated 2nd May 2002. However, that the original letter by the Minister dated 2nd May 2002 does not contain any settlement project known as Mutarakwa-road Jua Kali – Kariobangi's South and therefore, that the same is a forgery. The Defendant also annexed as evidence a copy of a replying affidavit sworn by Peter Kibinda on 17th July 2006 in High Court Civil Suit No. 721 of 2006 where the City Council of Nairobi stated that similar letters to the ones held by the Plaintiffs were forgeries.

The Defendant averred that he had been in occupation of his premises since early 1980's and he denied commencing construction this year as alleged by the Plaintiffs. Further, the Defendant stated that he had put up a huge investment on the premises whereby he carries on business worth millions of shillings and employed more than 50 employees. The Defendant attached evidence of a certificate of registration of the business known as Yakayaka Building Contractors Ltd dated 6th February 2006, single business permit issued to Yakayaka Building Contractors Ltd dated 28th March 2013, letter from the ministry of roads certifying registration of Yakayaka Building Contractors Ltd as road works contractors dated 17th August 2013, membership certificates issued by Kenya Federation of Master Builders to Yakayaka Building Contractors Ltd dated 10th May 2013 as well as a tax compliant certificate dated 19th December 2012 issued to Yakayaka Building Contractor ltd.

According to the Defendant, the Plaintiffs attempts to trespass on his property on various occasions necessitated him to put up appropriate security measures in a bid to protect his property. Lastly, the Defendant contended that since the purported letters of allotment held by the Plaintiffs are the subject of criminal investigation, they cannot be relied on to prove ownership of the alleged parcels of land.

Parties were directed to file submissions which were highlighted before the court on 10th July 2013. In submissions dated 8th July 2013, the Plaintiffs' counsel reiterated the facts in their supporting affidavit and stated that the Plaintiffs had established a *prima facie* case on a balance of probabilities. The Plaintiffs argued that it would be in the interest of justice to allow the application, and in the alternative, that the interim orders allowed by the court remain in force pending the hearing and determination of the suit.

The Defendant argued in submissions dated 1st July 2013 that the letters and receipts annexed in the 1st Plaintiff's supporting affidavit refers to third parties whose connection to the Plaintiff is difficult to tell.

Counsel for the Defendant argued that it is difficult to tell who owns the various plots mentioned in the application as it was not clear how the ownership link was established.

It is the Defendant's submission that here is no evidence whatsoever of how he trespassed on any of these suit plots and therefore, that no *prima facie case* had been established. The Defendant argued that the letters dated 17th April 2012 stating that the Plaintiffs' allotment letters were a forgery as well the letter dated 29th April 2003 requesting that the letters of allotment be recalled had not been controverted by the Plaintiff. Counsel submitted that the Plaintiffs did not demonstrate the damages they are likely to suffer and lastly, that the balance of convenience tilted in favour of the Defendant who had adduced evidence that he had heavily invested in the plot.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The issue before the court is whether the Plaintiffs have met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction.

The Plaintiffs have adduced allotment letters for plot number 195 issued to Johantina K. Mutiga on 13th May 2002, letter of allotment for plot 185 issued to Wilfred Karanja on 13th May 2002 as well as an agreement for sale for the said plot dated 9th October 2002 between Wilfred Karanja Njoroge and Duncan Murage Maina together with Lucy Wangari Ngigi.

Save for plots 195 and 185, allotment letters for plots 186, 182 and 183B mentioned in the application were issued to persons who are not parties to this suit, and there is no evidence that the Plaintiffs have proprietary interest in the said plots. The Plaintiffs did not provide ownership documents for plots 184A, 188, 189, 190, 191 and 192 in respect of which they have also sought injunctive orders, and there is no evidence that the Plaintiffs instituted the suit in a representative capacity.

The Defendant has produced an allotment letter for plot 78, New Komarock/Mutarakwa Roads Shopping Centre issued to him on 7th May 1992 as well as payment receipts as evidence of ownership, and has stated that he is in occupation of his own plot. There is no evidence that the Defendant's plot no. 78 is the same as any of the plots mentioned in the application. In addition as the Defendant has brought evidence to show the possibility of fraud in the acquisition of the Plaintiffs' allotment letters, it is my view that the Plaintiffs have not established a *prima facie case*. I am also guided in this respect by the Court of Appeal decision in the case of **Mrao Ltd -vs- First American Bank of Kenya Ltd & 2 others (2003) KLR 125** where a *prima facie case* was said to be *one in which on the material presented to the court or 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 opposite party.*

It is also my view that the dispute between the parties herein can only be effectively resolved by undertaking a survey of the disputed plots to determine their location and if there has been any double allocation in this regard.

The Plaintiff's Notice of Motion dated 8th April 2013 is accordingly denied, and the costs of the said Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____9th____ day of ____October____, 2013.

P. NYAMWEYA

JUDGE