



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 465 of 2011

NILS BERNARD FRIDE NILSSON

DILIPKUMAR SHAH

VINCENT SAHANI AS TRUSTEES OF

THE FAITH HOMES OF KENYA.....PLAINTIFFS

VERSUS

DUNSON KARU.....1ST DEFENDANT

SIKO WORME DAWA.....2ND DEFENDANT

PATRICK MUTEMBEI.....3RD DEFENDANT

COUNCILLOR GM WANJOHI.....4TH DEFENDANT

CITY COUNCIL OF NAIROBI.....5TH DEFENDANT

JAMES WANYOIKE MBUGUA.....6TH DEFENDANT

IBRAHIM SOLOMON NDICHU.....7TH DEFENDANT

SAMUEL MBUTHIA.....8TH DEFENDANT

RULING

The application before the Court for determination is a Notice of Motion by the Plaintiffs dated 6th September 2011. The application is brought under the provisions of Order 40 Rules 1,2, and 3 of the Civil Procedure Rules and sections 1A, 1B, 3A and 100 of the Civil Procedure Act. The Plaintiffs are seeking a substantive order from this Court that pending the hearing and determination of the suit herein, the Defendants jointly and severally be strictly enjoined and restrained whether by themselves or by their servants, agents or otherwise howsoever, from trespassing, alienating, constructing or continuing with the construction of any structures and/or in any way whatsoever interfering with the Plaintiffs quiet possession over all that piece of land known as Land Reference, Number 209/14527 situated in the City of Nairobi (hereinafter referred to as the suit property).

The grounds for the application are that the Plaintiffs are the registered owners and in possession of the suit property as trustees of the Faith Homes of Kenya, and that 1st, 2nd and 3rd Defendants, at the instigation of and/or with the encouragement of the 4th Defendant, entered upon the said land and commenced construction thereon. Further, that the Defendants have therefore not only committed acts of trespass, but have also violated the Plaintiffs' constitutionally enshrined and guaranteed right under Article 40(1) of the Constitution to acquire and hold property.

The Plaintiffs also claim that the 1st, 2nd and 3rd Defendants have not sought nor obtained an Environmental Impact Assessment Licence as required under part VI of the Environmental Management and Co-ordination Act, 1999; have not applied for or obtained permission to carry out the said developments on the said land as required by section 30 and 31 of the Physical Planning Act; nor have they applied for a change of user of the said land to permit the construction of blocks of flats and/or petrol stations as the allowed use of the suit property is for educational purposes.

The detailed facts giving rise to the application are detailed out in the supporting affidavit sworn on 6th September 2011 by Dilipkumar Jadhav one of the Trustees of the Faith Homes of Kenya. Attached to the said affidavit as evidence is a copy of a certificate of title with respect to the suit property issued to the Trustees of the Faith Homes of Kenya under the Registration of Titles Act on 19th July 2002, and registered on 22nd August 2002. Also annexed is a letter of allotment with respect to the suit property issued by the Commissioner of Lands to the said trustees dated 14th July 1999.

The 2nd, 3rd, 4th, 5th and 6th Defendants opposed the application. The 2nd Defendant in his replying affidavit sworn on 22nd September 2011 stated that he was approached in February 2011 by two gentlemen, namely Mr. John Karugu Remor and Mr. Josphat Machira Kinyua, to purchase their pieces of land within an area known as Kiamaiko/Huruma Fire Victims Phase II. Further, that the said gentlemen presented him with allotment letters dated 22/8/2007 showing that they were the lawful allottees of plot numbers C. 24 and C.25 respectively within the said Kiamaiko/Huruma Fire Victims Phase II, and he purchased the said plots for valuable consideration.

The 2nd Defendant further stated that upon payment of the purchase price, he took possession of the said plots and commenced development by putting up a car wash, service bay, lubricant shop and Mini Supermarket. He annexed as evidence copies of the said letters of allotment, sale agreements entered into with the two gentlemen dated 15/3/2011, cheques evidencing payment of the purchase price and an Agreement for Lease and Assignments to be executed by the respective parties.

The 3rd Defendant in his Replying Affidavit sworn on 18th October 2011 stated that he is the lawful owner of plot No. 43 within Kiamaiko/Huruma Fire victims Phase II having been allotted the said parcel of land by the City Council of Nairobi on 22nd August, 2007, and a copy of the allotment letter was annexed. The 3rd Defendant further stated that he has duly paid outstanding rates, has taken possession of the said plot and commenced development of a residential flat in February 2011. Further, that he is aware that the Plaintiff is the occupier of an adjacent parcel of land which is clearly distinct and separate from the plot he owns and which has a separate title.

The 4th Defendant is the area councillor for the Kiamaiko Ward where the suit property is situated, and a member of the 5th Defendant's Town Planning Committee. He stated in his replying affidavit sworn on 12th October 2011 that the suit property was at all times under the domain of the 5th Defendant, and that the Plaintiffs have not demonstrated that they lawfully acquired the property. Further, that following a fire that razed Huruma slums in the year 1984, victims of the fire were resettled on the suit property in what became to be known as the Kiamaiko Huruma Fire Victims Scheme. The 4th Defendant annexed minutes of meetings of the City Council's Town Planning Committee held on 7th December 1999 and 17th February, 2010 with resolutions to resettle the fire victims in the scheme, and a copy of the Part Development Plan of the Scheme.

The above facts were reiterated in the response by the 5th Defendant in a replying affidavit sworn on 12th October 2011 by Tom Odongo, its Director of City Planning, wherein he further averred that the suit property herein was land within the jurisdiction of the City Council of Nairobi, and any allotment thereof as alleged to have been done by the Commissioner of Land would not have been lawfully possible without any records of notice, consent, approval of land or consultation with the City Council. Further, that the school alluded to in the Plaintiffs' affidavit namely Sunflower Academy is situated on a different property known as LR No. 209/9973, and there is no demonstration that the said LR. No. 209/9973 was ever lawfully merged with the suit property herein.

The 6th Defendant swore a replying affidavit on 15th November 2011 on his own behalf and on behalf of the 7th and 8th Defendants. The said Defendants state that they are lawful allottees of plots within Kiamaiko/Huruma Five Victims Phase II scheme, and hold valid letters of allotment in respect of their parcels of land. Further, that the Plaintiff is laying claim to their parcels of land illegally as they had not shown any lawful allocation of the suit property and only lawfully occupy L.R. No. 209/9973. The said Defendants annexed an extract of the City Council of Nairobi minutes and a copy of the part Development Plan of the said scheme as evidence.

The parties at the hearing of the application on 25th July 2012 wholly adopted their written submissions and requested for a ruling based on the same. The Plaintiff's learned Counsel in written submissions dated 14th October 2011 argued that the effect of section 23 of the Registration of Titles Act was that the Plaintiffs as the registered owners of the suit property were the indefeasible owners of the same, and that in such circumstances a letter of allotment does not confer any interest in land as held by the Court of Appeal in **Wreck Motor Enterprises vs The Commissioner of Lands and 2 others, Civil Appeal No 71 of 1997**

The Plaintiffs further submitted that the 5th Defendant has no authority to allocate unalienated Government land and that the Defendants were thereby trespassers, and their rights as temporary allottees could not be upheld over those of a registered proprietor as held in **Jaj Super Power Cash and Carry Ltd vs. Nairobi City & Two others, Civil Appeal No 111 of 2002**. Lastly, it was argued by the Plaintiffs relying on the decision in **Central Kenya Ltd vs Trust Bank Ltd and others EALR (1995-98) 2 EA 57**, that the onus was on the Defendants to prove the alleged fraud and they had not shown any *prima facie* proof of the same.

The 2nd Defendant's learned Counsel filed submissions dated 5th March 2012. The learned Counsel argued that the Plaintiffs had failed to establish a *prima facie* case as their title was voidable, having been obtained fraudulently. Further, that the Plaintiffs had not shown that they stood to suffer irreparable loss as the suit property's value can be quantified and they could be adequately compensated by way of damages. Lastly, that an injunction would be injurious to the 2nd Defendant as he had incurred expenses developing the suit property.

Similar arguments were proffered by the Counsel for the 5th Defendant in submissions dated 18th January 2012, wherein it was averred that the Plaintiffs had not met the legal principles for the grant of an injunction as enunciated in **Mrao vs First American Bank (2003) Eklr**, as they had not demonstrated that they had lawfully acquired the suit property. The arguments made by the 2nd and 5th Defendants were reiterated by the learned Counsel for the 3rd, 5th, 6th and 7th Defendants in submissions dated 5th March 2012.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. At this stage all 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 injunction. These 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.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of title to the suit property, while the 2nd and 3rd Defendants rely on allotment letters issued by the 5th Defendant with respect to the same property. The rest of the Defendants rely on resolutions made in meetings of the 5th Defendant as indicating the basis of their interest in the suit property. It is my opinion that being the registered owners of the suit property, the Plaintiffs *prima facie* have a superior claim, and have therefore established a *prima facie* case with a probability of success.

The issue of whether the said title was issued irregularly or fraudulently can only be established after full trial and not at this stage. I am also of the view that damages are not an adequate remedy as the Plaintiffs have indicated that the suit property is meant for educational purposes and they have already established a school in the adjoining parcel of land.

I therefore allow the Plaintiffs' application dated 6th September 2011 and hereby order as follows:

1. The Defendants are restrained jointly and severally and whether by themselves or by their servants, agents or otherwise howsoever from trespassing on, alienating, continuing with the construction of any structures and/or in any way whatsoever interfering with the Plaintiffs' quiet possession over all that piece of land known as Land Reference Number 209/14527 situated in the City of Nairobi pending the hearing and determination of the suit herein or until further orders.
2. The Plaintiffs shall not to demolish or in any way interfere with any structures constructed on the said parcel of land by the Defendants pending the hearing and determination of the suit herein or until further orders.
3. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____10th____ day of ____October____, 2012.

P. NYAMWEYA

JUDGE