



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 456 of 2010

EMBAKASI JUA KALI HOUSING ASSOCIATION

(Suing through)

1. JAMES BILLY O. ANUNDA - CHAIRMAN

2. JOHN MUYA - SECRETARY

3. NJOKI WAINAINA -TREASURER.....PLAINTIFF

VERSUS

EMBAKASI DEVELOPERS LTD1ST DEFENDANT

CITY COUNCIL OF NAIROBI2ND DEFENDANT

RULING

The application under consideration is dated the 30th January 2012 and is brought by the Plaintiffs under the provisions of Order 40 Rule 1(a) of the Civil Procedure Rules. The application is seeking orders that the 1st Defendant it's agents and servants be restrained by an order of temporary injunction from demolishing, destroying or damaging the Plaintiff's building and other properties standing and being on the parcels of land known as LR Numbers 7109/4, 7109/5, and 7109/7 (hereinafter referred to as the suit properties), and from interfering with the Plaintiffs' peaceful occupation of the said properties pending the hearing and final determination of this suit.

The grounds for the application are that the suit properties belong to the 1st Defendant, and the Plaintiffs have adversely been in occupation of the suit properties for a period in excess of 12 years. Further, that the Plaintiffs have done extensive developments on the said suit properties with the knowledge of the 1st and 2nd Defendant and without their consent, and that on or about 25th January, 2012 the 1st Defendant invaded the said properties and attempted to evict the Plaintiffs therefrom, destroyed some of the Plaintiffs' properties, killed some of the members of the Plaintiffs and seriously injured others. These grounds were elaborated upon in the supporting affidavit sworn on 20th January 2012 by James Billy O. Anunda, the Plaintiff's Chairman.

The 1st Defendant filed a Notice of Preliminary Objection dated 10th February 2012, which was dispensed with in a ruling delivered by this court on 7th May 2012. The 1st Defendant's substantive response to the application is in various Replying Affidavits all sworn on 10th February 2012. The first affidavit is sworn by James Murigi, a Director of the 1st Defendant, the second by Joseph Louis Onguto,

an Advocate who had acted for the 1st Defendant in HCCC No 2299 of 1999, and the last affidavit is sworn by Zachariah Baraza, a duly licensed auctioneer instructed by the 1st Defendant to enforce orders made HCCC No 2299 of 1999.

James Murigi confirms in his affidavit that the 1st Defendant is the owner of the suit properties, and stated that the Defendant has since 1999 never acquiesced in the occupation by squatters of the three properties. He annexed the pleadings and orders given in HCCC No 2299 of 1999, and further stated that pursuant to eviction orders given in the said case, the 1st Defendant set out to evict all persons on suit properties with assistance of a court auctioneer and 100 police officers on 28th January 2012, and that many squatters left the suit properties as a result. The Deponent averred that the Plaintiff failed to disclose the above facts to the court and obtained the orders herein given on 1st February 2012 through deception.

Mr. Joseph Louis Onguto in his replying affidavit explained in detail the history of, and circumstances under which HCCC No 2299 of 1999 was filed and decided. He acted for the 1st Defendant in the said proceedings which were later consolidated with HCCC No. 116 of 2000. He stated that HCCC No. 2299 of 1999 sought mandatory and prohibitory injunctive orders against the named Defendants who were a Councillor Simon Muteti , a church and its pastors, the latter who claimed to have been sold the suit property by the said Councillor. HCCC No. 116 of 2000 on the other hand was filed by Mukuru Jua Kali and they were claiming a portion of the suit properties.

Mr. Onguto stated that the two cases were heard and determined by Hon. Lady Gacheche, Commissioners of Assize (as she then was), and whilst granting the orders in favour of Embakasi Developers Limited, she dismissed the suit filed in HCCC No. 116 of 2000 with costs in January 2001. Mr. Onguto in addition stated that the 1st Defendant thereafter made attempts to enforce the court order in vain, and that subsequently in the year 2006, the Embakasi Jua Kali Self Help Group wrote to him through their lawyer protesting the attempted evictions. He duly replied stating that the said Embakasi Jua Kali Group had always been aware of the court order. Mr. Onguto annexed as evidence copies of the said correspondence and averred that the Plaintiffs have since 2006 been aware of the fact that this Honourable Court issued eviction orders against all the persons occupying the suit property on 29th January, 2001.

Mr. Onguto further stated that as attempts to evict the squatters and trespassers on the 1st Defendant's parcel of land had been fruitless he moved the court on 4th February, 2009 for execution of the eviction orders. He appeared before Hon. Justice Osiemo (now retired) on 23rd February, 2009 and the Judge directed that the application be heard by the Deputy Registrar. Further, that on 16th March, 2009 he did appear before the Deputy Registrar who issued the orders for eviction.

Mr. Zacharia Baraza deponed that the 1st Defendant herein instructed him to enforce orders of this court issued on 29th January 2001 with the assistance of the Officer Commanding Embakasi Police Station. He annexed a copy of the orders, and said that he obtained the assistance of 100 police officers, his own staff and casual employees to remove the persons in occupation of the suit properties. He also stated that he served 500 copies of the notice of the intended eviction upon the squatters on the suit properties on the date of the eviction.

Mr. Baraza stated that on the material day he introduced himself to the squatters on the suit properties as the auctioneer who had come to enforce orders made in HCCC No. 2299 of 1999, and explained to them that he was going to give them an opportunity to remove their possessions from their structures. Further, that the squatters were co-operative and started leaving the three properties. However that the eviction was interrupted when Honourable Waititu, the local Member of Parliament came to the suit properties and ordered that the eviction stops, and threatened to use youth who would greatly outnumber the police officers and disarm them.

Counsel for the Plaintiffs and 1st Defendant agreed to proceed with the prosecution of the application

herein by way of written submissions, and at the hearing of the application on 1st October 2012 asked for a ruling on the basis of their written submissions. The Plaintiffs' Counsel filed written submissions dated and filed on 28th May 2012 and contended that the application satisfies the conditions laid down in the case of **Giella vs Cassman Brown & Co. Ltd (1973) E.A 338**. It was argued by the Counsel that the 1st Defendant does not deny the Plaintiffs' occupation of the suit properties, save for referring to them as trespassers, and that the said occupation of over twelve years was only interrupted after the suit herein was filed.

The Plaintiff's Counsel also submitted that the Plaintiffs have made extensive developments on the suit properties, and they will not be adequately compensated by way of damages if the same are damaged or destroyed. Lastly that the balance of convenience is in favour of the Plaintiffs as they have been in occupation for over twelve years without any interruption or interference by the 1st Defendant.

The 1st Defendant's Counsel filed detailed submissions on 2nd July 2012 of even date. The Counsel submitted that the principles in **Giella vs Cassman Brown & Co. Ltd** are not the only ones that govern the grant of injunctions. It was argued by the Counsel that it is also settled law that an applicant for an injunction must make full disclosure of the relevant facts touching on the subject matter of the suit. Counsel relied on the rulings in **John Muritu Kigwe and Another vs Agip K Ltd, Nairobi HCCC 2348 of 1999**, and in **Uhuru Highway Development Co. Ltd & Others vs Central Bank of Kenya & Others, Nairobi Civil Appeal No. 126 of 1995** in this regard. It was further argued that the Plaintiffs ought to have disclosed to the Court that what happened on 28th January 2012 was an enforcement of the order of this Court, whose validity they ought to have established before coming to court.

The 1st Defendant's counsel also submitted that a party must not abuse the Court process and must use it honestly and for the proper purpose. Counsel relied on an article by I.H Jacobs on "**The Inherent Jurisdiction of the Court**" in the **Current Legal Problems, 1970**, at pages 23-52 in this respect. The Plaintiff's Counsel also relied on the decision in **Nabro Properties Ltd vs Sky Structures (2002) 2 KLR 299** that the Court will not allow a person to found his claim on his own wrong. The Counsel submitted that the Plaintiffs obtained orders from this court by deception and that they are in abuse of the process of court. Counsel also urged this Court to issue a notice to show cause to the Plaintiffs why they should not be committed to jail for contempt of Court. He quoted extensively from an article by former Chief Justice Evans Gicheru on "**Independence of the Judiciary: Accountability and Contempt of Court**" in **2007 Kenya Law Review Vol1:1**, at pages 1-18 in this regard.

It was also argued by the 1st Defendant's Counsel that no party can acquire land adversely when there is a suit pending touching on his or her occupation, or an eviction order which is in the process of enforcement. The Counsel relied on the cases of **McPhail v Persons Unknown (1973) 1 Ch. 447** and **Secretary of State for Environment, Food and Rural Affairs vs Meier & Another & Others (2009) UKSC 11** for the submission that the 1st Defendant has never acquiesced in the occupation of its property by the Plaintiffs and that they are squatters thereon. It was further argued that the Plaintiffs claim to have been in adverse possession since 1997, and the 1st Defendant filed HCCC No. 2299 of 1999 two years after the alleged occupation which was within the 12 year period. The Counsel also submitted the Plaintiff is also the same group known as Mukuru Embakasi Jua Kali Self Help Group that was informed of the court orders in 2006 by Mr. Onguto. Lastly it was argued that the Plaintiffs by refusing to obey the Court's orders and regarding them as fake have not come to Court with clean hands, and should not be entitled to the injunction sought.

I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. The two issues for consideration are whether the Plaintiffs are entitled to the injunction sought, and if so, if they have satisfied the requirements set out in **Giella vs Cassman Brown & Co. Ltd (1973) E.A 338**. It has been argued by the 1st Defendant that the Plaintiffs are not entitled to the injunction sought as they are guilty of material non-disclosure; are in abuse of the process of court; and in contempt of court for not obeying the orders of this Court issued in HCCC No 2299 of 1999. It is also argued that the Plaintiffs were aware of the said court orders from 2006.

I have perused the pleadings, documents and court orders that were annexed as a bundle “JM2” to the affidavit of James Murigi sworn on 10th February 2012. From the said bundle it is clear that the parties in HCCC No 2299 of 1999 were the 1st Defendant herein as the Plaintiff, and the Defendants were Councillor Simon Muteti, Seventh Day Adventist Church, Pastor John Obuya, Pastor James Mutie and Pastor John Mutwiri. I have also perused the Plaint in HCCC No 116 of 2000 also attached to the said bundle, and the Plaintiffs therein were Makau Mutie, Joshua Owino and Joseph Njoroge suing on behalf of Mukuru Embakasi Jua Kali Association, while Concreters Limited and the 1st Defendant herein were the Defendants in the said suit. The Plaintiffs in the current suit were not party to HCCC No 2299 of 1999 or HCCC No 116 of 2000.

I in addition perused the correspondence with the Plaintiffs referred to by Mr. Onguto in his Replying Affidavit sworn on 10th February 2012 and attached as exhibit “JLO”. The letter from Mativo and Company Advocates dated 16th February 2006 in the said annexure states that they act for Mukuru Embakasi Jua Kali Self Help Group and refers to the court orders received by its client. It has been argued by the 1st Defendant in paragraph 18 of its submissions that the Plaintiffs herein fall into the category of agents, representatives and servants of the Defendants in HCCC No 2299 of 1999. It is also argued in paragraph 22 of the said submissions that the certificate issued to Embakasi Jua Kali Housing Association the Plaintiff herein, is very much like the one issued to Mukuru Embakasi Jua Kali Self Help Group, and that they are therefore the one and same organisation.

I respectively do not agree with these submissions. No evidence has been given by the 1st Defendant to show any relationship between the Plaintiffs herein and the Defendants in HCCC No 2299 of 1999. It is also evident that Embakasi Jua Kali Housing Association and Mukuru Embakasi Jua Kali Self Help Group are two different organisations, each having their own certificates of registration. The one for Mukuru Embakasi Jua Kali Association which was annexed to the Replying Affidavit by James Murigi shows that the said Association was registered on 5th July 1999, while the certificate produced by the Plaintiffs show that Embakasi Jua Kali Housing Association was registered on 28th September 2000. In addition no evidence was produced by the 1st Defendant to show that the membership of the two organisations is the same.

It is therefore my finding that no evidence has been brought to show that the Plaintiffs were aware of the court of orders before 28th January 2012 when Zachary Baraza served the squatters on the suit property with 500 copies of the court orders, as deponed to in his replying affidavit sworn on 10th February 2012. The Plaintiffs cannot therefore be said to have deliberately ignored this Court’s orders or to have deliberately deceived this Court. It is also my finding that there has been no material non-disclosure, for upon the said service of the orders on 28th January 2012, the Plaintiffs filed the application herein on 30th January 2012, and did disclose the existence of the said order which they claimed was fake. The issue of whether the said order is genuine or not, is a matter to be proved from the court records of HCCC No 2299 of 1999 or by evidence at trial. This Court, taking into account all the foregoing circumstances, will therefore exercise its discretion in favour of the Plaintiff and consider their application for an injunction.

On the second issue as to whether the Plaintiff have met the requirements for the grant of an injunction, the first question to be answered is whether they have established a *prima facie* case. The application herein is filed in the context of the Plaintiffs’ suit filed by way of Originating Summons dated 23rd September 2010 as amended on 30th January 2012, seeking adverse possession with regard to the suit properties. It is not disputed that the Plaintiffs are in occupation of the suit properties. The issue of whether such possession has been interrupted to deny the Plaintiffs a claim for adverse possession as submitted by the 1st Defendant cannot be conclusively decided at this stage. Determination of this issue must await the main hearing, and the benefit of further evidence and argument. It is therefore the finding of this Court that the Plaintiffs have shown a *prima facie* case, and that they will suffer irreparable damage if the *status quo* is not maintained, as their suit herein will be rendered nugatory.

For the reasons given in the foregoing it is hereby ordered that 1st Defendant its agents and servants be

and are hereby restrained from demolishing, destroying or damaging the Plaintiff's building and other properties standing and being on the parcels of land known as LR Numbers 7109/4, 7109/5, and 7109/7, and from interfering with the Plaintiffs' peaceful occupation of the said properties pending the hearing and final determination of this suit, or until further orders.

Costs of the application dated 30th January 2012 shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ____5th____ day of ____November____, 2012.

P. NYAMWEYA

JUDGE