



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1454 of 2007

PENTECOSTAL EVANGELISTIC FELLOWSHIP OF AFRICA.....PLAINTIFF

VERSUS

1. JOHN MURIR.....DEFENDANT

2. CHARLES KYALO.....DEFENDANT

3. JOHN SACHO.....DEFENDANT

4. DAVID KOIGI..... DEFENDANT

5. RODRICK NYAMWEYA.....DEFENDANT

6. WAMAI.....DEFENDANT

7. MWEWA.....DEFENDANT

8. MUENI.....DEFENDANT

9. MUIRURI.....DEFENDANT

10. MULILI.....DEFENDANT

11. BEATRICE WANJIRU MUIRURI.....INTENDED DEFENDANT

12. CARLOS KALOLA.....INTENDED DEFENDANT

RULING

What is before the court for determination is the plaintiff's Notice of Motion application dated 14th November, 2017 in which the plaintiff has sought two prayers. The plaintiff has sought the joinder of Beatrice Wanjiru Muiruri and Carlos Kalola as defendants in the suit and a temporary injunction to restrain the intended defendants from excavating trenches, erecting a wall or in any other way interfering with the plaintiff's quiet possession of or access to L.R No. 18615, I.R 666431/1(hereinafter referred to as "the suit property").

The plaintiff's application is supported by an affidavit sworn by Bishop Dr. Mophat Kilioba, a trustee and general overseer of the plaintiff on 14th November, 2017. The plaintiff has averred that it is the registered owner of the suit property and that following a ruling delivered by the court on 17th February, 2017 dismissing its application for injunction dated 6th November 2015, the intended defendants who claim an interest in the suit property hired thugs who dug trenches at the entrance and on the rear part of the plaintiff's church building with the intention of putting up a wall. The plaintiff has averred that the said thugs held the members of the plaintiff who had a meeting at the church hostage for several hours and the matter had to be reported to the Police. The plaintiff has contended that they had filed a similar application wherein interim injunctive orders had been issued against the intended defendants on 23rd March, 2017. The plaintiff has contended that when the said application came up for hearing inter partes, the court expressed its reservation on the application due to the fact that the intended defendants against whom the injunctive orders were sought had not been joined as parties to the suit.

The plaintiff has averred that it has deemed it necessary to have the intended defendants joined formally as defendants in the suit so that the court may effectually and effectively deal with the issues arising in the suit between all the parties. The plaintiff has averred that as a result of the permanent wall erected by the intended defendants at the entrance and rear part of its church building, its members have no ingress and egress to the church. The plaintiff has averred that in the circumstances, it is necessary that the orders sought be granted.

The intended 11th defendant, Beatrice Wanjiru Muiruri has opposed the application through an affidavit she swore on 3rd July, 2017 in opposition to the plaintiff's earlier application for injunction. In the said affidavit, the intended 11th defendant has averred that her property and the suit property are separated by a narrow road measuring about 2 meters upon which the plaintiff has encroached. The intended 11th defendant has averred that the wall the plaintiff is complaining about has been built by her within the boundaries of her property. The intended 11th defendant has averred further that the plaintiff is using the court to displace other land owners in the area with a view to grabbing their land. The intended 11th defendant has averred that the OCS and Deputy OCS of Kayole Police Station had visited the site of the disputed parcels of land at the instance of the plaintiff and had confirmed that she has not trespassed on the suit property as alleged. The intended 11th defendant has averred that it is the plaintiff who has trespassed on a road and that the plaintiff has no case against her. The intended 12th defendant has not responded to the application.

I have considered the application together with the affidavit filed in support thereof. I have also considered the intended 11th defendant's affidavit in response to the application. There are two issues which arise for determination in the application namely, whether the intended defendants should be joined in the suit as parties and secondly, whether the plaintiff is entitled to the temporary injunction sought against the intended defendants.

In the case of Central Kenya Ltd v Trust Bank & 5 Others, CA No. 222 of 1998 the court stated as follows:

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

In the case of Deported Asians property Custodian Board v Jaffer Brothers Limited (1999)1E.A 55 (SCU) that was cited with approval in the case of Pravin Bowry v John Ward and another (2015) eKLR, the court stated that:

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on application by a defendant) to be joined as a co-defendant where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”

In the case of Werrot and Company Ltd. and others v Andrew Douglas Gregory and others, Nairobi(Milimani) HCCC No. 2363 of 1998(1998)LLR2848(CCK), Ringera J.(as he then was) stated that:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an effective decree in the absence of the party”.

I am satisfied from the material before the court that the plaintiff has made out a case for the joinder of Beatrice Wanjiru Muiruri and Carlos Kalola as defendants in the suit. The plaintiff's claim against the defendants who are already parties to the suit is that they have trespassed on the suit property. The plaintiff's claim against Beatrice Wanjiru Muiruri and Carlos Kalola is the same. Beatrice Wanjiru Muiruri has denied the alleged trespass and has contended that it is the plaintiff which has trespassed on a public road. There is therefore an issue to be tried as between her and the plaintiff in relation to the suit property. I am of the view that to avoid multiplicity of suits, Beatrice Wanjiru Muiruri and Carlos Kalola should be joined as parties to this suit so that the plaintiff's claim against the 1st to 10th defendants over the alleged trespass on the suit property and its claim against them can be heard together.

With regard to the prayer for interlocutory injunction, the conditions to be satisfied before such injunction can be granted were set out in the case of Giella v Cassman Brown & Co. Ltd. (1973) E. A 358. The same were restated in Nguruman Limited v Jan Bonde Nielsen & 2 Others (2014) eKLR as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

(a) establish his case only at a prima facie level,

(b) demonstrate irreparable injury if a temporary injunction is not granted, and

(c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.”

In determining whether a prima facie case has been established, the court's role is limited to gauging the strength of the plaintiff's case and not to decide the main suit. See, Habib Bank Ag Zurich v Eugene Marion Yakub, CA No. 43 of 1982. A prima facie case was defined in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 others(2003) eKLR as:

“...a genuine and arguable case...a case which, on the material presented to the court, a 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 latter.”

The photographs annexed to the plaintiff's affidavit in support of the application show that access to the plaintiff's church building has been severely restricted by the walls allegedly put up by the intended defendants. The plaintiff has claimed that the walls have been erected on the suit property. The intended 11th defendant has on the other hand claimed that the wall that she has put up is on her parcel of land. Whereas the plaintiff has produced before the court a copy of its title, the intended 11th and 12th defendants have not done so. The basis upon which the intended 11th and 12th defendants are laying claims to the land they have erected walls on has therefore not been established. The plaintiff has therefore established a prima facie case against the intended 11th and 12th defendants for trespass on the suit property. The plaintiff has also demonstrated that it will suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted.

The plaintiff has sought an interlocutory injunction to restrain the intended defendants from excavating trenches, erecting a wall or in any other way interfering with its quiet possession or access to the suit property. A prohibitory injunction looks at the future. From the plaintiff's own admission in its affidavit, the excavation has already been done and permanent walls have been erected. The orders sought with regard to the trenches already dug and walls already put up are therefore in vain as what is sought to be restrained has already happened. The best this court can do for the plaintiff is to restrain the intended defendants from carrying any further digging of trenches and constructing new walls on the suit property. The intended defendants shall also be restrained from interfering with the plaintiff's quiet possession of the suit property.

In conclusion, I hereby make the following orders:

1. Beatrice Wanjiru Muiruri alias Beatrice Wanjiru Gitukui and Carlos Kalola are added to this suit as 11th and 12th defendants respectively.
2. A temporary injunction is issued restraining Beatrice Wanjiru Muiruri alias Beatrice Wanjiru Gitukui and Carlos Kalola by themselves or through their agents, servants or anyone claiming under them from excavating further trenches, erecting further walls on L.R No. 18615, I.R 666431/1 or in any other way interfering with the plaintiff's quiet possession, use or access to the said parcel of land or the church building situated thereon pending the hearing and determination of this suit.
3. The plaintiff shall amend the plaint within 14 days from the date hereof to effect the joinder of Beatrice Wanjiru Muiruri alias Beatrice Wanjiru Gitukui and Carlos Kalola to the suit.
4. The costs of the application shall be in the cause.

Delivered and Dated at Nairobi this 24th day of January 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the 1st to 11th Defendants

N/A for the 12th Defendant

Catherine-Court Assistant