



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC CASE NO. 32 OF 2019

ALEX SIKUKU KASSAN

(Suing as the Legal Administrator of the Estate of the deceased

STEPHEN LIMATIAN KASSAN).....PLAINTIFF

VERSUS

WEST POKOT COUNTY GOVERNMENT.....DEFENDANT

RULING

1. This ruling is with regard to an application by way of Notice of Motion dated **10/4/2019** expressed to be brought under **Section 1A, 1B and 3A of the Civil Procedure Acts, Cap 21, Order 40 Rule 1 (a) and Order 51 Rule 1 of the Civil Procedure Rules, 2010**. The applicant is seeking orders thus:-

(1) ...spent

(2) ...spent

(3) THAT this court be pleased to grant a temporary injunction restraining and/or prohibiting the defendant/respondent whether by himself, his servants, employees, agents and/or by whomsoever from entering onto, trespassing, interfering, or evicting the plaintiff/applicant from the suit property pending the hearing and determination of this suit.

(4) THAT costs of this application be borne by the defendant.

(5) Any other or further relief this court may deem fit and just to grant *suo motu*.

2. The application is premised on the applicant's supporting affidavit sworn on the even date.

3. The grounds relied upon are that the applicant's father applied for and was successfully allotted **Plot No. 21** at **Makutano Bus Park** situate in Makutano, West Pokot County and therefore entitled to absolute and exclusive possession thereto; that despite payment of all the requisite fees by the applicant as per his allotment letter the respondent has issued a general eviction notice to the stall owners at Makutano Bus Park citing intention to refurbishment, streamline of the revenue collection, reapplication and reallocation after refurbishment; that the respondent's eviction notice is mainly to kick and/or evict the applicant from his rightfully allotted property, **Plot No. 21**; that the applicant has constructed a permanent building and has been operating a business therein since **2000** and therefore he will suffer irreparable loss and damage unless injunction is not issue; that consequently, the applicant is unable to peacefully and quietly use and/or deal in his said property unless an injunction is issued against the respondent prohibiting them from evicting him from the suit property; that the respondent's actions are glaringly irregular and constitute a blatant breach of the law and in particular **Gazette Notice No. 858** on verification and validation of assets of defunct County Council by the Transition Authority; that the respondent's actions are calculated towards depriving the applicant's suit property and that no prejudice whatsoever will visit upon the respondent herein if this application is allowed but the applicant on the other hand will suffer irreparable prejudice occasioned by the respondent.

4. The respondent opposed the application.

5. The Respondent filed a replying affidavit sworn on **13/5/2019** by its Municipal Manager, a **Ms. Loboo Lucy**. The gist of the affidavit is that in 2001 the Works Town Planning Committee approved the construction kiosks at the bus stop by 12 individuals; that most of the applicants subsequently constructed temporary structures contrary to the terms of approval; that the Municipal Council of West Pokot stopped the construction of temporary structures and demolished them leaving only permanent structures; that the council had failed to

construct structures by its own means due to financial constraints; that in 2003 it was resolved that some former councillors and some staff should under supervision by the counsel apply their own funds to develop permanent structures; that by then 21 permanent structure had been built; that 21 more were approved; that upon deliberations it was resolved to repossess the 21 already constructed structures and the 21 occupants be given a one year grace period upto 31st December, 2003 and further be refunded their construction in sum of Kshs.50,000/= each; that both the grace period and the refund time were extended to December, 2007 after which date the structures would be deemed council property; that at 1st January, 2008 all the structures reverted back to the council; that 2018 the County Government of West Pokot resolved that an inventory of the structures to be conducted to ascertain the tenants thereof and that a three month to vacate be issued to them to enable repairs and re-allocation of the shops and subsequently all the occupants were issued with a general notice to vacate; that an inventory of occupants were processed; that all the occupants except the applicant; that the repair work are almost complete; that a notice to the general public inviting applicants for vacant structures was issued on 15/4/2019 and various applications have been received; that the suit shop does not belong to the estate of the deceased and thus the suit is improperly before this court and that the applicant has not demonstrated a *prima facie* case.

6. In the instant application the issue at hand is whether the applicant has demonstrated a prima facie case or whether he will suffer substantial loss that cannot be compensated by way of damages.

7. It is observed from the contents of the replying affidavit that occupation of the suit property by the applicant is not denied. The shop is said to be his source of livelihood. No refund is demonstrated to have been paid for the structures constructed by his father on the plot. He is in court as a representative of his father's estate. In my view these are facts that lead this court to conclude that the applicant has a prima facie case.

8. As to whether he would suffer substantial loss that cannot be compensated by way of damages its noteworthy that the plot was originally in his father's hands and later on devolved to him upon his demise. Having transacted business on the said plot for long it is not certain that he would obtain alternative premises in sufficient to stabilize his economic position and no specific procedures protecting the rights of the existing occupants have been shown to have been put in place against the influx of new applicants. In the circumstances I find that the applicant would sustain loss that may not be capable for by way of damages if he lost the structure before the substantive rights of the parties have been determined in this suit. For the above reasons I find that his application satisfies the two conditions set out in the case of **Giella - vs- Cassman Brown 1973 EA 358**.

9. I therefore grant the application in terms of **prayer No. 3**. The cost of the application shall be in the cause.

Dated, signed and delivered at Kitale on this 15th day of July, 2019.

MWANGI NJOROGI

JUDGE

15/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Khisa for Defendant

Mr. Bungei holding brief for Jeruto for Applicant

COURT

Ruling read in open court.

MWANGI NJOROGI

JUDGE

15/7/2019