



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 268 OF 2019

NUBIAN RIGHTS FORUM.....PLAINTIFF

VERSUS

FULL GOSPEL CHURCH KIBERA.....DEFENDANT

TRUSTEES OF KIBRA COMMUNITY LAND TRUST...INTERESTED PARTY

RULING

What is before the court is the plaintiff's application brought by way of Notice of Motion dated 16th August, 2019 seeking a temporary injunction to restrain the defendant from dealing with, interfering or otherwise constructing on unspecified parcel of land pending the hearing and determination of the suit and an order for the Officer Commanding Kilimani Police Station to enforce the order. In its plaint, the plaintiff has described itself as a Non-Governmental Organization registered under the Non-Governmental Organizations Act. The plaintiff has claimed that its members are beneficiaries of Kibra Nubian Community Land Trust which owns all that parcel of land known as L.R No. 29976 (Grant No. I.R. 149108) situated in the City of Nairobi and measuring 109.2 hectares (hereinafter referred to as "the suit property"). The plaintiff has averred that the suit property is held by the trustees of Kibra Nubian Community Trust on behalf of the beneficiaries which include the members of the plaintiff. The said trustees have been joined in this suit as interested parties.

In the affidavit sworn on 16th August, 2019 by its Chairman, Shafi Ali Hussein in support of the application, the plaintiff has averred that under the trust deed which established the interested party, the interested party was supposed to hold the suit property on behalf of Kibra Nubian Community and to manage the property in the best way possible for the benefit of the community. The plaintiff has averred further that Grant No. I.R 149108 pursuant to which the suit property was vested on the interested party provides among others that the interested party is to undertake comprehensive physical planning of the suit property to facilitate harmonious and sustainable development of the same and that no further buildings are to be erected on the suit property save with the approval of the County Government of Nairobi and the National Land Commission. The plaintiff averred that the said Grant also provides that the Interested Party would maintain good and substantial repair of the buildings which are erected on the suit property as at the date of the Grant.

The plaintiff has averred that the defendant had written to the interested party on 9th April, 2019 notifying the interested party of its intention to repair its church building at Kambi Aluru Village in Kibra to which notice the interested party granted its approval. The plaintiff has averred that although the defendant was granted permission to carry out repairs on a temporary structure, the defendant embarked on the construction of a permanent church building. The plaintiff has annexed to its affidavit in support of the application photographs showing the construction works which were being undertaken by the defendant. The plaintiff has averred that in putting up a permanent building, the defendant had defied the terms of the approval that was granted to it by the interested party. The plaintiff has averred that the defendant had been asked to stop the construction of the said permanent building but it refused to do so necessitating the filing of this suit. The plaintiff has averred that the defendant would continue with the construction of the said building unless stopped by the court.

The application is opposed by the interested party through a replying affidavit sworn by its chairman, Suleiman Juma filed in court on 25th September, 2019. The interested party has averred that the defendant's church building was demolished in 2018 during the construction of the Southern bypass road which passed through Kibra. The interested party has averred that following the said demolition, the land on which the church building was hitherto situated became smaller. The interested party has averred that to accommodate the church on the reduced portion of land, the defendant informed the interested party that it wished to put up one storey building so as to have enough space for church activities. The interested party has averred that for the purposes of durability, structural stability and safety of the defendant's members, the defendant requested the interested party to allow it to construct stone pillars from the foundation of the building to the first floor of the new church structure which request was approved. The interested party has averred that the defendant's request was reasonable and that the approval which it granted was in order as it was intended to accommodate the defendant's need for more space.

The interested party has averred that the approval which it accorded to the defendant was not for the construction of a permanent structure but of a building with one floor on top. The interested party has averred that the plaintiff misunderstood the defendant's intention and urged the court to dismiss the plaintiff's application.

I have considered the plaintiff's application together with the affidavit filed in support thereof. The principles upon which the court exercises its discretion in applications for temporary injunction are settled. As was stated in the case of Giella v. Cassman Brown & Co. Ltd (1973) E.A 358, an applicant for an interlocutory injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR, the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows: -

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

From the material before the court, I am not persuaded that the plaintiff has established a prima facie case against the defendant. The interested party is the registered proprietor of the suit property on which the building complained of is being constructed by the defendant. The interested party holds the suit property in trust for Kibra Nubian Community Land Trust of which the plaintiff's members are amongst the beneficiaries. According to Grant No. I.R 149108, the interested party is to hold the suit property in accordance with the regulations contained in the trust deed which established Kibra Nubian Community Land Trust. There is no evidence that the interested party has violated any provision of the said Grant or trust deed in granting permission to the defendant to repair its church building which was demolished during the construction of a road. There is no convincing evidence before the court that the defendant is putting up a permanent church building. The photographs placed before the court show concrete pillars constructed from the base of the church building up to the lintel.

The interested party has contended that the said stone pillars and the lintel were intended to enable the defendant to have one floor on top of their previous church building and that the intention of the defendant was not to construct a permanent church building. I am not persuaded from the evidence before me that the defendant is constructing a permanent church building on the suit property. I am not convinced therefore that the defendant and the interested party have violated or breached any of the terms of Grant No. I.R 149108 or the trust deed for Kibra Nubian Community Land Trust. Due to the foregoing the plaintiff has not satisfied the court that it has a prima facie case against the defendant with a probability of success.

Even if the plaintiff had established a prima facie case against the defendant, the plaintiff had also to convince the court that it will suffer irreparable harm if the injunction sought is not granted. What the defendant is putting up is a building. The new church building is being put up where the defendant's old church building stood. In its plaint, the plaintiff has sought an order that the building be demolished. The plaintiff has not told the court what harm or loss it is likely to suffer if the temporary injunction sought is not granted. If the plaintiff succeeds in its suit against the defendant, the building would be demolished and the parties would go back to the status quo prior to the construction complained of. I am not persuaded that the plaintiff stands to suffer any loss if the injunction sought is not granted.

In the final analysis, the plaintiff has failed to satisfy the conditions for granting a temporary injunction. The Notice of Motion application dated 16th August, 2019 fails and the same is dismissed with costs to the interested party.

Delivered and Dated at Nairobi this 31st day of October 2019

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

N/A for the Defendant

N/A for the Interested Party

C. Nyokabi-Court Assistant