



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 267 OF 2018

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

NOREEN SHARIFF CHOGE, EVA CHEROGONY AND

BYRON KIPNGETICH GAWON CHOGE

(SUED AS ADMINISTRATORS OF THE ESTATE OF

JIM CHOGE (DECEASED)).....1ST DEFENDANT

STEPHEN KIBOWEN.....2ND DEFENDANT

WILSON GACHANJA.....3RD DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 23rd July 2018 and 2nd defendant's Notice of Preliminary Objection dated 28th April 2019.

2. Notice of Motion dated 23rd July 2018 seeks the following orders:

1. *Spent*

2. *Spent*

3. *THAT the 2nd defendants by themselves, servants or any other person whosoever be restrained from alienating, selling, transferring, charging, developing, leasing, sub-dividing, wasting, entering and remaining upon, or in any other way dealing with the parcel of land described as Nakuru Municipality Block 5/147, pending the hearing and final determination of this suit.*

4. *THAT the costs of this application be provided for.*

3. Notice of Preliminary Objection dated 28th April 2019 is pleaded as follows:

TAKE NOTICE that at the hearing of the suit and application herein, counsel for the 2nd Defendant will contend as a preliminary point of law, to be determined in limine, that the Plaintiff's suit and application is hopelessly misconceived, frivolous, totally devoid of merit and mala fides and ought to be struck out with costs to be paid forthwith to the 2nd Defendant for the reason, inter alia:

THAT by dint of the provisions of Articles 60(1)(g), 67(2)(a, e & f) and 68 (c) (v) of the constitution and sections 5(1)(a, e & f) and 14 of the National Land Commission Act the Plaintiff herein lacks locus standi to maintain this suit and the Court lacks jurisdiction to entertain these proceedings in the absence of a determination by the National Land Commission on the propriety or legality of the 2nd Defendant's title to the suit land.

4. Notice of Motion dated 23rd July 2018 is supported by an affidavit sworn by Jecinta Bungei, a forensic investigator employed by the applicant. She deposed that the parcel of land known as Nakuru Municipality Block 5/147 at St. Xavier Area, Nakuru County (the suit property) is government land which had been planned, reserved and used by the government for construction of housing for public officers

and that on it stood one government house number NKU/HOU/MG/30 which was built in 1964. That the foregoing notwithstanding, on 30th May 1994 the suit property was illegally and irregularly alienated to Jim Choge (now deceased) by the 3rd defendant who caused a lease over the suit property to be issued to the said Jim Choge. That on 3rd July 2013 the 1st defendants obtained registration through transmission and transferred the property to the 2nd defendant. That the suit property was not available for alienation since it was a public utility reserved for government housing.

5. The 1st defendants opposed the application through a replying affidavit sworn by Noreen Shariff Choge. She deposed that her and the rest of the 1st defendants are the administrators of the estate of Jim Choge (deceased) whose estate was subject to litigation in **High Court Succession Cause No. 934 of 2008 (Nairobi)** and **Nairobi Judicial Review Application No. 570 of 2017**. She further deposed that the suit property was purchased by the deceased from civil servants who were procedurally allocated by the government. That this case amounts to forum shopping and an attempt to bring the judicial process into disrepute in view of orders earlier made in **High Court Succession Cause No. 934 of 2008 (Nairobi)** and **Nairobi Judicial Review Application No. 570 of 2017**.

6. The 2nd defendant filed a replying affidavit sworn by himself. He deposed that after conducting due diligence he purchased the suit property from the administrators of the estate of Jim Choge (deceased) through a sale agreement dated 24th June 2013 and he was registered as proprietor on 3rd July 2013 and issued with a Certificate of Lease. He added that he lawfully purchased from the previous owner. He further stated that he has not been able to take possession of the suit property since it is occupied by a civil servant.

7. Parties were ordered to file and exchange submissions in respect of the application and the Notice of Preliminary Objection. The plaintiff filed submissions on 4th February 2019, the 1st defendant on 25th February 2019 and the 2nd defendant on 30th April 2019. I have not seen any response to the application or submissions from the 3rd defendant. I have carefully considered the application, the affidavits filed, the preliminary objection and the submissions. I will deal with the Notice of Preliminary Objection first.

8. The 2nd defendant argued that the plaintiff lacks *locus standi* to bring this suit and that this court lacks jurisdiction to entertain this suit in the absence of a determination being made first by the National Land Commission on the propriety of the 2nd defendant's title to the suit property pursuant to **Article 68(c) (v) of the Constitution** and **section 14(1) of the National Land Commission Act**. In response, the plaintiff argued that the jurisdiction of the National Land Commission to review grants under **Article 68(c) (v) of the Constitution** and **section 14(1) of the National Land Commission Act** expired after 5 years from 2nd May 2012 when the Act commenced and that in any case the said jurisdiction did not give the commission power to revoke titles but only to direct the registrar to revoke titles. Further, that the said jurisdiction does not oust this court's jurisdiction.

9. This court is established under **Article 162 of the Constitution of Kenya, 2010** as read with **section 4 of the Environment and Land Court Act, 2011**. **Article 162** provides:

162. System of courts

(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

10. The jurisdiction of the Court is provided for in detail under **section 13 of the Environment and Land Court Act, 2011** as follows:

13. Jurisdiction of the Court

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

11. This case principally concerns validity of the allotment of the suit property and the ensuing titles. That is a matter that falls squarely within the jurisdiction of this court as provided under **Article 162(2) (b)** of the **Constitution** and **section 13** of the **Environment and Land Court Act, 2011**. The 2nd defendant has not cited any law that ousts the jurisdiction of the court. The Preliminary Objection has no merit. It is dismissed with costs to the plaintiff.

12. Beyond the preliminary objection the 2nd defendant argued that the application is incompetent for being brought under Order 34 of the Civil Procedure Rules which is not applicable in the circumstances and that the applicant has not satisfied the conditions for granting an interlocutory injunction.

13. The plaintiff seeks an interlocutory injunction in Notice of Motion dated 23rd July 2018. It must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

14. The applicant's case is that the parcel of land known as Nakuru Municipality Block 5/147 at St. Xavier Area, Nakuru County (the suit property) is government land which had been planned, reserved and used by the government for construction of housing for public officers and that on it stands one government house number NKU/HOU/MG/30 which was built in 1964. That the suit property was not available for alienation to Jim Choge (now deceased) and later to the 1st defendants and the 2nd defendant since it was a public utility reserved for government housing. The 1st defendants and 2nd defendant have not denied that as at the date of the allotment and even now, a government house still stands on the suit property and that it still occupied by a government employee. They however maintain that the property was lawfully allocated and that proper procedure was followed in acquiring it.

15. Considering the non disputed public history of the suit property, there is a valid issue to be determined by the trial court whether or not its allocation and subsequent issuance of title document to the 1st defendants and 2nd defendant were valid and lawful. I am therefore satisfied that the applicant has established a *prima facie* case. There is need for the preservation of the suit property pending hearing and determination of the suit. I do not think that damages can be an adequate remedy in the circumstances of this case which involves a claim to protect a property said to be public utility. I am satisfied that a case has been made for granting the orders sought in the application.

16. I therefore make the following orders:

a) Notice of Preliminary Objection dated 28th April 2019 is dismissed with costs to the plaintiff.

b) I grant an injunction restraining the 2nd defendant by himself, servants or representatives from alienating, selling, transferring, charging, developing, leasing, sub-dividing, wasting, entering and remaining upon, or in any other way dealing with the parcel of land described as Nakuru Municipality Block 5/147, pending the hearing and final determination of this suit.

c) The inhibition which had been ordered at the ex parte stage shall also remain in force pending hearing and determination of this suit.

d) Costs of Notice of Motion dated 23rd July 2018 are awarded to the plaintiff.

Dated, signed and delivered in open court at Nakuru this 27th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff/applicant

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd defendant

Court Assistants: Beatrice & Lotkomoi