



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 490 OF 2017

MARGARET NJOKI GICHUHI.....1ST PLAINTIFF

MARY WANJIRU GICHUHI.....2ND PLAINTIFF

VERSUS

DANIEL MAGOTSI.....1ST DEFENDANT

RULING

The application for determination is a Notice of Motion dated the 7th December, 2016 by the Plaintiffs, brought pursuant to Section 3 and 3A of the Civil Procedure Act, Order 40 rules 1,2,3,4 and 5 of the Civil Procedure Rules, Section 13 (1)(2), (4), (7), 19 and 29 of the Environment and Land Court Act. It is based on the grounds that the Applicants are the Administrators and co wives of the late GICHUHI MUGI WAWERU who was the original as well as rightful allottee of the suit land namely plot No. 27/Business Ole Kasasi Trading Centre, Kajiado. Further that the Respondent's claim to the suit land as well as acts of purporting to develop it are without colour of any legal right which are meant to unlawfully disrupt the Applicants peaceful enjoyment of their constitutional including proprietary rights.

The application is supported by the affidavit of the 1st Plaintiff MARGARET NJOKI GICHUHI where she deposes that their late husband was allotted the suit land by the defunct Ol Kejuado County Council on 24th October, 1986 and subsequent to the allotment, he passed away on 4th August, 1996. She avers that together with her co wife, they obtained Letters of Administration Intestate vide Nairobi HC Succession Cause No. 1109 of 1997 on 22nd December, 1997 where they were appointed administrators of the deceased estate and the suit land forms an integral part of the said estate. She claims the Respondent has fenced the suit land and began construction thereon citing he was the rightful proprietor and upon realizing the same, she instituted a suit vide Kajiado PMCCC No. 58 of 2013, which suit, was withdrawn, as it had been filed in a wrong court. She contends that the Respondent's unlawful acts should be restrained as they are calculated to deprive them of their means of livelihood.

The application is opposed by the 1st Defendant DICKSON MAGOTSI who swore a replying affidavit where he deposed that the application is based on factual misrepresentations geared to mislead the court into issuing orders in favour of the Plaintiffs. He confirmed that the Plaintiffs had initially filed Kajiado PMCCC No. 58 of 2013 which was withdrawn before this instant suit was commenced. He insists this suit is an abuse of the court process and will apply to stay it until his costs in the Kajiado PMCCC No. 58 of 2013 are settled. Further, that he is aware the 2nd Defendant conducted a validation exercise for various properties within the Kajiado County including the suit property and they attended the said exercise

where all owners of properties were expected to be present thereon but none of the Plaintiffs' was available. He confirms his letter of allotment was stamped and validated by the 2nd Defendant and further to the validation exercise, the 2nd Defendant has advertised for a follow up exercise for issuance of new letters of allotment for the said properties including the suit property. He reiterates that the Plaintiffs' are trying to circumvent the verification process through the instant suit and contends that this case amounts to an abuse of the court process. He claims the Plaintiffs have been indolent and guilty of laches, the current application being unmerited and should be dismissed with costs.

The 1st Plaintiff filed a further affidavit where she deposed that they filed the suit initially in the lower court as they had been misinformed on the jurisdiction of the lower court by their initial counsel. She reiterates that the 1st Respondent has encroached on their property and that the purported validation exercise alluded to in the replying affidavit was marked with violence, insecurity and at some point had to be called off. She insists the 1st Respondent having irregularly procured the aforementioned transfer has followed up the same with the 2nd Respondent and if the 2nd Respondent does issue a new letter of allotment, it will only be a testimony to the unprocedural land transactions in the County which forms the basis for the instant suit. She contends that the 2nd Defendant had duly approved their development plans through the District Public Works Office begging the question as to how the same Government would have and has proceeded to irregularly transfer suit land to the 1st Defendant.

Both parties filed their respective submissions, which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion dated the 7th December, 2016 including the supporting, replying and supplementary affidavits as well as the annexures thereon, I note the only issue for determination at this juncture is whether the Plaintiffs are entitled to the injunctive orders sought pending the outcome of the suit.

The Plaintiffs contend that they are administrators of the estate of the late GICHUHI MUGI WAWERU who was the owner of the suit land, having been allotted the same by the defunct Ol Kejuado County Council in 1986. They state that the 1st Defendant has encroached on the suit land and commenced construction thereon. They relied on the case of **M'ikiara M'Mukanya & Anor Vs. Gilbert Kabeere M'Mbijiwe Nairobi Civil Appeal No. 13 of 1980** where the Court of Appeal held that in the event of Double Allocation of land, the First Allotment prevails and there is no power to reallocate the same property. They argue that the 1st Respondent was irregularly allotted the suit land by the 2nd Respondent and annexed a letter of allotment dated the 24th October, 1986 ('MNG1') issued to their late husband. The 1st Defendant on the other hand insists the suit land belongs to him as he had been allotted by the 2nd Respondent. He provided copies of initial letter of Allotment to EUNICE NAISENYA, Transfer to his Wife SUSAN MAGOTSI and Certificate of Official Search dated 3rd August, 2009 as annexures 'DM 1' 'DM2' and 'DM 1' respectively to prove his claim.

The principles for granting of temporary injunctions were settled in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358** as follows:

"First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

Bearing this principle in mind, it behoves this honourable court to interrogate whether the applicants have made out a prima facie case with a probability of success at the trial.

In the first instance as to whether the applicants have demonstrated a prima facie case with probability of

success, it is not in dispute both the Plaintiffs and 1st Respondent both hold letters of allotment to the suit land. It is also not in dispute that the 1st Respondent is already in the process of developing the suit land. I note the Plaintiffs have not commenced development on the suit land as per the conditions stated within their letter of allotment which required the suit land to be developed within two years. The 1st Respondent however has developed the suit land and further stated that there was a validation exercise which the Plaintiffs' failed to participate in.

The Plaintiffs claim they have letters of allotment to the suit land and that the Letters of Allotment held by the Defendant was obtained unlawfully and illegally. I note the Plaintiffs' letter of allotment indicate the suit land is parcel number plot No. 27/Business Ole Kasasi Trading Centre while the Defendant's letter of allotment state that it is 322/Residential Ole Kasasi T. Centre. These are issues, which can only be deciphered once oral evidence is adduced.

In the case **Stephen Mburu & 4 Others vs Comat Merchants Ltd & Anor [2012] eKLR** Kimondo J held that:

“... from a legal standpoint, a letter of allotment is not a title to property. It is a transient and [is] often a right or offer to take property”

From the foregoing, and in relying on the authorities cited above, I find that the Plaintiffs have not established a prima facie case to warrant the grant of orders of injunction.

On the issue of irreparable loss, which cannot be compensated by way of damages, I note the Plaintiffs have not developed the suit land, but the 1st Defendant has commenced doing so as evidenced by the photographs annexed to the respective affidavits. In the circumstances, I find that the Plaintiff's will not suffer any irreparable loss which cannot be compensated by way of damages.

On the question of balance of convenience, from the evidence presented by the parties, I am not in doubt that if the title to the property is not preserved, it may be wasted away.

Since both the Plaintiffs and the 1st Defendant are staking claim over the suit land, with the sanctity of the title being in dispute and , the Court finds that these are issues best determined at a full trial, I will decline to grant the orders as sought but will proceed to make the following order:

‘An inhibition order be and hereby registered by the Kajiado County Land Registrar as against land parcel number plot No. 27/Business Ole Kasasi Trading Centre and 322/Residential Ole Kasasi T. Centre of any dealings, lease or charge pending the hearing and determination of the suit’.

The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated, signed and delivered in open court at Kajiado this 29th day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present:

Cc Mpoye

Muia for the Plaintiff

N/A for Defendant