



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT NYAHURURU**

**ELC CASE NO 354 OF 2017**

**FRANCO NDERITU KANYARI.....1<sup>st</sup> LAINTIFF/APPLICANT**

**BETH WANJA GACHERU.....2<sup>nd</sup> PLAINTIFF/APPLICANT**

**GOD WORD CHURCH.....3<sup>rd</sup> PLAINTIFF/APPLICANT**

**FELISTA WANJIKU GICHURU.....4<sup>th</sup> PLAINTIFF/APPLICANT**

**DUNCAN KIMANI KAMANI.....5<sup>th</sup> PLAINTIFF/APPLICANT**

**JOSEPH MUCHEMI MAIRU.....6<sup>th</sup> PLAINTIFF/APPLICANT**

**FRANSCUSCA WANGUI MAINA.....7<sup>th</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF NYANDARUA.....DEFENDANT**

**RULING**

1. Before me for determination is the Notice of Motion dated 7<sup>th</sup> April 2017 brought under Section 63(c), (e) of the Civil Procedure Act, Order 40 rule 1 of the Civil Procedure Rules and all other enabling provisions of the law where the Applicant seeks:

i. Spent

ii. Spent

iii. That pending the hearing and determination of this suit or further orders of this court, a temporary injunction be issued against the Defendants by itself its servants, employees, agents, and/or proxies or any other person acting under it from entering, remaining, using, occupying, possessing, allocating or in any other manner whatsoever interfering with the Plaintiff's parcels of land known and described as UNS. RESD PLOT NO. 46 GATHANJI TOWNSHIP, UNS. CHURCH PLOT GATHANJI TOWNSHIP, UNS. RESD PLOT NO. 50 GATHANJI TOWNSHIP, UNS. RESD PLOT A 33, UNS. RESD A 36, UNS. RESD A 35 and UNS. RESD A34.

iv. That the costs of this application be paid by the Defendants/Respondents.

2. The said application is premised on the grounds on the face of it as well as on the sworn affidavit of Duncan Kimani Kamani, the 5<sup>th</sup> Plaintiff on the authority of the rest of the Applicants herein.

3. The gist of the Applicants' claim is that on the 25<sup>th</sup> August 1995 the 1<sup>st</sup>, 3<sup>rd</sup> and 7<sup>th</sup> Applicants were allotted parcels of land known as UNS RESD plot No. 46, 50 and Church Plot in Gathanji Township as per the letters of allotment marked as DKK1 (a) (b) and (c) by the Government of Kenya through the Commissioner of Lands.

4. That on the 1<sup>st</sup> March 2012 the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Applicants were also allocated with the parcels of land known as UNS RESD A 33, A36, A35 and A 34 in Gathanji Township as per the provisional allotment letters marked as DKK 2 (a), (b), (c) and (d) and the minutes of the Nyandarua Plots allocation committee marked as DKK 3 whereby this second group of Applicants immediately took possession of their respective plots of land.

5. That subsequently the Respondent herein vide a letter dated the 16<sup>th</sup> March 2017 gave notice of eviction to some of the Applicants and on the 5<sup>th</sup> April 2017 the Respondent entered onto the Applicant's plots of land and started demolishing the structures erected thereon on allegation that the allotment letters held by the Applicants were all forgeries, irregular and were not issued by the Respondent and that since they were in the process of re-allocating squatters the Applicants had to be evicted as per the annexed minutes of a meeting held on the 14<sup>th</sup> November 2016 and letters of re-settlement marked as MWM1.

6. The Applicants submitted that the provisions of granting an injunction were well settled and that they had proved a prima facie case as set out in the case of **MRAO vs. FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125** by proving that the **1<sup>st</sup>, 3<sup>rd</sup> and 7<sup>th</sup> Applicants were issued their letters of allotment by the** Commissioner of Lands who was the only person who had authority to allocate government land.

7. That by allocating the Applicants the said Plots the Commissioner of Lands had vested in them proprietary rights and as such the Respondents had no right to revoke the letters of allotment or interfere with the Applicants' proprietary rights.

8. On the other hand, the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Applicants' contention was that the process of re-settling Gathanji squatters was conducted by the District Plot Allocation Committee wherein it was done and completed before devolution and before the Respondent came into existence in the year 2013.

9. That the said committee had the mandate to allocate squatters with Provincial letters of allotment of which the Applicants were some of the beneficiaries and had proprietary rights over the said plots and as such, the Respondent could not therefore purport to revoke the said allotment letters.

10. That although the Respondents letter marked as MWM 1 purported to evict the Applicants herein so as to re-settle the Gathanji Squatters, it was the Applicant's submission that this exercise had already been conducted by a competent authority and there was no more land available in the Gathanji plots for the said allocation.

11. The Applicants submitted that since taking possession of their respective plots, they had developed the same according to their ability and as such, if the Respondent was not refrained from interfering with the use of their respective pieces of land, they would suffer irreparable loss and as such, the balance of convenience tilted in their favor for the prayers sought to be granted,

12. The Application was opposed by the Respondent who vide their written submissions, were of the view that the Applicant's application lacked merit because they had not satisfied all the three principles laid down in the case of **Giella vs Cassman Brown [1973] EA 358**.

13. On the first issue of whether or not the Applicants had established a prima facie case in the present circumstance, the Respondent submitted that the Applicants had not on the face of their application established a right that had been violated or threatened to be violated.

14. That whereas the 1<sup>st</sup>, 3<sup>rd</sup> and 7<sup>th</sup> Applicants' claim was to the effect that they were allocated their parcels of land by the Government of Kenya through the Commissioner of Lands and the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Applicants' claim was to the effect that they were also allocated their respective parcels of land through the provincial letters of allotment issued by the District Plots allocation Committee Nyandarua, the Respondent while relying on the sworn affidavit of Martin Wanyamu, the acting County Director, Physical Planning, Nyandarua County, at paragraph 6,7,8,9,10,11,12,13,14 and 15 gave detailed reasons as to why they were emphatic that the letters of allotment held by the Applicants were a forgery being that

15. At paragraph 13 the respondent was categorical that:

- i. There are no letters written by the Applicants seeking allocation of the respective plots.
- ii. There are no minutes of either the District Plots Allocation Committee, or of Nyandarua County Government.
- iii. Regarding the Allotment letters of 1995: the citation thereon on NYA/C/1129 is for Geta Trading Centre and not Gathanji whose code is NYA/C/1127
- iv. For the Provisional Letters of Allotment, there was no District Plots Allocation Committee as by then devolution was in place. Furthermore, since devolution came into being no allocation of land has ever taken place in the entire county.
- v. There was also no County Clerk in 2014.
- vi. The alleged Provisional Letters of Allotment do not indicate who is the Chairman or the Secretary.
- viii. There are no minutes to support the alleged issuance of the alleged Provisional Letters of Allotment.
- ix. The attached minutes address the allocation of the suit plot to the squatters and not the Applicant."

16. At paragraph 14, of the Respondent's replying affidavit, there were attached documents to show that indeed the suit lands herein had been allocated to squatters and not the Applicants herein. Which allocations were summarized as follows:

- i. Plot No A46 claimed by the 1<sup>st</sup> plaintiff is owned or was allocated to Stephen Komu

ii. Plot No A33 claimed by the 2<sup>nd</sup> plaintiff is owned or was allocated to Margaret Wanjiru Macharia

iii. Plot No 50 claimed by the 3<sup>rd</sup> plaintiff is owned or was allocated to Hannah Wathatu Kamau

iv. Plot No A36 claimed by the 4<sup>th</sup> plaintiff is owned or was allocated to Margaret Wahianyu.

v. Plot No A3 claimed by the 5<sup>th</sup> plaintiff is owned or was allocated to Esther Wangechi Wachiuri:

vi. Of note, regarding the 5<sup>th</sup> plaintiff (Duncan Kimani Kimani) he had been allocated plot A16 (see List of Squatters allocated in 2012)

vii. Plot No A34 claimed by the 6<sup>th</sup> plaintiff is owned or was allocated to Felister Njoki Chiuri

17. Further to their arguments the Respondent submitted that it was trite law that letters of allotment were not documents of title and relied on the case of **Joseph Tobiko Kelempu vs. Co-operative Management Committees of Emparnet Farmers Dairy Co-operative Society Ltd [2017] eKLR** where it was held that letters of allotment was not title to property.

18. The respondent further submitted that there was no evidence that the Applicants had abided by the conditions set at the back of the letters of allotment in that there was no evidence of the payments of the rates indicated therein.

19. The Respondent in their submission, relied on the case of **Nasir Maalim Arte vs Kenya Power and Lighting Co. Ltd [2015] eKLR** where that court had rejected to issue injunctive orders for reason that the Plaintiff had not complied with the terms of the letter of allotment issued.

20. It was the Respondents further submission that the Provincial letters of allotment issued to the 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Applicants' were just that, provisional, thus awaiting the formal letter of Allotment.

21. The Respondent then went on to submit that as per the principle laid down in the case of **Cassman Brown Supra**, the Applicants herein had not demonstrated that they would suffer irreparable loss that could not be compensated by way of damages, or allocation of alternative plots if the injunctive orders were not issued, and stated that the Respondent was capable of compensating them if they did not succeed.

22. The principles to be considered by this court in determining whether or not to grant the interlocutory injunction sought are well settled in the **Giella vs Cassman Brown [1973] EA 358** where the court held that:

*The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an Applicants must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Applicants 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. (E.A. Industries v. Trufoods, [1972] E.A. 420).*"

23. Have the Applicants thus made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

*"a prima facie case in a Civil Application includes but is not confined to a 'genuine and arguable case'. It is 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."*

24. Looking at the facts of this case, the court has been moved under certificate of urgency, by the Applicants, to issue temporary injunction against the Respondent. At this stage, the Court is only required to determine whether the Applicant are deserving of the Orders sought. The Court is not required to determine the merit of the case by deciding on whether the letters of allotment annexed on the Applicants' Affidavit are genuine documents or not as alleged by the Respondent.

25. I also find that the Applicants herein have not shown, prima facie, that they abided by the terms of the letter of allotment, one of those terms being in respect of the payment of the stand premium within 30 days.

26. The provisions of **Section 26(1)** of the **Land Registration Act** are very clear to the effect that:

*"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—"*

In the case of **Joseph Arap Ng'ok –vs- Justice Moiwo Ole Keiwua NAI Civil Application No. 60 of 1997** the Court of Appeal observed as follows:

*'It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document (my emphasis) pursuant to provisions in the Act under which*

*the property is held.'*

27. In the present case, both parties confirm that the Applicants do not hold titles to the suit properties and having so found, and further in pursuant to the various decisions from the court of Appeal on holders of allotment letters vis a vis holders of titles to property, the Applicants herein cannot claim to be the registered owners of the subject properties nor benefit from the orders so sought.

28. The Applicants have also not shown the kind of irreparable injury that they are likely to suffer that cannot be compensated by way of damages by the Respondent if the injunctive orders are not granted.

29. In the circumstance, I find that the Applicants have not discharged the onus put on them by virtue of the principles laid down in the case of **Giella vs Cassman Brown** for grant of orders of interlocutory injunction and I hereby proceed to dismiss this application with no orders as to costs.

30. For avoidance of doubt, the interim orders in force are herein vacated.

**Dated and delivered at Nyahururu this 28<sup>th</sup> day of February 2018.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**