



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA

THIKA LAW COURTS

ELC. 356 OF 2017

GAICHANJIRU ESTATE LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

FRANCIS NGANGA NDUNGU1ST DEFENDANT/RESPONDENT

DAVID GAKURA THIARI.....2ND DEFENDANT/RESPONDENT

SAMUEL MWANGI MBURU.....3RD DEFENDANT/RESPONDENT

HARRISON NUTHU WAWERU.....4TH DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's/Applicant's *Notice of Motion* application dated *20th March 2017*, wherein it has sought for the following orders:-

1. Spent.
2. That this Honourable Court be pleased to grant a temporary injunction against Defendants/Respondents by their servants and/or agents restraining them from further interfering with, alienating, or trespassing into all that piece of property situated in Kenol area of Muranga County known as Kakuzi/ Kirimiri Block 10/701, (the suit property) pending hearing and determination of this application.
3. That this Honourable Court be pleased to grant a mandatory injunction against the Defendants/Respondents by their servants and/or agents to compel them to render vacant possession of the suit property pending the hearing and determination of this application.
4. That this Honourable Court be pleased to grant prayers no.2 and 3 pending the hearing and determination of this suit.
5. That the costs of this application be awarded to the Plaintiff/Applicant.

This application is premised upon the grounds stated on the face of the application and on supporting Affidavit of *Danson Maina*. The grounds in support of this application are:-

1. The Applicant is the registered proprietor and owner of all that piece of land situated in

Gaichanjiru and registered as Kakuzi/Kirimiri Block 10/701, (the suit property).

2. The Applicant, through its shareholders, set aside the suit property for construction of a primary school known as Gaicha Primary School, and construction of the same has already commenced.

3. On or about 13th March 2017, the Respondents wrongfully, illegally, unlawfully and without any justifiable cause or colour of right invaded, intruded, interfered, trespassed and without consent of the Applicant entered the suit property, covered the foundation of the ongoing construction and converted the same into a playing ground without consent and/or knowledge of the Applicant.

4. That by virtue of the Respondents' wrongful occupation of the suit property, the Respondents have denied the Plaintiff/ Applicant access to the suit property.

5. If the prayers sought herein are not granted, the Applicant stands to suffer irreparable loss as construction of the school cannot proceed subsequently denying the children from the area their constitutional right to education.

6. It is the interest of justice and fairness that this Honourable Court grants the Applicant the orders as prayed.

In his supporting affidavit, **Danson Maina**, the Chairman of the Applicant reiterated most of the contents of the grounds in support of the application and further averred that the Respondents wrongful occupation of the suit property, has denied the Applicant access to the suit property.

Further, that the decision to construct a school on the suit premises was necessitated by the fact that there is no school which can be easily accessed by the residents and shareholders of the Applicant. Therefore the Applicant and the community stand to suffer irreparable loss and damage as construction of the school cannot proceed and thus the children of the area have been denied their constitutional right to education. He contended that it is in the interest of justice and fairness that the Court grants the Applicant the orders sought.

The application is contested and **Samuel Mwangi Mburu**, the 3rd Defendant/Respondent herein swore a Replying Affidavit on his behalf and on behalf of the other Respondents. He further averred that all the Defendants herein are officials of the School Committee purported to be constructed by the Plaintiff/Applicant. He also averred that there has been no resolution passed by the shareholders of **Gaichanjiru Estate Ltd**, for construction of the purported school known as **Gaicha Primary School**. He also contended that the Plaintiff/Applicant has not obtained building plans approval from **Muranga County Government** as required by law wherever a party intends to construct a building. It was his further contention that **Danson Maina**, is conducting the construction of **Gaicha Primary School**, as an individual and not as a Company Project. He further averred that the land in question, **Kakuzi/Kirimiri Block 10/701**, was supposed to be surrendered to **Muranga County Government** to construct a public school and not as a private school as **Danson Maina** intends. He urged the Court to dismiss the instant application as it lacks merit and is an abuse of the court's process.

The Applicant through **Danson Maina Njuguna**, filed a further affidavit and averred that the Applicant is a stranger to the averments that the Defendants herein are official of the school committee and that the Respondents only purported to be elected as football representatives on **25th March 2017**, after this suit had been filed. Further that the Respondents have been in the forefront in destruction of the school property and they would not have done so if they were officials of the school as claimed by them. The deponent further attached minutes of how decision was arrived at for the construction of the school being **DMN02**. Further that **Muranga County Government** and the **Ministry of Education** are aware and have duly approved the construction of the said school. Further that that school to be constructed is a **public school** and that the deponent herein is acting as a Director of the Applicant, who is to ensure that the land is transferred from the Applicant to **Gaicha Primary School**. He also denied that **Kakuzi Kirimiri Block**

10/701, was set aside by the Applicant to build a Private School. It was his contention that **Gaicha Primary School** is a Public school and not a private one. He urged the Court to dismiss the Respondents' contention and allow the application herein.

The application was canvassed by way of written submissions which this Courts has carefully read and considered. The Court has also considered the cited authorities and the relevant provisions of law and makes the following findings;-

There is no doubt that the Plaintiff herein filed this suit on **22nd March 2017** and sought for an **order of eviction of the Defendants from the suit property herein, Kakuzi/Kirimiri Block 10/701 together with their servants and/or their agents.**

There is also no doubt that the Plaintiff/Applicant is the registered owner of the suit property **Kakuzi/Kirimiri Block 10/701**, as per the copy of the title deed issued on **19th June 2015**, in favour of the Plaintiff/Applicant. There is also no doubt that when the suit herein was filed on **22nd March 2017**, the Applicant was allowed prayer no.2 of the instant application **wherein temporary injunction was issued against the Defendants/Respondents, their servants and/or agents restraining them from further interfering with, alienating, trespassing, into all that piece of land known as Kakuzi/Kirimiri Block 10/701, pending the hearing and determination of the application.** These interim orders have been extended severally. The Applicant has now urged the Court to confirm the said interim orders of injunction until the suit is heard and determined.

The question now for determination is whether the Applicant is deserving of the confirmation of the said interim order of injunction.

It is trite that grant of temporary injunction is an equitable relief granted at the discretion of the court. See the case of **David Kamau Gakuru...Vs..National Industrial Credit Bank Ltd, Civil Appeal No.84 of 2001**, where the Court held that"-

"It is trite that the granting of interim injunction is an exercise of Judicial discretion and an Appellate Court will not interfere unless it is shown that the discretion has not been exercised judicially"

Further, it is evident that at this interlocutory stage, the Court is not supposed to delve into the substantive issues which are in dispute and make a final finding. The Court is only supposed to determine whether the Applicant is deserving of the injunctive orders sought. See the case of **Edwin Kamau Muniu...Vs...Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where the court held that:

"In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is whether the Applicant is entitled to an Injunction sought on the usual criteria...."

In determining whether the Applicant is deserving of the temporary injunction, the Court will rely on the principles set out in the case of **Giella....Vs....Cassman Brown & Co. Ltd 1973 EA 358**. There principles are:-

- a. The Applicant must establish that he has a prima facie case with probability of success.**
- b. That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of damages.**
- c. When the Court is in doubt, to decide the case on a balance of convenience.**

Has the Applicant herein established that it has a prima-facie case with probability of success as was held in the **Mrao Ltd...Vs...First American Bank**, where the Court held that:-

“A prima-facie case means more than an arguable case. It means that the evidence must show infringement of a right and probability of success of the Applicant’s case at the trial”.

There is no doubt that the applicant herein is the registered owner of the suit property **Kakuzi/Kirimiri Block 10/701**. A certificate of title has been attached to the supporting affidavit. There is also no doubt that the shareholders of the Applicant passed resolutions in several meetings allowing the Applicant to establish a school on the suit property known as **Gaicha Primary School**. The Defendants have alleged that the Plaintiff/Applicant does not have approval from **Muranga County Government** to establish such a school. However, the Applicant has alleged that they have the said approval. This is a disputed issue which can only be resolved after calling of evidence at the full trial but not at this interlocutory stage.

The Court finds that as a registered proprietor, the Plaintiff/Applicant has its rights protected by Section 24(a) and 25 (1) of the Land Registration Act. As a proprietor too, the Applicant can utilize its land as per its wishes.

See **Sections 24(a) & 25(1)** of the Act which provides:-

24 (a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto:

and

25 (1) The rights of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject:-

a. to the leased, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and

b. to such liabilities, rights and interests as affect the same and are declared by Section 28 and to require noting on the register, unless the contrary is expressed in the register.

Therefore in establishing the said **Gaicha Primary School** on the suit property, the Plaintiff/Applicant was exercising its rights as provided by the law. The Respondents have not denied that they have invaded the suit land and covered the foundation dug by the Applicant for construction of the proposed school. It is evident that the Applicant’s right to own property and enjoy peaceful possession of the same has been infringed by the Respondents herein. Consequently, the Court finds that the Plaintiff/ Applicant has established that it has a *prima-facie* with probability of success.

Further, the disruption of the school and the learning programme will cause irreparable loss on the part of the Applicant which cannot be compensated by an award of damages.

On the balance of convenience, the Court finds that the same tilts in favour of the Plaintiff/Applicant herein who is the registered owner of the suit property and has expressed its intention of establishing a school on its property and majority of its shareholders have given a green light for the construction of the same. The Court finds that the balance of convenience tilt in favour of maintaining the *status quo* and the *status quo* herein is that the Plaintiff/Applicant has started the construction of **Gaicha Primary School** and it should be allowed to continue with the said construction. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Consequently, the Court finds that the Applicant has established the laid down criteria for grant of temporary order of Injunction and this Court finds that the Applicant is deserving of the order sought.

The second issue for determination is whether the Applicant is entitled to grant of mandatory injunction against the Defendants' herein. The Defendant/Respondents have contested the grant of the mandatory injunction and they submitted that these are final orders which are capable of bringing litigation to an end. What is not in doubt is that the suit property herein is owned by the Plaintiff/Applicant and there is a school to be constructed on one of its parcels of land. The Plaintiff has alleged that the said school **Gaicha Primary School**, is to be constructed on the suit property as per the **resolutions** of the **shareholders** which resolutions were attached to the affidavits in support of the application.

The Respondents have averred that there was no resolution passed by the Applicant for the construction of the said school and that the Respondents being officials of the said school are not aware of the said resolution. The issue of whether there was a resolution to construct the school or not is a matter of evidence which will have to await the calling of evidence at the main trial. The Court herein will also caution itself that at this stage, it is not supposed to deal with contested issues with a finality without the benefit of hearing the evidence of the witnesses. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & 2 Others, Civil Appeal No.213 of 1999**, where the Court held that:-

“In an application for injunction, the court should not delve in substantive issues and make finally concluded views of the dispute before hearing oral evidence”.

However, what the court is called upon to determine is whether the Applicant is deserving of the orders of mandatory injunction based on the laid down criteria.

It is trite that mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances. However, the said mandatory injunction can be granted at the interlocutory stage in exceptional circumstances. See the case of **Kheira Omar Maalim ...Vs... New Look Estates Ltd & Another, Nairobi HCCC No.156 of 2008**, where the Court held that:-

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once or if the act done is simple and summary one which can be readily remedied or if the defendant attempted to steal a march on the Plaintiff, a mandatory injunction will be granted at the interlocutory application.... moreover, before granting a mandatory injunction, the court ought to feel a high degree of assurance that at the trial, it would appear that the injunction has rightly been granted that being on a different and higher standard than was required for prohibitory injunction. (see Halsbury's Laws of England, 4th Edition Volume 24 Para 948)”.

In the instant matter, are there any special circumstances that would warrant grant of mandatory injunction? The mandatory injunction sought herein is to compel the Respondents to give vacant possession of the suit property to the Applicant. The Applicant has alleged that it has started the construction of **Gaicha Primary School**, as per the resolutions of the shareholders of **29th November 2014**, but the Respondents on **13th March 2017**, invaded the suit property and covered the foundation of the on-going construction and converted the same into a playing ground.

The Respondents in their response did not categorically deny the said invasion and covering of the foundation that had been dug. They only stated that the said construction was done without resolutions of the Applicant and without the approval of **Muranga County Government**, and without having surrendered the land where the school is to be constructed to **Muranga County Government** for construction of a public school.

However, the Court has considered the annexures attached to the affidavits in support of the application and has seen minutes of **Special AGM** for the Applicant dated **29th November 2014**, wherein the shareholders agreed to construct **Gaicha Primary School**. There are several other minutes wherein the

issue of construction of the said school was discussed and resolutions were passed to that effect.

Further, the Court observed earlier that the issue of whether there were resolutions or not is a matter of evidence which can only be adequately addressed at the main trial. Further on whether the **Muranga County Government** gave approval for the construction of the school is an issue to be addressed at the main trial as evidence has to be called to prove or disapprove that fact. The Respondents cannot cover the foundation for construction of the purported school for alleged lack of approval from the **County Government of Muranga**. The suit land is owned by the Applicant herein and the Respondents who are only some members of the Applicant cannot purport to restrain the Applicant from constructing a school on its parcel of land. The Court finds that though the Plaintiff/Applicant has sought for eviction order in the main suit and in the instant application has sought for mandatory injunction to compel the Respondents to give vacant possession, the said orders are necessary for maintenance of *status quo* pending the hearing and determination of the suit.

It is trite that mandatory injunction is often granted to undo what has already been done and its purpose is to preserve the *status quo* and the *status quo* to be preserved is the one that existed before the wrongful acts of the Respondents. (See the case of **Belle Manson Ltd...Vs...Yaya Towers Ltd, Nairobi HCC No. 2225 of 1992 (UR)**).

The Court finds that there exist special circumstances herein in that the applicant had been mandated by its shareholders to construct a school, but the Respondents have allegedly invaded the suit land and covered the said foundation. The suit land belongs to the Applicant and this is a clear case which the Court thinks that it ought to be decided at once. Therefore the Court finds that there is a high degree of assurance that at the trial, it would appear that the injunction was rightly granted.

Having now carefully considered the instant **Notice of Motion** date **20th March 2017**, the **Court finds that the same is merited in terms of prayer no.4 and consequently, the Court allows the said application and proceeds to grant prayers no.2 and 3 entirely pending the hearing and determination of the suit. The Applicant is also entitled to costs of this application.**

The parties to prepare the main suit for hearing by complying with Order 11 expeditiously so that the contested issues can be resolved at once.

It is so ordered.

Dated, Signed and Delivered at Thika this **16th** day of **February 2018**.

L. GACHERU

JUDGE

In the presence of

Mr. Maina holding brief for Mr. Muchoki for Plaintiff/Applicant

Mr. Anyonje for J. K. Ngaruiya for Defendants/Respondents

Lucy - Court clerk.

L. GACHERU

JUDGE

Court – Ruling read in open court in the presence of the above stated advocates.

L. GACHERU

JUDGE

16/2/2018