



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 163 OF 2017

BOARD OF TRUSTEES, PENTECOSTAL

EVANGELISTIC FELLOWSHIP OF AFRICA.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF NAKURU.....1ST DEFENDANT

JOHN KARANJA.....2ND DEFENDANT

CYRUS KINJA.....3RD DEFENDANT

ESTHER WANGARI.....4TH DEFENDANT

PRISILA KARANJA.....5TH DEFENDANT

VIRGINIAH KOINANGE.....6TH DEFENDANT

JUSTUS ONDICHO.....7TH DEFENDANT

ANNE WAIRIMU.....8TH DEFENDANT

EUINICE MATHENGE.....9TH DEFENDANT

JOSEPH MOTUKO.....10TH DEFENDANT

REDEMPTEER NAMBIRO.....11TH DEFENDANT

PETER GICHARA.....12TH DEFENDANT

EDWARD GITAU.....13TH DEFENDANT

TOM.....14TH DEFENDANT

MAINA.....15TH DEFENDANT

VENNIS N. SENGERA.....16TH DEFENDANT

RULING

1. This ruling is in respect of two applications, both filed by the plaintiff: Notice of Motion dated 26th July 2017 and Notice of Motion dated 12th October 2017.

2. Notice of Motion dated 26th July 2017 seeks the following orders:

1. Spent.

2. Spent.

3. ***This honourable court be pleased to restrain the 2nd to 16th defendants by way of mandatory injunction by themselves, their agents or servants from interfering, obstructing plaintiff's access way to the plaintiffs premises or displaying their merchandise outside the plaintiff's suit property without its consent until this suit is heard and decided.***

4. ***Costs of this application be provided for.***

3. On the other hand, Notice of Motion dated 12th October 2017 seeks the following orders:

a) Spent.

b) ***That this honourable court be pleased to cite the 2nd defendant herein, John Karanja Ndegwa for contempt and proceed to attach his property or detain him in prison for a term of six month (sic) or punish him as the court may deem fit for being in contempt of the court orders of 18th April 2017.***

c) ***That costs of this application be provided for.***

4. Before going further into the applications, it is necessary to project a background of the matter. This suit was filed on 13th April 2017 through plaint dated 11th April 2017. At that date there was only one defendant, County Government of Nakuru. Alongside the plaint, the plaintiff also filed Notice of Motion dated 11th April 2017, under Certificate of Urgency, seeking an interlocutory injunction. The Certificate of Urgency was heard on 13th April 2017 when the court made an order:

Restraining the defendant, its agents or servants from interfering with the plaintiff's construction works on L.R. No. Nakuru Municipality Block 3/730 pending inter parte hearing of the application.

5. Subsequently, on 17th July 2017, the plaintiff filed an amended plaint pursuant to which it introduced the 2nd to 16th defendants as new parties to the suit. Shortly thereafter on 26th July 2017, the plaintiff filed Notice of Motion dated 26th July 2017 in which it essentially sought the same orders as those sought in Notice of Motion dated 11th April 2017 save for the fact that the orders sought in Notice of Motion dated 26th July 2017 also target the new defendants.

6. Notice of Motion dated 26th July 2017 is supported by an affidavit sworn by Mr. Harun Thuo Mwangi who described himself as the "Chairman of the Board of Trustees of the plaintiff religious organization." It is deposed in the affidavit that the plaintiff is the registered owner of the parcel of land known as Nakuru Municipality Block 3/130 (the suit property) and that the plaintiff has constructed stalls that open into the main road along the fence of the suit property. It is further deposed that the defendants have without the plaintiff's consent, erected kiosks and merchandise blocking the way into the road thus rendering the stalls of no use. Despite appeals to stop, the defendants have refused to stop their activities. It is further alleged that the 1st defendant has encouraged the rest of the defendants in their activities.

7. The 1st defendant opposed Notice of Motion dated 26th July 2017 through Grounds of Opposition dated 6th December 2017 wherein it took the position that the application seeks a mandatory injunction and should therefore not be allowed at this interlocutory state and that a mandatory injunction if granted at this stage would cause injustice.

8. The 2nd to 16th defendants opposed Notice of Motion dated 26th July 2017 through a replying affidavit sworn by the 2nd defendant. He denied that they have erected kiosks and merchandise blocking the way into the road and rendering the plaintiff's stalls of no use. He added that the defendants have been carrying out various businesses on the road reserve that neighbours the frontage of the suit property but which does not form any part of it since 1987. The 2nd to 16th defendants' businesses and operations are sanctioned by the 1st defendant. It was further deposed that the plaintiff constructed stalls despite being aware of the 2nd to 16th defendants' occupation. They thus urged the court not to grant the orders sought.

9. Notice of Motion dated 12th October 2017 is also supported by an affidavit sworn by Mr. Harun Thuo Mwangi wherein he deposed that the orders issued on 18th April 2017 were served upon the defendants. That in violation of the orders, the 2nd defendant by himself or through his agents, servants or employees began construction on the suit premises. He therefore urged the court to grant the orders sought in the application.

10. The 2nd defendant opposed Notice of Motion dated 12th October 2017 through his replying affidavit sworn on 23rd October 2017. He deposed that he has never been served with any court order in these proceedings' and that the order made on 13th April 2017 was made before he was joined in this suit and was directed at the 1st defendant.

11. Both applications were argued by way of written submissions. Plaintiff's submissions were filed on 17th January 2018 while the 1st defendant's as well as the 2nd to 16th defendants' submissions were filed on 23rd January 2018. I have considered the applications, the affidavits, grounds of opposition and submissions.

12. Notice of Motion dated 26th July 2017 seeks a mandatory injunction. The principles applicable in determining whether or not to grant a

mandatory injunction were discussed by the Court of Appeal in Lucy Wangui Gachara v Minudi Okemba Lore [2015] eKLR where the court stated:

Ultimately the court granted what was for all intents and purposes a mandatory injunction for the eviction of the appellant from the suit property. It has been stated time and again that although the court has jurisdiction to grant a mandatory injunction at the interlocutory stage, such injunction should not be granted, absent special circumstances or only in the clearest of cases. The circumspection with which the court approaches the matter is informed by the fact that the grant of a mandatory injunction amounts to determination of the issues in dispute in a summary manner. In addition, the parties are put in an awkward situation should the court, after hearing the suit, ultimately decide that there was no basis for the mandatory injunction at the interlocutory stage. ...

Among the special circumstances that may justify the grant of a mandatory injunction at interlocutory stage is where the injunction involves a simple act that could be easily reversed or remedied should the court find otherwise after trial; the defendant has accelerated the development that the plaintiff seeks to retrain, with the intention of defeating the plaintiff's claim or where the defendant is otherwise bent on stealing a march on the plaintiff.

On the other hand, the court will not grant a mandatory injunction if the damage feared by the plaintiff is trivial, or where the detriment that the mandatory injunction would inflict is disproportionate to the benefit it would confer. We would also add that, save in the clearest of cases, the right of the parties to a fair and proper hearing of their dispute, entailing calling and cross-examination of witnesses must not be sacrificed or substituted by a summary hearing.

13. I have perused the affidavit in support of Notice of Motion dated 26th July 2017 and I see neither special circumstances nor any “clearest of cases” demonstrated. Though the 2nd to 16th defendants do not deny erecting kiosks and merchandise outside the suit property, the plaintiff has not placed before the court any evidence that demonstrates how the 2nd to 16th defendants’ activities block its access to the road or render its stalls of no use as alleged. Similarly, the plaintiff has not demonstrated any exclusive right to the area where the 2nd to 16th defendants are operating. Indeed, the supporting affidavit has absolutely no annexure. In the circumstances, I am not persuaded that the plaintiff has established any prima facie case. The plaintiff is therefore not entitled to the orders sought in Notice of Motion dated 26th July 2017. The application is dismissed with costs to the defendants.

14. As regards Notice of Motion dated 12th October 2017, I earlier on above gave the background of this matter up 17th July 2017 when the 2nd to 16th defendants were enjoined. The orders that the 2nd defendant is accused of violating were made by this court on 13th April 2017. Needless to state, the 2nd defendant was not a party to this suit as at 13th April 2017. The question then emerges as to whether the 2nd defendant was aware of the order. The plaintiff/applicant does not give any details as to whether the 2nd defendant was served with the order or was aware of it. All that is stated at paragraph 3 of the supporting affidavit is that “those orders have not been vacated or varied having been served upon the defendants”. No affidavit of service in respect of the order is provided. In the face of the 2nd defendant’s denial that he was neither aware of the order nor was he served with it, the court is unable to find that the 2nd defendant was aware of the order or that he was served with it.

15. Even assuming that it is established that the 2nd defendant was aware of the order, the next question that arises is whether the order was binding upon him. The order restrained the then existing sole defendant that is the current 1st defendant, its agents or servants from interfering with the plaintiff’s construction works on the suit property. Since the 2nd defendant was not a party when the order was issued, it was incumbent upon the applicant to demonstrate that the 2nd defendant was either an agent or servant of the 1st defendant as at the time of the alleged violation. This was not done. In the circumstances, I do not see how the 2nd defendant can be said to be in violation of an order that did not in any way address him or call upon him to do or refrain from doing anything. That being the case, Notice of Motion dated 12th October 2017 is dismissed with costs to the 2nd defendant.

16. In summary Notice of Motion dated 26th July 2017 is dismissed with costs to the defendants and Notice of Motion dated 12th October 2017 is dismissed with costs to the 2nd defendant.

Dated, signed and delivered in open court at Nakuru this 11th day of May 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Maina for the plaintiff

Mr. Karanja for the 2nd to 16th defendants

No appearance for the 1st defendant

Court Assistant: Gichaba