



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELCNO.1387.2013

MICHAEL MAINA KIMANI & ANOTHER.....PLAINTIFF

VERSUS

NATIONAL SOCIAL SECURITY FUND

NELSON OBAMA.....DEFENDANT

RULING

1. This is a ruling in respect an application for injunction which was filed on 15th November 2013. The applicants did not get any orders when their application was placed before a judge on the same date of filing. The court gave directions on 25th June 2015 to the effect that the application was to be disposed of by way of written submissions. The parties did not comply with the directions of the court until 2018 a period of almost three years from the date directions were given and a period of almost five years since the filing of the application.
2. The applicants contend that they have built storey houses on their plots which were initially fronting a road reserve which was later allocated to the second defendant who has now blocked access to their buildings. They therefore want the first and second respondents to be stopped from putting up structures on the second respondent's property which would block access to their houses which are meant be used for commercial purposes.
3. The applicants contend that when they purchased their respective plots from the first respondent, the plot now held by the second respondent had not been created; that the second respondent's plot was created out of a road reserve whose effect has now blocked them from the frontage of the road reserve.
4. The first respondent has opposed the applicants' application based on a replying affidavit sworn on 19th February 2014 and a further affidavit sworn on 19th June 2015. The first respondent states that the area where the applicants plots are belonged to it. The area was invaded by squatters who illegally subdivided the area into plots and sold them to third parties. The first respondent obtained an order of eviction against the illegal squatters but it was later agreed that the occupation could be regularized subject to the area being re-planned. The process of re-planning was carried out which process led to displacement of some persons. Those displaced such as the second respondent had to be accommodated by some plots being created thus reducing the size of roads.
5. The second respondent on his part states that he lawfully purchased his plot which is adjacent to those held by the applicants. In the year 2013, the two applicants built their plots which had their balconies hanging over his plot . He complained to the first respondent which asked the applicants to demolish the balconies which were hanging over his plot. This is what prompted the applicants to come to court seeking to stop him from developing his plot.
6. I have carefully considered the applicants' application as well as the opposition thereto by the respondents. I have also considered the submissions by the parties. This being an application for injunction, I have to determine whether the applicants have met the threshold for grant of an injunction. Firstly an applicant has to demonstrate that he has a prima facie case with probability of success. See **Giella vs Cassman Brown & Co.Ltd (1973) EA 358**. As was stated clearly in the case of **Mrao Vs First American Bank of Kenya Ltd & 2 others (2003) Eklr** , 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 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.
7. In the instant case, I have looked at the materials presented before the court. One of the documents presented to the court is a map introduced by the first respondent through a supplementary affidavit. The map clearly shows that the applicants' plots have a frontage to a road on the upper side. The same plots would have had another frontage on the lower part were it not for the second respondent's plot. The applicants have not demonstrated that the second respondent's plot was crated illegally. The history of the Tassia Plots was clearly captured in the replying affidavits by the first respondent. The area was invaded and built up in an-haphazard manner. When re-planning was done,

some parties were affected and plots had to be created to accommodate those affected. The applicants built what appears to be shops on the lower side of their plots. There is no evidence that they obtained any building approvals from the County Government or its predecessor. Admittedly, the balconies of their houses are facing what they call a road reserve which is actually a plot held by the second respondent. If there is any person whose rights have been infringed, it is the second respondent who has balconies hanging over his plot. To this extent, I do not see what prima facie case the applicants have. I find no merit in the applicants' application which is hereby dismissed with costs to the respondents.

It is so ordered.

Dated, Signed and delivered at Nairobi on this **28th** day of **June, 2018**.

E.O.OBAGA

JUDGE

In the presence of:-

Mr Munishi for Plaintiff/Applicants

M/s Mueni for Mrs Mbabu for 1st defendant/respondent

Mr Ayieko for Mr Owino for 2nd defendant/respondent

Court Assistant: Hilda

E.O.OBAGA

JUDGE