



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT NAIROBI

ELC SUIT NO. 1392 OF 2016

SIMON NDABA.....PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....1STDEFENDANT

KENYA INSTITUTE OF

CURRICULUM DEVELOPMENT.....2ND DEFENDANT

RULING

What is before me is the plaintiff's Notice of Motion dated 10th November, 2016 seeking a temporary injunction to restrain the 1st defendant from revoking the allotment that was issued to the plaintiff by the 1st defendant on 8th April, 1999 under reference number CV. 705/SG/1/96/mnw-Desai or re-allocating the property the subject of the allotment to any other person without following the due process pending the hearing of the suit. The plaintiff has also sought a temporary injunction restraining the 2nd defendant from constructing a fence or in any way taking an action that may block the plaintiff from accessing the said property that was allotted to him by the 1st defendant on 8th April, 1999 under reference number CV.705/SG/1/96/mnw– Desai pending the hearing of the suit.

The plaintiff's application is supported by the affidavit and further affidavit of the plaintiff sworn on 10th November, 2016 and 18th July, 2017 respectively. The plaintiff has contended that the defunct Nairobi City Council, the 1st defendant's predecessor had issued a Temporary Occupation Licence (TOL) reference number CV. 705/SG/1/96/mnw to one, Nderitu Murage in 1995 in respect of a parcel of land a long Desai Road, Nairobi (hereinafter referred to as "the suit property"). The plaintiff has averred that on 8th June, 1995, the said Nderitu Murage requested the Nairobi City Council (hereinafter referred to as "the Council") to include the name of the plaintiff who was his business partner in the TOL. The plaintiff has averred that on the 20th June 1995 the Council confirmed that it had accepted the request by Nderitu Murage and would include the name of the Plaintiff in the TOL. The plaintiff has averred that on 10th December, 1995, Nderitu Murage conveyed the said TOL to him and notified the Council which confirmed in a letter dated 8th April, 1999 that the TOL had been transferred to him. The plaintiff has averred that he has been operating a business on the suit property of selling motor vehicles from 1999 together with his business partners until 8th November, 2016 when the 2nd defendant sent workers on the suit property to undertake construction of a fence in an attempt to evict him from the suit property illegally. The plaintiff has averred that its TOL has not been revoked by the 1st defendant who is the successor of the Council and if it is in the process of doing so, it has not involved the plaintiff in the process.

The plaintiff has averred that the suit property is not part of the 2nd defendant's premises. The plaintiff has averred that the property is outside the 2nd defendant's boundary wall on a road reverse. The plaintiff has averred that the 2nd defendant has colluded with the 1st defendant to grab the suit property. The plaintiff has contended that it has not put up any structures on the suit property and as such its occupation is not a security risk to the 2nd defendant. The plaintiff has contended that he assembles vehicles on the suit property for sale in the morning and removes them in the evening. He has denied that he has put up illegal kiosks near the entrance of the 2nd defendant's premises thereby posing a security threat to the 2nd defendant.

The application is opposed by the defendants. The 2nd defendant opposed the application through a replying affidavit sworn by its director Julius O. Jwan on 6th December, 2016. The 2nd defendant has contended that it is the owner of the premises known as L.R No. 209/9670 (formerly L.R No. 209/8756) measuring 4.162 hectares situated along Muranga Road and Desai Road, Nairobi (hereinafter referred to as "the 2nd defendant's premises"). The 2nd defendant has averred that its institute is situated on the said premises. The 2nd defendant has contended that the suit property is situated along Desai road and is part of a road reserve at the main entrance of the 2nd defendant's property. The 2nd defendant has averred that it is not aware of any legal or equitable interest that the plaintiff has over the suit property. The 2nd defendant has averred that since early 1990s it has carried out landscaping and beautification of lawns around its main gate along Desai Road in order to

provide conducive and friendly environment at the entrance of its property and also to enhance security for the institute, its staff members and visitors. The 2nd defendant has averred that its landscaping and beautification efforts were hampered by kiosks and other illegal structures that were erected on the road reserve next to the entrance of the 2nd defendant's property which included the plaintiff's garage.

The 2nd defendant has averred that illegal structures were removed by the Council including the plaintiff's garage that was deemed as a security risk to the 2nd defendant's institute. The 2nd defendant has averred that the plaintiff reconstructed the garage in front of its gate and the same has remained a security risk to its premises. The 2nd defendant has averred that it has written several letters to the 1st defendant since 2010 to remove the plaintiff's garage in front of its gate so that it may proceed with its beautification programme. The 2nd defendant has averred that by letters dated 20th September, 2016 and 6th October, 2016, the 1st defendant authorised it to fence and secure the area in front of its premises that had been invaded by car sellers. The 2nd defendant has averred that when it commenced fencing the front part of its premises, the plaintiff and some unknown people engaged its employees in physical confrontation and destroyed a wall that it had put up and land scrapping materials all valued at Kshs.537,000/-. The 2nd Defendant has averred that the plaintiff's application has no merit.

The 1st defendant opposed the application through a replying affidavit sworn by N. I. Nyoike on 23rd March, 2017. The 1st defendant has denied having granted the plaintiff TOL in respect of a parcel of land along Desai Road ("the suit property"). The 1st defendant has averred that the suit property is a road reserve fronting the 2nd defendant's property along Desai Road and cannot be allotted to individuals. The 1st defendant has averred that the activities which the plaintiff and his partners are undertaking on the suit property are illegal and an obstruction to other road users. The 1st defendant has averred that it is not privy to the business the plaintiff is carrying out on the suit property. The 1st defendant has denied the TOL which is the basis of the plaintiff's claim contending that it cannot allocate a road reserve to an individual. The 1st defendant has averred that the illegal structures which the plaintiff and others who are not parties to this suit have put up near the 2nd defendant's gate are a security threat and an inconvenience to the high profile visitors who come to the 2nd defendant's premises from time to time.

The 1st defendant averred that the plaintiff's claim over the suit property which is an open space in front of the 2nd defendant's premises has no basis. The 1st defendant has termed the application as frivolous and urged the court to dismiss the same.

The application was heard by way of written submissions. The plaintiff filed his submissions on 26th September, 2017. The 1st and 2nd defendants filed their submissions in reply on 17th October, 2017. I have considered the plaintiff's application together with the affidavits filed in support thereof. I have also considered the response by the defendants and the submissions of counsel.

As submitted by the plaintiff the threshold for granting a temporary injunction was set out in the case of Giella v Cassman Brown (1973) E.A 358 and restated in the case of Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003] KLR 125. On the material before me, I am not satisfied that the plaintiff has satisfied the conditions for granting a temporary injunction. The basis of the plaintiff's claim is a TOL that is said to have been issued to one, Nderitu Murage on or about 8th June, 1995 and that was transferred to their joint names on or about 20th June, 1995 and ultimately to his sole name on or about 8th April, 1999. This TOL from which the plaintiff derives the rights which he seeks to enforce against the defendants was not placed before the court for perusal. The court is not aware of its terms, conditions and the rights that it confers upon the plaintiff. As pointed out by the defendants, the evidence placed before the court also shows that the last payment that was made by the plaintiff on account of rent for the TOL was made to the Council on 24th January, 2008 which is over 7 years ago. The 1st defendant denied the existence of the TOL and none was produced by the plaintiff. I am in agreement with the defendants that the correspondence that was produced by the plaintiff does not confer any rights upon the plaintiff which the court can enforce. In the circumstances, I am not satisfied that the plaintiff has established a prima facie case against the defendants. The plaintiff has not demonstrated that he has a legal or equitable right over the road reserve next to the 2nd defendant's gate and that the 2nd defendant violated those rights in its attempt to beautify and secure the entrance to its property.

I am not also satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted. The plaintiff who has claimed to be carrying out business of selling cars on the suit property which supports over 50 families has not placed any evidence before the court of that business. The plaintiff has not placed before the court a trade licence or business permit for the business he is carrying out on the suit property. In any event, the plaintiff has contended that he has not put up structure on the suit property and that his business is such that he brings vehicles for sale on the suit property in the morning and takes them away in the evening. This means that the suit property is undeveloped and since it is a road reserve the plaintiff can get the same back if he wins the case at the trial. The plaintiff has not suggested that he cannot get alternative premises to sell his vehicles or that he cannot be compensated in damages by the defendants for any business losses he may incur.

For the foregoing reasons, I find no merit in the Notice of Motion application dated 10th November, 2016. The same is dismissed with costs to the defendants.

Delivered and Dated at Nairobi this 21st day of June 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Nyamweya for the Plaintiff

Mr. Getuma holding brief for Morara for the 1st Defendant

Ms. Getuma holding brief for Ms. Kimani for the 2nd Defendant

Catherine Court Assistant