



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.6 OF 2018

BARINAS SQUARTERS SELF HELP GROUP

(Suing through Simon Ndungu Kuria, Tobia

Aol & Selly Kipyegon).....PLAINTIFF

VERSUS

CLEMENT OTIENO NYAGA.....1ST DEFENDANT

JOHAH KIBILIOCH.....2ND DEFENDANT

SAMUEL LOKOMAR.....3RD DEFENDANT

GRACE NJERI WACHIRA.....4TH DEFENDANT

COUNTY GOVERNMENT OF NAKURU.....5TH DEFENDANT

PRINCIPAL SECRETARY MINISTRY

OF LANDS & PHYSICAL PLANNING.....6TH DEFENDANT

HON. ATTORNEY GENERAL.....7TH DEFENDANT

RULING

(Application for injunction; principles to be applied; applicants being new office holders to a Self Help Group; previous office having tendered a proposal for planning and subdivision of land held by the Group; new office holders wishing to stay the said planning proposal; evidence showing that the plan had already been approved and consent to subdivide issued by the Land Control Board; nothing to stop as the process is way advanced; nothing to show that the plan was illegally presented; prima facie case not established; application dismissed with costs)

1. This ruling is in respect of an application for injunction that was filed by the plaintiff contemporaneously with this suit. In the plaint, the 1st plaintiffs have described themselves as officials of Barina Squarters Self Help Group whereas the 2nd plaintiffs are the Registered Trustees of the said Self Help Group. It is averred that the 1st-4th defendants were officials of the plaintiffs but they were removed in a special general meeting held on 10 April 2015 when the 1st plaintiffs were appointed as officials of the Self Help Group and also new Trustees of the 2nd plaintiff. It is pleaded that in the year 2013, the Self Help Group had engaged Median Planners to amalgamate and apply for change of user of the properties LR No. 11384, 5700 and 10332, and submit the same to the County Government of Nakuru, the 5th defendant, for approval. It is averred that Median Planners did not prepare the planning brief as instructed and through a resolution passed on 2 April 2016, it was agreed that the planning brief by Median Planners be discarded and a new consultant be engaged. Spatial Design Solutions were thus engaged and it is averred that the said consultant has completed his work and submitted it for approval. However, the plaintiffs have averred that it has come to their knowledge that the 1st -4th defendants, have without the authority of the plaintiff, illegally applied for approval of the plan that was prepared by Median Planners. It is further pleaded that the 5th and 6th defendants, have also without the consent of the plaintiffs approved the scheme. It is the position of the plaintiffs that this is illegal, and in this suit, they inter alia wish to have orders vacating the approval of the plan of Median Planners.

2. In this application for injunction, the plaintiffs/applicants wish to have orders restraining the defendants/respondents from acting on the approved plan of Median Planners, or using it to survey or allocate the suit properties.

3. The application is opposed by the 1st – 4th respondents through the affidavit of Jonah Kibet Kibilyoch, the 2nd respondent. He has deposed inter alia that on 6 August 2008, Simon Ndungu Kuria, Tobias Osano, Grace Njeri Wachira, and himself, were appointed and registered as Trustees of the Self Help Group, and that the same has never been altered to date, and that Selly Kipyegon is erroneously included as trustee. He has annexed a copy of the Certificate of incorporation of the trust. He has further deposed that the Group was concerned with the conduct of Tobias Osano, for it is claimed that he was misappropriating the trust property, and they held a meeting on 5 March 2015 to discuss his conduct and that it was resolved that he be removed. It is deposed that the 1st – 4th respondents did not assent to the holding of elections on 10 April 2015, and did not participate in the said election. It is further deposed that the meeting of 10 April 2015, was enjoined by court through Civil Suit No. 356 of 2015 and it is averred that any such election is null and void. He has deposed that the 1st – 4th respondents caused the circulation of the plan by Median Planners and that the same was approved on 1 April 2014 by the 5th respondent. He has deposed that on 30 June 2017, the Self Help Group paid to the Department of Lands, Nairobi, the fees for final formalization of change of user and subdivision and that members have paid substantial amounts of money to get their individual title deeds. He has deposed that the amalgamation, change of user and subdivision of the three suit properties has already been finalized and the Registry Index Map amended, so that the three parcels have been extinguished resulting in a new registration block identified as Solai/Ndungiri Block 19 (Barina), comprising of 32 parcels of land. He has annexed a letter dated 4 September 2017 to confirm this. It is thus his position that the application has been overtaken by events as there is no land parcel LR No. 5700, 11384 and 10332. He has contended that the engagement of Spatial Design Solutions to do work that has already been done is suspect.

4. Both parties filed supplementary affidavits where they annexed a copy of the trust deed and change of trustees. I have considered the sentiments of both parties regarding this document. I have also considered the elaborate written submissions of both counsel for the applicant and counsel for the 1st to 4th respondents. The 5th to 7th defendants opted not to participate in this application.

5. I take the following view of the matter.

6. What is before me is an application for injunction and there is a beaten path in the form of the case of **Giella vs Cassman Brown (1973) EA 358** which guides the court on the principles applicable in applications of this nature. Essentially, one needs to demonstrate a prima facie case and also show that he stands to suffer irreparable loss if the injunction is not granted. Where the court is in doubt, it will decide the application on a balance of convenience.

7. What the applicants want in this application is to stop any further action on a plan that was submitted by Median Planners and to stop issuance of titles on the basis of the same. The gist of the response by the 1st – 4th respondents is that this is a process that has already been completed. I have seen the various documents annexed in the replying affidavit and I have seen “no objection” letters from the Ministry of Lands, Housing and Urban Development to the proposed subdivision, amalgamation and change of user, which letters were drawn well before 10 April 2015 when the new officials of the Self Help Group came into office. I have also seen a consent from the Land Control Board, dated 7 November 2013, which allowed the subdivision of LR No. 5700 into 10 portions, and amalgamation with LR Nos. 11354 and 10332. There is also consent issued on the same day, allowing the subdivision of the land parcel LR No. 11354 into 22 portions. All these were done by the persons who were in office at the time within the Self Help Group and they must have had the mandate of the members to proceed on the basis that they did.

8. The applicants have argued that the plan has errors and that the same was not prepared according to the instructions that the planner was given. Unfortunately, I do not have any evidence of the errors that are said to have been conducted, and even if there are some errors, I have not been informed why this errors cannot be corrected by say, an addendum, rather than nullifying everything that has been done. At this stage of the proceedings, I agree with the position of the 1st – 4th respondents that there is nothing to stop, since the process has already commenced and has been given the requisite consents and approvals. My own view of the matter, subject of course to being convinced otherwise at a full hearing of the suit, is that the plaintiffs ought to proceed and distribute the land to the members based on the approvals and consents that have been issued. If there is an issue here and there, the same can be resolved on a case by case basis.

9. I am not persuaded that the plaintiffs have tabled a prima facie case that the plan by Median Planners is illegal, or that the approvals given by the 5th – 7th respondents were also issued illegally. I am not persuaded that the approvals were given without the consent of the plaintiffs for as I have pointed out, these approvals were granted way before the new officials, came into office. I have not been shown any document where the Self Help Group was complaining of an illegal approval before the new group came into office. I have not been shown any right of the applicants that has been infringed by the process of approval of the plan sought to be impugned.

10. Given the above, the applicants have failed to satisfy the first test of the principle in **Giella vs Cassman Brown**, that of establishing a prima facie case. It is therefore not necessary for me to go into the other two principles that were laid down in the said case. As stated by the Court of Appeal in the case of **Nguruman Limited vs Jan Bonde Nielsen & 2 Others (2014) eKLR**, cited by counsel for the applicants in his submissions, if a prima facie case is not established, then irreparable injury and balance of convenience need no consideration.

11. Before I pen off, it will be remiss of me, if I did not give the litigants herein a piece of my mind. The applicants hold a position of trust and they need to act in the best interests of their membership. I have seen within the affidavits herein, a lot of personal attacks on individuals, and it goes without saying, a lot of personal interest that may not be necessarily in favour of the larger membership of the Self Help Group. It is time to put these personal differences and wrangles aside and work for the members. Generally, I believe that what members in such Groups wish for, is for them to be issued with their individual titles depending on their contributions. I beseech the applicants, the 1st – 4th respondents, and the general members of the Self Help Group, to work in concert so as to ensure that their members get their titles. There is no need of putting road blocks to this process solely for purposes of settling scores or for self-aggrandisement. I hope that the litigants will see sense in what I have just said.

12. On the application, the same is dismissed with costs.

13. Orders accordingly.

Dated, signed and delivered in open court at Nakuru this 25th day of October 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. B. N. Kipkoech for the applicants.

Mr. Morigori for the 1st-4th respondents.

No appearance for the 5th- 7th respondents.

Court Assistants : Nelima/Carlton.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU