



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 274 OF 2017

PETER MAINA NDIRANGU.....1ST PLAINTIFF

SILBANUS NJERU KARIINGA.....2ND PLAINTIFF

SIMON MUREITHI.....3RD PLAINTIFF

=VERSUS=

DANISH O AGALLOH.....1ST DEFENDANT

(Sued as the Chairman of Kariobangi South Jua Kali Society)

KARIOBANGI SOUTH JUA KALI SOCIETY.....2ND DEFENDANT

RULING

1. On 25/4/2017, the plaintiffs, Peter Maina Ndirangu, Silvanus Njeru Kariinga and Simon Mureithi instituted this suit against Danish O. Agalloh and Kariobangi South Jua Kali Society. They contended that they are plot owners of unidentified plots within Kariobangi South Estate Sector VI. They stated that the said plots are comprised “within all that land identified as Kariobangi South Jua Kali Sector VI - LR No. 1206R”. They further contended that they stumbled upon a replying affidavit sworn by the 1st defendant in Constitutional Petition Number 423 of 2016 in which the 1st defendant had deposed that Kariobangi South Jua Kali Society owns all the suit properties. They further contended that the defendants have colluded with officers of the Nairobi City County Government and are downsizing their plots.

2. Consequently, the plaintiffs sought the following verbatim orders in the plaint:

a) A mandatory injunctive order restraining the defendants whether by themselves, their servants, agents and/or proxies or any one working under their instructions, from interfering in any manner with all their sub-divided plots situated within Kariobangi South Locality Nairobi County, and comprised within all that land identified as Kariobangi South Jua Kali Sector VI LR No 12062R.

b) The defendants be directed by an order of this Honourable Court to produce:

- all records respecting to the composition and registration records respecting to Kariobangi South Jua Kali Society

- Ownership documents respecting to the ownership documents respecting to all that property identified as Kariobangi South Jua Kali VI-LR No 12062R

- Minutes executed by the said Society membership giving mandate to Nairobi City County to reduce individual plots situated within Kariobangi South Sector VI plots size from 0.02ha to 0.01 ha.

c) The court do make a formal declaration that all that the sub divisions excised from all that property identified as Kariobangi South Jua Kali South VI-LR No 12062/R are vested in the individual initial allottees.

d) Costs of this suit.

3. Together with the plaint, the applicants brought a notice of motion dated 21/4/2017 seeking the following prayers:

a) *That this honourable court be pleased to certify this application as extremely urgent and be heard ex-parte in the first instance.*

b) *That pending the interpartes hearing of this application there be a temporary injunctive order restraining the defendants whether by themselves, their servants, agents and /or proxies or any one working under their instruction from interfering in any manner with all their sub-divided plots situated within Kariobangi South Locality Nairobi County, and comprised within all that land identified as Kariobangi South Jua Kali Sector vi-LR. No 12062R*

c) *That the respondent/defendants be directed by an order of this honourable court to produce:*

- *all records respecting to the composition and registration records respecting to Kariobangi South Kali Society.*

- *Comprehensive list of all registered members of Kariobangi South Jua Kali society in line with the records available with the registrar of societies.*

- *Ownership documents respecting to the ownership documents respecting to all that property identified as Kariobangi South Jua Kali VI-LR No 12062R.*

- *Minutes executed by the said society membership giving mandate to Nairobi City Council to reduce individual plots situated within Kariobangi South Sector VI Plots size from 0.02 hac to 0.015ha*

d) *That the honourable court do make a declaration that all that the subdivision excised from all that property identified as Kariobangi South Jua Kali South Vi-LR No. 12062 are vested in the individual initial allottees.*

e) *That the costs of the suit be provided for*

4. The application was supported by an affidavit sworn on 21/4/2017 by the first plaintiff. He deposed that they are individual plot owners in Kariobangi South Estate, Sector VI, each holding a distinctive parcel of land, having been allotted the plots by the defunct City Council of Nairobi. Each holds an allotment letter issued in 2002 and each has been in occupation of their respective plots since the 1980s. In 1992 the President of Kenya directed that the occupants of the plots be settled permanently and they were consequently issued with the said allotment letters.

5. The deponent further contended that they have learnt Kariobangi South Jua Kali Society was laying claim to the larger parcel of land in which their plots are comprised and it is colluding with the County Government of Nairobi to down-size their individual plots. Aggrieved, they seek the orders set out in the plaint and in the application.

6. The respondents opposed the application through a replying affidavit sworn on 7/6/2017 by Danish O. Agalloh. He deposed that he was the Chairman Jua Kali Society, a society registered in 1991 under the Societies Act under Certificate Number 14792. Society members have been in occupation of the suit property since 1980s carrying on jua kali activities and in 1992 the then President of Kenya directed that their occupation be formalized and jua kali sheds be constructed to house them.

7. Mr Agallo further deposed that the plaintiffs were members of the Society who had instituted this suit without authority of the Society and who were aggrieved by the Society's decision to downsize all the plots in order to accommodate all the members. Letters of allotment to member of the Society have been issued and members shown their respective plots and are in possession.

8. Mr Agallo further deposed that this suit is an abuse of the court process because it is a duplicate of Nairobi ELC Petition Number 1337 of 2016 in which the plaintiffs together with other persons have sued the National Land Commission and the Nairobi City County Government. He urged the court to dismiss the application.

9. The application was canvassed through written and oral submissions. The plaintiff's written submissions dated 23/10/2017 were filed on 24/10/2018. The defendants' written submissions dated 1/12/2017 were filed on 4/12/2017. Oral submissions were made on 27/6/2018.

10. I have considered the application together with the parties' rival affidavits and submissions. I have also considered the relevant principles that guide this court's jurisdiction to grant injunctive orders. The principles were set out in the case of **Giella v Cassman Brown (1973) EA 358**. The applicants were required to demonstrate a *prima facie* case with a probability of success. Secondly, they were required to demonstrate that in the absence of an interim injunctive order, they stand to suffer irreparable injury that cannot be indemnified through an award of damages. In the event of doubt, the application would be determined on a balance of convenience.

11. Prayer Number 2 of the application seeks an interim injunctive order pending the interpartes hearing and determination of the application. The application did not seek any interim order pending the hearing and determination of the suit. In my view, Prayer 2 is spent because the application has been heard and a determination is now being made through this ruling.

12. Even if the applicants had made a prayer for an interim injunctive order pending the hearing and determination of this suit, I would not grant it. I take this view because all the parties to this suit have made reference to a related suit, ELC Petition Number 1337/2016 which is before Okongo J. I have called for the file and perused the ruling rendered by Okongo' J on 15/9/2017. The Judge observed in the last paragraph of the ruling thus:

From what I have set above, I am not satisfied that the respondents have violated the petitioners' constitutional rights to warrant the grant of the orders sought. I wish to add that the conservatory orders sought would not have been issued even if the

petitioners had established a case for it. The evidence before me shows that the process of subdivision of the suit property has been completed and the members of the interested party have been granted letters of allotment. The petitioners have sought an injunction. An injunction cannot issue to restrain what has already taken place. Considering the case as a whole, I am also of the view that it would not serve the public interest to grant the orders sought. In my view all is not lost for the petitioners, I have noted that they have sought compensation in the petition. If they establish at the hearing that their rights have been violated the court would be at liberty to award them damages. In the final analysis and for the foregoing reasons, it is my finding that the petitioners' application dated 10th September 2016 has no merit. The same is dismissed accordingly. The costs of the application shall be in the cause.

13. For the very reasons set out by Okongo J in the said ruling, this court will not issue restraining orders whose effect will be to create chaos and stall the survey and titling exercise which is ongoing and whose key objective is to resolve recurring disputes relating to the suit property.

14. Prayer number 4 relates to registration and membership records of Kariobangi Jua Kali Society. It has been contended without any controverting evidence that the Society is registered under the Societies Act under Certificate Number 14792. In my view, the records alluded to are supposed to be kept by the Registrar of Societies. There is no evidence that the Registrar has declined to release those records. Similarly, requests for records held by the Society are supposed to be directed to the proper officer of the Society. Grievances arising from any failure to avail the records are supposed to be ventilated in an appropriate forum. There is no evidence that the records have been sought and withheld.

15. Prayers 5 is a final declaratory order annulling the exercise being undertaken by the Nairobi City County Government in conjunction with the Society. In my view, a final order such as the one sought in prayer 5 cannot issue as an interlocutory relief. Secondly, the County Government is not a party to this suit. That order cannot issue in its absence.

16. Consequently, it is this court's finding that the prayers sought in the notice of motion dated 21/4/2017 are wholly unmerited. The application is accordingly dismissed. The respondent shall have costs of the application.

17. Lastly, it is clear that this suit and ELC Petition Number 1337 of 2016 relate to the same suit property. To avoid a scenario where different judges of the same court issue conflicting orders relating to the same suit property, I order that this case be mentioned before Okongo J on a day to be set at the time of delivery this ruling. Okongo J will determine whether to stay one of the suits or to consolidate the two suits or issue any other directions he may deem appropriate.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF OCTOBER 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr Ajulu holding brief for Mr Kuria Advocate for the plaintiff

No appearance by the Advocate for the defendant

Hannah - Court Clerk