



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1454 of 2007

PENTECOSTAL EVANGELISTIC FELLOWSHIP OF AFRICA..... PLAINTIFF

VERSUS

1. JOHN MURIRI

2. CHARLES KYALO

3. JOHN SACHO

4. DAVID KOIGI

5. RODRICK NYAMWEYA

6. WAMAI

7. MWEWA

8. MUENI

9. MUIRURI

10. MULILI

11. ATHI WATER SERVICES BOARD.....DEFENDANTS

RULING

What is before the court for determination is the plaintiff's application dated 6th November 2015. Prayers 2, 3 and 5 of the application were granted on 30th November 2015. The only substantive prayer pending in the application is prayer 4. The plaintiff has sought interlocutory injunction restraining the defendants from encroaching, developing, constructing or in any other way interfering with the plaintiff's access and quiet possession of LR No. 18615 IR 66643/1(hereinafter "the suit property"). The application is supported by the affidavits sworn on 6th November 2015 by Bishop Dr. Mophat Kilioba, a trustee and General Overseer of the plaintiff. The plaintiff's case is as follows. The plaintiff is the registered owner of the suit property. In the month of May 2015, third parties in conjunction with the 11th defendant dug up trenches within the suit property for the purposes of constructing manholes and sewerage lines within the suit property. The said construction works were extended to the plaintiff's church compound thereby

limiting access to the church. The plaintiff is apprehensive that unless restrained by way of an injunction, the defendants would continue with the activities complained of thereby adversely affecting the plaintiff's access to the said church premises.

The 1st to 10 defendants did not respond to the application. The 11th defendant opposed the application through a replying affidavit sworn by its legal officer, Emily Kyalo on 19th January 2016. In her affidavit, Ms. Kyalo has stated that, on 5th May 2015, it received a letter from the plaintiff's advocates on record claiming that the 11th defendant's contractor had trespassed on the suit property. The said advocate demanded that the said contractor makes arrangement to enable the plaintiff to access its premises or reroute the trench which was being dug on LR No. 18615. Ms. Kyalo has stated that the construction works complained of by the plaintiff were intended for the improvement of water supply and sanitation in the informal settlements in Nairobi-Matopeni/Spring Valley area and that the said works had been executed along the existing way leave in accordance with the development plan for the area approved by the Nairobi City Council. Ms. Kyalo contended that the sewer network was on a road reserve and not on the suit property as claimed by the plaintiff. She denied the existence of open trenches on the suit property stating that at all material times, the contractor had under its instructions ensured that residents had access to their properties. Ms. Kyalo contended further that the allocation of the suit property to the plaintiff was cancelled by the then Nairobi City Council in its Town Planning Committee meeting held on 15th September 2000. Ms. Kyalo contended that the 11th defendant had no claim or interest in the suit property and was wrongly joined in the suit. She contended that the 11th defendant could not be restrained from performing its statutory duty. Finally, Ms. Kyalo stated that the injunctive relief sought against it was in vain as the works complained of were completed in October 2015 before the application under consideration was brought.

In a rejoinder to the replying affidavit by the 11th defendant, the plaintiff filed a further affidavit sworn on 19th April 2016 by Bishop Dr. Mophat Kilioba. In the affidavit, the plaintiff denied that the construction works complained of were being undertaken on a wayleave as claimed by the 11th defendant. The plaintiff also denied that its title to the suit property was revoked by the City Council of Nairobi. The plaintiff contended that the 11th defendant had continued with its illegal activities on the suit property until it was joined in this suit. The plaintiff admitted that the 11th defendant has stopped the activities it was complaining about. It contended however that the defendant had left open trenches on the suit property.

The application was argued before me on 13th July 2016. The plaintiff's advocate Mr. Mutua submitted that the plaintiff had demonstrated that it was the registered proprietor of the suit property and that the 11th defendant was carrying out some construction works thereon. He submitted that the defendants had no right to enter the suit property. Mr. Mutua referred the court to the photographs annexed to the 11th defendant's affidavit and contended that the construction works were on going contrary to the allegation by the 11th defendant that they had completed the construction works in the area. Mr. Mutua submitted that if at all the said works had been completed as alleged, then the 11th defendant would not be affected by the injunction sought.

In response, Mr. Obondi for the 11th defendant submitted that the construction works complained of were being undertaken on a way leave and not on the suit property. He submitted that the 11th defendant had not encroached on the suit property as the sewer lines were being constructed on a road reserve. Mr. Obondi submitted that there was no evidence that the works complained of were on the suit property. Mr. Obondi reiterated that the said works were already completed and that the 11th defendant's joinder to this suit was improper as it was only discharging its statutory duties. Mr. Obondi urged the court to dismiss the plaintiff's application with costs.

I have considered the plaintiffs' application together with the two affidavits filed in support thereof. I have also considered the 11th defendant's replying affidavit filed in opposition to the application. Finally, I have considered the submissions which were made before me by the parties' respective advocates. As

was held in the case of Giella –vs- Cassman Brown & Co. Ltd. [1973] E. A. 358, an applicant for interlocutory injunction must establish a prima facie case with a probability of success against the respondent. He must also demonstrate that unless the injunction is granted, he will suffer irreparable injury which cannot be compensated in damages. If the court is in doubt as to the fulfilment of the two conditions, the court would determine the application on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) eKLR the court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 and went further to state as follows:-

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed.”

What I need to determine in the application before me is whether the plaintiff has shown that it has a prima facie case against the defendants and that unless the orders sought are granted, the plaintiff will suffer irreparable loss or injury. This suit was filed on 19th November 2004 with the 1st to 10th defendants as the only defendants in the suit. The 11th defendant was joined in the suit when the plaintiff brought the application under consideration. In its plaint, the plaintiff had contended that the 1st to 10th defendants had trespassed on the suit property and occupied the same. The plaintiff sought the eviction of the 1st to 10th defendants from the suit property and an injunction to restrain the defendants from entering or continuing to occupy the suit property. From the record, the plaintiff did not file an application for interlocutory injunction against the 1st to 10th defendants. The present application for injunction was brought after a lapse of over 12 years since the suit was filed. I have looked at the two affidavits filed in support of the present application. The claims against the 1st to 10th defendants are made in general terms. The plaintiff has not come out clearly as to when the 1st to 10th defendants are said to have trespassed on the suit property more particularly whether the trespass complained of in the application was committed in the year 2016 when the application herein was brought or in the year 2004 when the suit was filed. Although the application was not opposed by the 1st to 10th defendants, I am not satisfied that on the material before me a prima facie case has been made out against the 1st to 10th defendants. In any event, an injunction is an equitable remedy. In my view, it would be inequitable to grant interlocutory injunction in the year 2017 for acts of trespass said to have been committed in the year 2004. I am of the view that the plaintiff is guilty of laches. No explanation has been given as to why the injunction sought against the 1st to 10th defendants was not brought earlier. There is no evidence before me that any new acts of trespass were committed by the 1st to 10th defendants in the year 2016 which could have prompted the present application.

With regard to the 11th defendant, it is admitted that the 11th defendant was carrying out construction works around the area where the suit property is situated. The construction works involved digging trenches and laying sewage and water pipes. The plaintiff has contended that the said activities were being carried out on the suit property. The 11th defendant has denied this fact. The 11th defendant has contended that its activities were restricted to a road reserve and a way leave that was reserved for the works they were undertaking. On the material before me, I am not able to determine whether the activities complained of by the plaintiff were being undertaken on the suit property or on a road reserve. The photographs annexed to the parties’ affidavits are of no assistance. The same applies to the map that was exhibited in the plaintiff’s further affidavit. This issue will have to await determination at the trial of the suit. For the foregoing reasons, I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the 11th defendant. I am also not satisfied that the plaintiff would suffer irreparable harm which cannot be compensated in damages if the injunction sought against the 11th

defendant is not granted. This is because, it is common ground that the construction works which were being undertaken by the 11th defendant were completed and the 11th defendant had left the site as at the time the present application was being argued. I am unable therefore to see any harm which will be suffered by the plaintiff if injunction is not granted to stop construction works which have been completed.

The upshot of the foregoing is that I find no merit in prayer 4 of the Notice of Motion dated 6th November 2016 and I hereby decline to grant the same. The application is accordingly dismissed with regard to that prayer. The costs of the application shall be in the cause.

Delivered and Signed at Nairobi this 17th day of February, 2017.

S. OKONG'O

JUDGE.

In the presence of:-

Mr. Musyoka h/b for Mutua for Plaintiff

N/A for the 1st Defendant

Mr. Obondi for the 11th Defendant

Kajuju Court Assistant