



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 14 OF 2015

KEFA NYAGA KARIUKI.....1ST PLAINTIFF

JOHNSON KARIUKI NGUNE.....2ND PLAINTIFF

JEDIDAH MUTHONI NYAGA.....3RD PLAINTIFF

ISAIA NJERU J. MBAKA.....4TH PLAINTIFF

JAMES KINYUA NJONA5TH PLAINTIFF

VERSUS

THE MUNICIPAL COUNCIL OF EMBU.....DEFENDANT

THE COUNTY GOVERNMENT OF EMBU.....SUBSTITUTED

RULING

By an amended Notice of Motion dated 25th November 2015 and filed herein on 9th December 2015, the plaintiff seek the following orders:-

1. Spent.

2. That this Honourable Court do issue a temporary injunction order against the defendants, their servants, agents and contractors restraining them, their servants and agents from constructing Dallas Primary School on land L.R GATURI/GITHIMU/38 marked S.P (open space) measuring 0.20 Ha situated on land L.R GATURI/GITHIMU/703 subject matter of this case until the hearing and disposal of this suit.

3. That the defendants, their servants and agents and contractors temporarily be restrained from entering, occupying, trespassing, encroaching or in any other manner interfering with the open space (sp) on plot No. GATURI/GITHIMU/38 measuring 0.20 Ha situated on land parcel GATURI/GITHIMU/703 and subject matter of this suit until the hearing and disposal of this case.

4. That costs of this application be provided for.

The application which is founded under **Order 40 Rule 1 (a) and (b) of the Civil Procedure Rules** is premised on the grounds set out therein and supported by the affidavit of the 4th plaintiff **ISAIA NJERU MBAKA**. From the grounds set out therein and the said supporting affidavit, it is the plaintiff's case that

the defendant has compulsorily acquired a portion measuring 1.67 Ha from land parcel No. GATURI/GITHIMU/38 (open space) without paying compensation contrary to the provisions of the Land Act or the Constitution. That the defendant intends to construct Dallas Primary School on a portion of land parcel No. GATURI/GITHIMU/38 (herein the suit land) and unless restrained by an order of injunction, the said construction shall proceed to be detriment of the plaintiffs who will suffer irreparable damage that cannot be compensated in monetary terms. Annexed to the supporting affidavit of the 4th plaintiff are several annexures including a copy of the title deed to the land parcels No. GATURI/GITHIMU/9388 in the names of **DALLAS PRIMARY SCHOOL** which is the land the plaintiffs claim the school should be constructed and not the suit land and several correspondences.

The application is opposed and **NICHOLAS MOGAKA** the defendant's Legal Officer has sworn a replying affidavit to which are annexed several documents including a certificate of official search showing that the suit land is registered in the names of one **MUNYI MWITHAGA**. In the said replying affidavit, it is deponed, inter alia, that Dallas Primary School is not being constructed on the suit land but is infact being constructed on un-numbered open space which had been left for public use as per **Section 31 (b) of the Physical Planning Act** which was surrendered to the defendant to manage on behalf of the public. That the said open space was surrendered by the owner for public use and therefore, any title deed issued to the plaintiffs could have been acquired irregularly.

The application was canvassed by way of written submissions which have been filed by the firm of **KINYANJUI NJAGI Advocates** for the defendant and **V.E MUGUKU MURIU Advocates** for the plaintiffs.

I have considered the application, the rival affidavits and annexures thereto together with submissions by counsel.

This being an application for temporary injunction, it has to be determined in line with the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

- 1. The applicant must show a prima facie case with a probability of success.***
- 2. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not otherwise be adequately compensated by an award of damages.***
- 3. Thirdly, if in doubt, the Court will determine such application on the balance of convenience.***

As to what amounts to a prima facie case, this was defined by the Court of Appeal in **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** in the following terms:-

“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 the 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”.

Being an equitable remedy, a temporary injunction will not be granted as a matter of course nor to a party who has not approached the Court with clean hands. Finally, as was held in the case of **FILMS ROVER INTERNATIONAL LTD VS CANNON FILM SALE LTD 1986 3 ALL E.R 772**, a Court considering such an application will take the course that appears to carry the lower risk of injustice.

The plaintiff's case for temporary injunction is premised on the claim that the defendant is constructing a school on the suit land having acquired the same compulsorily without compensation, instead of constructing the said school on land parcel No. GATURI/GITHIMU/9388. The relevant paragraphs of the supporting affidavit of **ISAIA NJERU MBAKA** are number 3 and 4 and they read as follows:

3:“***That on 10th March 2015, I was served with a letter ref ECG/LWENR/EDUG/VOL 1/5 dated 5th March 2015 written by Eng. Stephen K. Njiru C.O Lands, Water Environment and Natural Resources of Embu County Government addressed to Chief Officer Infrastructure Embu County Government proposing constructions of Dallas Primary on land parcel GATURI/GITHIMU/38 marked sp (open space) measuring 0.20 Ha which land is subject to this case (letter exhibit INM 1)***”

4:“***That the defendants/respondents demanded surrender of 1.67 Ha out of the applicant’s land measuring 3.23***

Ha which was excessive and they compulsorily acquired the same including the portion of open space L.R GATURI/GITHIMU/38 measuring 0.20 Ha without paying any compensation as required by land acquisition act (sic) now repealed and replaced by Section 111 (1) of the Land Act 2012 and Article 64 of the Kenya Constitution 2010”.

It is instructive to note that the plaintiffs have not annexed a copy of the title deed or any other document as proof that they own the suit land. On the other hand, the defendant through the replying affidavit of its Legal Officer **NICHOLAS MOGAKA** has annexed a copy of the certificate of search in respect to the suit land (annexture **NM 1**) showing that the said suit land is infact registered in the names of one **MUNYI MWITHAGA** who is not a party to this suit. In paragraph 3 of the said replying affidavit, it is deponed as follows:-

“That Dallas Primary School is not being constructed on plot No. GATURI/GITHIMU/38 as evidenced vide the attached copy of official search showing the land belongs to one MUNYI MWITHAGA”

However, the plaintiffs’ annexture **INM 1** which is the letter from the defendant’s Lands, Water, Environment and Natural Resources Office dated 5th March 2015 reads in the first paragraph as follows:-

“RE: PROPOSED DALLAS PRIMARY SCHOOL.

Due to the interest of the Dallas Community to have a Public School within its radius, it has been proposed that the land parcel GATURI/GITHIMU/38 marked for (open space) be utilized for construction of Dallas Primary School”.

The defendant cannot however approbate and reprobate at the same time. It cannot, as deponed in the replying affidavit of **NICHOLAS MOGAKA**, claim ***“that Dallas Primary School is not being constructed on plot No. GATURI/GITHIMU/38”***

yet by its own letter dated 15th March 2015, it concedes that ***“it has been proposed that the land parcel GATURI/GITHIMU/38 marked for O open space be utilized for construction of Dallas Primary School”***. This Court is therefore satisfied that the said Dallas Primary School is being constructed on the suit land.

Having said so, however, I see no nexus between the plaintiffs and the suit land. The plaintiffs have not established what interest they have in the suit land which, as per the certificate of search annexed to the replying affidavit of **NICHOLAS MOGAKA**, is registered in the names of one **MUNYI MUTHAKA** who is not a party in this case. Therefore, even if the construction of Dallas Primary School is being done on the suit land, the plaintiffs have not demonstrated their interest in the said land and there can be no basis upon which they can be entitled to any injunctive relief as sought herein as they do not represent the said **MUNYI MWITHAGA**. In short, the plaintiffs are strangers to the suit land. And although in paragraph 10 of his replying affidavit **NICHOLAS MOGAKA** has deponed that any title held by the plaintiffs with respect to the suit land ***“could have been irregularly acquired”***, the plaintiffs did not annex to their application any document of title to the suit land whether illegally acquired or otherwise. In the circumstances therefore, and having found that the plaintiffs have not shown what interest they have in the suit land, a prima facie case with a probability of success has not clearly been demonstrated to

warrant this Court to issue any injunctive relief. And that being the first hurdle that the plaintiffs had to surmount, it follows that their application for temporary injunction pending trial must be dismissed. That is because, as was held by the Court of Appeal in NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012:

“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration”.

There is therefore no need to consider the other two principles set out in the GIELLA case (supra). This is because, those principles have to be considered sequentially and if the applicant is un-able to prove the first principle, then a consideration of the second and third principles is superfluous. It is only when the first principle is established that the Court then moves to consider the second and third principle.

But that is not all. The interlocutory relief, as is clear from the plaintiffs Notice of Motion, is premised on their claim to the suit land which claim, as I have already found above, has not, prima facie, been established as required. However, both in their original suit filed on 14th November 2008 and amended on 19th January 2015, there is no mention of the suit land. Instead the plaintiffs seek the following substantive remedies:

(I)“That the excess claimable land illegally surrender and unlawfully acquired by the defendant under paragraph 7 herein measuring in total 0.78 Ha (1.92 acres) of land L.R GATURI/GITHIMU/706, 780, 704, 703 be surrendered by the defendant and be transferred to the plaintiffs as prayed in paragraph 7 above”.

(II)“That in the alternative, the defendant be ordered to pay compensation to the plaintiffs for the value of the claimable land measuring 0.78 Ha (0.192 acres) to be valued and assessed jointly by the Government Valuer and a private Valuer to be appointed by the plaintiff”.

What is immediately clear from the above averments is that while the main suit seeks orders with respect to land parcels No. L.R GATURI/GITHIMU/706, 780, 704 and 703, the Notice of Motion seeking an order of temporary injunction is in respect to land parcel No. L.R GATURI/GITHIMU/38. Those are two distinct parcels of land. My understanding of Order 40 Rules 1 and 2 of the Civil Procedure Rules is that an interlocutory injunction cannot be granted if the orders sought are at variance with those sought in the main suit. That is why **Order 40 Rule 1 (a)** reads as follows:

“Where in any suit it is proved by affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) “ Emphasis added.

The ***“property in dispute”*** in this suit is L.R No. GATURI/GITHIMU/706, 780, 704 and 703. An order of temporary injunction cannot therefore properly be issued in respect to land No. L.R GATURI/GITHIMU/38. That would be contrary to the powers donated by Order 40 of the Civil Procedure Rules. For that reason also, this application cannot be allowed.

Ultimately therefore, having considered all the matters herein, I find that the plaintiff’s amended Notice of Motion dated 25th November 2015 and filed herein on 9th December 2015 is devoid of merit. It is accordingly dismissed with costs.

B.N. OLAO

JUDGE

3RD MARCH, 2017

Ruling dated, delivered and signed in open Court this 3rd day of March 2017

Mr. Macharia for Mr. Muguku for the Plaintiffs present and also holding brief for Kinyua Njagi for the Respondent.

B. N. OLAO

JUDGE

3RD MARCH, 2017