



REPUBLIC OF KENYA
IN THE E.L.C. COURT OF KENYA AT EMBU
E.L.C. NO. 83 OF 2013

MICHEAL KOTI.....1ST PLAINTIFF
 BEATRICE WANZA.....2ND PLAINTIFF
 ROXANAH W. MUNGAI.....3RD PLAINTIFF
 PHINIUS NGARI NYAGA.....4TH PLAINTIFF
 FREDRICK NDAIRE KARUA.....5TH PLAINTIFF
 JEDIEL KIRIA MUBIU.....6TH PLAINTIFF
 MARY MUTHAMA.....7TH PLAINTIFF
 GERALD GIOTONGA NDIRITU.....8TH PLAINTIFF
 EUNICE K. MOGUSU.....9TH PLAINTIFF
 LISALBA G. NJAGI.....10TH PLAINTIFF
 MARY WANJIRU NTHIGA.....11TH PLAINTIFF
 ALOYSIUS NTHIGA NJOKA.....12TH PLAINTIFF

VERSUS

COUNTY DIRECTOR OF HOUSING EMBU.....1ST DEFENDANT
 HON. ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. By a plaint dated 30th April 2017, the Plaintiffs sued the Attorney General and the “County Director of Housing” seeking the following reliefs:

I. A permanent injunction restraining the Defendants, their agents, servants, employees or anybody claiming through them from evicting them or interfering with their occupation of the various government houses they are occupying at Spring Valley in Embu Town and or a declaration that

the vacation notices dated 27th February 2017 issued to them were unreasonable, uncalled for, vindictive and should be revoked.

II. Costs and interests.

III. Any other relief the court may deem fit to grant.

2. It is evident from the said plaint that the Plaintiffs are government officials who were allocated the said houses by virtue of their employment with the Government of Kenya and its various agencies.

3. Simultaneously with the filing of the suit, the Plaintiffs also filed a Notice of Motion dated 30th April, 2017 under certificate of urgency in which they sought two interim orders of injunction to restrain the Respondents from evicting them or interfering with their occupation of the said houses firstly pending the hearing and determination of the application and secondly, pending the hearing and determination of the suit.

4. The said application was supported by the supporting affidavit of Aloysius Nthiga Njoka who swore it on his own behalf and on behalf of his fellow Applicants. The Applicants also filed a further affidavit on 31st May 2017 in response to the 1st Respondent's replying affidavit.

5. The said application was opposed by the Respondents on the basis of the replying affidavit sworn by J.M. Karuku on 25th May 2017. Mr J.M. Karuku is the current County Director of Housing based at Embu County. He stated in his said affidavit that the Government issued the vacation notices to the Applicants to enable re-development of the estate to enable it accommodate more public servants.

6. The said application was in the first instance placed before the Hon Justice Boaz Olao on 3rd May 2017 who certified it as urgent but declined to grant any interim orders. He asked the Plaintiffs to serve the application for *interpartes* hearing before me on 8th May 2017.

7. The said application was ultimately listed before me on 29th May 2017 for *interpartes* hearing when the advocates for the Plaintiffs and the Defendants agreed to dispose of the same by way of written submissions.

8. The Applicants filed their submissions on 31st May 2017 in which it was submitted that the notice of 2 months given to the Applicants to vacate was too short. It was further submitted that moving out at this time would inconvenience them since they had school going children; that there was no justifiable urgency in re-developing the estate; that there was no evidence to demonstrate that any money had been committed to the project or that a contract for re-development had been awarded. It was further submitted that the Government had acted in an arbitrary manner.

9. The Respondents were represented by the Office of the Attorney General who filed written submissions on their behalf on 6th June 2017. In opposing the said application for injunction, the Attorney General submitted first, that the application for injunction does not lie because no notice was issued under **section 13A of Government Proceedings Act (Cap. 40)** and secondly, that an order of injunction cannot issue against the Government and its officers under **section 16 of the said Act and Order 40 of the Civil Procedure Rules**. Finally, it was submitted that the Applicants had failed to meet the requirements for the grant of an order of injunction as set out in the case **of Giella v. Cassman Brown & Co. Ltd [1979] EA 358**.

10. There are at least three (3) issues arising for determination in this application. First, the question of whether or not a statutory notice of intention to sue was given under the **Government Proceedings Act (Cap. 40)**. Second, whether an order of interlocutory injunction can issue against the Respondents for the grant of an order of injunction. Third, whether or not the Applicants have satisfied the requirements for the grant of an order of injunction.

11. I have noted that the issue of the notice of intention to sue was not raised by the Respondents in the replying affidavit and neither does it appear in any pleading on record. It was raised for the first time in the Respondent's written submissions. The Applicants had really no opportunity to respond to this issue. I have noted, however, that it is pleaded in paragraph 10 of the plaint that a demand and notice of intention to sue were given.

12. In those circumstances, it would be premature to make any finding on this issue before the close of pleadings. The averment in paragraph 10 of the plaint is yet to be responded to by way of defence. The court is, therefore, of the view that this issue can only be fairly adjudicated upon at the trial of the suit or by way of a separate application by the Respondents.

13. The second issue is a question of law on whether or not an order of injunction can issue against the Respondents. The 1st Respondent is the Hon. Attorney General of the Republic of Kenya whereas the 2nd is the County Director of Housing in the Ministry of Transport, infrastructure and Urban Development of the Government of Kenya.

14. The relevant parts of section 16 of the Government Proceedings Act state that;

1. In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in any proceedings between subjects, and otherwise give such appropriate relief as the case may require:-

Provided that-

Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties.

15. On the other hand, the material provisions of Order 29 (2) of the Civil Procedure Rule provide that:

"No order against the Government may be made under-

a) ...

b) ...

c) ...

d) Order 40 (injunctions)

16. The court is satisfied on the basis of the above legal provisions and on the authority of the case of *Kariuki Muigua T/A Kariuki Muigua & Co Advocates v. Commissioner of VAT and 2 Others [2013] eKLR* that an order of injunction cannot issue against the two Respondents herein.

17. The third issue relates to the well known principles for grant of an interlocutory injunction. In spite of my finding on the second issue the court is far from satisfied that the applicants have made out a *prima facie* case with a probability of success at the trial. The test for a *prima facie* case was aptly captured in the case of *Mrao Ltd v. First American Bank of Kenya & 2 Others [2003] KLR 125* as follows:

"A prima facie case in a civil application includes but is not confined to a genuine and arguable case. It is a case which, 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."

18. The Applicants concede that the houses they are occupying are Government houses and they occupy

them by virtue of their positions as public officers. They are not challenging the Government's title nor the right of Government to re-develop the estate into modern housing facilities under the Civil Servants Housing Scheme as happened in other counties. What they are saying is that the vacation notice of two months was not adequate and that they would be inconvenienced because they have school going children. They, however, avoid stating what notice period they would consider as adequate.

19. The Applicants appeared to put undue emphasis on the perceived weaknesses of the Respondents' case instead of building up the strength of their case in an effort to demonstrate a *prima facie* case. For instance, the question of financial commitment on the part of Government is neither here nor there. The award of a contract for re-development is solely the business of Government. The timeliness for completion of the project and pace of the project are neither here nor there. These matters do not advance the applicants' case in any way.

20. The court is unable to appreciate what genuine and arguable case the Applicants would have against the Government of Kenya. It has also not been demonstrated which legal right has been infringed or threatened with violation by the Government to warrant a protective order. For those Applicants who wanted additional time to vacate, I think they have obtained an extension of time by a few months by filing the instant suit and application.

21. For the foregoing reasons, I hold that the Applicants have failed to satisfy the first principle for the grant of injunctive relief. It follows that a consideration of the 2nd and 3rd principles for the grant of such order is not necessary.

22. The upshot of the foregoing is that the court finds no merit in the Applicants' Notice of Motion dated 30th April 2017 and the same is hereby dismissed with costs.

23. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **28th day of JUNE 2017**.

In the presence of Ms Muriuki holding brief for Applicant and Mr Momanyi holding brief for Ms Njoroge for Attorney General for Respondents.

Court clerk Njue/Leadys.

Y.M. ANGIMA

JUDGE

28.06.17