



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 344 OF 2017

BENJAMIN OTIENO OKUMU.....APPLICANT

VERSUS

COUNTY GOVERNMENT OF NYANDARUA.....RESPONDENT

RULING

1. Coming up before me for determination is the Notice of Motion dated 31st March 2017 and filed on the 3rd April 2017 in which the Applicant seeks for the following orders:

i. **Spent.....**

ii. **Spent.....**

iii. That pending the hearing and determination of this suit the honorable court be pleased to issue a temporary injunction restraining the defendant either by itself, and/or its servants from trespassing, entering, damaging, interfering, dealing in any manner whatsoever with Plot No. 32 OI- Kalou Township belonging to the Applicant herein and the said orders be enforced by the OCPD OI- Kalou police station.

iv. That costs of this application be borne by the Respondent herein.

2. The Application is premised on the grounds that the Plaintiff is the legal owner of plot No. 32 OI- Kalou Township having been allocated the same by the then Town council of OI-Kalou via an allotment letter dated 13th March 2006 upon which the Applicant has been paying rates to the Respondent.

3. That on 27th March 2017, the Respondent's agents or servants, while accompanied with some goons and without color of right descended upon the Applicant's land and started demolishing the property therein on the pretext that the same had been set aside for a slaughter house. With this interference, he stood to suffer irreparable loss and damage that could not be compensated.

4. The Application was supported by the affidavit of the applicant sworn on the 31st March 2017 whose main depositions are that he was allocated the suit property on the 13th March 2006 by the then Town council of OI-Kalou whereby he took possession of the same and continued to pay the rates to the Respondent

5. That sometime in the year 2015 he presented his building plans to the Respondent for construction of rental houses wherein the same were approved.

6. Towards the end of that year (2015) the Respondent put up a list of disputed plots but the suit land was not one of them and the Applicant commenced the construction.

7. However on 27th March 2017, the Respondent his agents, or servants while accompanied with some goons descended upon his land and started demolishing the construction works that was ongoing claiming that the land had been set aside for a slaughter house.

8. The applicant deponed that the matter had now taken a political angle and as such he needed assistance form the police.

9. When this matter came up for hearing *ex-parte*, I issued a temporal injunction on 3rd April 2017 for interparte hearing on the 24th April 2017. On that date directions were taken where parties were directed to file their written submissions with the high lighting scheduled for the 9th May 2017.

10. Consequently the pending issue for determination is whether this court should grant the Applicant an interim injunction pending the hearing of the suit. I shall therefore proceed to determine the current application on that basis.

APPLICANT'S SUBMISSIONS

11. Upon the Applicant's allocation of the suit land on the 13th March 2006, he took possession of the same and began to pay rates, as demanded, to both the Town council of Ol- Kalou and the Respondent herein.

12. That sometime in July, the year 2015 he presented his building plans to the Respondent for construction of rental and/ or residential house(s) wherein the same were approved.

13. In the month of October 2016, the Respondent put up a list of disputed plots but the suit land was not one of them and he commenced the construction.

14. However on the 27th March 2017, the Respondent his agents, or servants while accompanied with some goons descended upon his land and started demolishing the construction works that was ongoing claiming that the land had been set aside for a slaughter house.

15. When he visited the offices of the county surveyor, he was assured that the land was not meant for a slaughterhouse.

16. The applicant submitted that the interim orders issued by the court on the 3rd April 2017 weren't a nullity just because they were sealed with the seal of the High Court and leaned on Article 159(d) of the constitution to buttress his submission. I agree.

17. Further submissions were to the effect that the present suit land is neither an asset nor a liability of the defunct Town Council of Ol-Kalou and as such it could not be governed by the provisions under the Intergovernmental Relations Act, 2012.

18. The Applicant further contented that the suit land could not be termed as an asset of the Town Council of Ol- Kalou as the Town Council divested its interest when it issued the Applicant with an allotment letter on the 13th March 2006, accepted his payments by way of rates and allowed him to take possession of the same.

19. The Land commission, the Applicant submitted has no Jurisdiction to deal with the suit land as it ceased being Public Land the moment it was allocated to him. He submitted that he had an indefeasible lawful right over the suit land which right should be protected by the law. That although he failed to develop the land within 24 months as stipulated in the allotment letter, yet the Respondent continued to recognize him as the owner as it did not issue him with any letter of cancellation of the allotment nor one for re-possession but had continued to receive the rates he paid to it.

20. As to the whether the letter of allotment was genuine or not, the applicant submitted that this was a matter that would be best be canvased during the full hearing of the main suit.

21. The applicant submitted that the court ought to grant him the interim orders pending the hearing of the suit as prayed, because he had satisfied the principals laid down in the Giella vs. Cassman Brown case by demonstrating that he had a *prima facie* case which had high likelihood of success.

22. He further stated that even if the Respondent is capable of compensating him damages, yet it should not be allowed to trample on the rights of the Applicant as it wishes. Damages he submitted were not an adequate remedy. He had been in possession of the said land for the last ten years and should be allowed to stay thereupon until the case was heard and determined.

RESPONDENT'S SUBMISSIONS

23. The Respondent's response and submission was that the application ought to be dismissed based on two issues. The first being a preliminary issue on the jurisdiction of the court while the second being that the conditions set down in Giella vs. Cassman Brown case had not been met by the Applicant.

24. On the first issue, the Respondent's written submissions was to the effect that vide Gazette Notice No. 858 published on 27th January 2017, under the Intergovernmental Relations Act, an intergovernmental Relations Technical Committee was created to investigate and facilitate verification and transfer of the assets and liabilities that belonged to the defunct local authorities as on the 27th March, 2013.

25. The suit property herein was allocated by the defunct local authorities and as such the instant claim is a liability arising from local authority, the court could not therefore determine this claim when the Applicant had not pursued and exhausted the above captioned option.

26. That jurisprudence has favored deference to the competence of other alternative mechanisms and that the Applicant ought to have sought relief from the committee herein above established or from the National Land Commission. The claim was therefore immature and the court had no jurisdiction to hear this matter.

27. The Respondent further submitted that the Applicant had not fulfilled the parameters as laid down in the Giella Vs Cassman Brown to warrant the orders so sought.

28. In so submitting that the Applicant had not proved a prima facie case with a probability of success, the Respondent relied on the case of

Mrao Ltd vs. First America Bank of Kenya Ltd & 2 others [2003] eKLR where it was held that;

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..... further that a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.

29. The Applicant in the present case had no title except a letter of allotment.

30. The legal position of a letter of allotment submitted the Respondent, was not proof of title as it was only a step in the process of allocation of land. Reliance was placed on the cases of **John Mukora Wachihi vs. Minister for Lands & 6 others [2013] eKLR** where the court held that

...that the right to property protected under the law and the Constitution is afforded to registered owners of land..... A letter of allotment is not proof of title as it is only a step in the process of allocation of land.

And on the case of;

31. **Wreck Motors Enterprises –vs. - The Commissioner of Lands and 3 Others Nairobi [1997] eKLR**, where the Court of Appeal held as follows:

Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter and actual issuance thereafter of a title document pursuant to provisions held.

32. The Respondent further submitted that the Applicant had therefore not met the first to be granted an injunction pending the hearing of the case.

33. On whether the Applicant had met the second test of whether he would suffer irreparable injury, which would not be adequately compensated by an award of damages, the Respondent relied on the case of **Simon Njii Mwangi vs. Utumishi Investment Ltd [2012]eKLR** where the court held that;

...the applicant must first establish that he has a prima facie case with a probability of success at the trial, before the court can move to consider irreparable loss and balance of convenience.

34. It was thus submitted that since the Applicant had not established the first test on a prima facie case, the second test was inapplicable.

35. The Respondent further submitted that since the Applicant had just started to develop the suit land, contrary to what had been stipulated in the letter of allotment where he was to develop the same within 24 months, he could easily be compensated more so because the land was a public utility and was liable to compulsory acquisition.

36. Finally, the Respondent submitted that the Applicant had come to court with unclean hands since the terms of the allotment of the suit land were to the effect that he was to develop the same within 24 months but had not done so and instead came to court claiming to have proprietary rights in respect to which equity should come to his aid. The Applicant had also not provided evidence of payment for rates and rent starting 2006 till 2017(all inclusive) and as such, he was not entitled to an equitable remedy of injunction.

Determination

37. I have read the respective pleadings and submissions of the parties as well as looked at the documents annexed thereof in support of their respective cases as summarized herein above.

38. The issue for determination in this matter is whether this court has jurisdiction to hear this matter based on the preliminary issue raised by the Respondent **and secondly whether the Plaintiff has met the conditions for the grant of an injunction as enunciated in the GIELLA –VS- CASSMAN BROWN CASE (1973) EA 358 to entitle him to the order of injunction.**

39. **On the first issue touching on jurisdiction, the law as set out in the Mukisa Biscuits Manufacturing Co. Limited vs. West End Distributors Limited [1969] EA 696, is clear to the effect that Sir Charles Newbold held:**

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary Objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

40. The issue on whether the court has or does not have jurisdiction to determine a claim arising from a liability from the local authority when the Applicant has not pursued and exhausted all avenues available and further that jurisprudence has favored deference to the

competence of other alternative mechanisms and that the applicant ought to have sought relief from the committee herein above established or to the National Land Commission, is in my humble opinion a matter of fact to be ascertained through the calling of evidence. This Preliminary objection fails in its tracks.

41. On the second issue as to whether the Applicant has established a prima facie case, a summary of the Applicant's case is that he is the bonafide, genuine and legal owner of the suit property which was allocated to him by the then Town council of Ol-Kalou via an allotment letter dated 13th March 2006.

42. The Applicant has annexed as evidence copies of receipts of payment of rates/rent as well as a letter of allotment issued by Town council of Ol-Kalou in his name dated 13th March 2006.

43. The legal position of a letter of allotment, as submitted by the Respondent, is not proof of title but only a step in the process of allocation of land. Reliance here being placed on the case of **John Mukora Wachihi vs. Minister for Lands & 6 others [2013] eKLR** where the court held;

...that the right to property protected under the law and the Constitution is afforded to registered owners of land.... A letter of allotment is not proof of title as it is only a step in the process of allocation of land.

44. Secondly, I find that the terms and conditions of the allotment letter were further not met by the Applicant to the effect that he was to develop the land within 24 months upon receipt of the allotment letter but had just started developing the same in the year 2017, more than 11 years after the allotment which in effect reverted the land back to the County Government making it an asset of the said county. The same was therefore to be dealt with in accordance with the Intergovernmental Relations Technical Committee which was established by the **Intergovernmental Relations Act, 2012** to take over the residual functions of the Transition Authority after expiry of the term of the Authority to finalize the audit and verification of assets and liabilities of the defunct Local Authorities. I do not know if this has been done.

45. In the case of **Joseph N.K. Arap Ng'ok v Moijo Ole Keiwua & 4 others [1997] eKLR** the Court of Appeal held as follows:

It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.

46. Based on the above findings, the Applicant, in my view, has **not met the first condition for the grant of an injunction as enumerated in the Giella –vs- Cassman Brown Case** to wit that he has not established a prima facie case that concludes that there exists a right which has apparently been infringed by the Respondent so as to call for an explanation or rebuttal from the said Respondent.

47. Having so found, I need not delve into the other remaining conditions. I decline to grant the order of injunction sought, with the result that the Applicant's notice of motion application dated 31st March 2017 is accordingly dismissed with costs to the Defendant.

Dated and delivered at Nyahururu this 26th day of July 2017.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE