



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CONSTITUTION PETITION NO. 5 OF 2016

DR. SAMMY CHEGE NJENGA.....1ST PETITIONER

DR. JOHN KIPLAGAT RUTTO.....2ND PETITIONER

VERSUS

THE COMMISSIONER OF PRISONS.....1ST RESPONDENT

LAND REGISTRAR-TRANS-NZOIA.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. The petitioners filed an application dated 2/11/2016 seeking a temporary injunction to restrain the 1st respondent from constructing, charging, leasing or dealing in whatsoever manner with the parcel of land known as **LR. 2116/1059** pending the hearing of the application and after that, the orders, if granted be firmed pending the hearing and determination of the petition.
2. The grounds on which the application is made are stated as follows: In 1998 the petitioners requested the Municipal Council of Kitale for land to construct a hospital on; the application was approved and processed to completion whereupon the petitioners were registered as owners of **LR.No. 2116/1059** and a certificate of title issued on **28/4/1992**; the petitioners obtained approval of building plans and permission to construct the hospital on **16/12/2009**; that the petitioners together with their strategic partners, Ebenezer Health Services Limited made necessary arrangements to begin construction but they were prevented from delivering and/or depositing building materials on the site by officers from the Kitale Remand Prison; that the reason for the said bar to the delivery and deposit of material on the site has not been given despite request; that no written response has been forthcoming and recently all efforts to deliver materials were blocked by prison officers without any explanation despite personal visits by the petitioners to the Prisons Department, Kitale. They therefore aver that they need their interest in the land protected pending hearing and determination of the suit.
3. The application is opposed. The respondents filed the replying affidavit sworn by one Samuel G. Mugo (S.P), currently the Officer in Charge at Kitale Medium Prison. S.P Mugodepones that the suit property is and has always been Government land gazetted on **1/4/1943**. He annexes a copy of the Gazette Notice as Exhibit "**SCM1**". He further depones that the suit land has never been available for allocation to individuals as the same has never been degazetted, and if as suggested by the petitioners, there was any allocation to them, the same was irregular and illegal.
4. In this application the question that arises is whether the petitioners merit the grant of interlocutory

injunction. In this application the principles laid down in the case of **Giella –vs- Cassman Brown 1973 EA 359** have to be satisfied. First and foremost is whether the petitioners established that they have a *prima facie* case with probability of success.

5. The Letter of Allotment (**Exhibit SCN1**) suggests that the land was allocated to the petitioners. A Part Development plan is attached to the Letter of Allotment. It can only be presumed that the proposal for allocation was made by the petitioners themselves as they did not attach any evidence of any application to that end.

6. There is a copy of a Grant was apparently prepared and lodged with the Registrar of Titles for registration on **28/4/1992**. Attached to the copy of the Grant is a copy of a **Deed Plan No. 161105** signed on behalf of the Director of Surveys. The Grant appears to have been registered on **28/4/1992** at **15.44 hrs**. The Grant appears to show that a parcel of land measuring **2.636 Hectares** was granted to the petitioners for a term of 99 years from **1/7/1991**. From the terms appearing on the copy, the grant states that the land and buildings shall only be used for Maternity and Nursing Home only.

7. A look at the prayers sought in the main petition is necessary, for they too may have a bearing on this application. The petitioners seek a declaration that their constitutional rights under **Article 21, 22, 23, 40, 47, 48, 50(1), 60(b)** and **64** of the Constitution have been violated and that the respondents' action amounts to deprivation of the petitioners' right to property.

8. They also seek a declaration that they are the lawfully registered owners of **Land Parcel No. 2116/1059**, and an order of permanent injunction barring the respondents from dealing in whatsoever manner with **LR.No. 2116/1059**. It would appear to me that the other prayers are all hinged on the declaration sought to the effect that the petitioners are the lawfully registered owners of **Land Parcel No. 2116/1059**.

9. It is incumbent upon the petitioners to demonstrate violation of their rights under the Constitution at the main hearing. For now the defence the respondents raise is that the land claimed by the petitioners was gazetted on **1/4/1943** as property of Kitale Prison. However the petitioners point out that the relevant **Gazette Notice No. 359** of **1/4/1943** is in respect of another parcel, **LR. No. 2197/2/2**.

10. The respondents have failed to draw a proper connection between **LR. No. 2197/2/2** and the land claim by the plaintiff either by way of geographical or genealogical description or by use of maps, outlining where the suit land is or, in view of the replying affidavit, how the plots are connected. In the face of the pleading by the respondents. It is also noteworthy that the applicants have also not shown the proper origins of the suit land.

11. However at this stage in the proceedings not much can be commented upon by the court regarding the merits of the parties' respective cases. I find the petitioners' claim to violation of rights under the constitution and claim for interim relief to be incongruous to the long and unexplained delay which appears to have prevailed before the claim was filed. The petitioners have also not presented a clear-cut case that would entitle them to the conservatory orders sought.

12. It is also noted that the petitioners do not expressly declare whether they have ever been in possession of the land, and if not so, why. This is vital in view of the submission by the respondents that "*the petitioners have since waited for 26 years without occupation and have not suffered damage. There is no allegation that the respondents intend to dispose of the land in any way*".

13. Twenty six years is quite a long period. What the petitioners seem to be admitting is that they have been kept out of this property by the respondents for a very long time, during which they never sought the court's intervention. The reasons for the delay are not given. This court finds that after such a long period, the urgency of this application is in doubt. There is the main suit that would resolve the issues herein with finality. This application is made in the suit.

14. From the discussion above, it is clear that the petitioners have not demonstrated that they have a *prima*

facie case or that they would suffer any loss or damage that would be beyond compensation in monetary terms if the orders sought are not granted pending the hearing of the suit.

15. Two limbs that comprise the appropriate test for the granting of injunction is the celebrated case of ***Giella –vs- Cassman Brown, 1973 E.A*** at **page 358**, have not been satisfied. There is no need to inquire into the issue of the balance of convenience. The circumstances are such that in this matter the evidence of both parties requires to be laid before the court for the purpose of proof of their respective cases so that a judgement on the merits of the case may be made.

16. The upshot of the above discussion is that application dated **2nd November, 2016** is hereby dismissed with costs. The Petition should be set down for hearing.

Signed, dated and delivered at Kitale on this **10th** day of **July, 2017**.

MWANGI NJOROGE

JUDGE

Ruling delivered in open court in the presence of:-

Mr. Barongo for the Applicants

N/A for the Respondents

MWANGI NJOROGE

JUDGE

10/07/2017