



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 272 OF 2015

BENARD BANGUA WAIHENYA

BENEDICTOR NJERI WAWERU

KENNEDY OCHIENG (Suing as chairman, secretary &

treasurer of Kamiti Farmers Traders).....PLAINTIFFS

VERSUS

SIMON KINYANJUI..... 1ST DEFENDANT

ANASTASIA GAKUYU GIKU.....2ND DEFENDANT

MICHAEL MACHARIA KAMAU.....3RD DEFENDANT

NG'ANGA MWAURA.....4TH DEFENDANT

KAMITI FARMERS CO. LTD.....5TH DEFENDANT

RULING

This was initially brought against the 1st to 4th defendants only on 2nd April, 2015. The 5th defendant was joined in the suit on 10th April 2015 on its own request. In their plaint dated 1st April, 2015, the plaintiffs who brought this suit as chairman, secretary and treasurer of an entity known as Kamiti Farmers Traders (hereinafter referred to as “**Kamiti Farmers**”) averred that Kamiti Farmers was at all material times the owner and was in possession of all those parcels of land known as Nairobi/Block 117/518 and Nairobi/Block 117/519 situated at Kahawa West, Nairobi (hereinafter referred to as “**the suit properties**”). The plaintiff’s averred that on or about 30th March, 2015, the 1st to 4th defendants entered the suit properties without the plaintiff’s permission and started digging trenches thereon for the purposes of erecting structures. The plaintiffs averred that 1st to 4th Defendants entry onto the suit properties amounted to trespass. The plaintiffs averred that the 1st to 4th Defendants have refused to stop the said acts of trespass even after a demand was served upon them to do so thereby rendering the filing of this suit inevitable.

Together with the Plaint, the plaintiffs filed an application by way of Notice of Motion dated 1st April 2015 seeking a temporary injunction to restrain the 1st to 4th defendants from trespassing onto and constructing structures on the suit properties pending the hearing and determination to this suit and, that the O.C.S Kiamumbi Police Station do supervise the implementation of the order if granted. The

application as supported by the affidavit and further affidavit sworn by the 2nd plaintiff on 1st April 2015 and 5th May 2015. The same was also supported by the affidavit of one, Mbugua Kariuki sworn on 5th May, 2015. In her affidavit sworn on 1st April 2015, the 2nd plaintiff deposed that on 8th September, 2014 Kamiti Farmers applied to the 5th defendant to be allocated the suit properties.

The plaintiffs' application was allowed by the 5th defendant who proceeded to issue Kamiti Farmers with a certificate confirming Kamiti Farmers' ownership of the suit properties. Kamiti Farmers paid a total sum of Kshs.40,000/= for the said certificates. The 5th Defendant thereafter wrote to the National Land Commission confirming that it had allocated the suit properties to Kamiti Farmers and asked the commission to approve Kamiti Farmers' sub-division scheme for the suit properties. On 14th January, 2015 Kamiti Farmers wrote to the Nairobi City Government seeking approval to set up a market on the suit properties. The suit properties were reserved and set aside by the 5th defendant for the establishment of a market and had been allocated to Kamiti Farmers for the same purpose. The Nairobi City Government asked Kamiti Farmers to submit a proposal for the proposed market which they did on 4th March, 2015. The 2nd Plaintiff averred that on 30th April 2015 the Plaintiffs visited the suit properties and found some people digging trenches for the purposes of putting up a foundation for a building. On making inquiry, they were informed that the said trenches were being dug on the instructions of the 1st to 4th Defendants who intended to put up structures on the suit properties. When they approached the 1st to 4th defendants and inquired from them why they had entered the suit properties, they were dismissive in their response.

The 2nd plaintiff annexed to her affidavit among others, a copy of a letter dated 16th September, 2014 through which the 5th defendant confirmed that it had allocated the suit properties to Kamiti Farmers, a copy of a certificate that was issued by the 5th defendant confirming that the suit properties had been allocated to Kamiti Farmers, copies of two (2) receipts both dated 1st October, 2014 for Kshs.20,000/= each issued by the 5th Defendant to Kamiti Farmers for the payments that had been made by the latter in respect of the suit properties, a copy of a letter dated 3rd October, 2014 by Kamiti Farmers thanking the 5th defendant for the allocation of the suit properties, a copy of a letter dated 22nd December, 2014 by the 5th Defendant to the National Land Commission requesting it to approve the subdivision scheme that had been prepared by the Kamiti Farmers for the suit properties, a copy of a letter dated 14th January 2015 by Kamiti Farmers to the Nairobi City County Government seeking approval to set up a market on the suit property.

The plaintiff's application was opposed by the defendants through grounds of opposition dated 4th April, 2015 and replying affidavit sworn by Michael Chege, the Vice Chairman of the 5th Defendant on 27th April 2015. In their grounds of opposition, the 1st to 4th defendants contended that the plaintiffs have not met the threshold for granting a temporary injunction. The 1st to 4th defendants termed the plaintiffs' application as incompetent, bad in law, fatally defective and an abuse of the process of the court. In his replying affidavit, Michael Chege the Vice Chairman of the 5th defendant deposed that the 5th defendant is a land buying company and is the registered owner of the suit properties. He stated that the 1st to 4th defendants are members of the 5th defendant. He deposed further that the plaintiffs who are not members of the 5th defendant have not exhibited any document evidencing the disposition of the suit properties to them by the 5th defendant. He admitted that the suit properties were reserved for the establishment of market stalls. He contended however that the said stalls were to be put up by members of the 5th defendant including the 1st and 4th defendants but not by non members. He denied that the 5th defendant had allocated the suit properties to the plaintiffs and contended that the issue had been referred to the police for investigation of suspected criminal acts of fraud, falsification of documents and impropriety in the alleged allocation of the suit properties to the plaintiffs. Mr. Chege deposed further that the members of the 5th defendant have resolved that the suit properties cannot be allocated to the Plaintiffs who are non members of the 5th defendant. He contended that the 1st to 4th defendants cannot be trespassers on their

own land.

In response to the contents of the affidavit of Michael Chege, the 2nd plaintiff swore a further affidavit in which she annexed an affidavit by Mbugua Kariuki sworn on 5th May 2015. Mbugua Kariuki was at all material times the Chairman of the 5th Defendant while Mr. Michael Chege was his vice chairman. In his affidavit, Mbugua Kariuki (“Mbugua”) confirmed that the suit properties were indeed allocated to Kamiti Farmers by the 5th defendant. He stated that the 1st, 2nd and 4th defendants are neither shareholders nor members of the 5th defendant. He stated further that the 5th defendant did not hold any annual general meeting on 20th March 2015 at which the purported resolution of 20th March 2015 were passed. He denounced a number of documents which are annexed to the affidavit of Michael Chege as not belonging to the 5th defendant.

He stated that the allocation of the suit properties to Kamiti Farmers was sanctioned by the members of the 5th defendant at a properly convened meeting that was held on 15th June 2013 at which as the chairman of the 5th defendant; he was authorized by the members to look for an organization that could develop the suit properties. He stated that Michael Chege who he claimed is now feigning ignorance of the transaction between the 5th defendant and Kamiti Farmers was one of the signatories to the certificate of ownership of the suit properties that was issued to Kamiti Farmers by the 5th defendant. He annexed to his affidavit, among others, copies of a letter that he wrote to among others the 1st to 4th defendants to keep off the suit properties, a copy of letter that he wrote to the Deputy County Commissioner on 27th March 2015 asking him to intervene and stop the invasion of the suit properties that had been allocated by the 5th defendant to Kamiti Farmers and a copy of the minutes of the Special General Meeting of the 5th defendant that was held on 15th June 2013.

On 25th May, 2015, the 5th defendant made an application for leave to cross-examine Mbugua on his affidavit aforesaid which it claimed had sparked uproar among the members of the 5th defendant. The application which was opposed by the Plaintiffs was withdrawn by the 5th defendant on 17th September 2015. On 4th May, 2015, the court directed that the plaintiff’s application be heard by way of written submissions. The Plaintiffs filed their submissions on 15th May, 2015, the 1st to 4th defendants on 25th May, 2015 and the 5th defendant on 7th October 2015.

I have considered the plaintiffs’ application together with the affidavits filed in support thereof. I have also considered the defendants’ grounds of opposition and replying affidavit filed in opposition to the application. Finally, I have considered the parties’ respective submissions and the authorities cited in support thereof. What is before me is an application for an interlocutory injunction pending the hearing of the parties’ dispute. At this stage, the court is not supposed to express any firm or definite opinion on the merits of the parties’ respective cases. The principles upon which the court exercises its discretion in applications for interlocutory injunction were set out in the case of **Giella Vs. Cassman Brown & Company Ltd. (1973) E. A. 358** which has been cited by both parties. What I need to determine is whether the plaintiffs have satisfied the conditions that were set out in that case for granting the injunction sought. As submitted by the 5th defendant, the plaintiffs had to demonstrate that they have a prima facie case against the defendants with a probability of success and that they stand to suffer irreparable injury which cannot be adequately compensated in damages. If the court is in doubt as to the above, the application would be determined on a balance of convenience. On the material before me, I am satisfied that the plaintiffs have established a prima facie case against the defendants with a probability of success. As I have stated at the beginning of this ruling, this suit was instituted against the 1st to 4th defendants. The plaintiffs’ claim as pleaded in the plaint is against the 1st to 4th defendants only. The injunction sought in the plaint and the application before me is against the 1st to 4th defendants only. The 5th defendant sought to be joined in the suit on the ground that it is a necessary party in the proceedings whose presence would assist the court to fully and finally determine all the issues arising between the parties to this suit.

As at the time when the application before me was argued, the plaint had not been amended formally to join the 5th defendant in the suit. In the circumstances, it is not clear as of yet whether the plaintiffs would have any claim against the 5th defendant and the nature of the defence which the 5th defendant would put forward to that claim. The 5th Defendant's participation in the present application was essentially to support the 1st to 4th defendants against whom an interlocutory injunction has been sought. Arising from the foregoing, what is up for consideration is whether or not the plaintiffs have established a prima facie case against the 1st to 4th defendants.

The plaintiffs' claim against the 1st to 4th defendants is based on trespass. Trespass has been defined as any intrusion by one person on the land in the possession of the other. The plaintiffs have placed before the court sufficient material which shows that the suit properties were allocated to Kamiti Farmers by the 5th defendant. The plaintiffs have exhibited a letter by the 5th defendant dated 16th September, 2014 and a certificate of ownership also issued by the 5th defendant confirming the allotment of the suit properties to Kamiti Farmers. There are also subsequent correspondences showing that the 5th defendant had allocated the suit property to Kamiti Farmers. The 1st to 4th defendants did not file a replying affidavit to contest the factual averments contained in the 2nd plaintiff's affidavit in support of the application herein. The said averments were however challenged by the 5th defendant through the affidavit of Michael Chege its vice chairman that I have referred to above. Mr. Chege had contended that the 5th defendant did not allocate the suit properties to Kamiti Farmers and that the authenticity of the documents which have been relied on by the Plaintiffs in support of the purported allocation are doubtful. The forgoing contentions by Mr. Chege were however dismissed by Mbugua Karuiki the Chairman of the 5th Defendant who swore an affidavit in support of the Plaintiffs' application. Mr. Mbugua stated that the suit properties were allocated to Kamiti Farmers by the 5th defendant following a resolution by the members of the 5th defendant that the same be allocated to an organization that could establish market stalls thereon. Mr. Mbugua stated that Mr. Chege fully participated in the allocation of the suit properties to Kamiti Farmers and was even a signatory to the certificate of ownership that was issued by the 5th defendant to Kamiti Farmers. Mr. Mbugua also confirmed that the documents that have been annexed to the 2nd Plaintiff's affidavit in support of the application herein are genuine. He on the other hand denied the genuineness of the minutes, certificates of ownership and a receipt which are annexed to the affidavit of Michael Chege. Mr. Mbugua also contended that the 1st, 2nd and 4th defendants are neither shareholders nor directors of the 5th defendant and as such have no right to interfere with the suit properties which the 5th defendant had allocated to Kamiti Farmers. Neither the 1st to 4th defendants nor the 5th defendant filed an affidavit to controvert the contents of the affidavit that was filed by Mbugua Kariuki. An attempt by the 5th defendant to cross-examine him on that affidavit was abandoned.

Looking at the affidavits of Michael Chege and Mbugua Kariuki, I am more inclined to believe the affidavit of Mbugua Kariuki as against that of Michael Chege. Mr. Chege has in his affidavit maintained that the suit properties could not have been allocated to the plaintiffs who are non members of the 5th defendant. He has however not disputed the minutes of the Special General Meeting of the 5th defendant that was held on 15th June, 2013 in which the members of the 5th defendant resolved among others to look for government institutions or organization that could develop the suit properties for the purposes for which they were intended. Mr. Chege has not denied that he was present at the meeting and contributed to the debate on the suit properties before the said resolution was passed.

Mr. Chege has also not denied Mr. Mbugua's allegation that he was one of the officials of the 5th defendant who signed the certificate of ownership that was issued by the 5th defendant to Kamiti Farmers. Considering the affidavit evidence before me in totality, I am persuaded that the 5th defendant allocated the suit properties to Kamiti Farmers.

The suit properties from the evidence on record were reserved by the 5th defendant as public utility plots when it was sub-dividing its then larger parcel of land known as LR No. 8570. Having reserved the plots

for public use, I see no inconsistency in the 5th defendant allocating the said plots to Kamiti Farmers to set up a market for use of the public. The suit properties did not belong to the 1st to the 4th defendants three (3) of whom are said to be non-members of the 5th defendant. The 1st to 4th defendants have not disclosed the nature of their interest on the suit properties.

As I have stated above, the 1st to 4th defendants did not file any affidavit in response to the present application. The plaintiffs having demonstrated that the suit properties were allocated to them by the 5th defendant and that they were in possession of the same when the 1st to 4th defendants entered thereon and started digging up trenches without their permission, I am of the view that they have established a prima facie case of trespass against the 1st to 4th defendants. The 1st to 4th defendants have not denied that they entered the suit properties and started digging trenches and assembling building materials. The 1st to 4th defendants have not stated under what authority they were carrying out these undertakings. I am in agreement with the submission by the 5th defendant that the plaintiffs have not exhibited an agreement which they entered into with the 5th defendant in respect of the suit properties that would entitle them to maintain this suit. I am of the opinion however that the provisions of section 3 (3) of the Contract Act and Section 38 of the Land Act, 2012 which have been cited by the 5th defendants advocates are not applicable to the facts of this case. As I have stated above, the plaintiffs have not sued the 5th defendant. The plaintiffs have not alleged that they had entered into an agreement with the 5th defendant for the disposition of the suit properties and that the 5th defendant has breached the same. The plaintiffs' case is that the suit properties were reserved by the 5th defendant as public utility plots and that they applied to the 5th defendant to allocate the same to them so that they may set up a market thereon which request was accepted by the 5th defendant. Their complaint is against the 1st to 4th defendants who are said to have entered onto the suit properties which had been allocated to them by the 5th defendant without their permission. Their claim is based on trespass. The provisions of section 3(3) of the Contract Act and Section 38 of the Land Act aforesaid are totally inapplicable.

I am also satisfied that the plaintiffs would suffer irreparable injury which cannot be compensated in damages if the orders sought are not granted. From the material on record, the plaintiffs had intended to set up market stalls on the suit properties. The photographs annexed to the 2nd plaintiff's affidavit in support of the application show that the 1st to 4th defendants have dug trenches on which they want to lay a foundation for the structures that they wish to put up on the suit properties. Since the 1st to 4th defendants did not file any affidavit, it is not clear as to what type of structures they intended to put up on the suit properties. The said structures may not be consistent with the use for which the plaintiffs wanted to put the suit properties. The same may also interfere with the texture of the properties and also more importantly, dispossess the plaintiffs of the suit properties.

All these factors considered together leave no doubt that the plaintiffs would suffer irreparable injury if the orders sought are not granted.

In conclusion I am satisfied that the plaintiffs have satisfied the conditions for granting interlocutory injunction. I therefore allow the application dated 1st April, 2015 in terms of prayers 3 and 4 thereof. The plaintiffs shall have the costs of the application.

Delivered, Dated and Signed at Nairobi this 29th day of January, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Mugikuyu

for the Plaintiffs

N/A for the 1st to 4th Defendants

N/A for the 5th Defendant