



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO 87 OF 2016

MARY VUHYA CHOGE (ASSOCIATE PASTOR) ALEXANDER MASESE (ELDER)

BERNARD ONDUKO MATARA (PASTOR)

Suing on their own behalf and on behalf of **NJORO CHURCH OF GOD....PLAINTIFFS**

VERSUS

THE BOARD OF GOVERNORS NJORO

TOWNSHIP PRIMARY SCHOOL.....1ST DEFENDANT

THE BOARD OF GOVERNORS NJORO TOWNSHIP

MIXED SECONDARY SCHOOL2ND DEFENDANT

NJORO TOWNSHIP PRIMARY SCHOOL.....3RD DEFENDANT

NJORO TOWNSHIP MIXED SECONDARY SCHOOL.....4TH DEFENDANT

RULING

(Application for injunction; principles to be applied; plaintiff claiming ownership of certain land; plaintiff relying on an allotment letter issued by the county council of Nakuru; defendants claiming the same land belongs to them; evidence showing that the allotment of the land to the plaintiff was revoked; no prima facie case established; application dismissed with costs)

1. The plaintiff in this case, the Njoro Church of God, suing through its officials, has sued the four schools, all situated in Njoro within Nakuru County, claiming that the defendants have trespassed into land owned by the plaintiff described as Plot No. Zone 2₁. It is pleaded that the defendants occupy adjoining property but have threatened to unlawfully grab the plaintiff's land. In the suit, the plaintiff has sought orders of a declaration that the plot No. Zone 2₁ is owned by the plaintiff, an order of permanent injunction to restrain the defendants from the said plot and damages.

2. Together with the plaint, the plaintiff filed an application seeking to have the defendants restrained from the said plot. In the application, the plaintiff averred that the defendant have commenced development on the plot hence the need to have an order of injunction.

3. In the affidavits filed in support of the application, sworn by Benard Onduko Masese, the Pastor of the plaintiff church, it is deposed inter alia that sometimes in the year 1996, the plaintiff made an application to be allotted the Plot No. 2₁ which adjoins the church for purposes of constructing a nursery school. It is averred that the County Council of Nakuru then approved the application and issued an allotment letter. The Church then made an application to be issued with a title deed after clearing all that was due to the County Council. Despite this, the defendants have laid claim to the land and commenced construction works. Some photographs showing the construction are annexed. Also annexed is a report by a surveyor by name of Joseph Mukholi Wekesa which contends that the construction is within the Church compound and not the schools compound. He has annexed a sketch plan of a Part Development Plan and demonstrated where the construction is situated within the plan.

4. The defendants have opposed the application through the affidavit of Jane Mbugua Wanjeri. She is the Principal and Secretary of the Board of Management of Njoro Township Mixed Secondary School, the 2nd defendant. She has deposed that the respondents legally occupy property allocated to them by the Commissioner of Lands on 29 March 1999. A dispute arose between the plaintiff and the 1st respondent on the plot in issue and the matter was referred to a committee of the County Council of Nakuru (now defunct), for arbitration. The Committee held that the land had initially been allocated to the 1st respondent for the 1st respondent's nursery school. It held the allocation of the land to the applicant to be irregular and proposed that the applicant be considered for an alternative plot.

5. This decision was communicated to the applicant through a letter dated 5 September 2011, which letter was annexed. She has averred that the ongoing construction is of a laboratory and washrooms for the 2nd respondent.

6. The defendants have also filed defence and a counterclaim. In their counterclaim, they have sought to have the plaintiff restrained from the suit property.

7. A supplementary affidavit was filed by the plaintiff vide which it is deposed that the respondents have no title to the land and that the allotment letter did not confer any ownership of the land to the respondents. Some more letters aimed at proving ownership of the plot were annexed.

8. I have considered the material placed before me by both parties together with the submissions of both Mr. Keboga for the applicant and Mr. Mbaka for the respondents.

9. The application before me is one for injunction and I stand guided by the principles laid down in the case of ***Giella vs Cassman Brown (1973) EA 358***. In the said case, it was held that to succeed in an application for injunction, one needs to demonstrate a prima facie case with a probability of success; demonstrate irreparable loss if the injunction is not granted; and if in doubt, the court will decide the application on a balance of convenience.

10. In order to assess whether an applicant has displayed a prima facie case with a probability of success, the court inevitably has to make a preliminary assessment of the case of the applicant, based on the material presented by the applicant. Where the respondent has replied to the application, the assessment has to be made in light of the response tabled by the respondent. The court then has to weigh the material and assess whether they demonstrate a likelihood that the applicant stands a greater chance at succeeding in the case as compared to the respondent. The holding of the court at this stage is only preliminary, based on what the parties have presented, and is aimed at enabling the court come to a finding on how the subject matter of the suit ought to be preserved. The same is not binding to the court, which is free to come to a different conclusion after hearing the suit on merits.

11. From the material tabled by the parties herein, it does appear to me that the applicant was granted a plot No. 4₁, which plot is not in dispute. Through a letter titled "Allocation of a Plot" dated 5 December 2005, the County Council of Nakuru allotted the applicant the subject plot which is Plot No. 2₁ (also sometimes described as Plot No. 2₁₁) for purposes of putting up a nursery school. It is not very clear to me how big this plot is. However, it does appear that there was a protest from the Njoro Township Primary School, for I have seen a letter dated 11 January 2006, addressed to the said school by the County Council

of Nakuru, asking the school not to interfere with this plot. The School itself holds an allotment letter dated 29 March 1999, for a plot measuring 5 Hectares.

12. The dispute between the two parties was mediated by the County Council of Nakuru on 2 March 2011. The County Council after analyzing the issues and sending a surveyor to the ground, found that the School has its 5 Ha whereas the Church was in possession of the plot No. 41 which it had developed. The Committee found that there was no extra land that could accommodate a further allocation of Zone 21 to the plaintiff church. It concluded that the allocation of the plot Zone 21 was irregular as there was no land to support the said allocation, hence the same should be revoked. It was of opinion that the church may be considered for an alternative plot.

13. The applicant has not tabled any material informing me that they appealed against this decision or filed any suit against the County Council of Nakuru. It is the County Council of Nakuru which allotted the plot to the plaintiff and it is the same County Council which held that the allocation was irregular. There is nothing from the County Council of Nakuru or the present Nakuru County Government which supports the allocation of the land to the applicant coming after the decision of 2 March 2011.

14. The plaintiff has not displayed to me any Certificate of title over the suit property. None has been granted to it despite the plaintiff applying for it. This informs me that it is probable that the allocation of the land to the applicant has never been sanctioned. The plaintiff will of course have a chance to demonstrate otherwise at the full hearing of the suit, but for the moment, I am not persuaded that the plaintiff has displayed before me a *prima facie* case with a probability of success, especially in light of the decision of the arbitration committee of the County Council of Nakuru. Given that position, I am unable to issue an order of injunction to the plaintiff to stop the ongoing construction of the school.

15. Even if I was in doubt, the balance of convenience would tilt in favour of the respondents. I have seen photographs of the construction complained of and it seems to me to be at a fairly advanced stage. The development is indeed almost complete and has even been roofed. If the applicants had come much earlier, when the construction had barely began, probably the balance would have been in their favour. But they have come when the construction is more or less complete and the balance therefore tilts in favour of the respondents. It would be unfair to stop the respondents from completing the construction and utilizing the suit property as this case proceeds given that the plaintiff has not displayed a *prima facie* case with a probability of success.

16. For the above reasons, I find no merit in the application by the plaintiff and the same is dismissed with costs. For the avoidance of doubt, all interim orders are hereby vacated.

17. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 18th day of October 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of :-

Mr. Keboga for the plaintiff/applicant

N/A on part of the State Law Office for the defendants/respondents

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU