



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 883 OF 2013

CHURCH COMMISSIONERS FOR KENYA.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

This ruling is on the Plaintiff's Notice of Motion dated 22nd July 2013, seeking orders that the Defendant be restrained from evicting the Plaintiff from a parcel of land known as Nairobi/Block 72/2256 (hereinafter referred to as the suit property), and/or demolishing the Plaintiff's church buildings and other structures on the said property, or trespassing thereon pending the hearing and determination of this suit or until further orders of this court. The Notice of Motion is supported by an affidavit and further affidavit sworn on 22 July 2013 and 5th September 2013 by Mercy Maina, the Pastor of ACK Church of the Good Shepherd Langata which is situated on the suit property, and is in the Nairobi Diocese of the Plaintiff.

The Plaintiff claims that it holds a valid title to the suit property, and followed the right procedure to acquire the said parcel of land. Further, that the Plaintiff has been in occupation of the said property for the last thirty years, and has made investments on the said land, on which there is a church building, office block and other structures, which were approved by the Director of Physical Planning. The deponent in her affidavit gave a detailed account of the history of the process of acquisition of the suit property. She attached two letters of allotment dated 7th February 1983 and 14th July 1986, correspondence on the survey of the said plot, photographs of the suit property and a copy of the Plaintiff's title to the suit property issued on 12th July 2013.

The deponent further claimed that in 2010 the 1st Defendant marked various buildings including their church with yellow crosses and the word "demolish", without any prior notice or explanation. Further, that the Plaintiff wrote to the 1st Defendant and explained the history of their acquisition of the suit property. The deponent averred that the boundaries of the suit property show that it does not encroach on the road reserve, and relied on a Part Development Plan issued on 19th June 17 that was annexed to their second allotment letter, and on an exhibit from Survey of Kenya in this regard. The deponent also averred that the exhibits produced by the 1st Defendant do not clearly show where the suit property is situated and if it is within the road reserve.

The 1st Defendant opposed the Plaintiff's Notice of Motion in a replying affidavit sworn on 20th August 2013 by Thomas Gacoki, the Manager of Survey of the 1st Defendant. He stated that the 1st Defendant has commenced construction work on the Trans Africa Highway and that the suit property is located on a

road reserve and buffer zone. Further, that once the suit property was planned and zoned, any subsequent allocation of the same was unlawful and contrary to public interest.

He further stated that the Ministry of Roads and Public Works and Housing gave notice to the public to remove any illegal structures existing on road reserves by way of Gazette Notice No. 3632 published on 6th June 2003, and a notice of demolition in the Kenya Times newspaper on 6th August 2003. The deponent stated that the 1st Defendant then subsequently marked various buildings including the suit property for demolition in 2010 and 2013.

Further that it appears the title and process of allocation of the suit property was irregular as the first letter of allocation was issued on 7th February 1983, while the title was issued on 12th July 2013, 20 years later, and when the construction of the Trans Africa Highway was being undertaken. The deponent attached copies of the notices referred to, and various survey plans and drawings of the suit property.

The 2nd Defendant did not file any response to the Plaintiff's Notice of Motion.

The parties were directed to file written submissions, and the Plaintiff's counsel in submissions dated 5th September 2013 argued that the Plaintiff acquired the suit property legally, there is no proof of impropriety on its part, and it is therefore entitled to protection of its right to property under Article 40 of the Constitution. Further, that it has therefore established a *prima facie* case with probability of success, and that it would suffer irreparable loss if its investments on the suit property are demolished. The counsel relied on various judicial and academic authorities in this regard.

The 1st Defendant's counsel in submissions dated 26th September 2013 reiterated that the suit property is located on a road reserve and buffer zone, and relied on the decision in **Cycad Properties Limited & Another vs The Attorney General and 4 Others (2013) e KLR** that buildings cannot be allowed to stand on road reserves. Further, that the suit property was not properly alienated and allocated according to the provisions of the repealed Government Lands Act, and even if properly allocated did not defeat the government's right to use the land for public purposes.

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff has provided evidence of its title to the suit property. The Defendant claims that the title was irregularly acquired. This is an issue that can only be determined after full hearing and benefit of further evidence and not at this stage. In addition both the Plaintiff and 1st Defendant have relied on various development and survey plans to buttress their arguments as to the location of the suit property. While the exhibit produced by the Plaintiff seems to support her argument that the suit property is not located on a road reserve or buffer zone, there are apparent conflicts between the plans produced by the parties as to the location of the suit property.

The relevant survey authorities therefore need to confirm to this court whether the suit property is located on a road reserve or buffer zone or not, and to produce the approved survey plans of the location of the suit property and Trans Africa Highway before any final orders can be made. In the circumstances I find that the Plaintiff has shown a *prima facie* case, and will also suffer irreparable loss if the injunction orders sought are not granted as it is not disputed that it has undertaken various developments on the suit property. I however also note the public interest in having the construction of the Trans Africa Highway proceed without undue delay.

The Plaintiff's Notice of Motion dated 22nd July 2013 is therefore allowed conditionally, and this court

accordingly orders as follows:

1. The Defendant, its servants and/or agents be and are hereby restrained from evicting the Plaintiff from the parcel of land known as Nairobi/Block 72/2256, and/or demolishing the Plaintiff's church buildings and other structures on the said property or trespassing thereon for a period of six months .
2. The Plaintiff shall within the said six months set the suit herein for hearing on a priority basis, and in default the injunction orders herein shall lapse.
3. The Parties shall be at liberty to apply.
4. The costs of the Plaintiff's Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____28th____ day of ____January____, 2014.

P. NYAMWEYA

JUDGE