



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 402 OF 2013

SURESH KUMAR SAFAT.....1ST PLAINTIFF

SADINA SOFAT.....2ND PLAINTIFF

VERSUS

TRUSTEES OF THE KENYA ASSEMBLIES OF GOD...1ST DEFENDANT

NAIROBI CITY COUNCIL.....2ND DEFENDANT

RULING

The Pleadings

The Plaintiffs are seeking the following orders in a Notice of Motion dated 22nd August 2013:

1. That the Defendants either by themselves, their agents, proxies and/or any other persons purporting to act under them be restrained from trespassing, transferring, constructing, developing and/or interfering in any way with the Plaintiff's peaceful possession of all that property identified as L.R. No. 209/11251, situated along Kabithi Road off Mombasa Road, pending the hearing inter partes of this suit.
2. That the 1st Defendant be directed by this Honourable Court to yield vacant possession of all that property identified as L.R No. 209/11251, (hereinafter referred to as the suit property), situated along Kabithi Road off Mombasa Road.

The Plaintiffs rely on their application and supporting and further affidavit sworn by the 1st Plaintiff on 22nd March 2013 and 23rd July 2103 respectively. They state that they are the registered owners of the suit property for a term of 99 years with effect from 1st day of July 1998, and attached copies of the Title Deed, Deed Plan and official search of the suit property. Further, that they were duly allotted the suit property by the Department of Lands on the 21st July 1998 and consequently paid the relevant statutory payments owing to the Government of Kenya. They also attached a copy of the Letter of Allotment date 21st July 1998.

The Plaintiffs further claim that after securing the suit property, they erected a fence around it but did not develop for lack of funds. Further, that in 2005 they proceeded to the United Kingdom leaving the suit

property unattended. The Plaintiffs stated that they came back to Kenya in December 2012 with the intention of *inter alia* developing the suit property, and that on visiting the site, discovered that some people had occupied the same. They further stated that they were advised that the 1st Defendant had occupied the same and erected temporary structures thereon with the authority of the 2nd Defendant. The Plaintiffs thereupon requested for assistance from the 2nd Defendant to cause vacant possession, and an enforcement notice was issued by the said Defendant on 28th January 2013 but the same has not been acted on to-date.

The 1st Defendant opposed the Plaintiffs' Notice of Motion in a replying affidavit sworn on 7th May 2013 by Reverend Fredrick M. Kibuga, the church minister in charge of the church erected on the suit property, and who had authority of the 1st Defendant to swear the affidavit. He stated that the 1st Defendant applied to the Commissioner of Lands requesting to be allocated a plot on which to build church offices, and that after various correspondences they were allocated the suit property, then unsurveyed, on 3rd November 1988.

Further, that he was aware that as from the year 1996, the 1st Defendant erected its church on the suit property, where they worship every Sunday and that they have been in possession, used and developed the suit property fully. He also stated that the allegations by the Plaintiffs that they erected a fence over the suit property but did not develop the same cannot be true, since the 1st Defendant has been in occupation of the suit property since the year 1988. The 1st Defendant averred that the prayers for vacant possession cannot be granted at this stage as the court would be determining ownership in favour of the Plaintiffs prematurely without conducting a full hearing.

The 2nd Defendant also opposed the Notice of Motion in a replying affidavit sworn on 18th September 2013 by Rose Muema, its Director of Physical Planning. She stated therein that under the Physical Planning Act and the County Government Act, the 2nd Defendant is legally mandated to regulate and licence all development projects within its jurisdiction. Further, that upon their visit to the suit property they established that the Plaintiffs and the 1st Defendant had carried out construction of buildings thereon and occupation of the same without approvals from the 2nd Defendant.

The deponent stated that they subsequently issued an Enforcement Notice requesting the Plaintiffs and 1st Defendant to stop further illegal development and remove the said illegal building structures within 7 days. She averred that the law requires the person served with an Enforcement Notice to comply or if dissatisfied to appeal to the respective Liaison Committee, and that since the Plaintiffs and the 1st Defendant have neither complied with the said Enforcement Notice nor exhausted the procedure of appeal, the instant suit is premature, an abuse of court process and meant to allow the Plaintiffs and the 1st Defendant carry out an illegal activity.

The Submissions

The court directed the parties to file written submissions on the Plaintiffs' Notice of Motion. The Plaintiffs' counsel filed submissions dated 25th September 2013 wherein he relied on the decision of the Court of Appeal in **Mrao Ltd vs First American Bank of Kenya & 2 Others, (2003) KLR 125** and section 26 (1) of the Land Registration Act to argue that the Plaintiffs have brought clear evidence that they are the registered owners of the suit property, and that no accusations of fraud or illegality have been levelled against them. Further, that they therefore have an indefeasible title to the suit property. The counsel argued that the 1st Defendant's letter of allotment may be fraudulent.

The counsel also submitted that the 1st Defendant has undertaken illegal construction on the suit property which will waste the suit property and render it unsuitable for the developments the Plaintiffs' want to undertake, and which they intend to be their source of livelihood. Further, that the 1st Defendant has also not shown that they have the means of meeting an award of damages to the Plaintiffs. On the grant of a mandatory injunction, the Plaintiffs' counsel submitted that this case is very clear as the Plaintiffs are the

registered owners of the suit property, and no defence to their ownership has been established.

The counsel for the 2nd Defendant filed submissions dated 4th October 2013 and reiterated the arguments made in their pleadings. He urged the Court to compel the Plaintiffs and 1st Defendant to comply with the requirements of the 2nd Defendant's Enforcement Notice and the Physical Planning Act.

The 1st Defendant did not file any written submissions.

The Issues and Determination

I have carefully read and considered the pleadings and arguments made by the parties herein. I will first address the preliminary issue raised by the 2nd Defendant as to the competence of the Plaintiffs' suit and Notice of Motion, where it was argued that the Plaintiff ought to have proceeded by way of appeal to the relevant Liaison Committee under the Physical Planning Act. It is the view of this Court in this regard that it has exclusive jurisdiction under Article 162(2)(b) of the Constitution to hear and determine all disputes as to the title to, use and occupation of land. Furthermore, the liaison committees set up under the Physical Planning Act do not have jurisdiction to grant the prayers and relief sought by the Plaintiff, particularly as to the vacant possession and ownership of the suit property. The Plaintiffs' suit and Notice of Motion are therefore properly before this court.

I will now proceed to determine the substantive issue raised by the Notice of Motion, and these are whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** and **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109** as to the grant of a temporary and mandatory injunction respectively.

The requirements for the grant of a temporary injunction 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 the letter of allotment and title to the suit property issued to them 21st July 1998 and 30th November 2005 respectively. The Defendant has provided a letter of allotment for an unsurveyed plot No. 1, issued to them by the Commissioner of Lands on 3rd November 1988.

I find that the Plaintiffs have established a *prima facie* case in this regard, as they have a title issued with respect to the suit property to a third party. The Defendant's letter of allotment on the other hand is with respect to an unidentified property. The Plaintiffs will also suffer irreparable harm as it is evident that the 1st Defendant has constructed structures on the suit property, which the 2nd Defendant has confirmed was done without the relevant approvals. The Plaintiffs are therefore entitled to the temporary injunction sought.

On the issue of the grant of the mandatory injunction sought, it was held by the Court of Appeal in **Kenya Breweries Ltd and Another v Washington Okeyo (2002) 1 E.A. 109** that for a mandatory injunction to issue, there must be special circumstances that exist over and above the establishment of a *prima facie* case, and even then only in clear cases where the court thinks that the matter ought to be decided at once.

It was argued by the 1st Defendant in this respect that granting the mandatory injunction at this stage would mean that the court is determining the ownership in favour of the Plaintiffs prematurely through the Notice of Motion application. The Plaintiffs have however brought evidence that they are the registered owners of the suit property, and as registered owners they are entitled to possession. In addition, the 1st Defendant in its Defence filed herein 8th May 2013 does not raise any counterclaim to challenge the Plaintiffs' title or seek any claim or prayers of ownership to the suit property. The 1st

Defendant also still has the opportunity to ventilate any claims of ownership to the suit property at the full hearing of this suit. I also note in this respect that the developments by the 1st Defendant on the suit property have been found to have been made without the necessary approvals.

I am therefore of the view that special circumstances exist in this case to warrant the grant of the mandatory injunction sought of vacant possession. I am in this respect also guided by the decision of the Court of Appeal in **Dr. Joseph arap Ngok vs Justice Moiwo ole Keiwa & 4 Others, Nairobi CA No 60 of 1997** that in the cases of double allocation a party who has been issued with a good title takes precedence over other equitable rights to the title. This finding notwithstanding, I appreciate the fact that the 1st Defendant have erected structures on the suit property, and may therefore require adequate notice and time to remove the said structures from the suit property.

The Plaintiff's Notice of Motion dated 22nd August 2013 is accordingly allowed and it is hereby ordered as follows:

1. That the Defendants either by themselves, their agents, proxies and/or any other persons purporting to act under them be and are hereby restrained from trespassing on, transferring, constructing, developing and/or interfering in any way with the Plaintiffs' peaceful possession of all that property identified as L.R. No. 209/11251, situated along Kabithi Road off Mombasa Road, pending the hearing and determination of this suit or until further orders.
2. That the 1st Defendant shall within sixty (60) days of service by the Plaintiffs of the orders granted herein yield vacant possession of all that property identified as L.R No. 209/11251, situated along Kabithi Road off Mombasa Road to the Plaintiffs. Eviction orders shall issue upon default.
3. The Plaintiffs shall serve the 1st and 2nd Defendants with the orders herein within fourteen (14) days of the date of this ruling.
4. The costs of the Plaintiffs' Notice of Motion dated 22nd August 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___3rd___ day of ___March___, 2014.

P. NYAMWEYA

JUDGE