



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 736 OF 2011

JESSEE GITAU M. GITAU

NELSON NYOIKE NGANGA

REV. LILIAN WAMBURA MUNYIRI (Suing for and on behalf of

THE GOOD SAMARITAN CHURCH KOMAROCK NAIROBI

(A BRANCH OF THE ANGLICAN CHURCH OF KENYA).....PLAINTIFF

VERSUS

THE CITY COUNCIL OF NAIROBI DEFENDANT

RULING

The Plaintiff's Application

The application before the court is a Notice of Motion dated 21st December 2011 filed by the Plaintiff seeking orders of a temporary injunction against the Defendant from threatening to demolish, demolishing, or pulling down the Church structures on plot No. A-09, 10, 11 and 19 Komarock II Shopping Centre "A" otherwise variously described as plot No. 241, 242, 243 or BLK 249 (J10) Komarock (HFCK) phase II Shopping Centre (hereinafter "the suit properties"). Further, that the Defendant be restrained from interfering in any other manner with the quiet enjoyment user, and/or occupation of the same by the Good Samaritan ACK Church Komarock Parish pending the hearing and final determination of the suit filed herein. The Plaintiffs also seek orders that the 2 notices issued by the Defendant dated 11th November, 2011 be declared null and void.

The grounds for the application are that the Good Samaritan ACK Church is the legal owner of the suit properties on which it has built a temporary church structure and a multi-purpose hall amongst other facilities. Further, that the Defendant without any colour of right or legitimate justification has issued 2 notices by which it demands that the said structures be removed failing which it would take unspecified appropriate legal action without any further reference. The Plaintiffs are therefore apprehensive that the Defendant will demolish the structures on the suit properties.

These grounds are detailed out in the 1st Plaintiff's supporting affidavit sworn on 21/12/2011, wherein he stated that the church bought one of the suit properties (plot A9) from one Julius Kamau Ngutho, though the formal transfer of the same has not been effected, and that the rest of the suit properties were allocated to it by the Nairobi City Council. The deponent further stated that the structures constructed on the suit properties are used by the church goers for worship and other related church activities , and annexed

photocopies of the said sale agreement and photographs of the said structures.

The deponent stated that on or about the 23rd November 2011 the Defendant's officers dropped into the said church compound 2 notices dated 11th November 2011, by which the Defendant purported to give the church seven (7) days' notice to remove some alleged encroachment on a road reserve. The deponent attached copies of the said notices, and stated that the suit properties do not encroach on any road reserve, and that the Plaintiffs have been paying the annual land rates for the said properties. The deponent also referred to survey reports that he averred point to double allocation of the suit properties, and to another suit filed in this court in **Harun Gachie Mahianyu –vs- The Church Commissioners Of Kenya & Another, Nairobi ELC No. 356 of 2010**, in which the Plaintiff is claiming plot A9 of the suit properties.

The Defendant's Response

The Defendant opposed the Plaintiff's application in Grounds of Opposition dated 2nd May 2012, and in a replying affidavit sworn on 27th September 2013 by Erick Abwao, its Assistant Director of Legal Affairs. The Defendant stated that the Plaintiffs' application is premature in so far as the Plaintiffs have failed to pursue the mandatory procedure of resolving this dispute as clearly stipulated under the Physical Planning Act. The Defendant averred that it would be against the public interest to permit the Plaintiffs to perpetuate an illegality by occupying and undertaking development on a road reserve. Further, the fact that the Plaintiffs were allocated the subject plots through inadvertence or otherwise, does not justify their illegal stay on and occupation of a road reserve.

The Defendant also deponed that the law generally and the Defendant's regulations in particular prohibit all persons, including the Plaintiffs herein, from carrying out development within the Defendant's local area of jurisdiction without a development permission properly granted to them by the Defendants. Further, that any dealing in connection with any development in respect of which no proper permission has been granted is null and void and that such development stands to be discontinued.

The Submissions

The parties were directed to file written submissions on the Plaintiffs' application. The Plaintiffs' counsel filed submissions dated 27th September 2013, wherein he argued that this court has jurisdiction and has entertained suits against local authorities in various suits that he cited. Further, that the Plaintiffs have demonstrated a *prima facie* case against the Defendant as they have demonstrated ownership of the suit properties, and the issuance of the two notices to owners of the plots referred to as L.R Komarock 242 and 243 to remove the structures on the same for allegedly encroaching on the road reserve.

The counsel submitted that the different description of the plots in the said notices was a triable issue that can only be resolved at full trial. Lastly, the Plaintiffs' counsel submitted that the loss that the Plaintiffs would suffer if the structures on the suit premises are demolished would not be quantifiable in money terms, as the premises are used by church goers for their spiritual needs.

The Defendant's counsel filed written submissions dated 27th September 2013. The counsel contended that while he was aware of the jurisdiction of this Court under the Constitution and Environment and Land Act, parties ought to first exhaust all the statutory and alternative procedures before moving the court for remedies. Further, that the procedure laid down in section 38 of the Physical Planning Act is in mandatory terms, and the Plaintiffs' application was therefore premature.

The counsel further submitted that the Plaintiffs had not shown a *prima facie* case as they have admitted that the notices were not directed at them or their structures, and that it would be against the public interest to permit the Plaintiffs to perpetuate an illegality by occupying and making a development of a road reserve.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the parties herein. The question to be determined is whether the Plaintiffs have met the threshold for the grant of temporary orders of injunction. I will therefore proceed to determine the Plaintiff's Notice of Motion on the basis of 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 answer is whether the Plaintiff has established a *prima facie* case.

A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others[2003] eKLR** as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The Plaintiffs in the Plaintiff filed herein dated 21st December 2011 are seeking a permanent injunction against the Defendant restraining it from demolishing their structure on the suit properties and from interfering with their occupation and use of the said premises. They aver that they are the owners of the suit property having acquired it by purchase and allocation, and have availed evidence of the sale agreement to prove ownership.

The Plaintiffs have relied on a sale agreement entered into between themselves and one Julius Kamau Ngotho dated 4th September 2007 for the purchase of plot A-09 Komarock II shopping centre as evidence of their ownership. They did not provide any evidence of the allocation by the City Council of Nairobi of the remaining plots namely A-10,11 and 19, which they alleged was the basis of their claim to ownership of the said plots.

Further, with regard to plot A-09, the Plaintiffs have admitted that there is existing an earlier suit filed with regards to the said plot namely **Harun Gachie Mahianyu –vs- The Church Commissioners of Kenya & Another, ELC No. 356 Of 2010**. This is therefore probably an instance of double allocation, and the legal and rightful allottee of the said plot can only be determined after full hearing and not at this stage.

With respect to the notices issued by the Defendant, I concur with the Defendant's submission that the Plaintiffs need to comply with the provisions of section 38 of the Physical Planning Act, which provides the procedure for challenging an enforcement notice. The procedure entails first making an appeal to the relevant Liaison Committee under section 13 of the Act. Appeals from the Liaison Committee lies to the National Liaison Committee and it is then that further appeals will lie to this Court under section 38(6).

While the procedure provided for under section 38 of the Physical Planning Act cannot oust the jurisdiction of this Court that is granted by the Constitution under Article 162 (2) (b) and by section 13 of the Environment and Land Court Act, it is also the position as stated by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425** that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. This court will however defer to statutory or alternative remedies when they are applicable or appropriate.

The question to be answered is whether the alternative procedures and remedies are applicable or appropriate in the circumstances of the application filed herein. I note in this respect that this is a matter that is within the jurisdiction of the liaison committee, as the Defendant alleges that the Plaintiffs have encroached on a road reserve and is seeking that the said encroachment be removed, while the Plaintiff is seeking relief as to the use and occupation of the said properties. This is therefore a matter relating to

development and user approvals which the Defendant is empowered to give under section 33 of the Physical Planning Act, and from which decisions appeals lie to the liaison committee. Furthermore, the Plaintiffs are not seeking any relief as to title and ownership of the suit properties, which would have been within the exclusive jurisdiction of this Court.

I therefore find arising from the foregoing reasons that the Plaintiffs have not established a *prima facie* case, and accordingly decline to grant the prayers sought in its Notice of Motion dated 21st December 2011. The Plaintiffs shall meet the costs of the said Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____29th____ day of ____May____, 2014.

P. NYAMWEYA

JUDGE