



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 289 OF 2012

NANCY BOMET..... 1ST PLAINTIFF

*(Suing on behalf of Jamhuri Estate Residents Association in
Her capacity as the Chairlady thereof)*

JOHN EVANS AREK 2ND PLAINTIFF

*(Suing on behalf of jamhuri east Residents Association in his
Capacity as the Secretary thereof)*

FRED KINUTHIA 3RD PLAINTIFF

*(Suing on behalf of Jamhuri East Residents Association in his
Capacity as the Treasurer thereof)*

VERSUS

JAMALDIN YAHYA1ST DEFENDANT

BARNABA AGAR NYANDIERO..... 2ND DEFENDANT

ALI BULLS 3RD DEFENDANT

KHADIJA RRII 4TH DEFENDANT

KHA LFAN JUMA SULEIMAN.....5TH DEFENDANT

SAMUEL KETAI6TH DEFENDANT

JENNIFER KISURU MUSIWA 7TH DEFENDANT

HELLEN CHEPKEMBOI 8TH DEFENDANT

PAMELA CHEPKEMBOI 9TH DEFENDANT

MWANGI KAWAYA t/a THINKER’S PUB	10TH DEFENDANT
EZEKIAL REMA.....	11TH DEFENDANT
LUCY MUTHONI t/a LUCY’S HOTEL.....	12TH DEFENDANT
JOSEPH MUNGAI KIMANI.....	13TH DEFENDANT
REBECCA SAMBEKI t/a SAMBEKI PUB.....	14TH DEFENDANT
JAIRUS SAWE t/a WOTE BUTCHERY	15TH DEFENDANT

RULING

Coming before me for determination is the Plaintiff/Applicants’ Notice of Motion dated 24th May 2012 in which they seek for the following orders:

1. Spent.
2. That a temporary injunction do issue to restrain the Defendants/Respondents, their respective duly authorized agents, servants, employees, personal representatives and/or assigns from continuing to unlawfully possess, own, occupy, use, enjoy, trespass and/or lease all those parcels of land known as Nairobi/Block 62/762-767, Nairobi/Block 62/749-753, Nairobi/Block 62/768-779 (hereinafter referred to as the “suit properties”) owned and duly registered in the names of members of Jamhuri East Residents Association (hereinafter referred to as “JERA”).
3. That a mandatory order do issue to compel the Defendants/Respondents to vacate and/or surrender actual possession of the suit properties pending the hearing and determination of this Application, this suit, further court orders and/or directions of this Honourable court.
4. Spent.
5. That the foregoing temporary injunction and mandatory order be executed by the OCS Kilimani Police Station, the District Officer of Dagoretti Division and/or the Chief of Jamhuri East Location.
6. That the Defendants/Respondents be condemned to bear the costs of the Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Thuita Ritho, a member of JERA, sworn on 24th May 2012 in which he averred that the members of JERA are duly registered proprietors of the suit properties. He produced copies of Certificates of Lease for the parcels of land known as Nairobi/Block 62/749-751, 753, 765, 768, 770, 777 and 779 (hereinafter referred to as the “titled suit properties”). He averred that the Defendants had trespassed upon the suit properties and were using the same as car parking lots and garages for motor vehicles. He also averred that the provincial administration officers condoned the unlawful trespass of the suit properties and had purported to exercise administrative jurisdiction over the said parcels of land. He further indicated that despite numerous attempted to engage the Chief, District Officers, District Commissioners and Provincial Administration, they had failed to resolve the dispute having taken positions that encourage the trespass and continuance of the illegal occupation of the suit properties. He further stated that he had filed Civil Suit No. 2144 of 2008 at the Chief Magistrate’s Court at Milimani but was informed by his advocate that that court did not have the requisite jurisdiction to hear and determine this dispute. He further stated that in spite of demand letters, the trespassers continue to violate the interests of the registered proprietors of the suit properties.

The Application is contested. The 6th Defendant, Samuel Ketai filed his Replying Affidavit sworn on 29th June 2013 in which he averred that what the Plaintiffs are claiming to be their parcel of land is a community project. He further averred that the Defendants are traders in Toi Market situated in Kibera since the early 1980s and in the year 1998, the City Council of Nairobi as it then was passed a resolution to have the Toi Market upgraded. He further averred that the said market has more than 3000 traders and serves the entire Kibera community and its environs. He further stated that Toi Market is a source of

revenue to the Government and has created employment to many youths. He further averred that a topographical survey of the said market was done showing the stalls therein. He further averred that the plots in the said market have never been demarcated and neither have title deeds or certificates of lease ever been issued to anyone. He further stated that the purported proprietors of the suit properties have never taken possession thereof and that their claim thereto is stale as they have acquired possessory rights by virtue of adverse possession. He further averred that the suit and application are both res judicata, the Plaintiffs/Applicants having filed a similar suit together with an application being Milimani CMCC No. 2144 of 2008 seeking the same orders which was dismissed.

Both the Plaintiffs and the 1st, 2nd and 6-12th Defendants filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described 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.”

In determining whether the Plaintiffs/Applicants have established a prima facie case, I must consider the documents of title produced by them in support of their claim of ownership of the suit properties. The suit properties comprise a total of 23 distinct parcels of land. Of these, certificates of lease were produced for the titled suit properties alone which are 9 in number. No title documents were produced for the remaining 14 properties. Where title to land is concerned, the law is clear as to the duty of a court where title documents for titled suit properties are produced.

Section 24(a) of the Land Registration Act provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

Section 26 (1) of the Land Registration Act states as follows:

“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. **On the ground of fraud or misrepresentation to which the person is proved to be a party; or**
- b. **Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

Based on these legal provisions, this court is duty bound to take the produced Certificates of title as prima facie evidence that the persons named as proprietors of the titled suit properties are the absolute and indefeasible owners thereof. Hence, I do find that the Plaintiffs/Applicants who produced the said title documents have established a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiffs/Applicants who own the titled suit properties? Land is unique and no one parcel can be equated in value to another. The value of the titled suit properties can be ascertained. However, it would not be right to say that the said Plaintiffs can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiffs have established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR**.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application only in respect of the titled suit properties with costs to the affected Plaintiffs. Note clearly that this Application stands dismissed in respect of the remaining 14 suit properties in respect of which no certificates of title were produced.

SIGNED AND DELIVERED IN NAIROBI THIS 2ND DAY OF MAY 2014.

MARY M. GITUMBI

JUDGE