



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO.231 OF 2013

HALIMA MOHAMED ABDILE1ST PLAINTIFF
SYLVESTER YONAM OKOTH OWITI.....2ND PLAINTIFF
IRUNGU MWANGI.....3RD PLAINTIFF
JANE NJERI MIGWI.....4TH PLAINTIFF

(Suing on their own behalf and on behalf of the members of Korogocho Owners Welfare (KOWA))

-VERSUS-

PETER KINYANJUI & 38 OTHERS..... DEFENDANTS

RULING

The application before the court for determination is a Notice of Motion dated 12th April 2013 brought by the Plaintiffs under Order 1 Rule 8, Order 40 Rules 1 and 2 4(1), and Order 51 Rule 1 of the Civil Procedure Rules. The Plaintiffs are seeking leave to commence and continue these proceedings on their own behalf and on behalf of the members of Korogocho Owners Welfare Association (**KOWA**). In addition, the Plaintiffs have sought restraining orders against the Defendants, their servants and or agents from interfering with the Plaintiffs and other members of members of Korogocho Owners Welfare Association's occupation, use, possession, construction or any development of their respective plots pending the hearing and determination of the suit.

The application is supported by an affidavit sworn by the 3rd Plaintiff on 12th April 2013 where he stated that Korogocho Owners Welfare Association which is registered under the Societies Act comprise members who are owners of plots and structures at Korogocho Location which is spread over 7 villages. The 3rd Plaintiff has asserted that the members of the association were relocated to Korogocho by the government in the 1960's and 1970's and that over a period of time, the government through the former president Daniel Arap Moi promised to issue the members of the association with title deeds.

It is the Plaintiffs' case that when the government delayed in issuing them with titles, members of the association sued the government demanding for titles in High Court Misc. Application No. 1366 of 2005 and a copy of the originating summons has been annexed as evidence. The Plaintiffs have stated that

although the summons were dismissed on 12th March 2010, an appeal was preferred and a ruling delivered on 9th December 2011 in Nairobi Civil Application No. 202 of 2010 granting injunctive orders pending the hearing and determination of the appeal has been annexed as evidence. This appeal which ruling is yet to be heard and determined.

The Plaintiffs have alleged that whereas the injunctive orders are still in place, government officials especially the area chief are using the Defendants to harass and interfere with the Plaintiffs' use and possession of their structures. The Plaintiffs have exhibited a photograph of one of the houses which has been demolished.

In a further affidavit sworn by the 3rd Plaintiff on 11th February 2014, the Plaintiffs have reiterated that they are the owners of plots and structures in Korogocho and have admitted that the structures are on government land and further, that the ownership of the said land is subject to a pending court case between the Plaintiffs and the government where the Defendants' in the instant suit are not parties.

While denying the dissolution of Korogocho Owners Welfare Association, the 3rd Plaintiff has denied that the association ever assigned any right, duty or obligation to Korogocho Residents Committee and a letter dated 26th September 2012 from the Deputy Registrar of Societies has been exhibited. It is the Plaintiffs' averment that the Residents Committee was created by the Provincial Administration in order to circumvent and defeat the order in Civil Application No. 202 of 2010. Lastly, the 3rd Plaintiff denied allegations that the Plaintiffs were acting selfishly in preventing the greater good of the slum upgrading project stating that the project was a farce meant to enrich a few from the donor funds.

The application was resisted by the 1st Respondent, Peter Kinyanjui who through a replying affidavit sworn on 30th January 2014 averred that the applicants have approached the court with misleading half truths, non disclosure of material facts and falsehoods. The 1st Respondent has averred that the applicants are imposters since Korogocho Owners Welfare Association was dissolved in 2005 and in its place Korogocho Residents Committee for Slum upgrading was established with 48 members. According to the 1st Defendant, the Committee took over all the duties and obligations of Korogocho Owners Welfare Association on behalf of all Korogocho residents.

The 1st Defendant has alleged that since the applicants were not elected in their respective villages as committee members, they started opposing the slum upgrading project. Further, it is alleged that since 2005, the applicants have engaged the government in endless litigation as they are opposed to the construction of roads, sewer lines, street lighting, health centres and other infrastructural facilities. It is the 1st Defendant's case that following the issuance of injunctive orders, the slum upgrading project has stalled and that the developer is threatening to pull out of the site to the detriment of tens of thousands of other residents and future generations. The 1st Defendant has annexed as evidence extracts of the project document and has accused the applicants as acting unfairly and out of narrow selfish interests without regard to the greater good of the project.

The application was canvassed through written submissions and the Plaintiff in submissions dated 28th February 2014 argued that the prayer for leave to commence representative suit was informed by the overriding objective of civil litigation under sections 1A and 1B of the civil Procedure Act which were explained by the court of appeal in the case **Hunker Trading Company Ltd -vs- Elf Oil Kenya Ltd, Civil Application No. 6 of 2010**. Counsel argued that the objective was to enable the court incorporate case management principles so as to conduct the proceedings in a manner that makes the attainment of justice fair, quick and cheap.

It was submitted for the Plaintiffs that Korogocho Owners Welfare Association being a duly registered society could sue through its officials and reliance was placed on the case of **Voi Jua Kali Association - vs- Sange & others (2002)474**. Counsel stated that under Order 1 Rule 8 of the Civil Procedure Rules, the Plaintiffs do not require leave to sue in a representative capacity.

While submitting that the Plaintiffs have demonstrated a prima facie case with a probability of success, Counsel argued that the Plaintiffs are the owners of plots and structures the subject matter of this suit which they have possessed and lived on since 1970's. It was argued that the injunctive orders issued by the court of appeal were still in force and had been granted after the government interfered with the Plaintiffs' structures while purporting to carry out the slum upgrading. Further, the Plaintiffs submitted that the respondents were an amorphous group with no proprietary interests whatsoever since the suit plot was owned by the government.

While stating that the Plaintiffs' case is based on the tort of trespass, Counsel relied on Harlsbury's Laws of England Third Edition Vol 38 and argued that the Defendants had not demonstrated any defence to the Plaintiffs' claim and further, that the Defendants had not demonstrated any interest other than the claim that they were in a committee that was carrying out a slum upgrading project.

In respect to inadequacy of damages, Counsel argued that the Plaintiffs have lived on the land since 1970s. It is the Plaintiffs' submission that if the injunction sought is not granted and the houses demolished, they stand to suffer irreparable loss. Counsel contended that if the Plaintiffs lose their homes and they succeed in the appeal and/or in this suit, it will be very difficult to execute the court of appeal judgement after the Plaintiffs have been kicked out of their plots and therefore, that damages would not be adequate. It was also argued that recovery from the Defendants who appear to be an amorphous group would be impossible.

As to where the balance of convenience tilts, it was submitted that it was in favour of the Plaintiffs who stand to lose their plots and homes having been on the land for many years. It was submitted that the Defendants are busy bodies with no proprietary interest and will not suffer if the project does not go on. Lastly, It was also argued that since the Defendants do not claim to be using their own funds to do the project, they would not suffer any financial loss.

The Defendants filed submissions on 18th March 2014 where they stated that it was improper for the Plaintiffs to seek leave as well as an interim injunction in the same application. It was argued that that the applicants cannot invoke the oxygen principles since no speedy disposal of cases can be achieved by seeking unnecessary orders and further, that the same amounts to an abuse of the court process.

Counsel for the Defendants made reference to the case of **Woodcraft Industries Ltd & 3 others -vs- The East African Building Society Nairobi HCCC No. 602 of 2002** for the proposition that an injunction being an equitable remedy should not be issued to a party whose conduct does not meet the approval of a court of equity. It was argued that the applicants' complaints were only against the area chief and unnamed government officials. Counsel contended that there were no facts to show that the Respondents had threatened or were about to interfere with the applicants' structures in any way and therefore, that there was no sufficient basis to issue an injunction.

In further submission, Counsel argued that the powers of the court in issuing injunctions is such that injunctions ought not to be issued in circumstances where other arms of government or statutory bodies are the right persons to deal with the complaint raised by the applicant. It was submitted that if the Defendants were unlawfully demolishing buildings, that was a criminal offence of malicious damage to property and therefore a police case.

While submitting that Misc Civil Application No. 1366 of 2005 has no bearing on the instant suit, Counsel argued that the Originating Summons were against the Attorney General, Nairobi Provincial Commissioner and the Commissioner of Lands. Counsel urged that since resources have already been committed or utilized in the project, an injunction which will result in prevention of a slum upgrading project should not issue and reference was made to the case of **Giella -vs- Cassman Brown(1973)EA 358.**

The court has reviewed the application and the submissions by counsel and in regard to the issue whether or not the plaintiff/applicants can commence what is otherwise a representative suit without first obtaining the leave of the court to do so the court is of the view that order 1 rule 8(1) is permissive and the

suit by the plaintiffs is properly before the court.

Order 1 Rule 8 (1) provides-

8.(1) where numerous persons have the same interest in any proceedings, the proceedings may be commenced, and unless the court otherwise orders, continued by or against anyone or more of them as representing all or as representing all except one or more of them.

Order 1 Rule 8 (2) provides for the giving of notice to all persons on whose behalf the suit is brought to enable such persons to decide whether or not they wish to be enjoined as parties to the suit. Thus in my view the plaintiff/Applicants could properly initiate the suit in the manner they did and it is henceforth up to the court to give directions as regards service and/or notification of the filing of the suit to all persons who may be interested in the suit. I therefore hold that the applicants were in order to file a suit embodying a prayer for leave to bring a representative action and a prayer for injunctive relief.

The other issue for determination is whether the Plaintiffs have satisfied the conditions for grant of injunctive orders as laid out in the case of **Giella -vs- Cassman Brown(1973)EA 358** to enable the court to grant them the injunction that they seek through the instant application.

On prima facie case, the Plaintiffs have averred that they have proprietary rights in the suit premises where they have been living for a long period of time. They have provided a copy of the originating summons in Misc Civil Application **No. 1366 of 2005** where they sought declaration of ownership of the suit premises amongst other orders. A copy of the ruling in **Civil Application No. 202 of 2010** where the court of appeal issued injunctive orders restraining the government from interfering with the Plaintiffs possession pending the hearing of the appeal flowing from the dismissal of Originating Summons has also been availed. This injunction by the court of appeal has not been set aside and/or vacated to the knowledge of the court and this court cannot give orders that would be inconsistent with the order given by the appellate court.

On the other hand, the Defendants have not substantiated their allegations that the applicants are imposters following the dissolution of Korogocho Owners Welfare Association. The project report attached to the replying affidavit shows that the slum upgrading project is a government project. Since an injunction was issued by the court of appeal in Civil Application No. 202 of 2010 against the government, the Defendants who claim to be members of Korogocho Residents Committee for Slum upgrading should also be restrained from interfering with the Plaintiffs' possession. In addition, since the Defendants submitted that there was no proof to show that they had threatened or were about to interfere with the applicants' structures in any way, they will not suffer any prejudice if the injunction is issued.

In respect to irreparable loss, the Plaintiffs submission that they had been on the suit property since 1970s was not rebutted. They stand to suffer irreparable damages if their structures are demolished. On the other hand, the Defendants will not suffer any loss since the slum upgrading project is a government project in which they have not invested. In any event, the Defendants have already admitted that since the injunctive orders were issued by the court of appeal, the slum upgrading project stalled and therefore, there is no justification for the alleged demolitions since the injunctive orders are still in place. The balance of convenience tilts in favour of the Plaintiffs who have been in possession for over 3 decades.

I have considered the submissions by counsel and the evidence and material placed before the court and I am satisfied that the plaintiffs have demonstrated they have a prima facie case with a probability of success and that damages may not be an adequate remedy incase they are successful at the trial and in the circumstances I grant orders in favour of the plaintiffs in terms of prayers (2) and (5) of the Notice of motion dated 12th April 2013.

As regards service and notification of the suit to all interested parties I direct that the Plaintiff/Applicants do serve notification of the suit to all persons who may be interested in the suit by placing an advertisement once in either the **Daily Nation Newspaper** or the **Standard Newspaper** during any week day (**Monday to Friday**) and thereafter to an affidavit of service in court.

As the suit has the semblance of being for public interest I direct that the cost of the application shall be in the cause.

Orders accordingly.

Ruling dated, signed and delivered this.....**20TH**day of.....**JUNE**.....2014.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendants