



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 388 OF 2014

JOHN NJOROGE MUINAMI

JAMES MBURU NUTHU

JANET KARUNGARI KAMOTHO & 72 OTHERS.....PLAINTIFFS

VERSUS

KENYA AFRICAN NATIONAL UNION.....1ST DEFENDANT

NAIROBI COUNTY GOVERNMENT.....2ND DEFENDANT

PATRICK NDERITU.....3RD DEFENDANT

RULING

The Plaintiff filed an application dated 20/3/2014, seeking orders that the 1st Defendant be restrained from alienating, disposing off, selling, transferring, mortgaging, and/or in any other manner whatsoever dealing with Plot No. 29082, Kasarani pending the hearing and determination of the suit. Secondly, that the 3rd Defendant be restrained from trespassing, developing, erecting structures and/or in any manner dealing with Plot No. 29082, Kasarani pending the hearing and determination of the suit.

The application is premised on grounds outlined in the application and supported by an affidavit sworn by the 1st Plaintiff. He deposed that the Plaintiffs are officials and members of the 1st Defendant and have all along enjoyed quiet possession of the suit property where they have erected structures and been carrying out their businesses uninterrupted. It is the 1st Plaintiff's deposition that on 21/2/2014 the 2nd Defendant dropped in to the premises an enforcement notice requiring the Plaintiffs to demolish their structures within 7 days. However that on 22/2/2014 before the notice period expired, the 1st and 2nd Defendants caused the demolition of their developments including the KANU Sub-branch offices thereby effectively evicting the Plaintiffs from the suit property. It is deposed that the Plaintiff's learnt that the enforcement notice was on the basis of a Court Order issued in **ELC No. 151 of 2014** which the Plaintiffs were not party to whereas they were occupants thereof.

The 1st Plaintiff deposes that the 1st and 2nd Defendants' action of demolition the Plaintiffs' property before the expiry of the enforcement notice is a violation of their fundamental right to fair administrative

action as enshrined in Article 47 of the Constitution. It is also deposed that the 1st and 2nd Defendants violated the Plaintiffs' constitutional right to equitable access to land. Further that the Plaintiffs did not get an opportunity to challenge the notice and as a result they have been occasioned great financial and material loss. The 1st Plaintiff deposed that subsequent to the demolition, the suit premises was fenced off and that the 1st Defendant is in the process of disposing it off to the 3rd Defendant who has paid substantial deposit of the purchase price and has even commenced developments thereon. It is the 1st Plaintiff's deposition that the 1st Defendant took advantage of the KANU Sub-branch office constructed by the Plaintiffs to obtain a letter of allotment which it has on several occasions attempted to evict them in order to dispose of the property whereas the 1st Defendant was to hold the property in trust for its members. Counsel pointed out Section 27 of the 1st Defendant's constitution deposing that it had a mandate to hold in trust all land, buildings and other immovable property and can only transfer subject to written approval from the National Governing Council. The 1st Plaintiff deposes that the 1st Defendant's act of disposing the suit property and demolishing its office is illegal as the same has not been sanctioned by the relevant party organs.

The application was opposed by the Defendants. **Nicholas K.K. Arap Salat**, the Secretary General of the 1st Defendant swore a Replying Affidavit on 1/4/2014. He deposed that the Plaintiffs had no *locus standi* to initiate the suit and that the names of the 72 Plaintiffs are undisclosed. The deponent also stated that the Plaintiffs do not specify the nature of interest and/or right they have over the suit property as they have not produced proof of ownership including an allotment, title deed and neither do they claim to have purchased the same. It is deposed that the Plaintiffs' claim is incompetent, contradictory and a sham as on the one hand they claim to have been in possession of the suit property and have an interest thereon as members of the 1st Defendant and on the other that the said property is public land.

The deponent further stated that the suit property has always belonged to the 1st Defendant through a lawful allotment and that it has been in possession thereof save for intermittent acts of trespass by unauthorized persons including the Plaintiffs culminating to various suits, namely: **ELC No. 232 of 2014 Lydia Muthoni Kariuki & 25 Others v KANU** and **ELC No. 151 of 2014 KANU v Bishop Patrick Gitau Mbugua**. It was further deposed that the parties to these suits claim to be Kasarani Branch Party Officials and thus entitled to be in occupation on the suit property. The deponent stated that even if they were officials, they have no right to the property belonging to the party in view of **Section 16 of the Political Parties Act** and therefore the branch does not need officials to manage its property. In any event, that all Branch Officials were dissolved with the enactment and adoption of the KANU Constitution 2012, under the 2nd Schedule Transitional Consequences, Article 10(3). Further that at Article 27 of the KANU constitution, the KANU Foundation is yet to be constituted.

The deponent stated that the Plaintiffs' allegation that the 1st Defendant has disposed off the property to the 3rd Defendant is unsubstantiated as they have not attached a sale agreement. In any event, as the proprietor of the suit property, the 1st Defendant can enter into any agreement with any party in respect to the property. It was deposed for the 1st Defendant that an enforcement notice cannot be subject of litigation in this forum and can only be challenged at the Physical Planning Liason Committee as provided under Section 13 of the Physical Planning Act, Cap 286 Laws of Kenya. The deponent contended that the application is an abuse of the court process as the prayers sought have been overtaken by events noting that the Plaintiffs are no longer in possession.

The 2nd Defendant (Replying Affidavit sworn by **R.K. Muema** (not on file. The 3rd Defendant swore a Replying Affidavit on 20/5/2014 wherein he deposed that he is the purchaser of the suit property from the 1st Defendant. It was his deposition that the Plaintiffs have not clearly specified the nature of interest or right they have over the suit property and neither have they annexed any documents to their application demonstrating any registrable interests or rights thereof. The 3rd Defendant deposed that he is in possession thereof and therefore it would be unjust if the orders sought are granted since he stands to suffer irreparable loss. Further that as the purchaser of the property he has the liberty to deal with the same in any way without hindrance from any other person claiming undefined rights over the suit

property.

The 1st Plaintiff swore a Further Affidavit on 25/5/2014, wherein he deposed that whereas the 3rd Defendant claimed to have purchased the property for value, he has not exhibited a sale agreement, proof of payment of the purchase price and an instrument of transfer and therefore the court cannot be called to protect an unsupported interest over the suit property. Further that the 1st Defendant has not exhibited proof of ownership as the purported letter of allotment does not indicate the plot number of the suit property anywhere. Consequently, the 1st Defendant cannot purport to sell to the 3rd Defendant what it does not own. The 1st Plaintiff contended that the Plaintiffs have *locus standi* as the former occupants of the suit property who were evicted and their structures demolished without following the laid down procedures.

The 1st Plaintiff deposed at length about the KANU Constitution stating that under Article 10(2) (f) a sub-branch (National Assembly Constituency) is a party organ under which the Kasarani Sub-Branch falls. He deposed that there is a difference between a branch and sub-branch of the party. It was his deposition that the former administrative districts were temporarily dissolved pending the composition of branches at county level upon grassroots elections. It was further deposed that no official has any capacity to usurp the powers of disposing property vested in the KANU Foundation, represented by registered trustees, which is yet to be constituted. The 1st Plaintiff urged the court to allow the application deposing that the property has not yet been transferred to the 3rd Defendant and thus the orders sought would not be in vain. Secondly, that they stand to suffer irreparable loss if their only source of livelihood is alienated.

The application was canvassed by way of written submissions. Kinyua Njagi & Co. Advocates for the Plaintiff filed submissions dated 17/6/2014 wherein counsel submitted that the Plaintiffs have established a prima facie case with chances of success having demonstrated that they have a legitimate interest over the property. Further that their livelihood is at stake since they have been in occupation thereof and erected structures where they carry out businesses since 1992. It was also submitted that the Defendants had not demonstrated that the suit property has been transferred to the 3rd Defendant and therefore there would be no harm to issue orders of maintaining status quo.

As regards the 1st Defendant's Preliminary Objection, counsel submitted that the suit herein raises weighty legal and constitutional issues which cannot be adjudicated upon and determined by the Political Parties Tribunal. Further that the dispute involves persons who are not KANU party members. Counsel submitted that the Preliminary Objection is divisionary tactic aimed at preventing the Court from adjudicating the real issues.

Koceyo & Company Advocates for the 1st Defendant filed submissions dated 5/6/2014 wherein counsel submitted that Plaintiffs have not established a prima facie case with chances of success for reasons that: they have no evidence of ownership; they are not in possession of the suit property as at the date of filing suit; the Plaintiffs have not exhibited membership cards or officials of the 1st Defendant; and that the names of the 72 Plaintiffs is yet to be disclosed. Counsel also submitted that the balance of convenience tilts in favour of the 1st Defendant who is the lawful allottee of the suit property.

W.S. Ogolla Advocate for the 2nd Defendant filed submissions dated 15/7/2014 wherein counsel submitted that the 2nd Defendant is mandated under the Physical Planning Act to ensure that all buildings to ensure that all structures within the city and its environs are approved, issue enforcement notices and demolish structures that are not approved by it. Counsel submitted that the Plaintiffs had not demonstrated that the buildings on the suit property had structural plans, and did not take measures to comply with the conditions of the notice. It was submitted that the 2nd Defendant did not flout any law in issuance of the said notice and demolishing the structures as it was carrying out its mandate. Counsel also submitted that temporary orders of injunction cannot be directed to the 2nd Defendant as the enforcement notice has already been acted upon.

Mariaria & Company Advocates for the 3rd Defendant filed submissions dated 8/7/2014 wherein counsel submitted that this is not a case in which the court can grant a temporary injunction for the reasons that: they have no registrable interests over the property; are trespassers on the property and cannot benefit from an equitable remedy as against the 1st Defendant's proprietary rights over the property; and that they lack *locus standi*. It was also submitted that the 1st Defendant is a body corporate and has the capacity to acquire and alienate its property to the exclusion of its members and therefore it has unfettered rights to deal with the suit land including transferring the same to a third party.

Having now considered the pleadings generally and the written submission, the Court finds that the Plaintiffs referred to a notice of Preliminary Objection filed by the 1st Defendant alongside its Replying Affidavit. The 1st Defendant objected to the jurisdiction of this court stating the suit herein being a dispute as to the running, operation and control of a Political Party's assets is within the realm of the Political Parties' Tribunal which is operation. **Section 40 of the Political Parties Act** provides for the jurisdiction of the Tribunal established under Article 39 thereof. S. 40 states:

- (1) The Tribunal shall determine—**
 - (a) disputes between the members of a political party;**
 - (b) disputes between a member of a political party and a political party;**
 - (c) disputes between political parties;**
 - (d) disputes between an independent candidate and a political party;**
 - (e) disputes between coalition partners; and**
 - (f) appeals from decisions of the Registrar under this Act.**
- (2) Notwithstanding subsection (1), the Tribunal shall not hear or determine a dispute under paragraphs (a), (b), (c) or (e) unless the dispute has been heard and determined by the internal political party dispute resolution mechanisms.**

The Plaintiffs have approached this court alleging, inter-alia, that their constitutional rights of fair administrative action and equitable access to land have been violated by the Defendants' action. Jurisdiction to determine whether the a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened is bestowed to the High Court and in view of the dispute being over land, the jurisdiction lies in this court by virtue of **Article 162 (2) (b) of the Constitution** and **Section 13 of the Environment and Land Court Act, 2012**.

The same reasoning applies to the submissions made by the 2nd Defendant who contends that the Plaintiffs ought to have filed an appeal at the Physical Planning Liaison Committee as opposed to approaching this court. I therefore find that this court has jurisdiction to adjudicate over dispute herein.

It was submitted for the 2nd Defendant that issuance of an enforcement notice and subsequent demolitions does not amount to breach of any fundamental rights, first because the Plaintiffs have not demonstrated how their rights were infringed and secondly that the 2nd Defendant was merely carrying out its mandate under the Physical Planning Act. The question as to whether the Plaintiffs' rights have been breached or violated can only be determined upon trial, since what is before court at this juncture is prayer for temporary orders of injunction pending the outcome of the suit.

The Plaintiffs pray for an order of injunction restraining the 1st Defendant from disposing off the suit property and against the 3rd Defendant from trespassing or in any way dealing with the suit property. The principles of grant of an injunction were laid down in **Giella v Cassman Brown & Co. Ltd (1973) EA**

358 that first, an applicant must show a *prima facie* case with the probability of success. Secondly, an interlocutory injunction will not normally be granted unless applicant will suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, where the court is in doubt, it will decide the application on a balance of convenience.

The first question is whether the Plaintiffs have established a *prima facie* case. The Plaintiffs aver that they are members and officials of the 1st Defendant and claim that the suit property was initially unalienated public land when they moved in and erected structure to carry out businesses. Subsequently, that the 1st Defendant constructed Kasarani Kanu Sub-Branch office and applied for a letter of allotment. Following it being issued with the allotment letter, the 1st Defendant has on several occasions attempted to evict them and dispose off the property. The Plaintiff's contend that even if the 1st Defendant obtained the letter of allotment, it ought to hold the property in trust for its members. Additionally, that even in the event the 1st Defendant wished to dispose off the property, it is required to adhere to the provisions of Section 27 of the KANU constitution.

In support of their application for injunction, the Plaintiffs some documentation to show their affiliation to the 1st Defendant. The 1st Plaintiff availed two letters dated 24/9/2007 addressed to the Executive Director of the 1st Defendant, the first requesting to be issued with a life membership card on since he had misplaced his and another letter of the same date seeking to be considered as nominee of the party a candidate in Kahawa West Ward. He also annexed a receipt from KANU acknowledging payment of Ksh. 10,500 dated 22/10/2007 being payment of Civic Nomination Fee. Also annexed were results of party elections conducted in 2005 which indicate that the 1st Plaintiff was elected as Assistant Secretary in Kasarani Branch. The 2nd Plaintiff annexed a copy of his Life Membership Card and an Official Card indicating the rank of Youth Leader.

In response, the 1st Defendant denied the claim that it has disposed off the suit property to a third party contending that the Plaintiffs had failed to substantiate their allegations. The 1st Defendant's averments were however contradicted by the 3rd Defendant who contended that he is the purchaser for value of the suit property from the 1st Defendant, being the allottee, and in possession thereof. Thus, he has superior rights over the Plaintiffs' who are mere trespassers and not entitled to equitable reliefs. Notably, however, the 3rd Defendant did not avail a sale agreement, proof of payment of the purchase price or an instrument of transfer to substantiate his averments of ownership through purchase. This court can therefore not ascertain the actuality of the 3rd Defendant's claim.

Currently, the Plaintiffs are not in possession of the property, but as members of the 1st Defendant, they have approached this court to restrain it from disposing off the suit property and the 3rd Defendant from interfering with it. The court takes note that the 1st Plaintiff's supporting documents are of over 7 years ago today. The 2nd Plaintiff however has annexed a life membership card. I am satisfied that the Plaintiffs have demonstrated that they are members of the 1st Defendant. It is also unclear as to whether the suit property has been disposed off, and in the event that the sale is in progress, the 1st Defendant has not demonstrated to this court that it has obtained the necessary approvals from the National Governing Council. Suffice to say, on its own admission, the 1st Defendant's foundation – the body bestowed with the power to hold in trust on behalf of the party its land, buildings and other immovable property is yet to be constituted.

Before I pen off, there are some technical issues that came up in the party's pleadings. The Defendants' reiterated that the Plaintiffs have not disclosed the names of the other 72 Plaintiffs and they therefore remain a mystery. The second issue was an indication by the 1st Defendant that there are other suits filed by persons purporting to be its members and that the filing of this suit is intended to circumvent the orders derived from **ELC No. 151 of 2014** and therefore that it is proper for the suits to be consolidated. On the first issue, it is my view that since the matter is yet to go for hearing, the Plaintiffs still have a window within which to disclose the names of the 72 other Plaintiffs. On the second issue, consolidation of suits is

a matter of the Court's consideration where there are common questions of law or fact in two or more suits. The court can only arrive at this conclusion after the benefit of perusing the other court files and in this circumstance upon an application by either party.

The upshot is that the Plaintiff's application is allowed as follows:

- 1. The 1st Defendant by itself, servants and/or agents is hereby restrained from alienating, disposing off, selling, transferring, mortgaging and/or in any manner dealing with Plot L.R. No. 29082 Kasarani pending the hearing and determination of the suit or further orders of this court.**
- 2. The 3rd Defendant is hereby restrained from trespassing, developing, erecting structures and/or in any manner dealing with Plot L.R. No. 29082 Kasarani pending the hearing and determination of the suit or further orders of this court.**
- 3. Costs of the application be in the cause.**

Dated, Signed and delivered this 31st day of **October, 2014**

L.N. GACHERU

JUDGE

In the Presence of:-

Mr Sifuna holding brief for Mr Njagi for the Plaintiffs/Applicant

Mr. Sifuna holding brief for Mr Koceyo for the 1st Defendant/Respondent

None attendance for the 2nd Defendant/Respondent

Mr Mariaria for the 3rd Defendant/Respondent

Kamau: Court Clerk

Court:

Ruling read in open Court in the presence of the above counsels.

L. GACHERU

JUDGE