



Registered Trustees of Catholic Diocese of Nyahururu v County Government of Nyandarua & another (Environment and Land Case E003 of 2023) [2024] KEELC 5367 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5367 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT AND LAND CASE E003 OF 2023**

**YM ANGIMA, J
JULY 18, 2024**

BETWEEN

THE REGISTERED TRUSTEES OF CATHOLIC DIOCESE OF NYAHURURU PLAINTIFF

AND

COUNTY GOVERNMENT OF NYANDARUA 1ST DEFENDANT

SETTLEMENT FUND TRUSTEES 2ND DEFENDANT

RULING

A. Introduction

1. Vide a plaint dated 12.10.2023, the Plaintiff sued the 1st Defendant and 2nd Defendant seeking the following reliefs:
 - a. A declaration that the parcel of land formerly known as Ex Debruins Farm House - Passenga Township and now known as Nyairoko Township/394 belongs to the Plaintiff and as such entitled to exclusive possession, peace and quiet.
 - b. A declaration that the registration of the 1st Defendant as proprietor of Nyairoko Township/394 is illegal and the same be cancelled and in its place a title document be issued to the Plaintiff by the Land Registrar at Nyandarua County.
 - c. An order of permanent injunction restraining the 1st and 2nd Defendants where by himself, his servants, agents and/or anyone acting under his authority from dealing with, entering, remaining, sub-leasing, alienating, trespassing, interfering and/or any other way dealing with all the parcel of land known formerly known as Ex Debruins Farm House – Passenga Township and now known as Nyairoko Township/394.



- d. Costs of this suit and interest thereon.
 - e. Any other relief this honourable court deems fit.
2. The Plaintiff pleaded that in August, 1982 it was allocated the suit property measuring about 2.5 acres by the Director of Settlement after which it made the requisite payments and took possession thereof. It pleaded that it developed part of the suit property by, inter alia, establishing and operating a dispensary thereon which was temporarily closed in 2021 due to the Covid-19 pandemic.
 3. It was the Plaintiff's case that whereas it had always been in open, exclusive and uninterrupted possession of the suit property for several decades the 1st Defendant had on or about 09.10.2023, through its agents and goons, invaded the suit property and threatened to demolish the dispensary and forcibly take over the land on the basis that it was the registered owner thereof. The Plaintiff pleaded that the basis that it was the duly registered owner thereof. The Plaintiff pleaded that the 1st Defendant must have obtained title to the suit property through fraudulent means particulars whereof were pleaded in paragraph 17 the plaint.

B. Plaintiff's Application

4. Simultaneously with the plaint, the Plaintiff filed a notice of motion of even date under certificate of urgency seeking interim orders pending the hearing and determination of the suit. The application was based upon Order 40 rules 1, 2, 4 & 8 of the Civil Procedure Rules, 2010, Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21) and all other enabling provisions of the law seeking, inter alia, the following orders:
 - a. That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the Defendant/respondent either by himself, his agents or his servants from entering, remaining, trespassing or in any other way interfering with the parcel of land formerly known as Ex Debruins Farm House-Passenga Township and now known as Nyairoko Township/394.
 - b. That pending the hearing and determination of this suit this honourable court be pleased to issue an order of inhibition preventing and or stopping any dealings with the parcel of land formerly known as Ex Debruins Farm House-Passenga Township and now known as Nyairoko Township/394.
 - c. That costs of this application be provided for.
5. The application was supported by an affidavit sworn by Fr. Paul Ndirangu Mwangi and based essentially on the same grounds as set out in the plaint. The Plaintiff asserted that it was the legitimate allottee of the suit property vide a letter dated 30.08.1982 and that it was utilizing part thereof as a dispensary. It contended that it had made the necessary payments to the government and complied with the terms and conditions of allotment hence all along it has been waiting for processing and issuance of title documents only to realize recently that the 1st Defendant had been issued with a lease for the same property now described as Nyairoko Township/394.
6. It was the Plaintiff's case that on 09.10.2023 the 1st Defendant's agents and servants had invaded the suit property and threatened to demolish the dispensary and forcibly take possession of the property. It was contended that unless the interim orders sought were granted the 1st Defendant may actualize its threats as a result of which the Plaintiff shall suffer irreparable loss and injury.



C. Defendants' Response

7. The 1st Defendant filed a replying affidavit sworn by Rachael N. Mugo on 19.04.2024 in opposition to the application. It was asserted that according to the approved development plan of 1964 the suit property was reserved for construction of a Police Station and that there was no part development plan showing that the reserved user was revised to include a dispensary. The 1st Defendant further stated that in 2020 there arose a need to re-plan the disputed area as a result of which it was reserved for construction of a village polytechnic.
8. The 1st Defendant further contended that the suit herein did not disclose any cause of action against it and that the Plaintiff had not satisfied the principles for the grant of an interim injunction as set out in the case of *Giella - v- Cassman Brown & Co. Ltd* [1973] EA 358. It was contended that the Plaintiff had not exhibited evidence of payment of the allotment fee or issuance of a letter of allotment. The 1st Defendant denied any form of fraud in its acquisition of the suit property and denied sending any goons or agents to the suit property as alleged by the Plaintiff.

D. Plaintiff's Rejoinder

9. The Plaintiff filed a supplementary affidavit sworn by Fr. Paul Ndungu Mwangi on 25.04.2023 in response to the 1st Defendant's affidavit. The deponent pointed out that the 1st Defendant's own exhibits marked as No. 1 and 2 actually confirmed that the suit property was allocated to the Catholic Church by the Settlement Fund Trustees (SFT). It was thus the Plaintiff's contention that since it had been in actual possession of the property since the time of its allocation in 1982 then the same land was not available for allocation or reservation for a village polytechnic in 2020.

E. Directions on Submissions

10. When the application was listed for inter partes hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff filed submissions dated 02.05.2024 whereas the 1st Defendant's submissions were dated 27.05.2024. However, the 2nd Defendant did not file any response or submissions to the application.

F. Issues for Determination

11. The court has perused the notice of motion dated 12.10.2023, the replying affidavit in opposition thereto, the supplementary affidavit and the material on record. The court is of the view that the main issues for determination herein are the following:
 - a. Whether the Plaintiff has made out a case for the grant of a temporary injunction.
 - b. Whether the Plaintiff has made out a case for the grant of an order of inhibition.
 - c. Who shall bear costs of the application.

G. Analysis and Determination

a. Whether the Plaintiff has made out a case for the grant of a temporary injunction

12. The principles for the grant of a temporary injunction were summarized in the celebrated case of *Giella - v- Cassman Brown & Co. Ltd* (supra) as follows:
 - a. First, an applicant must demonstrate a prima facie case with a probability of success at the trial.



- b. Second, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable loss which cannot be adequately compensated by an award of damages.
 - c. Third, in case the court is in doubt on (b) above, it shall determine the application on a balance of convenience.
13. The court has noted from the material on record that the Plaintiff was apparently allocated the suit property in 1982 by the Director of Settlement. There is prima facie evidence on record that the latter acknowledged receipt of payment of allotment fees. The court also finds sufficient evidence of possession by the Plaintiff. There is no indication on record to show that the 1st Defendant or its predecessor ever objected to the Plaintiff's possession nor is there evidence of objection to the Plaintiff's operation of a dispensary on the suit property. On its part, the 2nd Defendant did not file any response to the application denying the allocation of the suit property to the Plaintiff. In fact, there is on record a letter dated 24.02.2005 from the Ministry of Lands and Housing indicating that the Plaintiff was allocated the suit property since there was a permanent improvement thereon. The court is thus satisfied that the Plaintiff has satisfied the first principle for the grant of a temporary injunction.
14. The court has also considered the material and submissions on record on the second principle. Whereas the Plaintiff submitted that it and the general public stood to suffer irreparable injury in the absence of an injunction, the 1st Defendant contended otherwise. The court is of the view that the nature of services being to be rendered by the Plaintiff on the suit property are not capable of monetary compensation. Even if the court were to be in doubt on the second principle, the court would still have found that the balance of convenience favours the Plaintiff as the party who has been in possession for a long time. The Plaintiff is likely to suffer greater hardship by denying it the injunction than the 1st Defendant would by granting the injunction. The court is thus of the opinion that the Plaintiff has satisfied the principles for the grant of a temporary injunction hence the court is inclined to grant the same.

b. Whether the Plaintiff has made out a case for the grant of an order of inhibition

15. The court has considered the material and submissions on record. It is evident that the ownership of the suit property is disputed and that such dispute can only be resolved upon a full hearing of the suit. The court has already found that the Plaintiff has demonstrated a prima facie case with a probability of success at the trial. As was held in the case of *Shivabhai Patel v Manibhai Patel* [1959] EA 907 it is the duty of the court to preserve any property which may be in dispute pending resolution thereof. In the premises, the court is satisfied that an order of inhibition should be granted to preserve the suit property and to prevent any dealings pending the hearing and determination of the suit.

c. Who shall bear costs of the application

16. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons – v- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. In the case of *Giella - v Cassman Brown & Co. Ltd* (*supra*) it was held that the proper order to make in an application of this nature is for costs in the cause where the application is allowed and for costs against the applicant where it is refused. As a result, the court is inclined to make an order for costs of the application to be in the cause.



H. Conclusion and Disposal Order

17. The upshot of the foregoing is that the court finds and holds that the Plaintiff has made out a case for the grant of the interim orders sought. As a consequence, the court makes the following orders for disposal of the notice of motion dated 12.10.2024:
- a. An order of temporary injunction be and is hereby made restraining the 1st Defendant from entering, trespassing, or in any way interfering with the Plaintiff's possession of the suit property formerly known as Ex-Debruins Farm House – Passenga Township and now registered as Nyairoko Township/394 pending the hearing and determination of the suit.
 - b. An order of inhibition be and is hereby made preventing any dealings with the parcel of land known as Nyairoko Township/394 pending the hearing and determination of the suit.
 - c. Costs of the application shall be in the cause.
 - d. Mention on 14.10.2024 for pre-trial directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 18TH DAY OF JULY, 2024.

In the presence of:

Mr. Lawrence Karanja for the Plaintiff

Ms. Wesonga for the 1st Defendant

No appearance for the 2nd Defendant

Court Assistant – Carol

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Y. M. ANGIMA

JUDGE

