REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT NYAHURURU

ELC CASE NO 277 OF 2017

THE CHURCH COMMISSIONERS FOR KENYA.....1st PLAINTIFF/RESPONDENT

ST FRANCIS CHURCH,ANGLICAN CHURCH

OF KENYA,OLJORO OROK.....2nd PLAINTIFF/RESPONDENT

VERSUS

THE BOARD OF MANAGEMENT

OLJORO OROK PRIMARY SCHOOL.....DEFENDANT/APPLICANT

RULING

1. The Plaintiff/Respondent herein filed their application by way of Notice of Motion dated 3rd October 2016 and filed on the 6th October 2016 wherein they had sought for interim injunctive orders against the Respondents. The matter was placed before the Deputy Registrar on the 6th October 2016 who issued interim orders pending the hearing of the application interparties.

2. The matter came before the Judge on two occasions wherein on both occasions the interim orders were extended as the Respondents herein had not filed their response to the said application.

3. On the third time, there was still no response from the Applicants wherein the court confirmed the exparte interim order of injunction issued on the 6th October 2016 restraining the Defendant/Applicant herein from interfering with the suit land and directed that parties comply with the provisions of Order 11 of the Civil Procedure Rules so that the matter can proceed for full trial. The court further ordered for the District surveyor to visit the suit land and file his report in court. This was done and the report was filed on the 15th September 2017.

4. The matter was fixed for hearing on the 23rd May 2018, however pending the hearing, the Defendant/Applicant herein filed an application under certificate of urgency dated the 20th December 2017 on the 12th March 2018 wherein they sought for interim orders against the Plaintiffs herein injuncting them from ploughing the suit land as this would interfere with the learning of pupils in the Respondent's school.

5. The matter was not certified as urgent as the application had been overtaken by events and the court instead directed that the same be heard interparty.

6. The Defendant/Applicant's application dated the 20th December 2017 and filed on the 12th March 2018 sought for orders that:

i. **Spent**

ii. **Spent**

iii. That the honourable court be pleased to issue an order of interim injunction retraining the Plaintiffs/Respondents either by themselves or their agents from entering, transferring alienating, ploughing, erecting, building, planting, cultivating or performing any agricultural activities or otherwise interfering with the peaceful possession of land parcel No. Nyandarua/Oljoro Orok Township/70 pending the hearing and determination of the suit.

iv. That the cost of this Application be borne by the Plaintiffs/ Respondents.

7. The said application was supported by the grounds on its face and an Affidavit, sworn by Peter Kimunge Mwangi the head teacher and Secretary of the Defendant/Applicant.

8. The application was argued interparty on the 12th June 2018 wherein the Defendant/Applicant through the State Counsel submitted that they sought for interim orders against the Plaintiff/Respondent for reasons that the suit land herein was set aside by the government for the sole reason of constructing a Public nursery school. They relied on letter dated the 4th June 2014 herein annexed as PKM 1. That to that effect thereof, they were rightly on the suit land.

9. The Defendant/Applicant further submitted that they had been on the suit land without interference until the Plaintiff/Respondent herein came to interfere with their peaceful possession on allegations that the suit land had been lent to them in the year 1996, allegations which are refuted by the Defendant herein.

10. The Defendant submitted that vide a letter dated the 27th January 2015, their occupation of the suit land and been affirmed. That further vide the Plaintiff/Respondents pleadings which are binding to them, they were categorical that they intended to set up a nursery school on the suit land but instead they had turned around and have been using the same as an agricultural land, spraying pesticides on the same which in turn had affected the school children in the nursery school who have been eating a certain type of weed laced with the pesticide.

11. The Defendant/Applicant submitted that the Plaintiff/Respondents have not demonstrated that they are rightly on the suit land and further that the court do consider and balance the Public interest as opposed to the private interest where the right to education of the children in the school are greater than the rights of the Plaintiff/Respondents to harvest maize.

12. The application was opposed by counsel for the Plaintiff/Respondents who relied on their filed affidavits sworn on the 26th March 2016 and 4th June 2018, the annexures thereto as well as orders of the court made on the 6th October 2016 and 29th May 2016.

13. Counsel gave a short history of the suit land to the effect that there are 3 parcels in this case being Nyandarua/Oljoro Orok Township/78, 80 and 79.

14. That the 1st Respondent applied for and was allocated Nyandarua/Oljoro Orok Township/78 in the year 1960's, the larger piece of land being Nyandarua/Oljoro Orok Township/80 is land that hosts the Primary school and upon which the nursery school was also allocated as per the map herein annexed. That plot No. Nyandarua/Oljoro Orok Township/79 which is the subject suit herein was allocated to the 1st Plaintiff/Respondent in the year 1990 and a lease certificate issued to them on the 12th May 2016 after the 1st Plaintiff/Respondent had met all the requirements of the letter of allotment.

15. That indeed the 1st Plaintiff/Respondent had proved that he was the registered proprietor of the suit land and therefore had established a prima facie case as was expected of them by virtue of the celebrated case of **Giella vs. Cassman Brown & Company Ltd (1973) EA 358.**

16. That further by orders issued by the court, the Defendant/Applicants had been restrained through an order of injunction from interfering with the suit premises. Instead of adhering with the said order the Chairman and head teacher of the school incited the parents and pupils of the school who entered the suit premises and went ahead to uproot the crops and trees planted by the Plaintiff on the suit land (as is evidenced by the photos annexed to the application) wherein the matter was reported to the police.

17. It was further the submission by counsel for the Respondent that the Applicants are persons who do not respect the law and are therefore not the kind of people who could expect protection of the court. That they had not come to court with clean hands. That the two orders issued by the court have not been varied or set aside and that parties were bound by the same.

18. That the letter dated the 4th June 2014 which was relied upon by the Defendant/Applicant was written in complete ignorance of the fact that the suit land had been legally allocated to the Plaintiff/Respondents as at the 4th June 2014 when it was written. The property was therefore no longer available for allocation.

19. That the Plaintiff herein has obeyed the court order and had not destroyed the semi-permanent structure put up by the Defendant/Applicant on their land. The Plaintiff/Respondent sought for the application to be dismissed.

20. In rejoinder the state counsel representing the Defendant/Applicant submitted that there was no evidence tendered in court that plot No. Nyandarua/Oljoro Orok Township/78 was granted to the Plaintiff/Respondent.

21. Secondly, that vide the letter dated the 4th June 2014 the same was clear that the suit land was first allocated to the Defendant/Applicants and as such, the first registration could not be defeated. He relied on Section 30(2) of the Land Act to buttress his Submission.

22. He further submitted that there was no proof that indeed the Chairman and head teacher of the school incited the parents and pupils of the school to enter the suit premises and uproot the crops and tress planted by the Plaintiff. What was on the ground is that the children ate the weeds and parents reacted thereafter.

Analysis and Determination

23. In the present case there is no dispute that the Plaintiff/Respondents herein filed their application for interim injunctive orders by way of Notice of Motion dated 3rd October 2016, on the 6th October 2016.

24. This application not having been challenged despite service, on the 29th June 2017, interim orders were granted and Parties were directed to comply with the provisions of Order 11 of the Civil Procedure Rules. On the 22nd February 2018 directions were issued that the matter be

set down for hearing for the 23rd May 2018.

25. Suffice to say that despite the interim orders being in place and no application having been filed to vary or set them aside, the Defendant/Applicant herein filed the present application dated 20th December 2017, on the 12th March 2018, seeking for injunctive orders against the Plaintiff/Respondent herein.

26. I find that this application which was filed under the guise of stopping the Plaintiff from ploughing the suit land, was conducted in bad faith and was intended to steal the match from the Plaintiff/Respondent and circumvent the due process of this court. Interim orders of injunction had by then been granted, the Defendant/Applicant had been served with the court documents and were expected to be patient and exhibit respect to the law and the already initiated court process by holding their horses on any intended adverse action, pending the outcome of the court case.

27. Instead of waiting for the hearing of the suit, the Defendant/Applicant mischievously and in outright disregard to the rule of sub judice as stated in **Section 6** of the **Civil Procedure Act**, rushed to jump the gun by filing the present application so as to obtain orders from this court in a move clearly calculated to defeat the case pending before this court and steal the match from the Plaintiff/Respondent. This conduct by the Defendants does not augur well for the proper and fair administration of justice

28. That having said and done, the often cited case of **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** is the leading authority on the conditions that an applicant needs to satisfy for the grant of an interlocutory injunction. An applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

29. My first task is to determine whether the Defendant/Applicant has demonstrated a prima facie case. A prima facie case was described as follows in the case of ***Mrao v First American Bank (2003) KLR 125;***

> *"..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case."*

30. From the submission by both parties, I note that what the Applicant holds while claiming proprietorship of the suit land is a letter from the district Lands office Nyandarua District dated the 4th June 2014 which letter refer to plots No. Nyandarua/Oljoro Orok Township/77 and 79 stating that plot No 79 was meant for a nursery school which is developed as a primary school. The Applicant has also relied on a search certificate dated the 8th May 2014 that shows the proprietor of Nyandarua/Oljoro Orok Township/79 as being the Government of Kenya.

31. On the other hand, the Plaintiff/Respondents herein have shown prima facie, that they abided by the terms of the letter of allotment issued for the suit land wherein they were issued with the Certificate of lease for the suit land dated the 12th May 2016.

32. Section 26 of the land Registration Act obliges me to take the certificate of lease as conclusive evidence of proprietorship. It provides as follows :-

> *(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor 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, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, 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.*

33. The Plaintiff/Respondent having demonstrated that they were the registered owner of the suit property namely No. Nyandarua/Oljoro Orok Township/79 and having been issued with a certificate of lease, prima facie their title is indefeasible and the burden shifts to the Defendnat/Applicant to show or demonstrate that the title is challengeable within the provisions of the law.

34. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the Plaintiff/Respondent's title but the mere proof that they hold a duly registered certificate which on the face of it was properly acquired is sufficient to lead the court to hold that the Defendant/ Applicant has not established a prima facie case.

35. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

> *"The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied".*

36. Consequently, I dismiss the application dated to 20th December 2017 but filed on the 12th March 2018 with costs to the Respondent/Applicant.

37. Parties to comply with the provisions of order 11 within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyahururu this 11th day of October 2018.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE