REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC CASE NO. 351 OF 2015

CARGILL KENYA LIMITED.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT/RESPONDENT

FAIR OAKS LIMITED.....2ND DEFENDANT/REPONDENT

RULING

1. The notice of motion dated 21.12.2015 is brought under Order 40 rule 1 and 2 and Order 51 rule 1 of the Civil Procedure Rules and Section 1A, 1B and 3A of Civil Procedure Act. In the application, the following orders are sought ;

i) Spent

ii) Spent

iii) Spent

iv) Spent

v) That pending the hearing and determination of this suit, the Honourable Court be pleased to grant a temporary injunction restraining the 1st and the 2nd Defendants/Respondents whether jointly and/or severally, by themselves, their agents, servants and/or anyone claiming through them from taking over possession, constructing on, interfering with, disposing of, transferring and/or in any other manner whatsoever dealing with the land located in-between MSA/BLOCK/1/152, and MSA/BLOCK/1/166 situated at Shimanzi, off Dar es Salaam and Zanzibar Road.

vi) That pending the hearing and determination of this suit, the Honourable Court be pleased to grant a temporary injunction restraining the 1st and 2nd Defendants/Respondents, whether jointly and/or severally by themselves, their agents, servants and/or anyone claiming through them, from denying the Plaintiff, its employees, servants and/or visitors or any other persons who have the lawful authority of the Plaintiff, unhindered access to the land located in between Msa/block/1/152, and MSA/BLOCK/1/166 situated at Shimanzi, off Dar es Salaam and Zanzibar Road.

Vii) That the costs of this Application be borne by the Defendants.

2. The application is supported by the grounds on the face of it and the affidavits of Raphael Mwadime sworn on 21.12.15 and 24th February 2016. The Applicant pleads that this it is registered as the lessee of the parcels of land L. R Nos. MSA/BLOCK 1/152, 154, 166 AND 349 all situated at Shimanzi, off Dar es Salaam and Zanzibar roads where it runs warehouses.
3. The Applicant deposes that the land in question (hereinafter referred to as the suit property) is located between MSA/BLOCK 1/152 and MSA/BLOCK 1/166 and that plot is intended for use of the Applicant's operations as described in the original grant issued by the then Commissioner of Lands in respect of her two parcels of land above. Further that the 1st defendant is subjected to obey the special conditions contained therein particularly clauses 5, 13 and 14 of the two grants.
4. It is deposed that the Applicant has complied with all the special conditions attached to the use of the suit property. Instead it is the 1st defendant who has blatantly breached these special conditions by allowing the 2nd defendant to fence off and build a wall around the suit property. The Applicant deposes that for the period they have used the plot and in light of special condition 5, the suit property can only be used exclusively by them in facilitating her access to her warehouses.
5. The Applicant deposed that she wrote to the 1st defendant to lease out the suit plot to them to use it for loading and unloading of goods and stacking of containers. However on 20.12.2015, the 2nd Defendant moved into the suit premises and has already constructed a fence and towed away the Plaintiff's trucks by force. The Applicant urged the Court to grant the orders sought in the interest of justice.
6. The application is opposed by both defendants/Respondents. The 1st Respondent filed her replying affidavit sworn by Justine Omoke who said he is the Estates Manager of the 1st Respondent therefore authorised to swear the affidavit on her behalf. The 1st Defendant deposes that the Applicant obtained the exparte orders on outright falsehoods. That one of the false hoods is the allegation that the 2nd defendant's construction has denied the Applicant access to the godown yet the Applicant's access has always been on the side adjoining the public road.
7. Secondly that the Applicant informed the Judge at the exparte stage that the actions complained of had just happened yet the previous pleading in ELC 190 of 2015 (withdrawn) pleaded that the acts by the 2nd Defendant were committed on or about 18.8.15. The 1st Respondent deposes that the Applicant will not suffer any irreparable damage if the orders are not granted. The 1st defendant further deposes that it has not entered into any easement or restrictive convenant with the Applicant and that the 1st Respondent is purely performing its duties under the Kenya Railways Act. She urged the Court to dismiss the motion.
8. The 2nd Defendant/Respondent also swore her replying affidavit through Joseph Mwella who is the legal officer. Mr Omwella deposes that the suit land belongs to the 1st Respondent. He deposes that on 1th December 2013, the 2nd Defendant wrote to the 1st Defendant requesting to be allowed to lease the suit parcel for commercial development. The 1st Defendant in a letter dated 11th December 2014 granted them permission to fence off the property pending consideration of their application to lease.

9. The 2nd Respondent thereafter sought development approvals from the relevant institutions and later on receipt of the said approvals commenced the construction of the perimeter wall fence which is now complete.That before their application was made, the property was disused and was overgrown with bushes and was not conceivably in use by the Plaintiff/Applicant. That to confirm this, the Applicant in their letter 5th August 2014 have described the property as “unutilised”.

10. The 2nd Defendant deponed further that the Applicant has chosen the path of mis-representation as the orders she is currently seeking were discharged on17.12.2015 in HC ELC No 190 of 2015 and that the injunctive orders in force are injurious and oppressive to the 2nd Respondent and the Court should use its inherent power to vary, discharge or set them aside. It is their case that the Plaintiff/Applicant has failed to demonstrate that she has a prima facie case or has fulfilled any of

the conditions for granting the orders sought. She also live the 1st Defendant urged the Court to dismiss the application with costs.

11. Both parties made very detailed oral submissions which I have considered and will make references to as appropriate in the body of this ruling. Having looked at the pleadings as filed and the submissions rendered, I find that it is not disputed that the plot in dispute is owned by the 1st Respondent and that it is located between the two plots Nos Mombasa/Block 1/152 and 166 which plots are owned by the Plaintiff/Applicant.

12. It is also not disputed that this plot has been fenced off by the 2nd Defendant with permission of the 1st defendant. What is in dispute and for my determination are ;

a) Whether the plot was meant for exclusive use by the Applicant on the basis of the special conditions contained in the grant for Nos 152 and 166.

ii) If (a) above is positive, whether the applicant is entitled to the orders sought in line with provisions of Section 87 (a) of Kenya Railways Act.

13. The Applicant is laying her claim to use this suit land on the basis of two reasons. First and important is that the grant in respect of her two parcels Nos 152 and 166 contain special conditions whose clause 5 bestowed on her that right.The second reason is that the 1st Defendant has been invoicing them for the use of the land and they have appropriately been making payments as demanded. That these payments were to enable them use the suit property.

14. Clause 5 of the special conditions of both titles reads thus

"The grantee shall use the land only for godown warehouse or factory purposes for which railway access and facilities have been provided and shall not carry retail trade or business of any description and shall not use the land or the buildings as a place of residence except for a care taker or watchman"

Clause 1 required the grantee to erect within two years of the commencement of the term, a ratproof godown warehouse or factory constructed of the best materials.

15. The Applicant submitted that the 1st Respondent has not stated whether the conditions above have been discharged. In their view the 1st defendant has breached these conditions by leasing the land to the 2nd Defendant. They rely on the case of **Devani vs Bhadresa & Another (1972) E. A 22.** He also submitted that the Applicant uses the suit premises as access to their warehouses and the construction of the wall by the 2nd defendant has occasioned to them massive loss which may lead to the collapse of their business. They denied a claim by the 1st defendant that being owners of the suit property, they are entitled to use the land as they deem fit. He urged the Court to allow the application.

16. Mr Ndegwa advocate for the 1st defendant submitted that the Applicant ought to have taken this matter to arbitration before filing it in Court. On the issue of access, he asked the Court to look at the photographs annexed to their replying affidavit. It is the 1st defendant's case that the Applicant accesses her warehouses on her two plots through Zanzibar and Dar – es – Salaam roads running on the front and the back of both plots. He submitted that the suit plot has always been fallow and parts of it cultivated by a squatter. He referred the Court to look at the vegetation visible on the photographs annexed to their replying affidavit.

17. According to the 1st defendant, the Applicant is using this case to armtwist them into negotiating for lease. He put forth the sequence of events which made them feel they are being armtwisted. For instance he annexed the letter showing that 4.10.2014 the Applicant applied to be

leased the land and wanted to be given priority over the 2nd defendant.

18. Mr Ndegwa submits that this application is res – judicata the ruling of the Court made on 17.12.2015. However in my view on the issue of resjudicata is that the ruling of 17.12.2015 merely declined the extension of the interim orders in the withdrawn suit and its effect ended once the suit was withdrawn. Nothing would have stopped this Court from granting the injunctive orders sought if the application proceeded on its merits and the Court was satisfied to grant such an order. The suit on which the order was made was withdrawn before the inter partes hearing on merits of that application.

19. The 1st defendant submits that this motion cannot succeed as the documents upon which it is founded is not connected to the land or parties in this dispute. First that title No 1149/152/1 was issued to Rally brothers not the Applicant. Further that the easement claimed ought to have been registered on the two titles. The 1st defendant took this Court through section 94 and 95 of the Registered Land Act (now repealed) on how a right to an easement was created. And that for the easement to be binding, it must be registered on the subject title. This is not the case in the present circumstance.

20. The 1st defendant submitted further that the clauses referred to in the special conditions only binds the grantee in plot Nos 152 and 166 but does not bind the suit property. He continued that if there is a change of user then the easement dies. That the Applicant while planning to use her land should have created parking space for her trucks. This is a requirement contained in paragraph 13 of the grant title. In conclusion, he blamed the Applicant for non – disclosure and that the application is without merit and should be dismissed.

21. Mr Oloo for the 2nd Defendant associated himself with the submissions rendered by the 1st defendant. He reiterated the contents of their replying affidavit and the annexed documents on how they acquired the plot from the 1st Defendant. That the plot was unutilised and the Applicant only came to Court after they began construction of the perimeter wall. It is their submission that the application has failed to meet the threshold set in **Giela vs Cassman.** That the balance of convenience tilts in their favour as they are now in possession. He relied on the case of **Suleiman vs Amboseli Resort Ltd (2004) 2 KLR** in support of his submissions.

22. Mr Mwihuri for the Applicant in reply submitted that there is a relationship between the grant and the suit property. That the Applicant is not claiming ownership of the suit plot but that no person other than the plaintiff should be allowed to use it. It is their case that the grantee is the Plaintiff and the 1st defendant is breaching the special conditions contained in the grant. He has submitted that the Applicant is not claiming any easement but a legal right provided under clause 10 of the grant title. He also states that the 1st defendant has not specified what dispute that should be referred to arbitration. He urged the Court to allow the application.

23. My task is cut out for me to determine as set out in paragraph 12 above whether the special conditions contained in the two titles plot No MSA/BLOCK /152 and 166 apply to the suit plot which is owned by the 1st defendant. The Applicant has admitted this land belongs to the 1st Defendant. The plaintiff submits that she is not claiming an easement but a legal right created by the special conditions contained in their titles. This Court will therefore not impose a claim on the Applicant and to this end, I will not consider the submissions rendered by the 1st Defendant on easements.

24. I already quoted the contents of clause 5 in paragraph 15 supra. The plaintiff admits that she is the grantee. In paragraph 4 of her affidavit in support of her motion, she underlined the first sentence of clause 5 as follows : - use the **land** only for go-down warehouse for which **railway access** and facilities **have been provided.** My reading of this statement is that railway access has been provided to the Applicant's plot. The suit plot was used to provide the applicant with railway services as it has a railway sliding (now unused)

25. The suit plot had a built railway sliding which all parties agree is now disused. It is public knowledge and this Court takes judicial notice that the old railway transport system collapsed no wonder the plot in question became disused. The Applicant pleads that the suit property is subject to clause 13 and 14 of the special conditions of his grant which required **"the** grantee to **make provision within the plot** for the loading, unloading and parking of motor vehicles". The plaintiff admitted that she is the grantee. This obligation is imposed on her as regards her two plots. It behoves logic that a duty imposed on a holder of a Title on how to use the land in question is assumed to be transferred to a neighbouring plot owned by a person who is a stranger to the title – holder. Under registration of titles, registration confers upon a title holder absolute ownership of that land together with all rights and privileges thereto and subject to implied or expressed agreement, liabilities or incidents of the lease (section 24 and 25 of the Land Registration Act Cap 300). To confirm that indeed the suit plot is independent of the Applicant's two plots, the annexed certificate of leases were issued to the Applicant on 30.11.1993 while the grants which are predecessor to the certificates of title herein were issued on 1.11.1956. Yet on 5th August 2014, the Applicant wrote to the 1st Defendant (Annexture marked "RM 4") expressing "interest to lease or hire the parcel of land that is in between two of our warehouses to utilize the same for our operations". The letter describes the land as **blocked on both sides** and lies **unutilized.**
26. If the special conditions contained in the two grants applied to the suit parcel then the Applicant would not have applied to lease it from the 1st defendant in 2014 as the applicant would have been assumed to be using it. She may have prayed for renewal of or extension the lease. Secondly, she would not have referred to the suit plot as unutilised.
27. The clauses referred to by Applicant can only be restricted to the Land to whose title those conditions are contained in. I am unable to comprehend under which law such obligations would be transferred to any other title other than by way of a registrable interest. In this instance probably an easement would make close to the plaintiff's claim. The Applicant has denied that her claim is premised on a right created by an easement. There is nothing shown to have been registered on the suit plot either as provided under Section 94 of the Registration of Land Act (repealed) or any other regulations. Since no covenant is registered on he 1st defendant's title no such a claim as it presented by the Applicant be sustained.

28. On the issue of the invoices which the Applicant claim was to enable her use the land, the copies of invoices she annexed to her affidavits in respect of the suit property indicated the payment was meant for sliding maintenance charged at Ksh 13,000. The payments whether for maintenance or otherwise does in law confer on parties any rights unless there is a document to support the claim for such a right. The Applicant has not shown this Court such a document.
29. Lastly the photographs annexed by the 1st Defendant shows the trucks are parked on the side of a tarmacked road. The 1st defendant deposed that the Applicant is able to access her plots on the front from Zanzibar road and at the back through Dar – es – Salaam road. This fact was not denied by way of a further affidavit or submissions. The upshot in answering all these facts and legal principles, I find the Applicant has failed to show this Court that it has a prima facie case with a probability of succeeding.
30. On irreparable loss, the Applicant submitted that their operations will be paralysed as they will be unable to access their plot if the orders are not granted. However as shown by the 1st Defendant that the suit plot has not been in use either by the Applicant or any other person before August 2015 other than the squatters ploughing it. Secondly that the Applicant is able to access her plot using the two roads sandwiching her plots. Whether the orders are granted or not, the Applicant is able to continue with its operations. In any event the loss to be suffered if at all has not been demonstrated that it cannot be compensated by an award of damages.
31. Lastly on balance of convenience, the 2nd defendant already has permission to use the suit plot from the 1st Defendant. Towards this end they already put up a perimeter wall. The 1st Defendant stated that they made the offer to lease the premises to the highest bidder. The balance of convenience in this case tilts in favour of the Defendant's who already are in the process of concluding a lease contract.
32. In conclusion, I find the application to has failed to meet all the principles laid down in the

classical case of **Giella vs Cassman Brown** for granting temporary injunctions. Consequently I do dismiss it with costs to the Defendants/Respondents.

Ruling dated and delivered in Mombasa this 28th day of April, 2016

A. OMOLLO

JUDGE