



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC PETITION NO. 183 OF 2016

GALOT HOLDINGS LIMITEDPETITIONER

-VERSUS-

ADSITE LIMITED.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

RULING

What is before the court is the Petitioner's Notice of Motion application dated 26th February 2015(sic) filed on 29th February 2016 seeking the following orders;

1. That an order of injunction does issue restraining the 1st Respondent whether by itself, its agents, servants or whosoever from putting up a billboard blocking the 18 metres access road sitting between L.R No. 24092 and L.R No. 21919 and thereby blocking its use and quiet enjoyment by the Petitioner's staff, servants, officers, visitors and others of the land known as L.R No. 24092 Nairobi, pending the hearing and determination of the petition.
2. That a mandatory injunction does issue compelling the 1st Respondent, its agents, officers, servants or whosoever to remove the billboard it had erected blocking the access road sitting between L.R No. 21919 and L.R No. 24092 Mombasa Road, Nairobi pending the hearing and determination of the petition.
3. The costs of this application.

The application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by Pravin Galot on 26th February 2016. The Petitioner averred that it was the registered owner of all that parcel of land known as L.R No. 24092 situated on Mombasa road (hereinafter referred to as "the suit property") where it operated a textile plant. The Petitioner averred that directly adjacent to the suit property is an access road measuring 18 meters in width (hereinafter referred to only as "the access road"). The Petitioner averred that on 16th January 2016, the 1st Respondent erected a billboard in front of the entrance to the access road thereby causing obstruction and preventing access to the Petitioner's premises and other neighboring plots. The Petitioner averred that its personnel and officials had suffered anguish and it was also experiencing dwindling fortunes in its business because some of its customers were not able to access its property and factory. The Petitioner averred that the said billboard interfered with the natural beauty and scenery of the area and the natural flow of aerial progression, wind and sunlight.

The Petitioners averred that the erection of the said billboard amounted to a denial, violation and infringement of the Petitioner's rights and fundamental freedoms guaranteed under Articles 22, 27, 28, 40, 42 and 70 of the Constitution. The Petitioner averred that it was in the interest of justice that the 1st Respondent was stopped from undermining the letter and spirit of the Constitution.

The Respondents did not respond to the petition and the application. When the application came up for hearing on 10th November 2021, the Petitioner's advocates relied entirely on the grounds on the face of the application and the affidavit filed in support thereof. The Petitioner submitted that the 1st Respondent had constructed a billboard on a public road and as such it should be stopped from doing so.

Determination:

The Petitioner's application was brought under Articles 22, 23 and 159 of the Constitution and The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, the inherent jurisdiction of the court and all other enabling

provisions of the law. The Petitioner is seeking conservatory orders in the nature of temporary and mandatory injunction pending the hearing and determination of the petition.

In Kevin K. Mwiti & Others v Kenya School of Law & Others [2015] eKLR the court stated as follows on the principles which govern the exercise of the court's discretion in applications for conservatory orders:

“The first issue for determination is whether the Petitioner has established a prima facie case. A prima facie case, it has been held is not a case which must succeed at the hearing of the main case. However, it is not a case which is frivolous. In other words, the Petitioner has to show that he or she has a case which discloses arguable issues and in this case arguable Constitutional issues. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a prima facie case with a likelihood of success.”

In Kenya Association of Manufacturers & 2 others v Cabinet Secretary Ministry of Environment and Natural Resources & 3 others [2017] eKLR the court had this to say on the same principles:

“In an application for a conservatory order, the court is not invited to make any definite or conclusive findings of fact or law on the dispute before it because that duty falls within the jurisdiction of the court which will ultimately hear the substantive dispute. The jurisdiction of the court at this point is limited to examining and evaluating the materials placed before it to determine whether the applicant has made out a prima facie case to warrant grant of a conservatory order. The court is also required to evaluate the materials and determine whether, if the conservatory order is not granted, the applicant will suffer prejudice. Thirdly, it is to be borne in mind that conservatory orders in public law litigation are meant to facilitate ordered functioning within the public sector and to uphold the adjudicatory authority of the court in the public interest.”

In Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR the Supreme court stated as follows:

“[86] Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”

In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that:

The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, the Plaintiff must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the Plaintiff might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

In Joseph Kaloki t/a Royal Family Assembly v Nancy Atieno Ouma [2020] eKLR, the Court of Appeal stated that:

“28. As this Court stated in Kenya Breweries Limited & another vs. Washington O. Okeyo [2002] eKLR a mandatory injunction can be granted on an interlocutory application as well as at the hearing but should not normally be granted in the absence of special circumstances but that if a case is clear and which the court thinks it ought to be decided at once, a mandatory injunction will be granted at an interlocutory application.

29. The Court also stated in Shariff Abdi Hassan vs. Nadhif Jama Adan [2006] eKLR that:

“The courts have been reluctant to grant mandatory injunction at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.”

I have considered the Petitioner's application in light of the foregoing principles. Although the application was not opposed, the Petitioner still had a duty of satisfying the conditions for granting a conservatory order. I am not satisfied that the Petitioner has established a prima facie case of threatened or violation of constitutional rights. Without determining the matter with finality, I am of the view that this matter should not have been brought to court by way of a constitutional petition. The Petitioner's complaint is straight forward civil dispute regarding alleged obstruction of a public road. I am not persuaded from the material on record that the Petitioner's rights under Articles 27, 40, 42, 47, 50 and 70 of the Constitution have been violated or are threatened with violation as alleged. From the maps and photographs produced by the Petitioner, it is clear that the suit property has direct access to Mombasa road and that the Petitioner need not access the suit property through the disputed access road. Furthermore, the photographs produced by the Petitioner show that the access road is not being used by vehicles. Even if the access road was being used by vehicles and pedestrians, there is no evidence that the said billboard has obstructed vehicular and human traffic through the access road. I am not satisfied at this stage that the Petitioner's constitutional rights have been violated by the said billboard erected outside its premises on a section of a public road. A case has therefore not been made out for the grant of the conservatory orders sought. Before concluding, I wish to add that the conservatory orders sought as mentioned earlier are in the nature of prohibitory and mandatory injunction. A prohibitory injunction was sought to restrain the 1st Respondent from putting up the billboard. This prayer has been overtaken by events. The evidence presented to court by the Petitioner shows that the billboard has already

been erected. The court cannot restrain an act that has already taken place. For mandatory injunction, the same is normally granted only in exceptional circumstances. The Petitioner has not persuaded me that exceptional circumstances exist in this case that would warrant compelling the 1st Respondent to pull down its billboard before the hearing of the petition. Due to the foregoing and in the final analysis, I find no merit in the Petitioner's application.

The upshot of the foregoing is that the Notice of Motion application dated 26th February 2015(sic) fails. The same is dismissed with no order as to costs.

Delivered and Dated at Nairobi this 26th day of January 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Kenyatta for the Petitioner

N/A for the Respondents

Ms. C. Nyokabi-Court Assistant