



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 6 OF 2020

ASHBRO INTERNATIONAL LIMITED..... PLAINTIFF

- VERSUS -

CATHERINE NJERI KAMUNYU.....1ST DEFENDANT

RIROY COMPANY LIMITED..... 2ND DEFENDANT

NAIROBI CITY COUNTY.....3RD DEFENDANT

THE DEVELOPMENT BANK OF KENYA LTD ... INTERESTED PARTY

RULING

1. This Ruling is in respect to the Plaintiff's application dated 8th December 2021. The application seeks the following orders: -

1. Spent.

2. THAT this Honourable court be pleased to issue a temporary injunction to restrain any persons from trespassing, entering, damaging, alienating or building any structures or otherwise dealing with the parcel of land known as LR NO. 09/3694 located in the City of Nairobi within Nairobi City County pending hearing of this application.

3. THAT this Honourable court be pleased to issue a temporary injunction to restrain any persons from trespassing, entering, damaging, alienating or building any structures or otherwise dealing with the parcel of land known as L.R NO. 209/3694 located in the City of Nairobi within Nairobi City County pending final determination of this suit.

4. THAT this Honourable Court be pleased to issue eviction orders against the trespassers who have illegally and unlawfully encroached on the parcel of land known as LR NO. 209/3694 located in the City of Nairobi within Nairobi City County and are currently conducting business and constructing structures on the said parcel of land.

5. THAT this Honourable Court be pleased to allow the Plaintiff/Applicant to put up a temporary fence on the suit property to avoid any further interference on the suit property pending the hearing and determination of the main suit.

6. THAT this Honourable court be pleased to issue an order directing the Officer Commanding Station (OCS) Industrial Area, the Administration Police Commandant Makadara Sub-County, Land Fraud Department under the Directorate of Criminal Investigations or their agents to ensure compliance with the orders in (2) (3) and (4) and (5) above.

2. The Application is based on the following grounds: -

1. That the Plaintiff /Applicant is the registered proprietor to all that parcel of land known as LR NO. 209/3694 located in the city of Nairobi within Nairobi City County.

2. THAT on or around 16th January,2020, the Plaintiff /Applicant made an Application seeking inter-alia that this Honourable court be pleased to issue a temporary injunction to restrain the 1st, 2nd and 3rd Defendants/Respondents by themselves or any other person from trespassing, entering, damaging, alienating or building any structures or otherwise dealing with the parcel of land known as L.R NO. 209/3694 located in the City of Nairobi within Nairobi City County pending the inter-parties hearing of the Application and subsequently hearing of the main suit.

3. THAT on 2nd March, 2021 the Honourable Court issued interlocutory orders restraining the 3rd Defendant together with its agents and servants against continuing with or undertaking further constructions works on Land Reference Number 209/3694 pending the hearing and determination of the main suit.

4. THAT on or around early November the Plaintiff/Applicant discovered that there were trespassers and/or strangers who have illegally and/or unlawfully encroached on the suit property and who include hawkers and other trespassers and/or strangers who are constructing public toilets on the suit property.

5. THAT the Plaintiff has requested the Kenya Police Service Commander in charge of Industrial Area Police to enforce the order issued on 2nd March, 2020 by evicting the said trespassers and/or strangers but the police have declined and/or refused to enforce the order at the said court order were only directed at the 3rd Defendant herein.

6. THAT it is in the interest of justice that the said trespassers be restrained from dealing with or further interfering with the suit property.

3. The Application is also supported by the Affidavit sworn by **Peter Waita**, a director of the Plaintiff's company.

4. The Application was not opposed by the Defendants save for the 3rd Defendant who filed a replying Affidavit sworn by **Abwao Eric Odhiambo, the County Solicitor** on 18th February 2022.

5. During the hearing of the Application on 21st February 2022, **Ms. Karani, learned counsel** appeared for the Plaintiff/Applicant, **Mr Bulowa, learned counsel** held brief for **Mr Khaemba Advocate for the 1st and 2nd Defendants** while **learned counsel Mr Nyakoe** appeared for the 3rd Defendant. There was no response filed by the Interested Party neither did they attend the hearing of the said application.

6. **Ms. Karani** urged the court to allow the application and grant the orders sought. **Mr. Bulowa** informed the Court that the 1st and 2nd Defendants were not opposed to the Application while **Mr Nyakoe** submitted that the Application ought to be dismissed with costs to the 3rd Defendant since it had not sought for any specific orders against them.

7. I have considered the application and the Affidavit filed in response together with the parties oral submissions and in my humble opinion, the main issue for determination is whether the application is merited to warrant the grant of the prayers sought.

8. The principles governing whether or not to grant an interlocutory injunction were settled in *Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358* and were reiterated in *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR*. Such an applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

9. In the instant Application, the Plaintiff has existing orders issued by my brother **Justice B. M. Eboseo** on 24th February 2021 which orders were as follows: -

a. THAT an interlocutory order is hereby issued restraining the 3rd defendant together with its agents and servants against continuing with or undertaking further construction works on Land Reference Number 209/3694 pending the hearing and determination of this suit.

b. THAT an order is hereby issued preserving the structures already erected on the suit property by the 3rd defendant using public funds, pending the hearing and

c. THAT the 2nd defendant shall be at liberty to remove from the suit property its construction equipment which may still be there.

d. That Kenya Police Service Commander in charge of Industrial Area Police Station shall enforce the above orders.

e. That costs shall be in the cause.

10. However, the Plaintiff has stated that he is unable to enforce the said orders since the officer in charge of industrial area declined and/or refused to enforce the orders stating that the said Court Order was only directed to the 3rd Defendant.

11. In the current application, the Plaintiff has not sought for review of the said orders but instead filed a fresh application seeking for other orders.

12. I have perused the said application and the orders sought and I note that at prayer 4 of the application, the Plaintiff seeks for eviction orders against trespassers who have illegally and unlawfully encroached on the parcel of land known as **L.R No.209/3694** located in Nairobi.

13. In essence, the Plaintiff seeks inter alia for eviction orders at an interlocutory stage. The parties against who the eviction orders are sought

have not been cited as parties to this suit and further no specific orders have been sought against the defendants who are parties to this suit.

14. The Kenya legal regime provides for an elaborate process for eviction against trespassers who have illegally encroached onto someone's property..

15. It is also clear that the prayer number 4 of the order sought in this Application is final in nature. A similar prayer has also been sought in the plaint. The main point is that the prayer for eviction that the Plaintiff/Applicant seeks in this Application is not a prayer that can be granted in an interlocutory application such as this one. It is final in nature and would preempt the main trial of the suit. Instead of filing this Application and pursuing it all this time, the Plaintiff should have simply set this suit down for hearing.

16. No orders have also been specifically sought against the Defendants in this suit. Court orders cannot be issued in vain and it will be pointless for this Court to issue duplicate orders in the same matter. In the circumstances and considering that the Plaintiff already enjoys temporary injunctive orders pending the hearing and determination of the suit granted by my brother **Justice B. M. Eboso** on 24th February 2021, I am unable to grant the orders sought in the said application.

17. The upshot of the above is that the notice of motion dated 8th December 2021 is devoid of merit. It is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2022

E. K. WABWOTO

JUDGE

In the Mr. Muindi for the Plaintiff.

Mr. Bulowa for the 1st and 2nd Defendant presence of: -

N/A for the 3rd Defendant.

N/A for the Interested Party.

Court Assistant; Caroline Nafuna