



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KWALE

ELC NO 51 OF 2021

(FORMERLY MOMBASA ELC 233/20)

MOUNT ROBBIN LIMITED.....PLAINTIFF

VERSUS

ALI SALIM TOZA.....DEFENDANT

RULING

BACKGROUND

1 This suit was commenced by way of Plaintiff dated 15th December 2020. It is the Plaintiffs case that it is the registered owner of land parcel no Kwale/Tiwi Beach/13441 herein after referred to as the suit property. That from the year 2012 to date the Defendant has encroached on the suit property and has been and continues to carry out excavation activities which include quarrying of coral blocks. It is further alleged that the said activities by the Defendant have led to degradation of the suit property and several demands to have him stop the said activities have failed and or been ignored.

2 The Plaintiff in a bid to stop the said activities filed the instant suit and Notice of Motion application dated 15th December 2020 under certificate of urgency seeking for the following orders;

1) Spent

2) *That this honourable court be pleased to issue a temporary injunction restraining the defendant/respondent by itself,agent,servants or anybody acting on its behalf from entering,excavating,quarrying and/or mining building blocks and/or any other products and/or damaging or wasting and/or committing any wrong to the immovable property on parcel of land known as LR Kwale/Tiwi beach/13441 and/or interfering with the said land in any manner whatsoever pending the hearing and determination of this application.*

3) *That this honourable court be pleased to issue a temporary injunction restraining the defendant/respondent by itself,agent,servant or anybody acting on its behalf from entering,excavating,quarrying and/or mining building blocks and/or any other products and/or damaging or wasting and/or committing any wrong to the immovable property on parcel of land known as LR Kwale/Tiwi beach/13441 and/or interfering with the said land in any manner whatsoever pending the hearing and determination of this suit.*

4) *That this honourable court be pleased to direct the Deputy County Commissioner Kwale, the Administration Police Commander Kwale, the Officer Commanding Police Division Kwale,the Officer Commanding Station Kwale to assist in implementation of the orders this honourable court is pleased to grant.*

5) *That the court be pleased to issue any other order or further orders.*

3 A temporary injunction was granted by this court on 23rd March 2021. This ruling is the subject of the said Plaintiff's application dated 15/12/2020. The application was canvassed by way of written submissions. The Defendant did not respond to the application despite being served with the same.

PLAINTIFFS SUBMISSIONS

4 Counsel for the Applicant identified two issues for determination 1) Whether the defendants trespassed unto the suit premises without

authority of the applicant and 2) Whether the applicant is entitled to the orders sought.

Whether the defendants trespassed onto the suit premises without authority of the applicant

5 It was submitted that the Respondent has continuously infringed on the suit property as against the provisions of section 3[1] of the Trespass Act Cap 294 of the Laws of Kenya without consent despite being privy to the fact that the Plaintiff was the registered owner of the same. Excavation was identified as one of the main infringements. Referring to Sections 107 and 108 of the Evidence Act Cap 80 of the Laws of Kenya as to burden of proof, Counsel urged that the Plaintiff had demonstrated before this court that the Respondent had continuously encroached on the suit land. This was supported by the Report and Valuation of Quarrying Activities on the suit property dated 14/3/2019 and a site visit report by the County Council of Kwale dated 21/12/2021. This court was urged to restrain the Respondent from trespassing on and into the suit land as the acts were in contravention of the Plaintiffs constitutional right to property.

Whether the applicant is entitled to the orders sought.

6 On the orders sought it was submitted that the Applicant has demonstrated that the inconvenience caused to them will be greater than that which maybe caused to the Respondent if the injunction is granted. Counsel submitted that the applicants had met the threshold for grant of injunctive orders as outlined in **Giella V Cassman Brown [1973] EA 358** by establishing a prima facie case, demonstrating that they would suffer irreparable injury in the event that the defendant was not restrained and that the balance of convenience tilted in the Plaintiffs favour since the Plaintiffs actions continued to degrade the suit property. It was reiterated that the Plaintiff was the registered proprietor of the suit property and had never authorized the Defendants entry to carry out the excavation of building blocks. On irreparable harm Counsel emphasized that the photos of the quarrying activities showed degradation of the suit property and its beauty further causing increased depreciation and decreased value. Reliance was placed in the cases of **Kenya Electricity Transmission Company Limited V Kibotu Limited [2019]**; **Pius Kipchirchir Kogo V Frank Kimeli Tenai [2018]** and **Robert Mugo Wa Karanja V Eco Bank [Kenya] Limited & Another [2019]**.

7 It was also submitted that the Court was enjoined to grant a temporary injunction to restrain the Defendants actions since the suit property was in danger of being wasted, damaged or alienated- See Oder 40 of the Civil Procedure Act.

ANALYSIS AND DETERMINATION

8. I have considered the application, material and facts placed before this court vide the Supporting Affidavit thereto, the submissions, and case law cited in support of the arguments. The Notice of Motion application has been brought under Order 40 Rules 1 and 2 of the Civil Procedure Rules 2010 which stipulates as follows:

“[Order 40. Rule 1] Cases in which temporary injunction may be granted.

1. Where in any suit it is proved by affidavit or otherwise—

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

9 The principles for granting a temporary injunction have already been stated earlier however it is important to emphasize that the court will decide on where the balance of convenience tilts only when it is in doubt of the other tests.

Whether the defendants trespassed onto the suit premises without authority of the applicant

10 On whether the applicant has established a prima facie case, the court of appeal in the case of **Naftali Ruthi Kinyua V Patrick Thuita Gachure & Another [2015] eKLR** stated that:

*“With reference to the establishment of a prima facie case, Lord Diplock in the case of **American Cyanamid vs Ethicon Limited [1975] AC 396** stated thus,*

“If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant’s proposed activities that is the end of any claim to interlocutory relief.”

11 I have considered the documents exhibited/annexed by the Plaintiff in the Supporting Affidavit of Nagib Tadjin a Director of the plaintiff sworn on 14th December 2020. Two reports have been filed indicating and confirming the excavation activities taking place on the suit land. However, it is noteworthy that while the Plaintiff alleges to be the registered proprietors of the suit property no evidence had been tendered to show that indeed the land is owned by the plaintiff such as copy of the title deed or even beneficial interest. It is however clear that indeed the quarrying activities are taking place on the land. The plaintiff has proved a prima facie case on the limb of the degradation of the land, however the issue of ownership still hangs on the balance as the same has not been proved. This court is aware though that in the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR**, the court while expounding further on prima

facie case and quoting *Habib Bank Ag Zurich V. Eugene Marion Yakub, CA NO. 43 OF 1982* stated that ‘Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage’

Irreparable harm

12 The Applicant must also establish that he will suffer irreparable loss if the order of injunction is not issued. **Halsbury's Laws of England**[Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.] it is stated that :-

“It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question”

13 Pictures have been annexed in evidence of the excavations of building stone and reports on the worth of the coral stones that were found on site at that particular time when the said valuation was taking place. The court cannot make an order of compensation as of now, the same can only be made when issues such as ownership and the alleged trespass and destruction have been fully litigated upon by the testimony of both parties. However, the court notes that by the time the said hearing takes place the activities of the defendant might have done more damage and caused more injury to the plaintiff, in the event that the injunction is not granted. In any event it is the duty of this court to preserve the suit property from wastage. This court places reliance on the holding in the case of Said **Almed vs. Mannasseh Benga & Another [2019] eKLR** where the court held that:

*“Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of **Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd (2005) eKLR**.*

14 From the foregoing reasons it is clear that the balance of convenience tilts towards preserving the property as prayed by the Plaintiff. The Plaintiff is likely to suffer more harm should the injunction be denied and the suit ultimately determined in their favor. In the case of **Paul Gitonga Wanjau vs. Gathuthis Tea Factor Company Ltd & 2 others (2016) eKLR**, the court dealing with the issue on balance of convenience expressed itself thus:

“Where any doubt exists as to the applicants' right, or if the right is not disputed, but its violation is denied, the court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties and the nature of the injury which the Respondent on the other hand, would suffer if the injunction was granted and he should ultimately turn out to be right and that which injury the applicant, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right... Thus, the court makes a determination as to which party will suffer the greater harm with the outcome of the motion. If applicant has a strong case on the merits or there is significant irreparable harm, it may influence the balance in favour of granting an injunction. The court will seek to maintain the status quo in determining where the balance on convenience lies.

15 For the foregoing reasons, I do find that the Plaintiffs application dated 15th December 2020 is merited and on the material availed the Plaintiff is entitled to an order of injunction against the Respondent. The injunction will serve its purpose thus to preserve the substratum of the disputed suit property, while the rest of the issues are due for determination upon the substantive hearing of the suit. The following orders shall issue:-

1) That a temporary injunction be and is hereby issued restraining the defendant/respondent by itself, agent, servant or anybody acting on its behalf from entering, excavating, quarrying and/or mining building blocks and/or any other products and/or damaging or wasting and/or committing any wrong to the immovable property on parcel of land known as LR Kwale/Tiwi beach/13441 and/or interfering with the said land in any manner whatsoever pending the hearing and determination of this suit.

2) That the Deputy County Commissioner Kwale, the Administration Police Commander Kwale, the Officer Commanding Police Division Kwale, the Officer Commanding Station Kwale are hereby directed to assist in implementation of the orders of this honourable court.

3) Costs shall follow the event.

Delivered and Dated at Kwale this 21st Day of February 2022

A.E. DENA

JUDGE

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

N/Afor the Plaintiff Respondent

N/A..... for the Defendant Applicant

Mr. Mwakina DenisCourt Assistant.