

REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 467 OF 2012

NADIA HOLDINGS LIMITED..... PLAINTIFF

VERSUS

GIUSEPPE CHECCHINI.....DEFENDANT

RULING

The Plaintiff in a Notice of Motion dated 30th July 2012 is seeking orders of a temporary injunction restraining the Defendant from trespassing onto, encroaching upon, or in any way howsoever interfering with the Plaintiff's quiet possession of the parcel of land known as Kajiado/Ololoitikoshi/Kitengela/2034 (hereinafter referred to as the suit property), pending the hearing and determination of this suit. The Notice of Motion is supported by an affidavit and further affidavit sworn by the Mustafa Amirali Pirmohamed, a Director of the Plaintiff, on 30th July 2012 and 7th October 2013, respectively.

The Plaintiff's case is that it is the absolute registered proprietor of the suit property, having been issued with a title to the same on 3rd April 2003, and has been in occupation and utilized the said property since then. Further, that in February 2012, the Defendant laid a claim to the suit property and attempted to take possession of the same, when he is neither a director or shareholder of the Plaintiff. The Plaintiff also claims that they have never sought the services of the Defendant and/or Pepco Construction Ltd to do any work for them.

The Defendant opposed the said Notice of Motion in a replying affidavit sworn on 30th October 2012, wherein he stated that he is a director of Pepco Construction Company Limited which was contracted by the Plaintiff to undertake leveling and excavation works on the suit property in 1997. The Defendant further stated that while the Defendant's company was excavating an access road to the Plaintiff's property, a Mr. Mario Sabbatini who was the manager of the Plaintiff, and who had contracted him, left the country without paying him.

Further, that the Defendant's company has maintained a presence on the site since it was contracted and hired guards to secure the site, and has a lien over the suit property to secure payment for the unpaid excavation works. The Defendant's Advocate Mr. Moibi Mose swore a supplementary affidavit on 23rd November 2012 to which he attached an invoice note dated 30th February 1997 issued by Pepco Construction Company and addressed to the Plaintiff.

The parties were directed to file written submissions, which they relied upon for the ruling herein. The Plaintiff's counsel in submissions dated 15th November 2012 argued that as the registered proprietor, the Plaintiff holds an indefeasible title in the suit property, free from any encumbrances pursuant to section 24 of the Land Registration Act of 2012. Further, that the Defendant had failed to demonstrate any adverse registrable interest in the Plaintiff's title and/or *bona fide* overriding interest in tandem with the provisions of section 28 of the Land Registration Act of 2012. The counsel also submitted that the Defendant had not produced any evidence that the Plaintiff owes him any money for excavation work, and any attempt by the said Defendant to exercise a lien over the suit property would be illegal.

Lastly, the counsel submitted that the Plaintiff had therefore established a *prima facie* case with a high chance of success and that he will suffer irreparable loss and damage, and he relied on the decisions in **Giella vs Cassman Brown (1973) E.A. 358** and **Mrao Limited vs First American Bank & Others**

(2003) KLR 125 in this respect.

The Defendant's counsel in submissions dated 4th December 2012 argued that the Plaintiff had not shown a *prima facie* case as they have wrongly sued the Defendant and yet it is Pepco Construction Company Limited that has a lien over the suit property to secure payment for unpaid excavation works. Further, that the said Pepco Construction Company Limited has been in occupation of the suit property for over 15 years, and the balance of convenience therefore tilts in their favour. The counsel relied on the decision in Mary Wambui Marango vs Admson Mukunja Mwaura & Another (2006) e KLR in this respect. The Defendant's counsel also filed supplementary submissions dated 22nd October 2013 in which he argued that the Plaintiff should have provided the original memorandum and article of Association of the Plaintiff company to show the original shareholders of the company.

I have carefully read and considered the pleadings and arguments made by the parties herein. The issue for determination is whether the Plaintiff has met the requirements stated in Giella vs Cassman Brown & Co Ltd, (1973) EA 358 as to the grant of a temporary injunction. These are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. The Plaintiff in its Plaint dated 30th July 2011 is seeking a permanent injunction against the Defendant, whom they claim has trespassed on the suit property. The Plaintiff has in this respect provided evidence of its title to the suit property. The Defendant on the other hand claims to have been sued wrongly, and that the proper party who ought to have been sued is Pepco Construction Company Limited. The Plaintiff's allegations however are that it is the Defendant who has been visiting the suit property, and in any event the Defendant's remedy in the event that he is wrongly sued will be in an award of costs.

The Defendant in addition did not provide any evidence of the occupation of the suit property by Pepco Construction Company Limited, or of the agreement he alleged was entered into between the said company and the Plaintiff which he claims to be the basis of its lien over the suit property, or of the said company's occupation of the suit property. I therefore find that the Plaintiff has established a *prima facie* case in the circumstances of this application.

The Plaintiff's Notice of Motion dated 30th July 2012 is allowed for the foregoing reasons, and I accordingly order that the Defendant, his agents, servants, assigns and/or surrogates be and are hereby restrained from trespassing onto, encroaching upon, or in any way howsoever interfering with the Plaintiff's quiet possession and occupation of the parcel of land known as Kajiado/Ololoitikoshi/Kitengela/2034 pending the hearing and determination of this suit or until further orders.

The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____28th____ day of ____January____, 2014.

P. NYAMWEYA

JUDGE