



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MACHAKOS
ELC. CASE NO. E026 OF 2021

THE EAST AFRICAN PORTLAND CEMENT

COMPANY LIMITED.....PLAINTIFF

VERSUS

CALE INFRASTRUCTURE CONSTRUCTION

COMPANY.....1ST DEFENDANT

CHINA ROAD & BRIDGE CORPORATION.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion Application dated 26th February 2021, where it seeks the following orders:

- 1) *Spent*
- 2) *Spent*
- 3) *Spent*
- 4) *That pending the hearing of this suit, an order be issued prohibiting and/restraining;*
 - a) *The Respondents by themselves, their agents, servants, workers, employees, hoodlums, hirelings or any person acting on their behalf from continuing with the digging or mining murrum or any other excavation from the property known as Title L R NO. 10424*
 - b) *The Respondents by themselves, their agents, servants, workers, employees, hoodlums or hirelings or any person acting on their behalf from trespassing upon title L.R No. 10424 by entering and staying therein or using it as a path.*
- 5) *That the Court do issue any other orders it deems just and expedient in the circumstances.*
- 6) *That the costs of this Application be provided for.*

The Application is premised on the grounds on the face of it and supported by the Affidavit of one ROSELINE OMINDE its acting Legal Services Manager, where she deposes that the Applicant is the legal and beneficial owner of Title L.R. No. 10424 hereinafter referred to as the 'suit property', and annexed a copy of the title in support of this claim. She alleges that the Respondents had trespassed on the suit property and were carrying out activities on the land without the Applicant's consent as well as the relevant approvals. She contends that efforts to discuss and agree on an amicable mode of engagement on the project had been thwarted since the parties could not agree on the chargeable rates and the Respondents did not provide the relevant approvals. She explained that the Respondents had continued excavation on the suit property even after being directed to cease from doing so. She expressed fears that the Applicant stood to suffer irreparable harm if the orders sought were not granted.

The Defendants/Respondents opposed the instant application by filing a replying affidavit sworn by one KAIQIN GUO, the 2nd

Respondent's acting Public Relations Manager who confirmed that the 2nd Respondent had been contracted by the Government of Kenya to undertake construction of the Nairobi expressway through the 1st Respondent. He explained that they have documents in their possession which demonstrated that an entity known as 'Double T Engineering Solutions Limited' which was the Transporter, had obtained authorization from 'Aimi ma Lukenya' to excavate murrum from the suit property. He annexed a copy of the authorization letter, a copy of the title in the name of the said 'Aimi ma Lukenya' and a search certificate thereof. He deposed that the 1st Respondent entered into an agreement with the Transporter for the excavation of murrum on the suit property, with the Transporter acting as an agent of the owner of the said suit property. He expressed utter shock upon being informed that the Applicant was the registered owner of the suit property, upon which they withheld any payments to the Transporter and informed them on the issue of disputed ownership of the said suit property. He stated that the Transporter was asked to obtain the relevant authorization to excavate from the suit property. He contended that the Transporter and the said Aimi ma Lukenya had resorted to protests demanding payment from the 1st Respondent and consequently blocked the 1st Respondent's access to the suit property. Further, that it was the Transporter's mandate to obtain the relevant approvals from the authorities as per the inspection report dated 12th December, 2020. On the quantum of the valued amount of excavation, he argued that the Applicant had contracts with several other entities who were also excavating from the suit property and the amount that the Respondents were liable for, could not amount to the stated sum. He reiterated that the Transporter's Advocates had written to the 1st Respondent advising them to stop any payments arising from excavation pending the determination of an ongoing suit on ownership of the suit property, being Machakos ELC No.74 of 2014 and annexed a copy of the said letter. He concluded that the Applicant had failed in proving any reasonable case and that any loss can be adequately compensated by way of damages.

The Plaintiff filed a Supplementary Affidavit sworn by ROSELINE OMINDE, its acting Legal Services Manager reiterating her averments and contending that Aimi Ma Lukenya could not authorize anyone to excavate murrum on the suit property as they do not have any proprietary rights on the said property. Further, any authorization purportedly issued is illegal. She insisted the Defendants have approached this court with unclean hands. Further, the Defendants have never rebutted the meetings held with the Plaintiff to discuss the issue of excavation. She explained that vide annexure 'RO 9', it was confirmed by the National Land Commission that the title held by Aimi Ma Lukenya presented in Machakos ELC No. 74 of 2014 is a forgery.

The Application was canvassed by way of written submissions.

Analysis and determination

Upon consideration of the instant Notice of Motion application including the respective affidavits, annexures and rivalling submissions, the only issue for determination is whether the Applicant is entitled to orders of interim injunction in respect to the suit property pending the outcome of this suit.

The Applicant in its submissions contend that it has established a *prima facie* case to warrant the orders sought. Further, that the Defendants have failed to obtain all the necessary approvals/minimum consents from relevant authorities prior to undertaking the mining activities. To buttress its averments, it relied on the following decisions: **Centre for Education and Awareness (CREAW) & 7 others v Attorney General (2011) eKLR; Board of Management of Uhuru Secondary School V City County Director of Education & 2 others (2015) eKLR; Mrao Ltd V First American Bank of Kenya and 2 Others (2003) KLR 125** and **The Centre for Human Rights and Democracy & Others Vs the Judges and Magistrates Vetting Board & 2 Others (2012) eKLR**.

The Defendants in their submissions reiterated their averments as per their Replying Affidavit and contended that the Plaintiff has not demonstrated a *prima facie* case with a probability of success. Further, that the Plaintiff owes a duty of disclosure on the ownership dispute currently ongoing in respect to the suit property. It reiterates that the Plaintiff will not suffer irreparable harm which cannot be compensated by way of damages. Further, that the balance of convenience does not tilt in favour of the Plaintiff. To support their averments, they relied on the following decisions: **Giella Vs Cassman Brown (1973) EA 358; Mrao Ltd V First American Bank of Kenya and 2 Others (2003) KLR 125; Paul Gitonga Wanjau Vs Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR; Development Bank Vs Hyundai Motors Kenya Limited (2006) eKLR**.

In line with the principles governing grant of interim injunctive reliefs as established in the case **Giella Vs. Cassman Brown and Company Limited (1973) E.A. 358**, as well as the definition of a *prima facie* case as stated in the case of **Mrao Ltd V First American Bank of Kenya and 2 Others (2003) KLR 125**, I will proceed to decipher if the Plaintiff has established a *prima facie* case to warrant the orders sought.

The fulcrum of this dispute revolves around the Plaintiff's claim on an alleged trespass on the suit property by the Respondents who are said to be undertaking a project of national importance. In the Plaint dated 26th February 2021, the Plaintiff alleges that the Respondents have been carrying out unlawful and illegal activities on their piece of land without its consent. The Plaintiff prays for a permanent injunction restraining the Respondents and any person acting on their behalf from carrying out any activities on the suit property; a declaration that the mining that was and is still being carried out is illegal and special damages on the already mined murrum valued at Kshs. 506, 358,000 as well as costs of the suit. The Defendants opposed the instant Application and confirmed that the 1st Respondent entered into an agreement with a Transporter called 'Double T Engineering Solutions Limited' for the excavation of murrum on the suit property. They averred that they had documents in their possession which demonstrated that an entity known as 'Double T Engineering Solutions Limited' which was the Transporter, had obtained authorization from 'Aimi ma Lukenya' to excavate murrum from the suit property. They produced a copy of the authorization letter, a copy of the title in the name of the said Aimi ma Lukenya and a search certificate to prove their averments. I note the Applicant did annex copies of Certificates of Title, Report from National Land Commission confirming title held by Aimi Ma Lukenya is a forgery; and images of excavation activities by certain trucks in support of its averments. The Respondents have not denied entering the Applicant's land/mining murrum, but have argued that the Transporter is the entity that they contracted as an agent of the owner of suit property ('Aimi ma Lukenya'). Further, the Respondents did not deny that they had held meetings with the Plaintiff in respect to the dispute herein. The bone of contention is thus that the Respondents' agent obtained permission to excavate from 'the alleged wrong owner'. At this juncture, I note the Respondents did not furnish court with any affidavit from the alleged Transporter or owner of the suit property to prove their averments. Further, they admitted they are no longer on the suit property and are yet to pay the Transporter. Looking at the documents presented by the respective parties, I am of the view that the Applicant's claim is not baseless. Further, in absence of the proceedings from Machakos ELC No. 74 of 2014 as well as an affidavit from the said Aimi Ma Lukenya to dispute the Plaintiff's averments on ownership,

noting the Respondents are not owners of the suit property, I find that the Applicant has indeed satisfied the first limb of the requirements for grant of the orders as sought, being the demonstration of a prima facie case with a probability of success.

As to whether the Applicant will suffer irreparable harm which cannot be compensated by way of damages. The Applicant claims the Defendants did not procure the relevant approvals to undertake activities on suit property as required by Section 58 of the Environmental Management and Coordination Act of 1999. Further, that if it continues to undertake the said activities, it will cause serious harm to the topography of the suit property. The Applicant contends that the Respondents are still on the suit property which fact the Respondents deny. However, based on facts before me, I find that the Applicant's averments are not speculative and it will indeed suffer irreparable harm which cannot be compensated by way of damages.

On the issue of balance of convenience, I find that the same tilts in favour of the Applicant who is the owner of the suit property wherein the mining activities are taking place.

It is against the foregoing that I find the Notice of Motion Application dated the 26th February, 2021 merited and will allow it.

Costs will abide the outcome of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 22ND DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE