



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 8 OF 2011

TRITEX INDUSTRIES LIMITED 1ST PLAINTIFF

BENISIMO ENTERPRISES LIMITED..... 2ND PLAINTIFF

VIMLA J. K. KANABAR (*Suing as the Administrator*

***of the Estate of Jayntilal M. K. Kanabar*) 3RD PLAINTIFF**

ALI HABSHI 4TH PLAINTIFF

VERSUS

NATIONAL HOUSING CORPORATION 1ST DEFENDANT

MUNICIPAL COUNCIL OF MOMBASA 2ND DEFENDANT

RULING

Introduction

0. The plaintiffs who seek to enforce a registered proprietor's the right to property filed this suit herein by way of Plaint dated 17th January 2011 and prayed for orders:
 - i. A declaration that the 1st Defendant's property known as Plot No. Msa/Block XIII/114 is non-existent and the Title a nullity;
 - ii. An Order of Injunction restraining the Defendants, their employees, servants or agents from entering, encroaching and or constructing the boundary wall on their properties;
 - iii. General damages;
 - iv. Costs of the suit and interest thereon; and
 - v. Any other and further relief that this Honourable Court deems fit to grant.

0. Simultaneously with the suit was filed an application for temporary injunction. The court heard the applications on 20th January 2011 and ordered a temporary injunction restraining the Defendants from entering or constructing a boundary wall on the Plaintiffs' properties pending the inter-parties hearing and determination of this application. These orders have from time to time been extended.

The Application

0. The application currently before court is dated 17th January 2011 seeking an order -

“That an Order of Injunction do hereby issue restraining the Defendants, their Employees, servants and or agents from entering, encroaching, remaining and or constructing a boundary wall on the Plaintiffs' properties known as Msa/Block XIII/393, Msa/Block XIII/397, Msa/Block XIII/399, Msa/Block XIII/401 and Msa/Block XIII/420 pending the Hearing and determination of this suit”.

The facts of the case

0. The genesis of the matter is that the Municipal Council of Mombasa, the 2nd Defendants herein is the undisputed initial holder of title number Msa/Block XIII/114 measuring about 9.36 acres. It is pleaded in the plaint that sometime between 1993-1994, the 2nd Defendant subdivided the land and sold it for valuable consideration to private individuals, leading to the Plaintiffs acquiring titles as follows:
- i. Tritex Industries Limited - Msa/Block XIII/399 & 397
 - ii. Benesimo Enterprises Limited - Msa/Block XIII/393
 - iii. Jayntilal M. K. Kanabar Msa/Block XIII/401
 - iv. Ali Habshi - Msa/Block XIII/420

Copies of Titles to these properties (*save for Plot No. Msa/Block XIII/399 which copy of title was not produced, but for which a letter dated 13th November 2009 signed by Mr. Tubmun Otieno, Town Clerk gave consent to the 1st Plaintiff to Charge it to Equity Bank Limited*) have been produced vide the Plaintiffs' separate supporting affidavits each sworn on 19th January 2011. Thereafter, in 2009, the 2nd Defendant, transferred the original title Msa/Block XIII/114 to National Housing Corporation, the 1st Defendant/ Respondent herein, to extinguish a debt of Kshs.310 Million. The 2nd Defendant held the title for 2 years without contest, until sometime in January 2011 when upon attempting to construct a boundary wall around the said property, this suit was filed.

The plaintiff's case

0. The Plaintiffs contend that upon the excise of the 5 parcels from plot no. Msa/Block XIII/114, the said title became extinct and therefore the purported transfer to the 1st Defendant/ Respondent is illegal and a nullity. It is suggested in the submissions for the Plaintiff, that what was transferred to the 1st Defendant/ Respondent was the remaining parcel from Msa/Block XIII/114, exclusive of their properties and not the whole 9.36 acres.
0. The Plaintiffs further submit that having each produced copies of their respective title to the said properties, they have made a prima facie case as to ownership and are therefor entitled to the order for injunction as sought, based on the ingredients for grant stipulated in the celebrated case of ***Giella vs. Casman Brown Limited*** (1973) EA 358.

The Defendants' case

0. The 1st Defendant/ Respondent opposed the Plaintiffs' application and filed in reply an affidavit of Mr. W. K. B Keitany sworn on 16th February 2011. The 1st Defendant/ Respondent submitted that Msa/Block XIII/114 was legally transferred to it from the 2nd Defendant/Respondent to cover a debt of Kshs.310 Million. It was further submitted that in entering the agreement for transfer, the 1st Defendant/ Respondent verified the title by way of an Official Search dated 22nd May 2009 that the 2nd Defendant was the registered title holder of all that piece of land known as Msa/Block XIII/114 measuring 9.36 acres. Further, it was submitted for the 1st defendant that the alleged

plots claimed by the Plaintiffs constitute open spaces within the estate established upon Msa/Block XIII/114, for use as public amenities such as a children's playground, and they were therefore not available for sale or transfer. It was contended that the alleged subdivision could not have been legally effected since the original title deed for Msa/Block XIII/114 was at the time in the custody of Kenya Commercial Bank following the 1982 charge which was only discharged in May 2009. Any subdivision purportedly done and any titles issued were, therefore, illegal. Citing the case of *Standard Chartered Bank Kenya Limited vs. Intercom Services Limited & 4 others* (2004) eKLR, the 1st defendant urged the court not to give effect to an act of illegality.

0. The 2nd Defendant also opposed the application and filed in reply an affidavit by Mr. Tubmun Otieno, Town Clerk for the Municipal Council of Mombasa sworn on 4th March 2011. The 2nd Defendant's case is that the Msa/Block XIII/114 was duly transferred to the 1st Defendant, following a discharge of charge from the Kenya Commercial Bank dated 21st May 2009. In his Replying Affidavit sworn on 4th March 2011, Mr. Tubmun Otieno, Town Clerk of the 2nd Defendant, stated that he could not recall ever retrieving the original title to plot no. Msa/Block XIII/114 from the Kenya Commercial Bank in order to effect the subdivision and transfers to the Plaintiffs and, therefore, the transfers must be illegal. Citing the maxim of law *nemo dat non quod habet* that no one can give a better title than he himself has, it was submitted that the 2nd defendant did not have the title to the land between 27th October 1989 until 21st May 2009 when it was discharged with the bank and it could not have been able to sell to the plaintiffs.

Principles for the grant of interlocutory Injunctions

0. All the parties relied on the principles for the grant of an interlocutory injunction as set out in the case of *Giella vs. Casman Brown Limited* (1973) EA 358 that:
 - i. The Applicant must show that he is likely to prevail on the merits (prima facie case with probability of success);
 - ii. The Applicant must demonstrate that he will suffer imminent irreparable harm if the injunction is not granted (irreparable injury which cannot adequately be compensated in damages); and
 - iii. The Applicant must show that the harm he is likely to suffer absent the injunction outweighs the harm it would cause to the adverse party (balance of convenience).
0. While the plaintiffs contended that they had by virtue of holding titles to the parcels of land demonstrated prima facie, the defendants urged that the titles were fraudulent and could therefore not support a prima facie case and that the balance of convenience in any event lay with the refusal of the injunction to enable the defendant construct the security wall for its tenants' houses. The 1st Defendant/ Respondent cited *Kenya Hotels Limited vs. Kenya Commercial Bank Limited and Another* (2004) 1 KLR, which restates the principles of the *Giella vs. Casman Brown* case in an application for mandatory injunction and *Kenya Commercial Finance Company Limited vs Afraha Education Society* (2001) EA 86 (CAK), which held that the principles in *Giella vs. Cassman Brown* are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed.

Issue

0. The issue before the court is whether the court will grant an interlocutory injunction in the circumstances of the case on the basis of the applicable legal principles. Although the parties their respective cases under the *Giella v. Casman Brown* test of prima facie case with probability of success, I have, in enriching the jurisprudence on the principles for the grant of interlocutory injunctions, considered the balance of convenience test in House of Lords decision in ***American Cyanamid Co. v. Ethicon Ltd* (1975) 1 ALL ER 504; [1975] A.C. 396 HL** Lord Diplock with whom the other law lords agreed said:

'It is no part of the court's function at this state of the litigation to try to resolve conflicts of

evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that 'it aided the court in doing that which was its great objection, viz abstaining from expressing any opinion upon the merits of the case until the hearing' (*Wakefield v Duke of Buccleuch*). So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.'

0. The position in *American Cyanamid* is echoed by Platt, JA in ***Mbuthia v. Jimba Credit Corporation Ltd.*** (1988) KLR 1 that in an application for interlocutory injunctions the court is not required to make final findings of contested facts and law and the court should only weigh the relative strength of the parties cases and that in matters relating to land it is usual to grant injunctions.

Whether the Applicants have proved a prima facie case with probability of success:

0. Both the Plaintiffs/Applicants and the Defendant/Respondents have made out cases based on prima facie ownership of the property. The 1st Defendants have produced a copy of Official Search dated 22nd May 2009 indicating that the 9.36 acres of Msa/Block XIII/114 was at the time registered to the 2nd Defendant. The title indicates that between 27th October 1989 and 21st May 2009, the property was charged to Kenya Commercial Bank, and it was only upon that discharge that the title was released and transferred to the 1st Defendant/ Respondent for which a fresh title was on 29th May 2009 issued to them.
0. On the other hand, the Plaintiffs too have produced copies of titles to prove their ownership. In addition, the 2nd Defendant has from time to time acknowledged the ownership and occupation, as evidenced from the various correspondence on their respective properties with regard to change of user dated 10th January 1996 and consent to charge dated 13th November 2009 over Mbs/Block XIII/399 ("HS1" affidavit of Harish Shah sworn on 19th January 2011). The authenticity or veracity of these documents has not been challenged.
0. There is doubt however as to the authenticity of the plaintiffs' titles created by the evidence of the deposit of the main title with the bank when it was supposed to have been subdivided and sold to the plaintiffs. However, the court cannot be required to make a finding even on a prima facie basis on the issue of fraud for two reasons; one that it is an affront to the plaintiffs right to fair hearing under article 50 of the constitution to have a serious issue of fraud decided against them on the basis of affidavit evidence without opportunity that would be presented by a full hearing to cross-examine their accusers; and two, that the standard of proof in cases of fraud is higher than that in ordinary civil cases of balance of probability which is what the affidavit evidence at the interlocutory stage is able to facilitate. It is in such circumstances, that the inappropriateness of the prima facie test of *Giella v Casman Brown* is revealed.

Whether the Applicant is likely to suffer irreparable injury which cannot be adequately compensated in damages:

0. This adequacy of damages test is common denominator in the prima facie test of *Giella v. Casman Brown* and the balance of convenience test of *American Cyanamid* because under both tests an injunction will not be granted if the injury or loss complained of may adequately be remedied by an award of damages. As held in *Mbuthia v Jimba Credit*, supra, in matters of land it is usual to grant injunctions to protect the parties' profound interest in ownership of land whether as a residential property or as capital asset of production. But what does the balance of convenience test as honoured by both *Giella* and *American Cynamid* cases determine?

Balance of Convenience

0. The balance is in the competing interests between the parties, for the plaintiff to access and user of their plots and for the 1st defendant in constructing a wall to secure the houses in the main plot for the benefit of its many tenants. It is contended for the 1st defendant that “*the building of the perimeter wall will if anything secure all the plots within it and not diminish the value thereof. The wall under construction is along the boundaries of Plot Mbs/Block XIII/114 and has a common entrance*” (para.17, affidavit of W. K. B. Keitany sworn on 4th February 2011). The perimeter wall, it is argued, will provide security to the innocent occupants of the flats/estate erected on the entire 9.36 acre Mbs/Block XIII/114, and nothing will prevent the Applicants (if indeed they have plots within estate) from using the entrances provided and from enjoying the protection of the perimeter wall. The 1st Defendant/ Respondent further stated in submissions that the Plaintiffs have never occupied the alleged plots, have never been in physical possession thereof and would not suffer any or irreparable damage by the construction of the perimeter wall. Meanwhile, the 1st Defendant/ Respondent wishes to protect the property and the residents thereon to prevent loss of business resulting from the insecurity that the lack of a perimeter wall poses.
0. If the injunction is granted pending hearing and determination, and the defendants succeed at the trial the loss that 1st Defendant will have suffered is the delayed commencement of the perimeter wall with possible loss of rental revenue arising from lack tenants for their houses; If the injunction is refused and the 1st defendant constructs the wall around the suit property and the plaintiffs are successful at the trial, the plaintiffs will lost access to their plots during the period of the hearing and determination of the suit. While the loss to the 1st defendant may be accounted as the loss of rental income which may be ascertained, it may be difficult to quantify the damage caused if the injunction is not granted to the Plaintiffs should they eventually prove their case against the Defendants.
0. But I think that in the circumstances of this case where the plots claimed by the plaintiffs are allegedly inside the 1st defendant’s larger plot, construction by the plaintiffs will also affect the nature of the 1st defendant’s property should it finally succeed in its defence. I think, therefore, that the injunction to be granted in this case should preserve the property in the state that it is currently for the benefit of all the parties to the suit. The order of the court should therefore maintain the status quo on the property pending the hearing and determination of the suit. In view of the urgency of the need to provide security for the tenant houses of the 1st defendant, or to enable the plaintiffs to access and develop their plots should these be decreed to them, the hearing of the main suit must be heard on priority basis.

Orders

0. Accordingly, I make the following orders on the plaintiffs’ Notice of Motion dated the 17th January, 2011:
 - a. That the status quo on all the suit properties registered in the names of the plaintiffs and the 1st defendant herein shall be maintained for a period of ninety (90) days only within which the suit shall be heard and determined, or until further orders of the court.
 - b. The costs of the application shall abide the outcome of the suit.

Dated, signed and delivered this 31st March 2014.

EDWARD M. MURIITHI

JUDGE

In the presence of: -

Mr. Mohamed for Mr. Khatib for the Plaintiff

Mr. Wafula for the 1st Defendant

Mr. Nyamboye for the 2nd Defendant

Miss Linda - Court Assistant