



**ENVIRONMENTAL & LAND COURT AT KERICHO**

**CIVIL CASE NO. 82 OF 2013**

**HASS PETROLEUM (K) LIMITED.....PLAINTIFF**

**VS**

**DANIEL K. ARAP TONUI .....1<sup>ST</sup> DEFENDANT**

**THE CHIEF LANDS REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION .....3<sup>RD</sup>  
DEFENDANT**

**THE HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application before me is the notice of motion dated **30<sup>th</sup> November, 2013** filed by the plaintiff. It is an application brought under the provisions of **Sections 3A of the Civil Procedure Act, Order 40 Rules 1, 2 and 4, Order 51 Rule 1 of the Civil Procedure Rules** and all enabling provisions of the law. The plaintiff has sought the following substantive order :-

**The court be pleased to grant a temporary injunction order restraining the 1<sup>st</sup> defendant, his agents, representatives, successors, assignees from trespassing or dealing with or processing any title documents or in any way interfering with the plaintiffs land L.R No. 631/ 513 I.R No. 65150 ( hereafter referred to as the suit property) pending hearing and determination of this suit.**

2. It can be discerned that the plaintiff is seeking the usual order of injunction pending the determination of the suit. The application is based upon the grounds on the face of the application and on the supporting and further affidavits of **Issa Sheikh Mohammed**. It is opposed by the 1st defendant who swore a replying affidavit on **4<sup>th</sup> December, 2013**. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants have not yet entered appearance to this suit and have so far not filed any documents.
3. This being an application for injunction, I stand guided by the principles laid out in the celebrated case of **Giella v Cassman Brown (1973) EA 358**. In the said case, the court of appeal stated that before granting an application for injunction the court needs to be satisfied that the applicant has demonstrated a prima facie case with a probability of success; be alive to the tenet that an injunction will not normally be granted where damages can be an adequate remedy; and finally if in doubt, decide the matter on a balance of convenience.
4. In an application for an injunction, the court ought always to be alive that its function when considering an application for injunction is to determine the state in which the subject matter of the suit ought to be preserved pending the hearing and determination of the suit. That is why it is

- important for the plaintiff to establish a prima facie case, for where the plaintiff's case does not look impressive, then there is no purpose in disturbing the subject matter of the suit to the detriment of the defendant. What then is the plaintiff's case in our instance?
5. In the supporting affidavit, the plaintiff has pleaded that he is the registered proprietor of the suit property having purchased the same in 2003. It has been in actual possession of the property paying land rent and rates and has substantially developed therein a petrol station together with all amenities valued currently at over Kshs. 100,000,000 and carries on its business therein.
  6. On the 1<sup>st</sup> week of July, 2013, the 1<sup>st</sup> defendant visited the plaintiffs' offices in Nairobi in possession of an allotment letter claiming to have been allocated the same by the Commissioner of Lands (**ISM-4**). This made the plaintiff apprehensive that the 1<sup>st</sup> defendant may interrupt the plaintiff's quiet and peaceful possession and enjoyment of the suit property or proceed to process another title over the suit property to the detriment of the plaintiff's proprietary rights. It seeks an order of temporary injunction to halt such a move.
  7. As I mentioned earlier, the application is opposed by a Replying Affidavit sworn by the 1st defendant. The long and short of the 1st defendant's case is that the grant held by the applicant only came into existence after issuance of a letter of allotment for unsurveyed plot No. 29 to the 1<sup>st</sup> Defendant which grant was obtained fraudulently.
  8. This application was argued before me on the **27<sup>th</sup> May, 2014**. Only counsel for the applicant was present in court. He basically reiterated what was contained in the application and affidavits of the applicant. He relied on the case of **Mukundi Wairi vs Dorcas Wanjiku ELC 29 09 2013**
  9. I have considered the application, the supporting documents and the arguments of counsel. My first task is to determine whether the plaintiff has demonstrated a prima facie case. A prima facie case was described as follows in the case of **Mrao v First American Bank (2003) KLR 125**;

***“..a prima facie case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard that is higher than an arguable case.”***  
**(at p138)**

10. From the above dictum I need to be satisfied that the plaintiff not only has an arguable case, but that it has a case that has a good probability of success at the trial. A prima facie case is a case that appears to be headed for success on merits. It is of course only a preliminary assessment at an interlocutory stage yet critical on the decision of how the subject matter of the suit ought to be preserved pending the hearing of the suit on merits.
11. The Plaintiff has demonstrated that the land belongs to them having purchased the leasehold interest from the previous owners **Jaskamal Singh** and **Veronoer Singh** who had purchased the same from **Zakayo Cheruiyot** and **Richard Kiptangus Langat**. A copy of the transfer dated **5<sup>th</sup> May, 2003** is exhibited. They have also exhibited a copy of the grant issued for 99 years effective **1<sup>st</sup> September, 1993** to the 1<sup>st</sup> owner showing how the suit property changed hands from the original owners to the second owner and finally to the plaintiff. It is clear from the grant that the Plaintiff was registered as the owner of the suit property on **8<sup>th</sup> May, 2003**. This position was confirmed by the Lands office on **18<sup>th</sup> July, 2003**.
12. **Section 26 of the Land Registration Act, 2012** obliges me to take the certificate of lease as conclusive evidence of proprietorship. It provides as follows :-

**26. (1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

13. The 1<sup>st</sup> defendant's letter of allotment is dated **15th September, 1994** obviously issued after the grant. Other than this allotment letter for unsurveyed commercial Plot No 29- Kericho, payment receipts of Kshs. 60,697 dated **25<sup>th</sup> May, 1995** to Commissioner of Lands, the 1<sup>st</sup> defendant has not exhibited any other document. No material has been placed before me by the 1<sup>st</sup> Defendant to show the alleged connection between the plot noted in the allotment letter and the suit land **L.R No. 631/ 513 I.R No. 65150**.

14. The 1<sup>st</sup> defendant has further alleged that the plaintiff obtained the grant by way of fraud. I have not seen any evidence of fraud demonstrated by the 1<sup>st</sup> defendant. There is no evidence tendered that the grant held by the plaintiffs was acquired illegally, unprocedurally or through a corrupt scheme. In other words, there is no material placed before me by the 1<sup>st</sup> Defendant that would entitle me to vitiate the grant of the plaintiff.

15. From the foregoing, I am satisfied that the plaintiff has demonstrated a prima facie case with a probability of success. I therefore allow prayer 2 in the motion dated **30<sup>th</sup> November, 2013**. Costs to abide the outcome of the suit.

It is so ordered.

**Date signed and delivered this 25<sup>th</sup> day of June 2014**

**L N WAITHAKA**

**JUDGE**

**In the presence of:**

- Mr. Mutai Julius holding brief for Mr. Mwangi for Applicant.
- N/A for the Respondent