



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 439 OF 2013**

SACAPHESO INTERNATIONAL LIMITED ..... PLAINTIFF

VERSUS

EVERSWEET BAKERY LIMITED ..... DEFENDANT

**RULING**

1. What is before me is the plaintiff's application dated 1<sup>st</sup> November 2013 seeking a temporary injunction to restrain the defendant either by itself or through its agents, servants and/or anyone claiming under it from entering upon, trespassing onto, fencing, building on, interfering with and/or in any other manner dealing with all that parcel of land known as LR No. Kisii Municipality/block III/289 (hereinafter referred to as "the suit property") pending the hearing and determination this suit. The application was brought on the grounds set out on the face thereof and in the affidavit of Calvin Monari Kenani sworn on 1<sup>st</sup> November 2013. The application was brought on the grounds that the plaintiff is the registered proprietor of the suit property having acquired the same from its previous owner one, Samuel Kenani Omwando on 17<sup>th</sup> December 2010.
2. In proof of its ownership of the suit property, the plaintiff has exhibited a copy of the register for the suit property, a copy of the certificate of lease for the suit property in the name of the plaintiff and a copy of a certificate of official search in respect of the suit property dated 29<sup>th</sup> October 2013 which shows that as at that date the suit property was registered in the name of the plaintiff. The plaintiff has contended that on 29<sup>th</sup> October 2013, the defendant through its servants, agents or employees entered the suit property without any lawful cause or right and while thereon fenced it and commenced depositing assorted building materials thereon. The plaintiff has contended that the said activities by the defendant has denied and/or deprived the plaintiff of the suit property and the benefits attendant thereto. The plaintiff has contended further that the said activities are criminal in nature and amounts to forcible detainer of the suit property. The plaintiff contended that the suit property now stands on the verge of being alienated, wasted and/or diminished in value unless the orders sought herein are granted.
3. The plaintiff's application was opposed by the defendant through a replying affidavit sworn by one, Benjamin Onsongo Arori on 11<sup>th</sup> November 2013. In its reply to the plaintiff's application, the defendant contended that it is the lawful proprietor of the suit property and that the activities on the suit property are lawful the same being development duly approved by the relevant authorities. The defendant contended that it acquired the suit property from one, Henry Nyangechi Nyanchoka in the year 2006 at a consideration of kshs. 2,000,000/= which it paid in full and had the said property transferred and registered in its name. The defendant contended that it took possession of the suit property after the purchase thereof and has been consistently paying

ground rent and land rates to the Municipal Council of Kisii in respect thereof. The defendant has termed the documents annexed to the plaintiff's affidavit in support of the application herein as suspicious.

4. The defendant annexed to its affidavit among others; a copy of the agreement for sale that the defendant entered into with Henry Nyangechi Nyachoka on 24<sup>th</sup> March 2006 in respect of the suit property, a copy of a certificate of search in respect of the suit property dated 21<sup>st</sup> March 2006 which shows that as at that date the suit property was registered in the name of Henry Nyangechi Nyachoka, letter of allotment of the suit property to Henry Nyangechi Nyachoka ("Nyachoka") by the commissioner of lands dated 16<sup>th</sup> January 1987, a copy of a lease executed in favour of Nyachoka over the suit property by the county council of Gusii, a copy of a certificate of lease for the suit property dated 22<sup>nd</sup> December 1987 in the name of Nyachoka, a copy of the consent to transfer dated 26<sup>th</sup> May 2006 issued by Kisii Municipal Council, a copy of a certificate of lease in respect of the suit property in the name of the defendant dated 8<sup>th</sup> June 2006 and copies of receipts issued by Municipal Council of Kisii in acknowledgment of payments made by Nyachoka for ground rent and land rates for the suit property. The defendant has contended that the plaintiff's application for injunction has no merit.
5. When the plaintiff's application came up for hearing inter partes on 14<sup>th</sup> November 2013, the advocates for the parties agreed to argue the application by way of written submissions. The plaintiff filed its written submissions on 26<sup>th</sup> February 2014 while the defendant did so on 17<sup>th</sup> April 2014. I have considered the plaintiff's application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the defendant in opposition to the application and the written submissions filed by the respective advocates for the parties and the authorities cited. This being an application for a temporary injunction, what I have to determine are; whether the plaintiff has established a prima facie case with a probability of success and whether the plaintiff has demonstrated that the plaintiff stands to suffer irreparable injury if the orders sought are not granted. If I am in doubt as to the above, the application would be determined on a balance of convenience.
6. As I have stated hereinabove, the plaintiff has contended that it is the registered proprietor of the suit property. The plaintiff has placed before the court several documents in proof of its title to the suit property which included a certificate of lease for the suit property in the name of the plaintiff. The plaintiff has contended that the defendant has no right known in law to the suit property and it is at best a trespasser thereon whose activities on the suit property should be restrained pending the hearing and determination of this suit. In response to the plaintiff's claims, the defendant has also contended that it is the lawful proprietor of the suit property. The defendant has also placed before the court several documents in support of its ownership claims which includes a certificate of lease for the suit property in the name of the defendant.
7. It is apparent from the material before me that the suit property has two (2) titles, one in the name of the plaintiff and the other one in the name of the defendant. At this stage, the court is not able to determine on affidavit evidence as to which of the two titles is the valid one. The issue will have to wait for the plenary hearing. Since the dispute between the parties in this suit revolves around the ownership of the suit property and since the court is unable to determine the issue on the material before it, I am unable to say that the plaintiff has established a prima facie case against the defendant with a probability of success. On the material placed before the court by the defendant there is some doubt on the merit of the plaintiff's case. The merit of the plaintiff's case being in doubt, it is equally doubtful whether the plaintiff stands to suffer irreparable injury if the orders sought are not granted.
8. The foregoing being my view on the matter, the plaintiff's application falls for consideration on a balance of convenience. The suit property is not yet developed by either party. None of the parties would therefore suffer any prejudice if the property is preserved. The advocates for both parties have agreed in their respective submissions that the most appropriate order to make in the circumstances of this case is one that would preserve the suit property pending the hearing and determination of the plaintiff's suit and the defendant's counter-claim. I had made a similar order on an interim basis on 14<sup>th</sup> November 2013.
9. In conclusion, I hereby decline to grant the orders sought in the application dated 1<sup>st</sup> November 2013. In place thereof, I hereby order that pending the hearing and determination of this suit

neither party shall sell, transfer, lease, charge or carry out any form of development on all that parcel of land known as LR No. Kisii Municipality/Block III/289 or any portion thereof pending the hearing and determination of this suit or further orders by the court. The cost of the application shall be in the cause.

**Delivered, signed and dated at KISII this 31<sup>st</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Oguttu-Mboya for the plaintiff

Mr. Nyaega for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**