



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL NO. 1001 OF 2013

KENYA BUILDERS & CONCRETE COMPANY LIMITED.....PLAINTIFF

VERSUS

NAMAN NDONJI MUKABANA.....DEFENDANT

(Administrator of the Estate of the late PETER KEYA WERE)

RULING

By a Notice of Motion application dated 15th August 2013 the plaintiff/Applicant seeks an order of injunction restraining the Defendant from interfering in any manner with property known as **L.R.NO.7086**(original NO.6825/1) **Mihango, Embakasi, Nairobi** and from constructing, developing or erecting any buildings or structures thereon or any part thereof.

The application is premised on the grounds that are set out on the face of the application and on the grounds set out in the supporting affidavit sworn by **Dhirajlal Ramji Patel** a director of the plaintiff and filed on 16th August 2013. The plaintiff avers that it is pursuant to a conveyance dated 1st December 2010 the registered owner of the property known as **L.R. NO. 7086 (original NO.6825/1) Mihango, Embakasi Nairobi** (the suit property) comprising approximately 32.8 acres where it has been carrying on the business of a quarry for over 20 years. The plaintiff further avers that the suit property was prior conveyed to the plaintiff registered in the individual names of family members of the directors of the Applicant pursuant to a conveyance dated 7th May 1990. The plaintiff states it has over the years invested heavily in the suit property through installation equipment and machinery for carrying out its quarry business and has a workforce of over 250 employees. The plaintiff avers that on or about 28th July 2013 the Respondent in the company of hired goons forcefully ejected the Applicant from the suit property claiming ownership of the suit property.

The plaintiff has tendered the conveyance dated 1st December, 2010 marked "DRP1" made between **Halji Dershi Patel** as vender and the plaintiff as purchaser. The conveyance was for a consideration of **Kshs.12,000,000/-** but the collector of stamp duties assessed the dutiable value at **Kshs.14,000,000/-** against which stamp duty was paid. The conveyance was registered at the Government Lands Registry on 4th July 2013 in volume **N98 FOLIO 196/40** file **NO. 7823**. A certificate of official search dated 31/7/2013 issued by the Registrar of Government Land shows the plaintiff as the current registered proprietor. A death certificate in respect of **Premji Dershi Dhanji** (deceased) was registered against the title on 4th July 2013 in volume **N98 Folio 196/37** file **NO.7823**. Also annexed and marked "DRP3" is a copy of the conveyance dated 7th May 1990 from **Nyoike Holdings Limited to Lalji Dershi Patel** and

Premji Dershi Patel registered in volume N18 Folio 455/32 file 7823. **Lalji Dershi Patel** and **Premji Dershi Patel** were registered as joint tenants such that following the death of **Premji Dershi Dhanji** the entire property devolved to the surviving joint tenant **Lalji Dershi Patel** who could properly convey the same to the plaintiff vide December 2010.

Significantly also the plaintiff has annexed copies of mortgages and Re conveyances of mortgage which shows that the suit property since being transferred to **Lalji Dershi Patel** and **Premji Dershi Patel** was severally used as collateral by the registered proprietors. The plaintiff has further annexed an abstract of the title relating to the records held at the Lands Registry as regards the suit property. The following entries entered against the register are of note:-

Entry NO. 23 Conveyance dated 24th February 1958 to Krishina Kapila.

Entry NO. 24. Conveyance dated 27th October 1996 to Samson Nathan Mwathi and Rahab Njambi Mwathi.

Entry NO. 25 Conveyance dated 31st May 1984 to Nyoike Holdings Limited

Entry NO.32 Conveyance dated 7th May 1990 to Lalji Dershi Patel and Premji Dershi Patel for Kshs.4,000,000/-.

Entry NO. 33 mortgage dated 7th August 1991 to Standard Chartered Bank Kenya Ltd for Kshs.6,000,000/-.

Entry NO. 34 further mortgage dated 6th February 1995 to Standard Chartered Bank for Kshs.1,000,000/-

Entry NO.35 Mortgage dated 7th March 1996 to Standard Chartered Bank.

Entry NO. 36 further mortgage dated 27/5/2005 to Standard Chartered Bank for Kshs.2,100,000.00.

The plaintiff states that following the death of **Premji Dershi Patel** (also known as **Premji Dershi Dhanji**) the family decided to transfer the suit property to the plaintiff which is a family concern and to do so the family had to discharge all the mortgages and further mortgages registered against the property to facilitate the transfer. The plaintiff further depones that all the records of the property at the Nairobi City Council were and have been in the name of **Lalji Dershi Patel** and **Premji Dershi Patel** who have been paying the land rates as per the Rates Demand notes and payment receipts annexed and marked "DRP6" and contends the Defendants have no interest whatsoever in the suit property.

The Defendant filed a replying affidavit on 27th August 2013 sworn by **Naman Ndonji Mukabana** in opposition to the plaintiffs application. The Defendant depones the late Peter Keya Were is the registered proprietor of the suit property and annexes what is stated to be a certificate of official search dated 25/7/2013 which indicates the current registered proprietor to be Peter Keya Were marked "NN1". The annexure shows the L.R. Number as 7086 and the register details as N.18 Folio 454/25. The Defendant avers that the plaintiff did not disclose the existence of a prior suit namely **CMCC NO.4462 of 2013** involving the same subject matter and that this was a material non disclosure which should disentitle the plaintiff the orders sought. The Defendant states that the plaintiff's agents had trespassed onto the suit property which prompted the Defendant to seek restraining orders in the Chief Magistrate's court.

The plaintiff in a supplementary affidavit sworn and filed on 6th September 2013 refuted that the late Peter Keya Were is the registered proprietor of the suit property and questioned the authentic of the search annexed and marked as "NNM1" arguing that the same does not reflect the true position. The plaintiff further averred that the plaintiff in the instant suit was not at all a party in **CMCC NO.4462 of 2013** and the plaintiff could not therefore acknowledge the existence of that suit where it was not a party.

The parties filed written submissions as directed by the court. I have carefully considered all the pleadings, the affidavits and the annexures thereto and the parties submissions and though I am not required to making any finding on the issue of ownership at this stage I am on the material presented before the court at this stage persuaded that the plaintiff has demonstrated that it is the registered owner of the suit property. The conveyance dated 1st December 2010 has been shown to have been registered in volume **N.98** file **196/40** file **7823**. The registration of the conveyance conferred on the plaintiff ownership rights as under the provisions of section 25 of the Land Registration Act NO.3 of 2012. On the material presented by the plaintiff before the court I am satisfied that indeed **Lalji Dershi Patel** and **Premji Dershi Patel** and **Premji Dershi Patel** **Were** the registered proprietors of the suit property before the same was transferred to the plaintiff for valuable consideration. The abstract of the and recorded of transactions relating to the suit property held at the Lands clearly shows the history of the suit property and prima facie the plaintiff has established their interest in the suit property. in my view therefore, the plaintiff has established a prima facie case with a probability of success.

As relates to the Defendant's claim that the late Peter Keya Were is the registered proprietor of the suit property, I would only observe that has not been demonstrated. The certificate of search exhibited as "NNM" has been challenged as suspect by the plaintiff. The same is unsupported. For instance the Defendant has not furnished a copy of the conveyance that conveyed the property to Peter Keya Were which would have shown how the deceased came to be registered as proprietor. The Register details shown in the search by the Defendant as **N18 Folio 454/25** do not show the file details. The search also carries no copies of revenue stamps as is normal raising questions as to whether the same is a genuine search. Further the registration details shown as **N 18 Folio 454/25** are infact the registration details of the conveyance dated 31st May 1984 from **Samson Nathan Mwathi and Rahab Njambi Mwathi** to **Nyoike Holdings Limited** (see entry NO. 25 of the abstract of title).

Thus in my view the Defendant has failed to show or demonstrate that they have a legal interest in the suit property and in the premises I can see no justification whatsoever for the Defendant and/or the Defendants agents to interfere with the plaintiff's use of the suit property.

Upon evaluation of all the facts and circumstances I am persuaded the plaintiff has established a prima facie case with a probability of success and has therefore satisfied the conditions for grant of a temporary order of injunction. The threshold in **GIELLA –VS- CASSMAN BROWN & COMPANY LTD (1973) EA 358** has been met and I find the Notice of Motion application by the plaintiff meritorious and accordingly grant an injunction in terms of prayers 4 and 3 of the Notice of Motion. The costs of the Notice of Motion are awarded to the plaintiff.

Ruling dated, signed and delivered this **24th** day of **October**, 2014.

J. M. MUTUNGI

JUDGE

In the presence of:

..... For the Plaintiff

..... For the Defendant