REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND DIVISION

CIVIL CASE NO. 493 OF 2012

GORVAS HOLDINGS LIMITED..... PLAINTIFF

-VERSUS-

KENSALT LIMITED……..……..1ST DEFENDANT

SUPPLIES AND SERVICES LIMITED.....2ND DEFENDANT

COMMISSIONER OF LAND…..……/……..3RD DEFENDANT

THE REGISTRAR OF TITLES…….……..4TH DEFENDANT

DIRECTOR OF SURVEYS…….5TH DEFENDANT

RULING

Introduction

1. This case concerns a dispute over three properties namely Land Reference Numbers 209/11278, 209/12110 and 209/11410 ("the suit properties"). The Plaintiff seeks a permanent injunction against the 1st and 2nd Defendants from interfering with the Plaintiff's property known as Land Reference Number 209/11278, Nairobi. The Plaintiff also seeks declaratory orders in its favor to declare and affirm its private rights.
2. Having commenced the suit on 8th August, 2012 via a Plaint later amended on 28th August 2012, the Plaintiff also immediately filed an application for an interlocutory injunction on 13th August, 2012. That application is the subject of this Ruling as is the Notice of Motion dated 11th February, 2014.
3. This ruling is also to determine the Plaintiff's application dated 26th August 2013 which also sought injunctive orders against the 1st and 2nd Defendants. The parties already filed written submissions on the same.

Background

4. It is common ground that there exist three title documents for the Land Reference Number 209/11278, Land Reference Number 209/11410 and Land Reference Number 209/12110. The documents are all Grants respectively registered as Inland Registration No. 48935, 67926 and 68428. The first of the three was first in time. It was registered on 19th January, 1990 under a

Deed Plan issued on 9th January, 1990 as number DP 142521. The second Grant was registered on 14th December, 1995 under a Deed Plan issued on 10th March, 1995 as Number DP 193873 and the third Grant was registered on 20th February, 1996 under a Deed Plan issued on 14th July, 1995 as Number DP 197329.

5. It is also common ground that the dimensions of the said parcels of land are different as are their respective delineations and acreages. Property A (being Land Reference Number 209/11278) for ease of reference is owned by the Plaintiff. Property B (being Land Reference Number 209/11410) is owned by the 1st Defendant. Property B was once purportedly owned by the Plaintiff who allegedly transferred it to Taylor Winch (Coffee) Limited and who in turn then transferred it to the 1st Defendant. Property C (being Land Reference Number 209/12110) is owned by the 2nd Defendant as an original allottee of grant from the Government of Kenya. All the properties are within the same vicinity. They indeed rim and edge or limit each other.
6. The controversy is on the properties' borderlines, edges or limits. The Plaintiff has contended that Property B as well as Property C both transgress on the Plaintiff's property, namely Property A. The Plaintiff claims the re-parceling was unlawful and illegal. The Plaintiff claims that Property B and Property C comprise fully Property A. The Plaintiff consequently seeks a declaration that the Grant for Property B is null and void. There is also controversy as to whether the Plaintiff ever owned Property B.
7. The Plaintiff says it never did. The records on the title appear to show otherwise. The records also appear to reveal that the Plaintiff was twice incorporated by the Registrar General. First under a Certificate Number C.38460 on 6th October, 1988 and second under a Certificate Number C.60045 on 13th July, 1994. The Plaintiff says that the latter Certificate was a fraud.
8. The 1st and 2nd Defendants have not demurred but the Replying Affidavits filed herein would reveal that the 1st and 2nd Defendants contend that they are the bona fide owners for value without notice of the two properties. The Defendants, at least the 1st and 2nd Defendants, also assert that Property A has no relation or reference to Property B or C. They assert that it is the Grant as well as the Deed Plan for Property A which are not genuine. The 1st and 2nd Defendants further maintain that the Plaintiff has never been in possession but they have been and they should thus be left to enjoy their respective properties.
9. It is against the foregoing background that the Plaintiff hurried to court. When it attempted to develop its Property A in 2012, the 1st and 2nd Defendants also sought to erect their own boundary wall. According to the Plaintiff, the wall ingresses into the Plaintiff's Property A. This to the Plaintiff amounted to an actionable trespass to land.
10. On 10th August, 2012, the Plaintiff consequently moved the court under the vacation rules seeking an injunction. Three days later, the parties recorded a Consent Order which was to ultimately give rise to the Application dated 11th February, 2014.

The application of 11th February, 2014

11. I will deal with this Application first and be fairly frugal.
12. This Application seeks orders that:

> *"A declaration to issue that the Consent Order made herein on 13th August, 2012 and issued on 14th August, 2012 be and is hereby declared to have lapsed on 5th November, 2013".*

13. The Consent Orders in question were recorded before Hon. Lady Justice Angawa. Counsel for both parties endorsed the said Consent. The Consent was to the effect that the status quo then prevailing was to be maintained until the next hearing date of the Application dated 8th August, 2012. A further Consent, also recorded on the same day, was that the Application was fixed to be heard on 29th August, 2012 before the Vacation Judge. The status quo then to be maintained was also extensively described by the presiding Judge. The question though is not what the status quo was but whether the said Consent Order lapsed on 5th November, 2013 as a result of which the parties were no longer after that date to maintain the status quo, whatever it was.

14. The Plaintiff is of the view that the Consent lapsed on 5th November, 2013 and seeks a declaration of the court to like effect. The 1st and 2nd Defendants argue otherwise. The Plaintiff in its submissions filed in court on 14th August, 2014 insists that the Application dated 11th February, 2014 is not for setting aside but rather to declare that the Consent Order lapsed as it was not extended at the required time.
15. The 1st and 2nd Defendants on the other hand submit that the Order was still in force as the status quo was to be maintained until the next hearing date of the Application dated 8th August, 2012. This, according to the 1st and 2nd Defendants, meant the self imposed injunctive orders were to remain until the Application dated 8th August 2012 was finally heard and disposed of.
16. My reading of the Consent Orders of 13th August, 2012 is the complete parallel of what the 1st and 2nd Defendants say. The Orders were clear. The status quo as described by the learned Judge was to be maintained until the next hearing date. That is plain English, not pidgin and not Queen's either. If the parties had intended to record or state that the status quo was to maintain until the determination of the application, nothing would have been easier. Indeed at the next hearing date the said Orders were extended with both parties present.
17. Thereafter the Consent Order as to maintenance of status quo was extended several times, almost but not indefinitely. On almost all occasions the 1st and 2nd Defendants' counsel was present as was the Plaintiff's counsel. On one occasion when parties were absent the court extended the Orders *suo moto*. On other two occasions when the parties were not in court and the orders were not extended the 1st and 2nd Defendants' counsel prompted the court for extension and this was effected. The Orders were to last until the next "hearing date" which hearing dates the parties would settle for only not to proceed and cause the extension again and again. There was certainly nothing ever recorded about the Orders running until the determination of the application.
18. The 1st and 2nd Defendants attempts to reinvent redraft and redraw the Order are misfounded. So too, in my view, is the Plaintiff's Application dated 11th February 2014.
19. This Application by the Plaintiff is hypothetical in so far as it simply sought an advisory opinion of the court as to whether or not the Consent Order in question was still in force. It was not dependent on any cause of action but rather it was to re-affirm the position of what the court record already reflected. The Plaintiff in filing the Application was trifling with the court. It was, in short an obviously frivolous application. It was insubstantial and not founded upon any legally recognizable grievance. I would have struck it out in exercise of the court's inherent jurisdiction had it not been for the 1st and 2nd Defendants' attempts to deliberately misinterpret the same.
20. Though I have explained what the court record reflects and stands for, I need not allow the application. I found it frivolous and I strike it out.
21. I must also add that as far as I am aware declarations are remedies always applied to affirm and or confirm one's private or public rights which was not the case here: see **Jubilee Insurance Co. Ltd v Rex Hotel Ltd [1973] E.A 437.**

The Applications dated 26th August, 2013 and 8th August 2012

22. I now proceed to deal with the slightly intricate Application dated 26th August, 2013 alongside the one dated 8th August 2012.
23. The Applications sought positive Injunctions for purposes of preserving the subject matter of the suit. The subject matter of the suit is of course the properties referred to in paragraph 5 above as Property A, Property B and Property C. The Injunctions sought were to ensure that the 1st and 2nd Defendants did not excavate or erect a perimeter wall on any of the properties or all of them. The 1st and 2nd Defendants were also to be restrained from effecting any development on the suit properties. While the earlier of the two applications limited itself to the property registered in favor of the Plaintiff, the application dated 26th August 2013 related to the properties registered in favor of the 1st and 2nd Defendants. Both Applications were supported by the grounds stated on the faces thereof and the Supporting Affidavits of Ashok Labashanker Doshi.
24. It is to be noted that the Application of 26th August 2013 also had a third substantive prayer that the 5th Defendant be ordered to immediately point out the beacons for the three properties. The

Applications were both stated to have been brought under Order 40 Rule 10(1) and (2) the Civil Procedure Rules and Sections 3A and 63 of the Civil Procedure Act.

25. The Supporting Affidavit reiterated the contents of the Plaint albeit under oath. The Plaintiff depones as follows.That the Plaintiff is the holder of Grant No. I. R. 48935 whilst the 1st and 2nd Defendants respectively hold Grants Number I. R. 67926 and 68428. The three titles held by the three parties relate to the same property on the ground and that the Defendants properties though adjacent to each other overlap the Plaintiff's property. The Plaintiff further complained through the deponent that the 1st and 2nd Defendants are busy erecting a wall on and around the properties including the Plaintiff's property effectively asserting ownership to all the properties including the Plaintiff's. While the Plaintiff is complaining that it will suffer irreparably ,it curiously says that any such suffering will be through the demand to honor any compensatory damages order by the court in favor of the two Defendants.
26. The Applications are opposed. A Replying Affidavit was filed on 24th April, 2014 sworn by one Rajendra G. Thakker. Another Replying affidavit had been filed earlier on 14th August 2012. The Replying Affidavits, briefly, are to the effect that there is already in place an injunction for maintenance of the status quo. The Defendants further admit that they are truly erecting a wall around the two parcels of land, all with the intention of safeguarding the properties which they state were registered in their favour for value. The Defendants further contend that the Plaintiff's property namely Land Reference Number 209/11278 together with the Grant in which it is comprised and the delineating Deed Plan are not genuine, with the said Land Reference Number only being traced to a property in Nakuru. The 1st and 2nd Defendants finally assert that they are the owners of the properties.
27. In further rejoinder the Plaintiff filed a Further Affidavit on 14th August, 2014. The Plaintiff deposed that another company bearing the Plaintiff's name had been registered in 1994 under a Certificate Number C.60045 by the Registrar General. The Plaintiff reiterated that its Grant of title was genuine. Further that the 1st and 2nd Defendants in constructing the perimeter wall and excavating the suit properties were in breach of the Court's Orders issued on 13th August, 2012 which were that the status quo was to be maintained.
28. The Plaintiff finally stated that the Plaintiff had filed suit in HCCC No. 182 of 1999 at Mombasa. A Decree had been issued declaring the Plaintiff as the owner of the property known as Land Reference Number 209/11278 and the Grant comprising Land Reference Number 209/12110 was ordered to be revoked. The latter Grant is the one held by the 2nd Defendant.
29. Both parties filed their written Submissions in prosecution of the Applications. I have read the same. I have also read the pleadings in this matter as well as considered carefully the respective Affidavits of the parties.

Law, analysis and determination

30. At this stage of the proceedings and with the Plaintiff seeking an interlocutory prohibitory injunction, the Plaintiff need only establish a *prima facie* case with chances of success and show the Court that it will suffer irreparably. Where the Court is in doubt, then the court will decide the application on the balance of convenience. These conditions were laid out by Spry VP in the generally accepted case of **Giella -vs- Cassman Brown & Co Limited [1973] I E.A 358**. It must be noted though that the granting of an Interim Injunction is an exercise of judicial discretion and in exercise of a discretionary jurisdiction the Courts judicious hands must not be unnecessarily fettered. The principles of **Giella -vs- Cassman Brown & Co Limited** (supra) must thus not fetter the Court's discretion but are some of the relevant principles to be considered and not ignored. As was held by **Odunga J** in **Bonde -vs- Steyn & Others [2013] 2 E.A 8**, the conditions outlined in **Giella (supra)** are not exhaustive. Thus the Court will consider the conduct of the parties.
31. The Court will also appreciate and give effect to the overriding objective as provided under Section 1A of the Civil Procedure Act. As it exercises its discretion, the court must seek to ensure equality and proportionality. In the end, the main consideration in the grant of a temporary injunction or any interlocutory orders is the need to prevent the ends of justice from being defeated: see **Bonde -vs- Steyn & Others [2013] 2 E.A 8**.

32. Against the foregoing background and being conscious of the fact that at this interlocutory stage, I am not to make any final findings on the various facts by the parties, I now ask myself whether the orders sought are merited and warranted.
33. It is certainly beyond controversy that there is a dispute concerning the extent of the various suit properties. There are allegations of non-existent and adulterated titles. There are allegations of properties overlapping. There are allegations of boundaries being interlaced and criss-crossed. Then there is the true assertion that three registered Grants exist. A closer look at the Deed Plans which are the genesis of the Grants would reveal that Land Reference Number 209/11278 was first registered in 1990. A Deed Plan was issued. The Plaintiff owned that property. Then came Land Reference Number 209/11410. A Deed Plan was issued in March, 1995. It appears to have superimposed a portion of Land Reference Number 209/11278. Then came Land Reference Number 209/12110 with a Deed Plan issued in July 1995. This property appears to wholly overlay Land Reference Number 209/11278.
34. It is apparent that four public departments seem to have goofed and got it all wrong in the process of issuing the titles to the Plaintiff and subsequently to the 1st and 2nd Defendants.
35. The 5th Defendant, and his studious silence since the suit was filed has not escaped this court's eye, is charged with the task of ensuring proper cadastral survey of land under the Survey Act (Cap 299). He does not appear to have properly performed his task. The 3rd Defendant too does not appear to have diligently performed his task to ensure that the titles issued were infirm.
36. Then there is the Directorate of Physical Planning. Though not a party to these proceedings, under the Physical Planning Act this Directorate is charged with preparing part or physical Development Plan which identify unalienated land prior to allocation by the 3rd Defendant. This directorate, if at all it developed Part Development Plans for these three properties did not apparently perform its role perfectly. In the mix too came the Registrar General. A company bearing the Plaintiff's name was registered twice. This should not have happened in the ordinary conduct of business.
37. In all these instances; did someone sleep on the job? Were the 1st and 2nd Defendants aware of what was happening? What truly happened? Is the Plaintiff's title genuine? All these are questions which only the trial court will need to answer with finality.
38. For the moment, I should be contented to find that the Plaintiff has established a *prima facie* case that it has a registered proprietary interest in real property which pursuant to the provisions of **Section 24** of **Land Registration Act (No. 3 of 2012)** desires and deserves protection. There is admitted intrusion by the 1st and 2nd Defendants which would ordinarily amount to trespass. The 1st and 2nd Defendants however also lay a claim of proprietorship to their respective properties which as already indicated appear to overlay or superimpose the Plaintiff's property. Yet the 1st and 2nd Defendants hold titles also registered and which too demand protection under the same provisions of the Land Registration Act. It is evident then there is doubt as to who between the Plaintiff and the first two Defendants should be protected.The balance of convenience should then be considered alongside any other factor.
39. There is no doubt that the main consideration for the grant of an interlocutory injunction should always be to prevent the ends of justice from being defeated. An order of status quo whereby either the 1st and 2nd Defendants on the one hand and the Plaintiff on the other hand did not part with their respective proprietary interest would have been perfect. An order along the same lines where either party did not change or purport to assert absolute ownership in view of the raging controversy over the same would have been ideal. It would not be proper to occasion development over the same property as parties await resolution on who truly owns what. It is not about improving the value but the question is about who owns what.
40. In my view, the fact that one party is simply securing a property or developing the same should not be a factor to lead the court to find favour with such a party lest is turns out the party had no business undertaking such development in the first place. In fewer words, balance of convenience should not simply be about who is in possession. I would therefore not accede to the 1st and 2nd Defendant's submissions that they are simply securing the properties.
41. As indicated previously an order of status quo would have been much more appropriate but then such an order has previously been issued with the consent of the parties. Even though it has since

lapsed as I have already held elsewhere in this ruling, the relevance is on the actions of the 1st and 2nd Defendants vis–a vis the lapsed consent Order. The two Defendants were aware of the Order. Indeed the status quo sought to be maintained was possession. This was maintained. Then the two Defendants one year later, begun the construction and excavation. Certainly that was not the spirit of the status quo order.

42. In constructing and developing the wall boundaries it cannot be said they are only developing on their respective two properties. They could also be developing the other property belonging to the Plaintiff. They could also be enclosing the Plaintiff's property. They could be excavating not just their properties but also the Plaintiff's. I find the conduct of the two Defendants rather loathsome. I have found it strange that the 1st and 2nd Defendants could insist that an order of maintenance of status quo was in place so there is no need for an injunction but at the same time seek to do exactly what the Plaintiff has been, from day one, asking them not to do.

Epilogue

43. It is pretty obvious from the facts before the court that ultimately there will have to be an order made for the cancellation of one title or another. It is also pretty obvious that to resolve this dispute there will have to be made an order for resurvey and reparcellation of the parcels of land. That will mean substantial changes of ownership. It would not be advisable for such ownership to be asserted and conveyed as the suit is still pending.

44. To ensure that the ends of justice is not defeated, I would allow both Applications by the Plaintiff and issue the following orders:-

(a) The 1st and 2nd Defendants by themselves are restrained from excavating and or erecting a perimeter wall or undertaking any development or in any other manner changing the character of the 1st and 2nd Defendants Plots namely Land Reference No. 209/11410 and Land Reference Number 209/12110 until determination of the suit.

(b) The 1st and 2nd Defendants either by themselves or agents and or servants be restrained from trespassing entering excavating or in any manner interfering with the property known as Land Reference Number 209/11278, Nairobi.

33. I decline to issue any Orders directed to the 5th Defendant. Such an Order would be pre-emptive of and prejudicial to any evidence the 5th Defendant would wish to tender in this case. It is an order or directive that relates more to the management and trial of the case . It ought to be revisited at any pretrial conference.

34. The costs of the Applications dated 8th August, 2012 and 26th August, 2013 will be borne by the 1st & 2nd Defendants.

Dated, signed and delivered at Nairobi this 28th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff

..... for the 1st Respondent

..... for the 2nd Respondent

..... for the 3rd Respondent

..... for the 4th Respondent

..... for the 5th Respondent