



IN THE MATTER OF: ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 40 AND 42 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: FURTHER CONTRAVENTION OF ARTICLES 60, 61, 62, 66, 69 AND 70 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS AND

FREEDOMS OF THE INDIVIDUAL) HIGH COURT PRACTICE AND PROCEDURE RULES, 2006

AND

IN THE MATTER OF PLOT NUMBER 4173/VI/MN

BETWEEN

MAT INTERNATIONAL TERMINAL LIMITED.....PETITIONER

V E R S U S

MULTIPLE ICD (K) LTD.....1ST RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY.....2ND RESPONDENT

THE COMMISSIONER OF LANDS.....3RD RESPONDENT

THE PRINCIPAL REGISTRAR OF TITLES.....4TH RESPONDENT

RULING

(1) This Court is shown two Grants issued by the Commissioner of Lands in respect to one piece of land known and described as LR No. MN/VI/4173 (the disputed land) to two different persons. That double allocation is, not surprising, a source of dispute, this dispute.

(2) By way of a petition dated 23rd April 2012 the Petitioner seeks inter alia, the following orders-

(a) A declaration that the title of L.R. No. 4173 in the name of Multiple ICD Limited is a forgery and illegal and that the said property belongs to the Petitioner.

(b) An order directed to the Principle Registrar of Titles to cancel the illegal title known as L.R. NO. 4173 in the name of Multiple ICD Limited and to order the immediate eviction of the first Respondent from the suit property.

(3) Together with filing that petition, the Petitioner filed a Chamber Summons in which it sought a temporary injunction. On 24th April 2012 the Petitioner was granted some interim relief by Hon. Kasango, J restraining the 1st Respondent either by itself, its agents and/or servants from dealing with or transferring or undertaking any construction works and or construction of roads, railway line or erecting any permanent barriers and/or wall across the disputed land.

(4) That order has triggered the application dated 18th June 2012 in which the 1st Respondent is asking for the following orders-

“The exparte injunction granted on 24th April 2012 restraining the 1st Respondent either from dealing with or transferring or carrying out any construction on the suit property pending the interparties hearing of the application be,

(a) Set-aside or discharged or in alternative.

(b) Be varied to the extent that the Petitioner deposit Kshs. 100,000,000/- as security for the loss and damage, cost by the injunction stopping construction works”

This is the application I am now asked to determine.

(5) I do not find it necessary to get into the detail of the dispute at this stage. The argument by the 1st Respondent is that it is the owner of the disputed land and is in occupation thereof. That the “ownership” documents held by the Petitioner are a nullity as the Commissioner purported to issue another grant when the disputed land was already owned by Highrise Elevators Ltd who had obtained a grant on 6th May 2003. Highrise Elevators Ltd transferred that grant to the 1st Respondent.

(6) It is the argument of the 1st Respondent that the petition lacks any merit and the exparte injunction has stopped the construction works of a Kshs. 7 billion project and the damage from the stoppage of the works to the project is substantial and irreparable.

(7) The Petitioner, I am told, was aware as early as 5th March 2010 that the 1st Respondent intended to proceed with the project and it was therefore improper and in bad faith for the Petitioner to bring the application under the guise of urgency and thereby obtaining an exparte injunction.

(8) On its part the Petitioner is of the view that the grant held by the 1st Respondent is a forgery. It has given reasons as to why it takes that position. Details will not be necessary now. However, it needs to be said that the Petitioner lays a stake on the land by virtue of a purchase from V. Naran Mulji Properties Ltd. A complaint of the Petitioner is that the Principal Registrar of Titles has refused to transfer the grant thereover from the sellers to itself.

(9) The Petitioner argues that it made a full disclosure to the Court at the exparte stage and the urgency was necessitated by the fact that the construction works was fast approaching the disputed land.

(10) The Petitioners’ position is that the order of injunction it has obtained is under the provisions of Article 23 of The Constitution and so the principles in respect to injunctions in a civil process is not

applicable. For this reason that the Court should not order for an undertaking of damages.

(11) I start by considering whether I should discharge the *ex parte* orders given by Hon. Kasango, J. I must bear in mind that the Petitioners application for injunction has not been argued *inter partes*. I do note that the Petitioner and the 1st Respondent each claim ownership of disputed land. Each having bought the same from different third parties. Although the Grant held by the 1st Respondent is first in time, there is an allegation that it is a forgery. Only after receiving evidence can the issue of the legitimacy of each grant be determined. At face value there is no saying with certainty which of the two Grants is legitimate. This, perhaps, is one of those instances where a decision on injunction would rest on a balance of convenience. But I must not say more because that application has yet to be canvassed fully.

(12) The 1st Respondent is in possession of the disputed land and is undertaking what seems to be a worthy investment. That would have inclined me towards discharging the injunction but I am swayed towards a different result by the environmental questions also raised in the petition. In addition to the allegation that the Petitioners right to property has been infringed, the Petitioner has alleged a threat or infringement to its right to a clean and healthy environment.

(13) Article 42 of The Constitution reads:-

“Every person has the right to a clean and healthy environment, which includes the right-

(a) to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and

(b) to have obligations relating to the environment fulfilled under Article 70.”

The provisions of that Article must be read in conjunction with Article 69 and 70 of The Constitution.

(14) Article 70 would be of interest here and I feel obliged to reproduce Clauses (1) and (3) of that Article-

“(1) If a person alleges that a right to a clean and healthy environment recognized and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter.

(3) For the purpose of this Article, an applicant does not have to demonstrate that any person has incurred loss or suffered injury.”

(15) As is quite clear, the provisions on locus standi are generous in matters of the enforcement of environmental rights. The threshold on standing is low. A grievance of the Petitioner is that no environmental impact assessment has been undertaken for the 1st Respondents project in respect to the disputed land and that there has been no NEMA approval for it. The Petitioner would have locus to raise that issue. The onus would be on it to prove the allegations made.

(16) It seems agreed, looking all affidavits filed herein including that of Benjamin Langwen on behalf of NEMA, that the project undertaken by the 1st Respondent is a project that requires permission under the provisions of Part VI of The Environment Management and Coordination Act, 1999. This Court has looked at all the licences issued by NEMA for the 1st Respondents project but finds none in respect to LR No. 4173 (the disputed land).

(17) It may very well be that no NEMA permission has been granted in respect to the disputed land. The Court notices that the 1st Respondents request to change user of that land from shops, offices and flats to industrial purposes was given by the Municipal Council of Mombasa on 8th December 2011 and a formal grant reflecting this change issued by the Commissioner of Lands on 23rd February 2012. Perhaps the

permission by NEMA had to await the change of user! As said earlier, the investment undertaken by the 1st Respondent must be applauded. If however that investment overlooks a regulation in our Environmental Statutes then this Court must start to frown. That for me would be the game changer. The question as to whether NEMAS' approval has been obtained in respect to the disputed property and its relevance to the Petitioner's right under Article 42 of The Constitution needs to be argued at the interpartes stage of the application for injunction. For this reason the Court is reluctant and will not discharge the existing interim orders.

(18) Let me now consider the second limb of the application. Article 23(3) provides the nature of relief's a constitutional court can grant in upholding and enforcing the Bill of Rights. Once such relief is an injunction (Article 23(3)(b)). An injunction is an equitable remedy. This Court agrees with Mr. Ndegwa appearing for the 1st Respondent that the Constitution does not create a special category or specie of injunction. The principles that are applicable to any other injunction would be applicable to an injunction issued in a constitutional matter.

(19) But I do not want to be misunderstood! When it comes to a conservatory order grantable under the provisions of Article 23(3)(c) the principles to be applied would be somewhat different. Some criteria was suggested by Justice Ibrahim in Mbsa Petition 7 of 2011 Muhuri & 2 Others –Vs- The AG & 2 Others. What, however, the Petitioner seeks here, and was granted on an interim basis, is an injunction not a conservatory order.

(20) A principle in granting an injunction is that in giving protection to the Applicant the Court must give regard to the corresponding ***“need of the Defendant to be protected against injury resulting from having been prevented from exercising his own legal right”*** (Gicheru J.A) in Rockland Kenya Ltd – Vs- Miller [1994]KLR 63. A way of assuring that protection is by requiring the Applicant to give an undertaking as to damages. The object of this was stated in Chatur Radio Service –Vs- Phonogram Ltd [1994] KLR 114 as follows at page 119-

“The object in insisting upon an undertaking as to damages is that if by misadventure through the judge not knowing all the facts, such as being misled by the affidavit evidence before him or by the arguments of counsel, an injunction is granted on an interlocutory application which ought not to have been granted, then the defendant is entitled to some remedy in damages; thus, the defendant becomes protected against the damage he may suffer by the wrongful issue of the injunction so that the whole purpose of such injunction, which is to preserve matters in status quo until the issue to be investigated in the suit can finally be disposed of, is not rendered nugatory. Save therefore in exceptional circumstances, an undertaking as to damages is required when an interlocutory injunction is granted in order that the Court granting such injunction may be able to do justice if the injunction was wrongly granted.”

My reading of this decision is that the requirement for an undertaking as to damages when an interlocutory injunction is granted is the rule rather than the exception. And if I may add, this requirement although cast in the Civil Process (Order 40 Rule 2 of The Civil Procedure Rules) is a general principle whenever an interlocutory injunction is granted.

(21) The injunction in force may have the effect of stopping or slowing or interfering with the construction of the 1st Respondents project. If the Petitioners application for injunction or petition were to fail on merit then the 1st Respondent should not be left without compensation for the loss that it may have suffered in the meanwhile. I have no difficulty reaching a decision that the Petitioner must furnish the 1st Respondent an undertaking as to damages. The undertaking shall be for any sum that may be found to be payable should an inquiry and assessment as to damages be made. That undertaking will extend backwards to the day the exparte order was granted.

(22) As the application was only partially successful, each party shall bear its own costs.

Dated and delivered at Mombasa this 23rd day of August, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Abed for the Petitioner

Ndegwa for the 1st Respondent

Lutta for 3rd and 4th Respondents

Court clerk - Moriasi

F. TUIYOTT
JUDGE