



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 64 of 2012

CRESENT CONSTRUCTION COMPANY LTD.....PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....DEFENDANT

RULING

The application up for consideration is the one dated 7th March, 2012 filed pursuant to orders 40 rule 1(a), 2(1) and 51 rule 1 of the Civil Procedure rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law.

The applicant has sought several orders but of relevance at this stage are prayers 3,4,5,6 and 8 on the face of the application. Essentially, the applicant is praying that an interlocutory injunction do issue to restrain the respondent from depositing soil, debris or any other material into the applicant's parcel of land known as L.R. No. 16115 pending the hearing and determination of this suit, a mandatory injunction to compel the respondent to remove the soil land debris deposited on the seasonal river/stream bed bank situate on the boundary of L.R. No. 16115 and the respondent's parcel of land known as L.R. No.12715/432 pending the hearing and determination of the suit. Mandatory injunction to compel the respondent to remove the soil and debris deposited in the applicant's parcel of land aforesaid, mandatory injunction to compel the respondent to drain the water collected into the quarry in the applicant's land and restore the quarry to as good a condition as it was before the damage caused by flooding by the respondent and interlocutory injunction to restrain the respondent from trespassing on the applicant's land pending the hearing and final determination of the suit.

Grounds in support of the application are that the respondent is the registered owner of land parcel No. L.R No. 12715/432 and the nuisance trespass and damage caused to the applicant's land originate from the respondent's land aforesaid. That due to the conduct, actions and negligence of the respondent, the applicant had lost its source of construction material from its quarry and has been forced to purchase the same at higher costs from other suppliers, due to the closure of the applicant's quarry as a result of flooding caused by the conduct, trespass and negligence of the respondent, the applicant had continued to pay its permanent staff salaries for no work done; the "pond", "dam" that has resulted directly from the blockage of the surface water flow route and streams/river course by the respondent had become a health hazard to the staff of the applicant and physical danger to the staff and people around the quarry. Indeed the danger posed by the pond/dam aforesaid had already manifested itself by a member of the public drowning in the quarry on 4th February, 2012. The physical danger posed as aforesaid unnecessarily exposes the applicant to civil and criminal liabilities for actions committed by the respondent.

In support of the application, **Mr. Mohammed Ashraf** the managing director of the defendant, swore an affidavit. Where pertinent he deposed that the applicant was the registered leasehold owner of L.R. 16115 whereas the respondent owns land parcel No. 12715/432. The 2 parcels of land are adjacent to

each other and share a common boundary in the form of a natural seasonal river. For 40 years the applicant had been obtaining building blocks, construction chips, soil and aggregate for its use and sale from its quarry situate on its parcel of land with 35 permanent employees. However, from June, 2011, the respondent started reclaiming its parcel of land which had been a disused quarry by filling soil debris and other materials. The respondent did so by depositing on the applicant's land the filling material thus wrongfully trespassing of the applicant's land. The reclamation also blocked the seasonal river that forms the common boundary with the consequence that it diverted the route of the area's surface water flow into the applicant's parcel of land thereby flooding its quarry rendering it non-operational. As a result of the closure of the quarry, the applicant had been forced to buy the materials that it ordinarily acquired from its own quarry from other supplies at a higher cost. In the meantime, it had continued to pay salaries to its permanent employees at the quarry. Similarly its machines and equipment had been rendered idle and in the process made the applicant to suffer dry costs for the machinery and equipment. The applicant had taken all necessary action to move the respondent to unblock the river and drain the quarry but the respondent had refused, failed and or neglected to rectify the situation. The conduct of the respondent was thus wrongful trespass, negligent and a nuisance for which it is liable at law. In the circumstances, it was the plea of the applicant that this court should intervene by issuing interim orders sought, to protect the applicant against the respondent's impunity, unmitigated trespass, nuisance and negligence.

In a replying affidavit sworn by **Margaret Osolika** a legal officer employed by the respondent, it disputed the applicant's claims. She deponed that the respondent once used to own the land but had since sold and transferred it to one, **Chandana Ratnayaka**. At the time, no diversion of the stream was noted nor was any deposit of soil and or debris evident on the land. Accordingly, if there are any soil and debris deposited then it was either deposited by the applicant or 3rd parties without consent and or authority or involvement of the respondent. According to the respondent the deposit of soil and debris if at all was done clandestinely often at night at the behest of the applicant as a precursor to this suit and therefore beyond the control of the respondent. Taking into account the prevailing circumstances, it may not be possible for the respondent to comply with the orders sought, firstly, because it is not responsible for land reclamation, secondly, it had sold the land to a 3rd party and therefore has no possession thereof and lastly, it would be inequitable to condemn the respondents for acts beyond its control that it did not authorize and had no knowledge. The respondent is of the view that the dumping took place in June, 2011. The date has been backdated to import liability on the respondent as the respondent's staff visited and sold the land parcel at a later date without the alleged dumping.

With the leave of court, the applicant filed a further affidavit in which it deponed that it matters not that the land parcel was sold to a 3rd party on 1st August, 2011 because possession had not passed. That the sale agreement was not conclusive prove of the sale nor had the respondent exhibited any documents to show that the land parcel had been sold and transferred to a 3rd party. The activities giving rise to the claim were carried out between June, 2011 and October, 2011, a period in which the respondent was in possession of the parcel of land.

When the application came up for inter-parties hearing, before me on 3rd July, 2012, **Mr. Wanyonyi** and **Mr. Adan**, learned counsel for the applicant and respondent respectively consented to canvassing the application by way of written submissions. They subsequently filed and exchanged written submissions which I have carefully read and considered alongside cited authorities.

It is common ground that debris and soil were dumped on the respective parcels of land with the consequence that water was diverted from seasonal river into the applicant's quarry. To the applicant, this was done by the respondent. However, the respondent takes a contrary view. It was not responsible for the dumping. In any event, the dumping if at all was done long after it had sold the parcel of land to one **Chandana Ratnayaka**. Before the sale, the purchaser and officers from the respondent visited the parcel of land where the purchaser undertook physical inspection of the land and beacons. The visit took place towards the end of July, 2011. No diversion of the stream was noted. No deposit of soil and debris was evident on the land. The applicant has not rebutted the fact that the respondent had sold its parcel of land to a 3rd party. It is contend with the position that a mere sale agreement does not mean that the parcel of land was sold and transferred to a 3rd party. That in any event the respondent had not exhibited any

document to show that the parcel of land was indeed sold and transferred to a 3rd party. To my mind, I do not think that it was necessary for the respondent to bring such documents. The respondent made the allegation and it was upto the applicant to discount such allegation by bringing forth such documents. In the absence of such prove, I can only assume that indeed the respondent sold the property to a 3rd party to whom it delivered vacant possession long before the applicant instituted this suit. Now if the property is in the name of a 3rd party, and who has not been made a party to this suit, how will the order of injunction if granted be executed? If the respondent was to comply it will equally be committing an act of trespass on the 3rd party's parcel of land.

Dealing with the aspect of mandatory injunction, the principles upon which a court will grant such injunction are well known. The applicant must show existence of special circumstances which will warrant the court to issue such an injunction. In the case of ***Locabil International Finance Ltd vs Agro Export and others the Sea Hawk [1986] 1 ALL E.R. 901***, the court delivered itself thus on the issue;-

“...a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and a summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the court had to feel high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction...”

I am far from being satisfied, given the circumstances obtaining in this case, that at the trial I would be confident that the mandatory injunction was rightly granted. The respondent does not own the premises anymore and therefore cannot be held to account for activities conducted over the same. The respondent has submitted that the soil or debris if at all, must have either been deposited by the applicant or third parties without its consent and or authority or its involvement. It has also contended that the applicant may be the author of his misfortune. I have not seen any serious rebuttal to these depositions by the applicant. Further, I note from the annexed documents on the applicant's affidavits that it took up the matter with the clerk for Mavoko Municipality and even NEMA. But it would appear that these organizations did not take seriously the complaint meaning perhaps that it was not well founded and or was spurious. On the basis of the foregoing, it would be inequitable to condemn the respondent for acts which perhaps are beyond its control. The respondent had sold the land to a 3rd party who has taken possession and lastly, the respondent has no possession of the parcel of land and would be committing trespass on the same if the orders mandatory injunction sought was to issue. The court will be acting in vain if it was to issue such an order and ordinarily courts of law do not act in vain.

Given that the parcel of land no longer belongs to the respondent can it be said that the applicant has satisfied the general principles of granting temporary prohibitory injunction as laid down in the celebrated case of ***Giella vs Cassman Brown & Company Ltd [1973] E.A. 358?*** I do not think so. The applicant has been made aware that the parcel of land no longer belongs to the respondent. It has not sought to enjoin the 3rd party to whom the respondent sold the land to in these proceedings. In the premises it will be futile to make orders of interlocutory injunction against the respondent. If the respondent admits that it no longer owns the parcel of land how will the order of interlocutory injunction to restrain the respondent from depositing soil, debris or any other materials on to the applicant's land help.? Nor will an order of interlocutory injunction to restrain the respondent from trespassing on the applicants land help. On the whole therefore I am not satisfied that the applicant has made out a prima facie case with probability of success to warrant the grant of any of the injunctions sought in the application.

Accordingly, the application is dismissed with costs to the respondents.

DATED at MACHAKOS this 22ND day of NOVEMBER, 2012.

ASIKE-MAKHANDIA

JUDGE

DATED, SIGNED and DELIVERED at MACHAKOS this 30TH day of NOVEMBER, 2012.

**GEORGE DULU
JUDGE**