



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 413 of 2011

SIBTAIN J. SHIVJI.....1ST PLAINTIFF

TAHERA SIBTAIN SHIVJI2ND PLAINTIFF

- VERSUS -

TELKOM (K) LIMITED..... DEFENDANT

ERICSSON (K) LIMITED.....THIRD PARTY

RULING

1. This is the plaintiffs' notice of motion dated 11th August 2011. It seeks both prohibitive and mandatory interlocutory injunctions. The first is to restrain the defendant from trespassing or encroaching up on the plaintiffs' property. The second is for an order to compel the defendant to remove a telecommunication mast and structures from the land. An order is also sought for the police and the Provincial Surveyor to supervise enforcement of the order.

2. In a nutshell, the plaintiffs' case is that they are the registered proprietors of LR No 3858/37, Nairobi. In July 2010, they commissioned a survey that established that a telecommunication mast, boundary wall and other structures erected by the defendant on an adjoining property, LR 3858/36 had encroached upon the plaintiffs' land. As the plaintiffs are in the process of developing residential units on their land, their quiet possession is prejudiced by the encroachment by the defendant.

3. The motion is contested. There is a replying affidavit sworn by James Ruto on 3rd October 2011. The defendant asserts that it is a lawful tenant of a portion of land comprised in LR 3858/36 upon which it has erected a telecommunication mast and other structures. It denies that it has encroached upon the plaintiffs' property. It is contended that the plaintiffs have not established any loss or risen to the threshold for grant of interlocutory prohibitive and mandatory injunctions.

4. I have heard the rival submissions. The principles for grant of prohibitive and mandatory injunctions are now well settled. I will deal first with the former. When a litigant approaches the court for prohibitive injunction, she must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that she stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted herself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80. See also the *Public Trustee Vs Nicholas Kabucho Murimi* HCCC ELC 610 of 2011 [2012] e KLR, *George Munge Vs Sanjeev Sharma & 3 others*

5. A mandatory injunction on the other hand should be granted in exceptional and the clearest of cases. Mucuha Vs Ripples Limited [1990 – 94] E.A. 388 Kenya Railways Corporation Vs Thomas M. Nguti Civil Appeal No 210 of 2004 (unreported).

6. In granting such an order, the court must be completely clear in its mind that the plaintiff is nearly guaranteed the same prayers at the trial. Authorities in this area abound and they hold, primarily that a mandatory interlocutory injunction ought not to be granted save only in special circumstances. It cannot be better said than in the decision of Locabail International Finance Limited Vs Agro Export et al [1986] 1 ALL E.R. 901 where their lordships held;

“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 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 injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being on a different and higher standard than was required for a prohibitory injunction”.

See also the decision in Technomatic Limited T/A Promopack Company Vs Kenya Wine Agencies Limited Nairobi HCCC 398 of 2005 (unreported). That position has been restated in Halsbury’s Laws of England 4th Edition Volume 24 paragraph 848.

7. When I juxtapose the law against the available evidence, I find as follows. It is common ground that the plaintiffs are the registered proprietors of LR 3858/37. They are thus entitled to quiet possession of the land. It is also not disputed that the defendant has leased a portion of the adjoining land LR 3858/36 and has through the third party, Ericsson Kenya Limited, erected a telecommunication mast, wall and other structures there. The crux of the matter then is whether those developments have permeated the boundaries and encroached upon the plaintiffs’ property. The plaintiffs’ position is affirmative. The defendant’s position is negative. The plaintiffs place great reliance on a topographical and boundary survey conducted by Martin Dangana, a surveyor with Geospatial Solutions Limited. A report dated 23rd July 2010 is annexed to the supporting affidavit. It concluded that the stone wall around the mast had exceeded the boundaries into the plaintiff’s property. There was also encroachment from a different property known as LR No 3858/38. The report then states as follows:

“Following survey findings of boundary encroachment among owners of parcel numbers 3858/36 – 38, it was recommended that the other two parties engage their independent surveyors to look into the prevailing survey work in the view of disputing or adopting this report. It was then concluded that should their (sic) emerge discrepancies among the surveys then all the surveyors be called upon for a joint survey work to ensure satisfaction of all the parties”.

8. To my mind then, the survey report is subject to an independent finding. The surveyor recommends that the owners of properties known as LR 3858/36 and LR 3858/38 conduct independent surveys. True, annexure “SJS 2” in the supporting affidavit is a letter by the Provincial Surveyor from the Ministry of Lands confirming that the perimeter wall of the mast encroaches on the plaintiffs’ land by “about 2.2 meters”. But that report is made in a different suit being HCCC ELC 33 of 2011. The surveyor of the proprietor of LR 3858/6 was not involved. Beacon numbered W8 could not be marked as it was inside the perimeter wall. The true boundaries can then only be fully determined by the trial court upon full evidence.

9. It has not also been lost on me that the owner of LR No 3858/36 has not been enjoined into these proceedings. The defendant is the lessee of that property. The offending structures were put up by Ericsson Kenya Limited who have since been enjoined as a third party to these proceedings. As the boundary line between the plaintiffs property and the defendants structures is contested by the affidavit evidence, I would be groping in the dark to make a final determination: that is the province of the trial

court.

10. From the survey report annexed, the encroachment is by a few meters. The Provincial Surveyor put it at 2.2 meters only. I am not saying it is inconsequential or insignificant. If it turns out that the defendant or the proprietor of that adjoining land have trespassed on the plaintiffs' land, I am of the view that damages would be available. I am thus not satisfied that the plaintiffs have established a strong *prima facie* case or that damages would not be a fair recompense. I have to weigh the competing proprietary interests of the parties. So much so that even the balance of convenience does not tilt in favour of the plaintiffs. The plaintiffs have thus failed to rise to the threshold of grant of a prohibitive interlocutory injunction.

11. To succeed in an application for mandatory injunction at the interlocutory stage the standards go beyond a *prima facie* case in an ordinary prohibitory injunction. The court must be so clear in its mind that the plaintiff would, at the trial, almost be assured of getting the same relief that is sought by way of an interlocutory mandatory injunction. Given the highly contested positions of the boundaries of the suit property, I am afraid I cannot say that this is one such obvious or clear cut case that meets the threshold for grant of interlocutory mandatory injunction to remove the offending wall, mast or other structures.

12. For all the above reasons, the plaintiffs' notice of motion dated 11th August 2011 is without merit. I order that it be and is hereby dismissed. In the interests of justice, costs shall abide by the final judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 27th day of November 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

-
Mrs. Keya for Ms Wambua for the Plaintiffs.

No appearance for the Defendant.

No appearance for the 3rd Party.