



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
LAND AND ENVIRONMENTAL LAW DIVISION
CIVIL SUIT (ELC) NO.483 OF 2010

MAYA INVESTMENTS LTD.....PLAINTIFF

VERSUS

MUTIYA HOLDINGS LTD.....DEFENDANT

R U L I N G

1. Maya Investments Ltd (hereinafter referred to as the applicant) has come to this court seeking *inter alia* an order of interlocutory injunction restraining Mutuya Holdings Ltd (hereinafter referred to as the Respondent) its servants, agents, workers or employees from trespassing on LR No. 9042/605 situated along Mombasa Road (hereinafter referred to as the suit property). The applicant further seeks an order restraining the respondents from constructing on the suit property or damaging or wasting it or interfering with or destroying the boundary marks thereon pending the hearing and determination of the suit.
2. The application is anchored on the grounds that the applicant is the registered proprietor of the suit property by virtue of a grant issued to it by the government of Kenya for a 99 year lease with effect from 1st January 1996. The applicant has been paying all the land rent and rates as and when they fall due. The respondent has now without any colour of right since 27th September 2010, trespassed onto the suit property and is constructing on the suit property. The applicant maintains that unless the respondent is stopped, it will cause waste and damage to the suit property and the applicant will suffer irreparable loss.
3. The respondent has objected to the application through a replying affidavit and a further affidavit both signed by its company secretary Jacob O. Ombongi. In short the respondent contends that the applicant obtained interim injunctive orders through concealment of material facts. The respondent maintains that it is the registered owner of land parcel known as LR. No.9042/305 Grant No. 1R 59731 delineated by a Deed Plan annexed to grant as No.175175 (hereinafter referred to as the respondent's parcel). The respondent has been in uninterrupted possession and occupation of this land parcel since allocation. In the year 2005 the respondent discovered that the Commissioner of Lands had issued a parallel grant and deed plan to the applicant for the respondent's parcel irregularly. The Commissioner of Lands in recognition of the double allocation registered a caveat under Section 65(1)(f) of the Registrar of Titles Act against the parallel title held by the applicant. The Commissioner of Lands also wrote to the applicants cautioning them from taking possession of the suit property and advising the applicant that it was private property. Subsequently the Director of Survey confirmed by a letter dated 10th March, 2006, that the

plaintiff's deed plan had been cancelled.

4. In November 2009, the applicant trespassed onto the respondent's parcel and erected a sign post on the property. The respondent protested through its advocates and there ensued an exchange of correspondence. The respondent maintains that it is the applicant who has trespassed onto the respondent's land parcel, and that the applicant's claim to the respondent's parcel is an attempt at depriving the respondent of its property through fraud.

5. Written submissions were duly filed by each party's counsel, each urging the court to find in favour of his client. Counsel for the applicant submitted that the applicant had satisfied the requirement for establishing a *prima facie* case, in that it has demonstrated that the applicant's cause of action has been actuated by the respondent's wrongful act. Relying on ***American Cyanamid vs Ethican [1975] 1 All ER 504***, it was submitted that the applicant had demonstrated that its claim was not frivolous or vexatious, but that there were triable issues, namely, who is the *bona fide* and registered owner of the suit property. The court was urged to preserve the substratum of the suit by issuing an order of injunction until the court makes a determination as to who is the rightful owner of the subject property.

6. It was argued that the court's injunctive power to restore the status quo ante was essential to the concept of fairness and equity. It was submitted that the damage occasioned by the respondent cannot be remedied by damages. Relying on ***Shariff Abdi Hassan vs Nadhif Juma Adan Civil Appeal 121 of 2005***, it was submitted that the defendant being a trespasser, he ought not to be allowed to continue benefiting from the trespass simply because it can pay for it.

7. On the issue of balance of convenience it was submitted that the applicant having demonstrated that they are deserving of injunctive orders, the balance of convenience tilts in their favour. The court was urged to reject the replying affidavit as it fell foul of the provision of Order III Rule 2 of the Civil Procedure Rules.

8. For the respondent it was submitted that the applicant holds a parallel grant issued 3 years after the respondent's grant was issued. It was argued that the applicant's grant having been nullified, it has no locus standi to institute the present suit on the basis of an invalid grant. It was further submitted that the grant issued to the applicant and that issued to the respondent, related to the same property on the ground. It was maintained that the respondent's title was absolute and indefeasible. It was pointed out that the respondent being the first registered proprietor, his title was supreme over all other equitable rights of title. Relying on ***HCCC 182 of 1999 Govas Holding Ltd vs Tom Mayani Omani & 2 Others***, it was submitted that once a suit property is alienated and granted to a party it was incapable of any subsequent alienation, and any purported alienation thereafter was unlawful. It was maintained that the purported alienation of the respondent's land to the applicant was violation of the applicant's constitutional rights.

9. It was argued that the applicable law to the suit property was the Government Lands Act (Cap 280). Section 136(1) of that Act provided for actions under that Act to be brought within one year from the date the cause of action arose. It was submitted that the applicant's suit was statute barred 14 years having lapsed from the time the applicant's title was nullified by the Commissioner in the year 1996. The suit was also statute barred under Section 7 of the Limitation of Actions Act which provides that actions for recovery of land may not be brought after the end of 12 years from the date on which the cause of action arose. It was further pointed out that no notice was issued to the respondent as required under Section 136(2) of the Government Lands Act and this rendered the applicant's suit fatally defective. In this regard ***HCC ELC No. 921 of 2007 Nyangate Guto Alias Maxwell Okwama Mogere & Another*** was relied upon.

10. As concerns the replying affidavit, it was maintained that the same was properly before the court as the deponent had sworn that she had authority to swear the affidavit. ***Civil Case no. 187 of 2000, Colour Print Limited vs Pre press productions*** and ***Civil Case No. 113 of 2005 Mohawk Limited vs Devon Group Limited*** were relied upon.

11. It was argued that the applicant was not entitled to the orders sought because it was guilty of

concealment of material facts and also misleading the court. The court was thus urged to dismiss the application.

12. I have carefully considered the application, the affidavits in support and in reply, together with the annexures thereto. I have also considered the written submissions made by counsel and the authorities cited. The issue is whether the applicant has established a prima facie case with regard to the respondent's alleged trespass onto the applicant's property.

13. From the facts deposed to in the affidavit it is evident that this is a case of double allocation by the Commissioner of Lands. Even though the applicant's parcel bears a different number from the respondent's parcel, it is evident that the two parcels are the same land on the ground. The respondent has demonstrated that it has a proper title to its parcel and that the Commissioner of Lands did indicate that the allocation to the applicant was erroneous, and that the deed plans in respect of the applicant's parcel was cancelled.

14. In the circumstances, the applicant has failed to establish that the respondent is a trespasser on the suit property. I find that in the circumstances of this case an order of interlocutory injunction would not be justified.

15. Accordingly, the application is dismissed.

Dated and delivered this 11th day of February, 2011

H. M. OKWENGU
JUDGE

In the presence of: -
Advocate for the plaintiff absent
Kabaiko for the defendant
B. Kosgei - Court clerk