



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 209 OF 2011

WILD ELEGANCE FASHIONS LTDPLAINTIFF/APPLICANT
V E R S U S
CLAUDIO MWANGI1ST DEFENDANT/RESPONDENT
PETER NJOROGE2ND DEFENDANT/RESPONDENT
DIESEL CARE LTD3RD DEFENDANT/RESPONDENT
CITY COUNCIL OF NAIROBI4TH DEFENDANT/RESPONDENT

RULING

The Plaintiff has exhibited copy of payment receipt (“NS-1”) dated 12th August 2009 to say it paid for the suit land, L.R. No.14732 Grant No. I.R. 120812 situate in the City of Nairobi, which had been allocated to it by the Commissioner of Land. The allotment letter was not produced. Its case is that following the allocation, the parcel was registered in its name on 24th November 2009. There is annexed the copy of the Grant (“NS-2”). It caused a rates account to be opened at the City Council of Nairobi (4th Defendant) and on 8th December 2009 made payment of KShs. 82,165/=. “NS-4” and “NS-5” refer. The Plaintiff further alleges that the 1st to 3rd Defendants hold a Grant for the same land but that the same has been fraudulently obtained. The 1st to 3rd Defendants are in possession and are undertaking developments to the suit land. They have erected a perimeter wall and developed an office block and go-down on the premises. The office block and go-down are apparently nearly completed.

The Plaintiff’s complaint is that the 1st to 3rd Defendants are on the suit land illegally and as an act of trespass. The suit was filed for a declaration that the Plaintiff is the legal owner of the suit land; that the documents the Defendants hold are fraudulent; eviction; and permanent injunction. With the suit was filed application for temporary injunction under Order 40 rules 1(a) and (b) and 4 of the Civil Procedure Rules and sections 3, 3A and 63 (c) and (e) of the Civil Procedure Act to restrain the Defendants and their agents and/or servants from, among other things, trespassing on, developing, alienating, disposing, subdividing or charging the suit land until the suit is heard and determined. This is the application under consideration.

The 3rd Defendant filed a replying affidavit through its director Joseph Karuoro Claudio and also filed a notice of preliminary objection. The suit against the 1st and 2nd Defendants was withdrawn.

The case for the 3rd Defendant is that the company holds Grant No. I.R. 101233 for the suit land whose Survey Plan is No. 244969 (“JC 1”) and that registration was effected on 21st February 2003; that since 2002 the company has been in possession of the land which it has developed as indicated above. Photographs of the development were produced (“JC 2”). The Defendant has since been paying

rates and rent for the parcel. Regarding the documents exhibited to support the Plaintiff's claim to the land, the Defendant's case is that they are all forgeries which the Director of Criminal Investigations Department is investigating and has called for them but have yet to be availed by the Plaintiff. The documents include "NS-8" and "NS-9" which are letters from the Chief Land Registrar and the Commissioner of Lands saying the suit land belongs to the Plaintiff. It is material that the Plaintiff did not have sworn a supplementary affidavit to deny the averments contained in the replying affidavit.

The principles governing the grant of interlocutory injunction have been settled since the decision in **Giella –Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The Plaintiff has to show it has a *prima facie* which will probably succeed; that it stands to suffer irreparably if the injunction sought is not granted; and that, if the court is in doubt, the balance of convenience tilts in its favour.

This is one of those many unfortunate cases where the court is confronted with a situation where each party is waving a certificate of title issued by the Ministry of Lands to say it is the registered owner of the suit land. Registration and certificate of title were, under section 23 (1) of the Registration of Titles Act (Cap. 281), intended to confer absolute and indefeasible claim to the piece of land in question (**Mbothu & 8 Others –Vs- Waitimu & 11 Others [1986] KLR 171**), and therefore two or more certificates of title should never legally be issued in respect of the same land. The court will therefore have to inquire into the matter to be able to determine the rightful owner of this parcel. The evidence of the Chief Land Registrar and the Commissioner of Land will be crucial, and this is why I accept the plea by the 3rd Defendant that the Plaintiff should have made them parties to the claim.

The plaint and the supporting affidavit are silent on whether, upon allotment and registration, the Plaintiff went into possession. Paragraph 8 of the plaint and paragraph 7 of the supporting affidavit allege the Defendant trespassed on the suit land and begun construction. No dates are given. This is material because the allotment and registration of land in favour of the Plaintiff was in 2009. That means any occupation or possession, if at all, must have been subsequent to that. The Defendant states that it obtained registration in 2003 after going into possession the previous year. The photos exhibited by the Defendant show nearly completed development of the suit land, and that would support the case that it has been in occupation for a long time. The Plaintiff is not saying it was evicted for the Defendant to occupy and develop the suit land. From these facts, my preliminary conclusion is that the Plaintiff has not been in occupation and that it is the Defendant who has been in occupation all along.

The material available tends to show the Defendant had an earlier registration. Was the land available for alienation after it was allocated and registered in the name of the Defendant? If the Defendant had an earlier registration and has been in occupation since 2002, I find the Plaintiff has not demonstrated a *prima facie* case; it has not demonstrated that it has a better title or claim to the suit land.

The photos show massive developments of the suit land. What is apparent is that the Defendant has the resources, or can mobilize resources, to pay damages if the injunction is not granted and the Plaintiff ultimately succeeds in the suit.

Lastly, the balance of convenience will tilt in favour of the Defendant who had an earlier claim to the suit land which it has extensively developed after being in occupation since 2002.

The result is that the application filed on 12th May 2011 by the Plaintiff is dismissed with costs.

DATED AND DELIVERED AT NAIROBI

THIS 2ND DAY OF JUNE 2011

**A. O. MUCHELULE
J U D G E**