



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Environmental & Land Case 64 of 2009

LAISER COMMUNICATIONS LTDPLAINTIFF/APPLICANT

V E R S U S

TANAD TRANSPORTERS LTD1ST DEFENDANT/RESPONDENT
GEORGE GICHANA MOMANYI2ND DEFENDANT/RESPONDENT
ABDULRAHMAN M. SAID3RD DEFENDANT/RESPONDENT

AND

CITY COUNCIL OF NAIROBI1ST THIRD PARTY/RESPONDENT
CHIEF LAND REGISTRAR2ND THIRD PARTY/RESPONDENT

R U L I N G

On 19th February, 2009 the Plaintiff filed this suit in which it claimed that on 8th August, 2008 it bought the suit property L.R. No. 36/16/IV measuring about 2.88 acres situate in Eastleigh – Nairobi from KEEMTI SINGH BAMRAH, MANJENDER BAMRAH, SAMMY B. S. SANDHU and SURINDER SINGH BIRDI at agreed price of KShs. 30 million and paid the full purchase price. It stated that the Defendants have without its consent and authority occupied the premises on which the 1st Defendant has erected a perimeter wall and operates a garage and parking bay and the 2nd Defendant has built semi-permanent structures. It is alleged that they have no legal claim to the plot and are therefore engaged in acts of trespass which have caused the Plaintiff to suffer loss and damage. The suit was brought to compel the Defendants to remove these structures and to vacate the premises.

The Defendants denied these allegations in the statement of defence. The 1st Defendant claimed he has a 99 year lease registered over the property. The Defendants stated they are in lawful occupation of the premises and are not trespassers.

On 18th November, 2009 the Defendants application to join third parties, that is the City Council of Nairobi and the Chief Land Registrar, was allowed. The City Council of Nairobi (1st Third Party) filed statement of defence in which it denied that the Plaintiff has any valid, legitimate or legal title to the alleged property or that it bought it. It denied that the alleged sellers had any claim to the land which they could pass on. It denied the existence of this plot and

stated that it was only aware of plots L.R. 36/IV/106, L.R. 36/IV/167 and L.R.36/IV/108 registered under the Registration of Titles Act and whose respective Deed Plans are Numbers 290569, 290570 and 290571.

On 21st January, 2010 the Plaintiff successfully applied to amend the plaint which brought in the 3rd Defendant. In the amended plaint it was pleaded that the Defendants and the 1st and 2nd third parties had by way of fraud, collusion and breach of law purported to subdivide the Plaintiff's property above which had resulted into the making of grants under I.R. 116076 (L.R. No. 36/IV/107) and 116077 (L.R. No. 36/IV/106) and parcel L.R. No. 36/IV/108. The prayers were amended to include orders that there be a declaration that the Plaintiff is the *bona fide* proprietor by L.R. No. 36/16/IV alias 36/IV/106, 36/IV/107 and 36/IV/108; that the Registrar of Titles cancels grant numbers 116076 (L.R. No. 36/IV/107), 116077 (L.R.No. 36/IV/106) and parcel No. 36/IV/108 and/or any other purported subtitles created from L.R. No. 36/16/IV; nullification of Deed Plans numbers 290569, 290570 and 290571; permanent injunction against the Defendants and Third Party in regard to these parcels; and general damages for trespass and unlawful occupation.

The Defendants filed a joint amended defence denying the allegations of fraud, collusion or illegality. The 1st Defendant reiterated he was the registered owner L.R. 36/16/IV which was resurveyed by the 1st Third Party and registered as L.R. No. 36/IV/106 over which he was issued a lease by the Ministry of Lands. It was on this basis that the Defendants were occupying the land.

On 15th January, 2010 the Plaintiff filed an urgent chamber application under **Order 39 rules 1 and 2 of the Civil Procedure Rules** and **section 3A of the Civil Procedure Act** for an interlocutory injunction against the Defendants and 1st Third Party and all those acting under them restraining them from further wasting, entering upon, trespassing upon, carrying on any business activity, developing, constructing, selling, charging, transferring, leasing or in any manner whatsoever dealing with L.R. No. 36/16/IV (alias L.R. Nos. 36/IV/106, 36/IV/107, 36/IV/108) pending the resolution of this dispute. It was alleged that since the filing of the suit the Defendants and 1st Third Party have continued to accelerate the wastage of the property by *inter alia* causing continuous dumping of waste materials and engaging in other destructive acts. The affidavit of ABDULLAHI SHARRIF in support of the application annexed photographs of the alleged waste. They are "AS6". The rest of the affidavit deals with the Plaintiff's claim to the property and the alleged collusion and fraud by the Defendants and Third Parties. The Defendants swore a replying affidavit through MUSA SAID HASSAN (the managing director of the 1st Defendant) saying the application is an afterthought as they have not committed any acts of wastage since the suit was filed. The Defendants say the photos do not say much about who may have dumped materials on the site, if at all. They say they have always been in possession of the suit property and have not sought to alienate it. They content that the Plaintiff has not shown it may suffer irreparable damage if the application is not granted.

Mr. Omotii for the Plaintiff and Mr. Ligunya for the Defendants addressed the court on the application. The Third Parties did not respond to the application. I have also considered the written submissions and the authorities filed.

The principles governing the grant of an interlocutory injunction have been settled since the decision in **GIELLA –VS- CASSMAN BROWN AND COMPANY [1973] EA 358**. The applicant must show a *prima facie* case with a probability of success; an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and if the court is in doubt, it will decide the application on the balance of convenience.

The Plaintiff claims to have a lease registered over L.R. 36/16/IV. It states it bought the plot for KShs. 30 million from KEEMTI SINGH BAMRAH, MANSENDER BAMRAH, SAMMY B. S. SANDHU and SURINDER SINGH BIRDI on 8th August, 2008. It annexed “AS1” to the supporting affidavit showing the history of the title up to its conveyance to it which was duly registered on 22nd December, 2008. There is a certificate of postal search “AS2” showing confirming this proprietorship. There is also the Beacon Certificate “AS3”. The conveyance to the Plaintiff is “AS4”.

On the other hand, the 1st Defendant claims to be the owner of this plot which he alleges was resurveyed by the 1st Third Party and registered as L. R. No. 36/IV/106 over which he was granted a 99 year lease by the same 1st Third Party and that the said lease was duly registered at the Ministry of Lands and title issued. The documents to support the resurvey, lease and registration and title were not annexed to the replying affidavit by the Defendants. It was infact the Plaintiff who produced documents to show how L.R. No.36/IV/106, L.R. No. 36/IV/167 and L.R. No. 36/IV/108 came into being and says these titles are as a result of a fraud on the part of the Defendants and Third Parties. The Plaintiff produced a letter dated 11th June, 2009 from the 1st Third Party to the Commissioner of Lands indicating it (the 1st Third Party) had caused a subdivision of the disputed land as a result of which Deed Plans Nos. 290569, 290570 and 290571 were produced. The 1st Third Party was asking the Commissioner of Lands to issue letters of allotment and grant directly to it. It was saying it owned the disputed land. It is the resurvey that produced the three titles, L.R. No. 36/IV/106 by which is now in the name of the 3rd Defendant “AS7” and L.R. No. 36/IV/107 is in the name of the 1st Defendant. The plot in dispute belonged to the Plaintiff and not to the 1st Third Party and was therefore not available for allotment. Indeed there is letter dated 10th June, 2009 from the Principal Registrar of Documents which states that the property is registered in the name of the Plaintiff vide a deed of conveyance dated 18th December, 2008 and registered in volume V. 63 folio 298/23 and registered on 22nd December, 2008. The Registry found that L.R. Nos 36/IV/106 and 107 were:-

“issued in our office but were wrongly drafted and wrongly registered. The same should have been registered against the title relating to L.R. No. 36/VII/619.

By a separate letter the registered proprietors of the said title have been summoned to return the same for rectification.”

It follows that the registration and the titles that the 1st and 3rd Defendants are holding were wrongly registered and

issued against the title in dispute. There is letter “AS10” dated 19th March, 2009 from the 1st Third Party stating as follows:-

“According to my records in VB. NO. 424/9, the above property is in the name of LAISER COMMUNICATIONS LIMITED C. O. BOX 1142 – 00400 Nairobi as the rateable owner. It is also noteworthy to mention that according to my said record, at no any given time has the property belonged to the City Council of Nairobi and thus the City Council had no authority to allocate it.”

In short, there is sufficient material on which this court finds that the Plaintiff has demonstrated a *prima facie* case with a probability of success. It is the registered proprietor of the disputed plot. Under **section 23 (1)** of the **Registration of Titles Act (Cap. 281)** it has an absolute and indefeasible claim to the plot which can only be challenged on the ground of fraud or misrepresentation to which it is proved to be a party. **(See MBOTHU & 8 OTHERS –VS- WAITIMU & 11 OTHERS [1986] KLR 171)**. It is a necessary incident of ownership of property to have full and exclusive possession.

The Defendants are in possession of the property. They base their claim to it on the documents which have been described above and which are not valid. The claim is baseless and that would mean they are trespassers on the plot. It is no excuse that the application is being made one year after the suit was filed or that the Plaintiff has not shown irreparable loss. A trespasser has to give way when pitted against a registered owner. The Defendants are engaged in a continuing trespass which the court orders restrained in terms of prayer 3 of the chamber application. Costs shall be paid by the Defendants and Third Parties.

Dated and signed at Nairobi this 27th day of April 201

A. O. MUCHELULE
JUDGE