



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA Commercial Civil Case 44 of 2009

**AMARNATH ENTERPRISES LIMITED & NYALI CONSTRUCTION &
ELECTRICAL SERVICES LIMITED (A JOINT VENTURE UNDERTAKING).....PLAINTIFF**

VERSUS

**1. UGANDA PROPERTY HOLDINGS LIMITED
2. SUMMIT COVE LINES CO. LTD.....DEFENDANTS**

RULING

In their amended plaint lodged on 12th January, 2009, the plaintiffs seek the following orders of the court:

1. **An order restraining the defendant from leasing out plot No. 9695/12 Pamba Road Mombasa and or in any other way interfering with the current status of the plot in such a way that would prejudice the plaintiffs' claim.**
2. **Specific performance of the contract for building works.**
- (b (i)) **An order directed at the 2nd defendant to further vacate the suit property and a further order directed at the 2nd defendant restraining the 2nd defendant from interfering with the suit property or in any other way dealing with the suit property.**
3. **General damages for breach of contract. Alternatively and without prejudice special damages of USD 622,722.60.**
4. **Costs and interest.**

The foundation of the plaintiffs' claim is that the plaintiffs in answer to bids sought by the 1st defendant agreed to undertake building works for the 1st defendant on plot No. 9695/12 Pamba Road Mombasa (hereinafter "*the suit plot*") at USD 1,699,772.08. Pursuant to the said agreement, the 1st defendant handed over the building site to the plaintiffs whereupon the plaintiffs moved their construction equipment onto the site and have been waiting for the 1st defendant to avail money to commence the building works. While waiting for the green light to commence the said works, the 1st defendant, on 7th July, 2009 invited bids for leasing of the suit plot which invitation, according to the plaintiffs, was an indication that the 1st defendant was no longer interested in the construction on the suit plot which action constituted a breach of the 1st defendant's contractual obligations hence the suit.

The plaintiffs' claim against the 2nd defendant is pleaded in paragraphs 16 B and 16 C of the amended plaint. The gist of the complaint is that the 2nd defendant was introduced by the 1st defendant a day after being served with Summons to Enter Appearance and by use of brutal force, the 2nd defendant entered the suit plot and relocated the plaintiffs' equipment to a different part of the suit plot and in the process damaged some of the plaintiffs' said equipment. The 2nd defendant, according to the plaintiffs, claimed to be a lessee of the 1st defendant yet no lease had been executed between them. The plaintiffs therefore contend that the 2nd defendant has been introduced for the

sole purpose of defeating the plaintiffs' claim hence the prayers sought against it in the plaint.

Simultaneously with the amended plaint, the plaintiffs lodged an amended Chamber Summons expressed to have been brought under sections 63 (c) and 3A of the Civil Procedure Act, Order XXXIX Rules 1, 2, 3, and 6 of the Civil Procedure Rules and all other enabling provisions of the Law. The plaintiffs seek two primary orders expressed as follows:-

- “3. An order of injunction do issue restraining the 1st defendant, its agents, servants and/or employees from leasing out the suit plot to a third party and or in any other way interfering with the current status of the plot pending the hearing and disposal of this suit.**
- 3b. A mandatory injunction directed to the 2nd defendant to vacate the suit premises and to further stop dealing with the suit premises.”**

The application is based on the following principal grounds:

- 1. That in the year 2006 the plaintiffs and the 1st defendant entered into an agreement whereby the plaintiffs were to undertake construction works on the open space on the suit plot.**
- 2. That subsequent to the said agreement the 1st defendant handed over the site to the plaintiffs who moved their equipment onto the site and took over from the 1st defendant two rooms for the purpose of the contract.**
- 3. That the plaintiffs have been ready, willing and capable to commence and complete the building works but the defendant has frustrated the performance of the contract and caused an advertisement to be placed in the newspapers inviting bids for the leasing out of the open space on the suit plot.**
- 4. That unless the 1st defendant is restrained it may hand over the suit plot to a 3rd party/s before the hearing and disposal of this suit which event would render a substantial part of this suit nugatory occasioning the plaintiffs irreparable loss and damages.**
- 5. That the 1st defendant is a foreign based company and if the orders sought are not granted the 1st defendant may lease out the open space on the suit plot leaving the plaintiff with nothing in its hand which could be used to satisfy any decree that may be passed by the court.**
- 6. That having served the 1st defendant with court pleadings herein, on 23rd October, 2009, the 1st defendant on 24th October, 2009 brought in the 2nd defendant claiming to be the lessee over the suit plot and thereafter relocated the plaintiffs' machineries and in the process damaged some of them.**
- 7. That the 2nd defendant is not a lawful tenant of the 1st defendant and is a busy body intermeddling in the contractual relationship between the plaintiff and the 1st defendant.**

The application is further supported by three (3) affidavits sworn by one Amarnath Gupta, the Managing Director of the 1st plaintiff. The affidavits elaborate the averments in the amended plaint and the grounds for the application. Annexed to the affidavits are various documents including correspondence exchanged and the building contract.

The plaintiffs appeared ex-parte before me on 21st October, 2009 and I certified the application as urgent but granted no interim orders. The defendants were served and have filed replying affidavits. The 1st defendant responded through its Managing Director, Albert B. Abaliwano. He depones that the 1st defendant never invited any bids in the year 2005 and further denies that the plaintiffs accepted any offer from the 1st defendant and that it handed over the site to the plaintiffs. Whereas the 1st defendant acknowledges it executed the building contract, its Managing Director depones that it was not executed by the 1st defendant's Principal Officer in accordance with the Company's Articles of Association. With regard to the presence of the plaintiffs' equipment on the suit plot, it is deponed that the same was used by the 1st plaintiff in an earlier contract on the suit plot but not pursuant to a handing over of the site in terms of the building contract under Article 20 of the contract. It is also deponed that pursuant to article 2.5 of the contract, the 1st defendant was required to pay a 10% discount deposit against a performance bond in terms of article 16.1 which bond was not furnished by the plaintiffs and commencement of the building works was not possible. In the premises, according to the 1st defendant, the plaintiffs were the ones in breach of the contract and the 1st defendant lawfully leased the suit plot to the 2nd defendant. In the premises, according to the 1st defendant, the orders sought by the plaintiffs have been overtaken by events. The 1st defendant has further contended that the plaintiffs' claim has been quantified and that the 1st defendant is

financially capable of discharging any decree which may ultimately be passed in favour of the plaintiffs.

The 2nd defendant's replying affidavit has been sworn by its Managing Director, Joseph Mr. Kirema. He deposes, *inter alia*, that the 2nd defendant is the lawful lessee in respect of the suit plot and is entitled to possession thereof. In the premises, according to the 2nd defendant, the plaintiffs have not only failed to demonstrate a prima facie case, but that their application is incompetent, vexatious, frivolous and an abuse of the process of the court.

When the application came up before me for hearing on 22nd February, 2010, Counsel agreed to file written submissions which were finally in place by 20th May, 2010 and on 15th July, 2010, Counsel highlighted the same. The submissions were a further elaboration of the parties' stand-points taken in their respective affidavits.

I have considered the application, the affidavits filed both for and against the application and the said submissions of Counsel. I have further given due consideration to the authorities relied upon by Counsel. Having done so, I take the following view of the matter. The principles for the grant of both prohibitory and mandatory injunctions are well settled. With respect to the grant of a prohibitory injunction the locus – classicus is the case of **Giella – vs - Cassman Brown & Company Limited (1973) EA 358**. The principles are as follows:-

- 1) **An applicant must show a prima facie case with a probability of success at the trial.**
1. **An inter locutory injunction will not normally be granted unless an applicant can show that he would suffer irreparable loss if the injunction is not granted.**
2. **If the court is in doubt, it will decide the application on a balance of convenience.**

The affidavit evidence adduced before the court demonstrates that the suit plot is undoubtedly the property of the 1st defendant. The 1st defendant is therefore in law entitled to enjoy the rights of a registered proprietor which rights include, transferring, charging and leasing the same. It is in exercise of those rights, that it entered into a lease arrangement with the 2nd defendant. It is not disputed that the 2nd defendant is now in possession of the suit plot with the consent of the 1st defendant. The plaintiffs indeed acknowledge that the 2nd defendant is in possession of the suit plot but denies that it is in such possession pursuant to any lease between it and the 1st defendant. The basis for that view seems to be that the lease has not been reduced into writing and that the same has not been registered. In those premises, the plaintiffs have pleaded that there is in reality no lease between the defendants. The 1st defendant has however, exhibited various documents including a handing over Memorandum dated 16th October, 2009, it's a letter dated 16th October, 2009 informing the 2nd defendant that the latter had been successful in its bid to lease the suit plot. The letter of 6th October, 2009 contained terms upon which the suit plot would be held on lease. Also exhibited, is the 2nd defendant's letter dated 18th October, 2009 informing the 1st defendant that it had taken possession of the suit plot after its payment of Kshs. 2.5. million. It further annexed evidence of that payment.

The documents exhibited by the 1st defendant demonstrate, prima facie, that the transaction between the defendants with respect to the lease over the suit plot commenced before 6th October 2009. That position appears to be in consonance with the plaintiffs' own pleading in paragraph 11 of the amended plaint and the averment in paragraph 14 of Gudka's supporting affidavit sworn on 19th October, 2009. In those paragraphs, the plaintiffs acknowledged that the 1st defendant on 7th July, 2009 placed, in the Daily Nation Newspapers, an advertisement inviting bids for the leasing of the open space on the suit plot.

Prima facie therefore, the lease transaction between the, defendants cannot be said to have been made when the 1st defendant was served with summons to enter appearance in this suit. Actual possession of the suit plot may have been taken by the 2nd defendant after the 1st defendant was served with summons to enter appearance. However the right to take possession had been given much earlier.

There may be no executed and registered formal lease between the defendants, but the documents I have referred to above, prima facie, disclose a lease arrangement between the defendants. The validity of the lease is not challenged by those privy to it. In the premises, again prima facie, I find and hold that the failure to execute a formal lease and the failure to register the same does not invalidate the lease

transaction between the defendants.

The plaintiffs' claim as already stated is for, *inter alia*, specific performance of a building contract and eviction of the 2nd defendant from the suit premises and general damages. In the alternative, the plaintiffs claim special damages of USD 622,722.60. The plea for specific performance is however against the 1st defendant. The 2nd defendant has nothing to do with that claim. The foundation of the plaintiffs' challenge against the 2nd defendant's lease in respect of the suit plot as already discussed above would not prima facie invalidate the lease between it and the 1st defendant. Prima facie, therefore the 2nd defendant is lawfully in possession of the suit plot. Although the plaintiff alleges that some of its machinery were damaged by the 2nd defendant, while being relocated, no claim is made against the 2nd defendant in respect of that damage.

Having found that the 2nd defendant is, prima facie, in lawful possession of the suit plot and that the plaintiff makes no other claim against it, in its amended plaint, I find and hold that the plaintiffs have not demonstrated a prima facie with a probability of success at the trial. There is already prima facie, a lease arrangement between the defendants in respect of the suit plot. In those premises the horse has already bolted from the staple. There is no prayer in the amended plaint which seeks the nullification of the lease. In the premises, a prohibitory injunction is not available to the plaintiffs as an order cannot issue to restrain what has already happened.

How about the prayer for a mandatory injunction directed at the 2nd defendant to vacate the suit premises and to further stop dealing with the suit property? As already stated above, the principles for the grant of such an injunction are well settled. The locus-classicus would appear to be the case of Locabail International Finance Limited – v – Agroexport and Others [1986] 1All ER901. There, the principles were stated as follows:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases 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 has attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory 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 a different and higher standard than was required for a prohibitory injunction.”

Those principles have been applied by Kenyan Courts. (See Kenya Breweries Limited – v – Okeyo [2002] 1 EA 109 a decision of our Court of Appeal. See also Maison Limited – v – Yaya Towers Limited [HCCC No. 2225 of 1992] (UR) which is a decision of the High Court and Agip Kenya Limited – v – Maheshchandra Himatlal Vora & Another CA NO. 213/99 (UR).

In addition to the above principles being an equitable remedy, an application for a mandatory injunction will not be granted if it appears inequitable to do so.

On the affidavit evidence availed before me, I cannot say that the plaintiffs' case is clear and incontrovertible. (See Malindi Air Services & Another – v – Abdnoor Hassan [C.A. No. NAI 202 of 1998] (UR). I have already found that the plaintiffs have not established a prima facie case with a probability of success at the trial proof whereof is at a lower standard than for a mandatory injunction. Having failed to demonstrate a prima facie case for a prohibitory injunction, it is not expected that the plaintiff would establish a case for a mandatory injunction which requires a higher standard of proof. The plaintiffs seek an order directing the 2nd defendant to vacate the suit premises and to further stop dealing with the suit plot. Having found, prima facie, that the 2nd defendant is lawfully on the suit plot pursuant to a lease arrangement with the 1st defendant, the mandatory order sought against the 2nd defendant to vacate the suit plot and stop dealing with the same is not available to the plaintiffs.

The plaintiffs' claim in my view is rooted in Order XXXIX Rule 1 (b) of the Civil Procedure Rules which reads as follows:-

- “1. Where in any suit it is proved by affidavit or otherwise**
- (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit the**

court may by order grant a temporary injunction to restrain such act and make such other order for the purpose of staying and preventing the wasting, damaging, alienating, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”

I am of that view, because the plaintiffs do not claim any proprietary or other interest in the suit plot capable of being protected by a prohibitory temporary injunction. In this regard the averments in paragraphs 21 and 22 of Gudka’s supporting affidavit are pertinent. The paragraphs are in the following terms:-

- “21. That the defendant is a foreign company incorporated in Uganda and if allowed to lease plot No. 9695/12 PAMBA ROAD MOMBASA the plaintiff will have nothing in its hands which could be used to satisfy any decree that maybe passed by the Honourable Court.**
- 1. That further unless the defendant is restrained by an order of this Honourable Court, the defendant may hand over plot No. 9695/12 PAMBA ROAD MOMBASA to a third party and/or parties before the hearing and disposal of this suit which would render a substantial part of this suit, and more specifically the plaintiffs prayer for specific performance, nugatory.”**

I have already found, prima facie at least, that the 2nd defendant has lawfully taken over possession of the suit plot. The action intended to be prevented has therefore already happened. Even if it had not, the affidavit evidence adduced by the plaintiffs does not support the orders sought. I say so because the 2nd defendant is a mere tenant of the 1st defendant. The suit plot otherwise remains the property of the 1st defendant and will be available to satisfy any decree which may be passed in favour of the plaintiffs.

In any event, the 1st defendant through its Managing Director, Albert B. Abaliwano, has sworn that it owns valuable real estate in Kenya and that it is a reputable company incorporated in Uganda and carries on business in Kenya, among other countries. The 1st defendant therefore maintains that it is financially capable of satisfying any decree which may ultimately be passed in favour of the plaintiffs against it. In their further supporting affidavit filed on 12th November, 2009, the plaintiffs did not contradict the 1st defendant’s assessment of its financial position. There is, in the circumstances, no reason to doubt that the 1st defendant’s financial position is sound and that it can satisfy any decree which may ultimately be passed against it in favour of the plaintiffs. That being the position, it is plain that the plaintiffs have not satisfied the requirements of Order XXXIX Rule 1 (b) of the Civil Procedure Rules.

The plaintiff placed reliance on several authorities in support of its application. I have read all those authorities. The cases properly enunciated the Law as it applied to the facts in the cases. The cases are however, clearly distinguishable from the facts in this case and merit no further consideration.

The upshot is that this application is declined in its entirety with costs.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 13TH DAY OF SEPTEMBER 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Ms. Nyamweya holding brief for Mr. Gikandi for the Plaintiffs and Mr. Owino holding brief for Mr. Lumatete for the 1st Defendant and Mr. Mwakireti for the 2nd Defendant.

F. AZANGALALA

JUDGE

13TH SEPTEMBER 2010

Nyamweya:

I pray that the status quo be maintained pending the filing of a formal application for injunction pending appeal.

Owino:

I have no objection.

Court:

There being no objection by the defendants, I order that the status quo be maintained for 14 days from the date hereof.

F. AZANGALALA

JUDGE

13TH SEPTEMBER 2010