



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 14 of 2009

AFRICAN LINE TRANSPORT CO. LTD PLAINTIFF

V E R S U S

1. KASSIM MAKAU

2. MUSA OTIENO

3. BAKARI HAMISI

4. MAJIMBO BEZAWADI

5. NDUNE KWANGALALA

6. TAITI SAIDI DEFENDANTS

R U L I N G

This application is brought by way of a chamber summons dated 21st January, 2009 and taken out under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure rules; Sections 3A and 63(c) and (e) of the Civil Procedure Act, and all other enabling provisions of the law. The applicant prays for three orders-

1. *THAT pending the hearing and determination of the suit filed herein, this Honourable Court be pleased to issue an order of injunction restraining the defendants whether by themselves, their servants, agents or any person(s) acting under their authority or instruction from encroaching, trespassing, and/or taking possession, moving into, occupying, developing or constructing any structures whatsoever or dealing in any other manner whatsoever on land L. R. Subdivision No. 4143/Original No. 3461/30 of Section VI Mainland North and/or interfering with the plaintiff's quiet occupation of the said parcel of land.*

2. *THAT due to the nature of this suit as set out in the pleadings herein this court be pleased to order that the Officer in charge Changamwe Police Station or his Deputy do provide Police assistance during the execution of the court orders in order to ensure that law and order is kept.*

3. *THAT costs of this application be provided for.*

The application is supported by the annexed affidavit of Ali Zubedi, the plaintiff company's managing director, and on the grounds spelt out on the face of the application. At the hearing of the application on

3rd February, 2009, Mr. Kibara appeared for the plaintiff/applicant.

The respondents neither appeared, nor were they represented. An affidavit of service sworn on 27th January, 2009 by one Samuel Karimi Gikunju, a licenced process server of the High Court, shows that all the respondents were duly served on 23rd January, 2009. All but the 3rd defendant accepted and acknowledged service. The 3rd defendant, however, merely accepted the service but declined to acknowledge it. The court thereupon opted to proceed ex parte on the premise that notice was duly served in sufficient time for the respondents to attend court, but they elected not to do so. It is also significant that none of them entered appearance, filed any replying affidavit, or grounds of opposition. In those circumstances, Mr. Kibara submitted that the application was deserving of the orders sought as the applicant had established a prima facie case by putting forth a copy of the title to the suit property, and the respondents had not come to claim that they could compensate the plaintiffs.

I have considered these submissions and the authorities cited in support. Technically, the applicant is entitled to the orders sought on the ground that the application is not opposed. In substance, however, the applicant has to satisfy the court that it is entitled to an interlocutory injunction. The conditions to be satisfied were immortalized in the words of SPRY, VP. of the then Court of Appeal for East Africa in the case of GIELLA v. CASSMAN BROWN & CO. LTD [1973] EA. 358 in which he said at page 360-

“The conditions for the grant of an interlocutory injunction are now ... well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Applying the first of these conditions to this case, the applicant has produced a copy of a certificate of title showing that it has been the registered proprietor of the suit premises since October, 2005. A copy of a certificate of postal search dated 19th January, 2009, confirms that position. Section 23(1) of the Registration of Titles Act under which the property is registered and the certificate of title issued reads as follows-

“The certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.”

The certificate of title does not contain any encumbrances, easements or restrictions, and it is not challenged on the ground of any fraud, or misrepresentation to which the applicant is alleged to be a party. On that basis, the applicant has clearly demonstrated a prima facie case with a probability of success.

As for the second condition, Ali Zubedi deposes in paragraph 10 of his supporting affidavit that barring the court's urgent intervention in this matter, the plaintiff will lose its property and will illegally, wrongfully and unjustifiably be denied its indefeasible, inalienable and constitutional right to title and to quiet occupation, possession, use and enjoyment of its property. The respondents have failed to come forward and deny any of these allegations, or allege that they can compensate the applicant in damages. I am therefore satisfied that if the injunction sought is not granted, the applicant might suffer irreparable injury which may not adequately be compensated by an award of damages. The second condition laid out in GIELLA'S CASE (supra) is therefore satisfied. As this court is not in any doubt, it will not consider the balance of convenience but will decide this application on the basis of the above findings.

By reason of the foregoing, prayers 3 and 4 of the application by chamber summons dated 21st January, 2009 are granted as prayed. The defendants will also bear the costs of this application.

Orders accordingly.

Dated and delivered at Mombasa this 27th day of March, 2009.

L. NJAGI

JUDGE