



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 164 of 2009

RAHANS INVESTMENTS LIMITED PLAINTIFF

VERSUS

AMARNATH ENTERPRISES LIMITED DEFENDANT

RULING

I have before me a Chamber Summons dated 29.5.2009 brought under the provisions of Order XXXIX Rules 2, 2A, 3 and 9 of the Civil Procedure rules, Sections 3A and 63 (e) of the Civil Procedure Act and any other enabling provisions of the Law. The application is by the plaintiff and seeks two main orders of the court expressed as follows: -

- 1) That the court be pleased to issue **a temporary injunction restraining the defendant by itself, its servants, agents, workmen and/or whomsoever from dealing with the suit property pending the hearing and determination of this suit.**
- 2) That further or in the alternative the court be pleased to issue **a mandatory injunction compelling the defendant by itself, its servants, workmen, to vacate from L.R. No. Mombasa/Block XXIII/185 and remove all the construction materials deposited in the suit property pending the hearing and determination of this suit.**

The main reasons for the application are that the plaintiff is the registered proprietor of the suit property and the defendant is depositing and continues to deposit construction materials on the same without the consent and/or approval of the plaintiff. In the premises it is fair, just and equitable that the orders sought in the application be granted to safe guard the plaintiff's interest in the suit property. In support of the application, one Rupen Haria, a director of the plaintiff, has sworn an affidavit in which he has deponed, *inter alia*, on the advise of his advocate that the defendant is a trespasser upon the suit property and that the plaintiff's attempts to develop the same are being frustrated by the defendant's actions and further that the plaintiff stands to suffer irreparable loss if the orders sought herein are not granted.

The application is opposed on the basis of a replying affidavit sworn by one Amaranth Gupta the defendant's Managing Director in which it is deponed, *inter alia*, that defendant has leased the suit premises from Kenya National Chamber of Commerce and Industry who is the rate payer in respect of the suit property. In the premises, the defendant contends that it is a bonafied occupier of the suit property and the plaintiff is a stranger.

The application was canvassed before me on 8.7.2009 by Mr. Karani, Learned Counsel for the plaintiff and Mr. Tarus, Learned Counsel for the defendant. Counsel restated the positions taken in their client's

respective affidavits.

I have considered the pleadings, the affidavits together with the annexures thereto and the submissions of counsel. Having done so, I take the following view of the matter. The facts of this suit are really not in dispute. The plaintiff is the registered proprietor of the suit property having purchased the same from an entity called Westand Limited and was duly issued with a certificate of Lease on 19.3.2008. The plaintiff has exhibited copies of a transfer of lease, certificate of lease, a certificate of official search which confirm that the plaintiff is indeed the registered proprietor of the suit property. Those documents do not show that the defendant or Kenya National Chamber of commerce have an interest in the suit property or ever had any interest at all. The defendant claims its interest from Kenya National Chamber of Commerce which itself had no interest of any kind to pass to the defendant. Payment of rates cannot confer title to the rate payer. In any event, evidence of that remote interest was not exhibited by the defendant. In the premises I cannot resist a prima-facie conclusion that the defendant is a trespasser upon the suit property.

I turn now to whether, on those facts, the plaintiff is entitled to the orders sought in its application. The plaintiff seeks orders of both prohibitive and mandatory injunctions. With regard to the former, the plaintiff had to show that it has a prima facie case with a probability of success. On satisfying that condition, it had then to show that it would suffer an irreparable injury which could not adequately be compensated by way of damages. Lastly where the court is in doubt, the application is to be considered on a balance of convenience (See **Giella – v – Cassman Brown & Co. Ltd. [1972] EA 358**). In my view, the material availed to the court has demonstrated that the plaintiff has a prima-facie case with a probability of success at the trial. As already found, it is the registered proprietor of the suit property and the defendant has no registerable interest in the same. Prima facie therefore the defendant is a trespasser upon the suit property. At the trial it is unlikely that the defendant will rise from the status of a trespasser to that of a legitimate occupier of the suit property as there is no nexus between it and the plaintiff.

With regard to the second condition for the grant of an interlocutory injunction, the plaintiff's director has deponed that, the plaintiff will suffer irreparably if the injunction is not granted and that the defendant will suffer no prejudice as it has no right in Law or otherwise to continue using the suit property. In response to those averments, the defendant's Managing Director deponed that the defendant is a stranger to the same. In the premises, I am persuaded that the plaintiff's loss will be irreparable unless the injunction is granted.

With regard to the mandatory injunction sought, the principles for the grant of the same at interlocutory stage are settled. In **Locabail International Finance Ltd. – v – Agro-export and Others [1986] ALL ER 901** the principles were expressed as follows: -

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing. if the defendant attempted to steal a match on the plaintiff. ...”

And

“Moreover before granting a mandatory injunction the court had to feel a high sense 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.”

Further

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could be easily remedied. ...”

Those principles have been applied by Kenyan courts, (see **Maison Ltd. – v – Yaya Towers Limited [HCCC No. 2225 of 1992] (UR)**, **Kenya Breweries Limited – v – Okayo [2002] 1 EA 109** and **Kamau**

Mucuha – v – Ripples Ltd. [C.A. No. NAI 186 of 1992] (UR).

The plaintiff, as already stated, has satisfactorily demonstrated that it is the registered proprietor of the suit property and that its title is not being challenged by the defendant. On the other hand, the defendant's status has been shown, prima facie at least, to be that of a trespasser. It is settled that where a registered proprietor's rights are competing against those of a trespasser, the latter should give way. The plaintiff has demonstrated that it has a clear case against which the defendant at this stage has no answer. In the language of the **Locabail International Finance case**, the court feels a high sense of assurance that at the trial it will appear that the injunction has rightly been granted. Besides, the injunction is directed at a simple and summary act which can easily be remedied. In the premises, I am persuaded, prima facie, that this case presents special circumstances.

In the premises, I allow the plaintiff's application dated 29.5.2009 in terms of prayers 3 and 4 thereof. The plaintiff should file a written and sealed undertaking as to damages within the next three (3) days. The said undertaking should be fortified by a separate undertaking under oath by Rupen Haria, the plaintiff's director. The same to be filed within the same period.

Costs of this application shall be in the cause. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF AUGUST 2009.

F. AZANGALALA

JUDGE

Read in the presence of Mr. Mogaka holding brief for Mungai for the plaintiff and Mr. Mwangi holding brief for Tarus for the defendant.

F. AZANGALALA

JUDGE

27.8.2009