



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISUMU

Civil Case 117 of 2009

KENYA ANTI-CORRUPTION COMMISSION PLAINTIFF

VERSUS

DAVID SOME BARNO..... 1ST DEFENDANT

ASTHER CHEBET SOME2ND DEFENDANT

(T/DASAHE INVESTMENTS)

VYATU LIMITED3RD DEFENDANT

WILSON GACANJA.....4TH DEFENDANT

RULING

The plaintiff, a body corporate, established under the Provisions of the **Anti Corruption and Economic Crimes Act No. 3 of 2003**, filed this suit against the four (4) defendants on the basis that a parcel of land registered as **KISUMU MUNICIPALITY/ BLOCK 7 / 467** measuring approximately 0.3889 hectares and situated within the Kisumu Municipality which was part and parcel of a larger parcel of land which was vested in the General manager of the defunct East African Railways & Harbours Administration vide legal Notice number 440 of 1963 and which was in or about the year 1935 surveyed and assigned L. R. No. 1148 / Section L V and set apart as a railway reserve was in or about 1998 wrongfully and fraudulently allotted to the first and second defendants who transferred it to the third defendant and was eventually registered at the Kisumu District Land Registry under the provisions of the Registered land Act (Cap 300 Law of Kenya) without the knowledge or consent of the Kenya Railways Corporation which took over all the assets of the defunct East African Railways Corporation following the dissolution of the East African Community in the year 1977.

The plaintiff contends that the fourth defendant acted illegally in issuing the lease over the suit property

and that at all material times the defendants were actually or constructively aware of the interest of the Kenya Railways Corporation and its predecessors in the suit property.

Consequently, the plaintiff filed this suit seeking “**inter – alia**” declaratory orders that the allotment by the fourth defendant to the first and second defendants of the suit property was null and void “**ab initio**” and that the subsequent informal transfer of the suit property and issuance of a certificate of lease over the suit property to the third defendant was null and void and ineffectual to confer a good title.

The filing of the suit on 8th July 2009 was contemporaneous to the filing of the present application vide the Chamber Summons dated 7th July 2009 seeking orders “**inter – alia**” that the third defendant whether by itself, its servants or agents be restrained from alienating, transferring, charging, leasing, sub-dividing entering or remaining upon the suit property and from undertaking any construction or development of any nature thereon or from howsoever dealing with the property pending the hearing and determination of this suit.

The application was in the first instance presented ex-parte under certificate of urgency and temporary restraining orders were granted against the defendants.

At the inter parties hearing of the application on the 29th October 2009, the plaintiff was represented by the learned Counsel, **Mr. An’gima** while the first, second and third defendants were represented by the learned Counsels, **Mr. Mokaya** and **Mr. Gadhia** respectively.

The fourth defendant despite being served failed to appear. The application is made under Order 39 Rules 1, 2, 2A, 3 and Order 5 Rule 17 of the Civil Procedure Rules and all other enabling provisions of the law.

At this juncture it is only prayer three (3) of the Chamber Summons which is vital.

The grounds for the application are contained in the body of the Chamber Summons and are supported by the facts contained in a supporting affidavit dated 7th July 2009 and a further affidavit dated 13th August 2009.

Both affidavits are deponed by the plaintiff’s attorney and investigator one **Ben Murei**.

The first, second and third defendants oppose the application on the basis of the facts contained in their respective affidavits-in- reply.

The contents of both the supporting and replying affidavits were relied upon by the learned counsels for the plaintiff, first defendant second defendant and third defendant and were fortified by the submissions and arguments presented by the said counsels at the hearing of the application.

The submissions were lengthy and well researched as may be seen from the lists of authorities filed by the learned Counsels and more so that of the plaintiff’s learned counsel.

Be that as it may, in deciding whether or not to grant a temporary injunction the courts are guided by the principles set out in the famous case of **Giella =vs= Cassman Brown & Co Ltd [1973] E. A. 358**, in which **Spry V. P.** firmly stated that:-

“The conditions for the grant of an interlocutory injunction are now, I think, 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 conveniences”.

Having considered the pleadings herein, the grounds for the application and the submissions made by the learned counsels, this court must first and foremost consider whether the plaintiff has shown a prima –

facie case with a probability of success. In, so doing, the court must refrain from making definite conclusions on facts and issues which are yet to be canvassed properly and adequately at the time of hearing of the main suit.

The Eighth Edition of **Black's Law Dictionary at page 1228** defines a prima – facie case as “**a party's production of enough evidence to allow the fact trier to infer the fact at issue and rule in the party's favour**”.

Prima-facie evidence is defined at page 598 as “**Evidence that will establish a fact or sustain a judgment unless contradictory evidence is produced**”.

In this application, the plaintiff has so far shown that it is legally mandated to carry out investigations to establish liability for loss of public property of which the suit property is one such property having been surveyed in 1935 and assigned L. R. No. 1148/Section L V and designated as a railway reserve. The relevant registered survey plan was exhibited as “**BM 3**” of the supporting affidavit.

It had also been shown that the property was vested in the General Manager of the defunct East African Railways & Harbours Administration and subsequently in the defunct East African Railways Corporation whose assets were eventually vested in the Kenya Railways Corporation vide legal Notice number 24 of 1986 (exhibit marked “BM 5”).

The Kenya Railways Corporation is a public body created under the provisions of the Kenya Railways Corporation Act (Cap 397 Laws of Kenya)

From the contents of the exhibit marked “BM 6” i.e. Folio Register number 345/155 it would appear that somehow in or about the year 1998 the property was re-surveyed and a new survey plan registered thereby creating the suit property. It was also about the same year (1998) that the first and second defendants procured from the fourth defendant an allotment of the property which allotment was transferred to the third defendant. The third defendant was subsequently registered as a lessee of the property and was eventually issued with a certificate of lease under the Registered Land Act.

The contention by the plaintiff is that the suit property was fraudulently and unlawfully created and thereafter allotted to the first and the second defendant by the fourth defendant who acted without necessary jurisdiction in terms of the Government lands Act by allotting public property for private use.

The plaintiff also contends that the suit property was created alienated and transferred without the consent and knowledge of the concerned public body i.e. Kenya Railways Corporation.

In support of the foregoing contentions, the plaintiff's learned Counsel relied on several decisions of the High Court as well as the Court of Appeal alongside several statutory enactments.

The position taken by the first and second defendants in this application is that the suit property was lawfully allotted to them after all the necessary procedures had been followed. They contend that they paid a purchase price of Kshs. 229,020/= (exhibit marked DSP 2”) and lawfully transferred the property to the third defendant.

The contention by the third defendant is that the plaintiff has not shown that it has any proprietary interest over the suit property and has only exhibited several documents which do not establish any right in law over the property.

The third defendant also contends that the link between the suit property and the General Manager of the East African Railways and Harbour Administration has not been shown and since equity follows the law, the plaintiff has not followed the law and is not entitled to a temporary injunction.

The third defendant further contends that it is possessed of a valid lease (exhibit marked “PNS 2”) issued by the Government of Kenya which Government continues to accept and receive from itself rent and rates

payments but it has taken the plaintiff a period of ten (10) years to institute this suit on behalf of Kenya Railways thereby being guilty of indolence, furthering impunity and acting maliciously.

From all the foregoing arguments and contentions it would not be difficult to opine that the plaintiff has presented prima – facie evidence through it's affidavits and annexures thereto clearly showing that it is capable of proving its case against all the defendant's unless of course contradictory evidence is produced.

Order 39 Rule 1 of the Civil Procedure Rules was intended to prohibit property in dispute from being wasted, damaged or alienated by any party to the suit. It would therefore be prudent and just to grant the order sought by the plaintiff if only to preserve and protect the suit property from being interfered with in any manner.

It has been suggested by the third defendant that if temporary injunction is granted to the plaintiff then the plaintiff, should be made to give an undertaking or security as to damages on the basis of the current valuation of the suit property.

In this court's opinion, no special circumstances arise to compel the plaintiff to give any security or undertaking. If the plaintiff succeeds in this case, the third defendant would have to seek remedy elsewhere for any damage or loss that it may suffer.

Having established a prima facie case with probability of success, the plaintiff is entitled to a temporary injunction without any conditions pending the hearing and determination of this suit.

In the circumstances, it is unnecessary to examine and consider the remaining conditions for the grant of a temporary injunction. The application is thus granted in terms of prayer (3) of the chamber summons.

Costs to the plaintiff.

Dated, signed and delivered at Kisumu this 17th day of November 2009.

J. R. KARANJA

JUDGE

JRK/aao