



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Case 126 of 2007

KENYA PIPELINE COMPANY LIMITED PLAINTIFF

VERSUS

RAIPLY WOOD (K) LIMITED DEFENDANT

RULING

The Plaintiff, the Kenya Pipeline Company Limited filed this suit against the Defendant Rai Plywood (Kenya) Limited on 23rd July, 2007 seeking the following orders:-

- (a) A permanent injunction directed at the Defendant to restrain it from constructing a perimeter wall or fence, digging, removing or otherwise blocking the access road situated on plot No. 239 i.e. Eldoret Municipality Block 15/239 in Eldoret Municipality.
- (b) A mandatory injunction directed at the Defendant to compel it to restore the access road situated on L.R. No. 239 Eldoret to the condition it was prior to 15/07/2007.
- (c) **In the alternative** and without prejudice to the foregoing a Declaration that the Plaintiff has a permanent right of way over plot No. 239 as per the road constructed upon Eldoret Municipality Block 15/239 and is the right proprietor of the said access road.
- (d) Costs of the suit.
- (e) Any other or further relief as the Honourable Court may deem just and fit to grant.

The Plaintiff simultaneously took out an application by way of Chamber Summons seeking to obtain Interim Injunctive Orders restraining the Defendant from, inter alia, blocking, interfering, digging and/or fencing off the access road pending the hearing of the suit.

In the Plaintiff's suit, the Plaintiff claims that it

purchased from a Company called Great Rift Transporters Limited a portion of land out of the suit property for purposes of constructing a road and all related auxiliary amenities for a consideration of Kshs. 1,081,334/=. The Plaintiff claims that jointly with the Kenya Ports Authority it subsequently constructed an all weather tarmac road and related amenities at a cost of Kshs. 29,959,020/=. That since getting possession and constructing the road the Plaintiff, its servants, employees, workers, agents, licensees, invitees and the general public have continued to use and derive benefit from the said road free of any interruptions.

The Defendant filed an Amended Defence and Amended Counterclaim on 21st August, 2007. It avers that the suit property never belonged to the Great Rift Transporters Limited but was registered in the name of His Excellency Daniel Toroitich Arap Moi on 21.9.1983 and that he sold portions thereof to the Defendant after it was also subdivided into 3 parcels, namely, Eldoret Block 15/2369, 2370 and 2371 created.

In the Amended Counterclaim, the Defendant prays for the following remedies:-

(a) A Declaration that the Defendant is the lawful proprietor of parcels number Eldoret Municipality Block 15/2369 and 2370 on which the alleged road is constructed and is entitled to absolute use, enjoyment, possession and occupation as guaranteed by law.

(b) A perpetual injunction restraining the Plaintiff by itself, its agents, employees or any other individual claiming authority from it, from entering, trespassing, interfering with the Defendant's use, occupation, possession and enjoyment of all those parcels of land known as Eldoret Municipality Block 15/2369 and 2370 or any portion thereof.

(bb) A declaration that the Plaintiffs erected a pipeline on the Defendant's parcel's number Eldoret Municipality Block 15/2369 and 2370 without way leave and that the Plaintiff be ordered to remove the same or alternatively compensate the Plaintiff for the market value of the land in use and loss of user due to the existence of the said pipeline on its properties.

On the basis of its Counterclaim, the Defendant also simultaneously with its original Defence and Counterclaim applied for Interim Injunctive Orders against the Plaintiff restraining them from trespassing, entering, or in any other manner interfering with the Plaintiff's use, possession, occupation, ownership, and/or enjoyment of the suit properties.

The Court ordered the applications to be heard together. After considering all the pleadings, the two rival injunction applications, supporting affidavits and their exhibits and the submissions by Counsel, I do hereby find as a matter of fact the following:-

1. The Plaintiff which is wholly owned by the Government of the Republic of Kenya is engaged in the business and activities of storage and transportation of fuel and petroleum products via a network of pipelines covering vast distances throughout the Republic of Kenya.
4. To enable the Plaintiff efficiently and adequately fulfill its core activities it has constructed alongside the pipeline manned pumps, booster stations, pipeline terminals and depots and all auxiliary amenities and facilities for its personnel and customer.
5. One of such Pipeline Terminal and Depots referred to is Pump Station 27 was constructed on a parcel of land at Eldoret. Also located on the said land are the Plaintiff's North Rift Regional Headquarter which is responsible for maintaining the supply of fuel and petroleum products to the inhabitants of the said region but also to outside foreign territories such as Uganda, Rwanda, Burundi, Northern Tanzania, Southern Sudan and Western Democratic Republic of Congo. The oil and petroleum products are transported from the Plaintiff's premises to the said jurisdictions via road on petroleum tankers and heavy commercial vehicles.

The Plaintiff claims that prior to 1994, the Plaintiff's

parcel of land upon which Pump Station 27 is built was accessed via a seasonal murrum road known as Mitaa Road off the Eldoret-Uganda Highway known as Uganda Road. An Inland Container Depot belonging to Kenya Ports Authority was also accessed via the same route.

That due to the nature of the clientele expected at the Plaintiff's Terminal and Depot and the Kenya Ports Authority Terminal which would have composed of fuel tankers and heavy commercial vehicles weighing approximately 10-15 tonnes each, the Plaintiff and Kenya Ports Authority together with

Municipal Council of Eldoret entered into a joint venture to upgrade Mitaa Road to enable heavy commercial vehicles easily and safely reach the terminal and depots and also reduce congestion on Uganda Road. However, it is claimed that later it was found that the said joint up-grading proposal was not viable for several reasons including danger to the general public.

That the Council advised the Plaintiff that it would be economically viable and administratively simple to acquire for the purpose of constructing a new road a portion of Eldoret Municipality Block 15/239. It is the Plaintiff's case that this was the background for their acquisition of the said portion of land and construction of the access road.

During the hearing the Plaintiff gave indication that it will consider enjoining the Company that purportedly sold to it the said portion and/or His Excellency President Daniel Arap Moi who is said to have been the registered owner of the land. Documents before this Court show that Arap Moi is the Director of the said Company.

I do find as a matter of fact that there is an access road on the suit premises which is used not only by the Plaintiff, the Kenya Ports Authority for their core activities but also by members of the general public. It is a fully developed permanent road. The access road existed before the Defendant acquired and/or purchased the suit properties. The Defendant acquired/purchased the suit properties when it knew or ought to have known that there is an access road on them used by the Plaintiff, Kenya Ports Authority and the general public.

I have considered the massive allegations and counter-allegations and the documentary evidence placed before this Court and also the potentiality of joinder of parties and further amendments of pleadings.

The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction to the Plaintiff or the Defendant in the two rival applications in terms of the case of **GIELLA –V- CASSMAN BROWN & CO. LTD (1973) EA 358** is:-

- (i) Whether the Applicant has laid out a prima facie case with a probability of success.
- (ii) Whether the Applicant might suffer irreparable injury if the injunction is not granted.
- (iii) If there is doubt, whether the balance of convenience favours the Applicant.

In the light of all the foregoing, I am unable to establish or determine that either of the parties in the Plaintiff and the Counter-claim have established any prima facie case with a probability of success. I would say that I am in doubt as to who has a case with probability of success.

At this stage, from the facts, it would appear that the Plaintiff will suffer irreparable injury which may not be capable of being compensated in damages. The Defendant claims that the original Mitaa Road is still available to the Plaintiff. But on the other hand, it has set up an alternative claim of compensation for the market value of the land in use and loss of user thereof.

As I have raised doubt and I am not totally able to find that either of the two Applicants have any prima facie case with probability of success at this stage, I do hereby find that the balance of convenience favours the Plaintiff/Applicant.

The access road was in existence at the time the Defendant came into the picture and purportedly acquired the suit properties. The Plaintiff, its customers and the public are using the road. The Plaintiff's activities, business and discharge of statutory duties will be immensely impaired and adversely affected if the orders of injunction are not granted.

I do hereby allow the Plaintiff's application in terms of prayer 2. It follows that I must which I hereby do, dismiss the Defendant's application dated 30th July, 2007. Costs of both applications shall be in the suit.

Orders accordingly.

DATED AND DELIVERED AT ELDORET ON THIS 14TH DAY OF MAY, 2008.

M.K. IBRAHIM

JUDGE

In the presence of:

Mr. Chemitei holding brief for Mr. Kurgat for the Defendant

Mr. Chemitei holding brief for Mrs. Masika for the Plaintiff