REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Suit 172 of 2006

MARGROVE INVESTMENT LIMITED ……PLAINTIFF

VERSUS

1. COAST WATER SERVICES BOARD

2. MOMBASA WATER AND SEWERAGE CO. LTD. ……..…DEFENDANTS

R U L I N G

Margrove Investments Ltd., the plaintiff herein filed a plaint against Coast Water Services Board and Mombasa Water and Sewerage Ltd, the defendants herein, in which it prayed for judgment as follows:

(a) A declaration that the defendants are not entitled to enter, occupy or use the suit premises known as L.R. No. M.N./VI/3615 or any part thereof.

(b) Possession of the suit premises

(c) A permanent injunction from entering or using or occupying the suit premises

(d) Mesne profits of Kshs.75,000/- per month as from 1st July 2006 until possession is delivered up.

(e) Costs of the suit.

The plaint plus the summons were served upon the defendants.

The defendants have filed their appearances but they are yet to file their defences.

The plaintiff contemporaneously filed a summons at the time of filing the plaint. The summons dated 17th July 2006 the subject matter of this ruling, was filed pursuant to order XXXIX rules 1,2 and 9 of the Civil Procedure Rules. In the summons, the plaintiff is seeking for an order of temporary injunction to restrain the defendants, their servants and or agents from trespassing on or entering upon L.R. No.MN/VI/3615 and or dealing in any manner whatsoever with the plaintiff's quiet and peaceful use and enjoyment of the said parcel of land pending the hearing and determination of the substantive suit. The summons is supported by the affidavit of Ashok Labshankar Doshi sworn on 17th July 2006. When served with the summons, the defendants each filed a replying affidavit to contest the plaintiff's application.

The principles for the grant of a temporary order of injunction are well settled. The first principle is that an applicant must show that he has a prima facie case with a probability of success. In this case, the applicant has argued that it has a prima facie case with a probability of success. It has attached to the affidavit in support of the summons a copy of the grant of lease in respect of L.R. No. MN/VI/3615 having purchased the same from Scleraca Ltd on 22nd February 2002. It is said that on an unknown date, the defendants entered upon the suit premises without the plaintiff's consent or authority whereupon it commenced occupation and is still in occupation upto date and has refused to vacate despite receiving a quit notice from the plaintiff's advocate. In response to this submission, the 1st and 2nd defendant's through the replying affidavits of Engineer Idd Mwasina and Abdulrahim A Kheir respectively admitted that the defendants are in occupation of the suit premises through the Ministry of Water since the early 1970s. They claimed that the title in possession of the plaintiff was obtained fraudulently. It is said the Government of Kenya

ed a letter of allotment to National Water conservation and Pipeline Corporation sometimes in the month of February 2003. *Pursuant to Rule 5(i)(c) of the Water Services (Plan of Transfer of Water Services) Rule 2005, of the Water Act (No. 8 of 2002)* the suit premises is said to have been vested in Coast Water Services Board (1st Defendant) who in turn left the suit premises to Mombasa Water & Sewerage Co. Ltd. (2nd Defendant), the body charged with managing Water Services in Mombasa District. The defendants further averred that they will stay put pursuant to a ministerial circular no. 16/2005 dated 29th June 2005 which stated that all irregularly acquired public lands will be repossessed. For the above reasons the defendants are of the view that the plaintiffs have not shown that they have a prima facie case. I keep on reminding myself that this is an interlocutory application hence care must be taken not to pronounce final orders while the main suit is pending for hearing.

The submissions given orally and the facts set out in the affidavits for and against the summons clearly show that the plaintiff is in possession of a grant of lease issued pursuant to the provisions of the Registration of Titles Act. The same undoubtedly was issued on 8/2/2002. It is admitted that the defendants came into existence in the year 2003. It is also evident that the defendants were put into occupation of the suit premises by the then National Water Conservation and Pipeline Corporation on the basis of a letter of allotment issued to it on 4/2/2003. By this time, the plaintiff had a grant of lease conferring legal rights as opposed to a letter of allotment. There is doubt whether the Commissioner Lands had any vacant land to offer to National Water Conservation and Pipeline Corporation. From the annexures availed via affidavits, it would appear to me that the Commissioner of Lands had nothing to allocate. It has been alleged that the land was fraudulently obtained by the plaintiff. It was incumbent upon the defendants to show what steps have been taken by them to have the plaintiff's title cancelled legally and in accordance with the provisions of the Registration of Titles Act. The defendants have relied on the circular issued to all government institutions to repossess land illegally allocated. In part that circular reads as follows:

"All dispossessed institutions therefore, public and private alike, should initiate necessary steps for repossession of such land."

The defendants have not shown what steps they have taken to implement that circular. The process of defeating a title issued under the Registration of Titles Act (Cap 281 Laws of Kenya) is set out in sections 59, 60, 61,62,63 and 64 of the aforesaid Act. It is clear that it is only a court of law which can cancel such titles and not through Ministerial Circulars or public pronouncements.

The sum total of all my above findings is that the plaintiff has shown that it has a prima facie case with a probability of success.

The second principle is that an applicant must show that he may suffer irreparable injury which cannot be compensated in monetary terms. The plaintiff is of the view that it will suffer irreparably because it is unable to utilize its land and even if there was some ascertainable damages it will be extremely difficult to recover the same from the defendants. The defendants have only pointed out that damages are ascertainable. They did not demonstrate to this court whether they will be able to meet the enormous

damage. In my view, this is a case where the kind of damage is ascertainable but the peculiar circumstances of the case favour that the order of injunction should be granted notwithstanding that in order to protect the sanctity of title and rights conferred therein. I am fortified by the decision of the court of Appeal in the case of **Taj Super Power Cash and carry Ltd. = vs= Nairobi City Council and two others E.A. No. 111 of 2002** in which the court of Appeal stated as follows:

"**This court has recognized and held in the past that it is the trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it."**

The third and final principle is that if the court is in doubt it should decide the case on a balance of convenience. It is the submission of the defendants that they have been in occupation since the early 1970s hence they will be more inconvenienced than the plaintiff.

The defendants do not deny that they are creatures of the Water Act, 2002. That Act came into operation on 18th March 2003. It is said that the suit premises was in possession of the Ministry of water from the early 1970s and possession was later handed over to the National Water Conservation and Pipeline Corporation. It is said by virtue of a letter of allotment of February 2003, the land was allotted to the defendants. The sum total in my view is that the defendants came into being in the year 2003. It is not clear when they took over occupation of the suit premises. I can only presume that they took over occupation of the same after the National Water Conservation & Pipeline Corporation obtained letters of allotment. As of now there is strong evidence that they came into occupation not long ago and at the time when the plaintiff was in possession of a title deed which has not been challenged. I am of the view that the balance of convenience tilts in favour of the plaintiff in that the plaintiff despite having title is prevented from developing its property. The plaintiff is at the mercy of the defendants who despite having been directed by the Permanent Secretary, Ministry of Lands and Housing on 29th June 2005, to initiate a process to repossess the land, have just sat on their laurels riding on that notice to stay put in occupation.

In the end, I find the summons well founded. It is allowed as prayed with costs to the plaintiffs.

Dated and delivered at Mombasa this 14th day of February 2007.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Okongo for the plaintiff and Mrs. Murangi for the 2nd defendant.