



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Case 820 of 2006

RIVERBANK PLAZA LIMITEDPLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

The application dated and filed in Court on 27th July 2006 sought two (2) main orders; namely orders 3 and 4 therein.

(3) That the defendants through themselves their servants, employees, nominees, assigns, agents or any other person or authority connected therewith be restrained from entering into, alienating, trespassing, surveying, allocating, dealing in or in any other way interfering with the quiet possession of L.R. No. 3734/843 pending the hearing of this application inter parties.

(4) That the Defendant/Respondent either by itself, its servants officers and/or agents or any other person or authority connected therewith be restrained by way of temporary injunction from entering into, alienating, allocating, trespassing surveying dealing in or in any other way interfering with the quiet possession of L.R. No. 3734/843 until the hearing and final determination of this suit.

There were further prayers including one for the Officer Commanding Police Division Kilimani to enforce the order issued herein and ensure the Defendant does not trespass on **L.R. No. 3734/843** and another for the costs of the application.

The application was based on the grounds set out on the face thereof and the averments in the supporting affidavit.

The grounds were that the Defendant through its agents had harassed the Plaintiff's lessees/agents and had made it difficult for the said lessees to economically use the land, that the Defendant had without any colour of right threatened to arrest any person who is found on the suit property, that there were third parties claiming to have leases from the Defendant; that the Plaintiff was the registered owner of **L.R. No. 3734/843** and its rights are indefeasible and had not been extinguished and that the Defendant had no capacity to grant a lease to third parties.

The supporting affidavit is deponed to by one **Simon Ndung'u**, a Director of the Plaintiff/Applicant.

According to him at all material time the Plaintiff/Applicant has been and is still the registered owner of **L.R. No. 3734/843** having received the said property from the Defendant via a transfer registered in the Lands Titles Registry at Nairobi and the same duly effected on the title on 8th March 1993; that it holds all the documents of title related thereto thereafter referred to as "**the suit property**", that upon transfer

of the property the Plaintiff took physical possession of the suit land and fenced it, that on 26th May 2006 the Plaintiff leased it to Lavington Motor Mart Limited and to no one else; that variously latest 26th July 2006, some people unknown to the Plaintiff went to the leased premises claiming that the suit property had been leased to themselves by the Defendant.

In the next paragraphs of the supporting affidavit, the deponent avers that the said persons had visited the leased premises severally together with City Council *askaris* and had threatened to arrest the Plaintiff's agents who were working on the ground, that the deponent verily believes that the Plaintiff and its agents, servants, lessees are entitled to quiet possession of the suit property.

The deponent avers further that the Plaintiff had paid rates to the defendant which the latter had accepted and issued **rates receipts** and **clearance certificate**; that apart from the Defendant demanding payments of rates from the Plaintiff it had no other claim over the suit property; that the Plaintiff was suffering economic loss and grave detriment and damage owing to the acts of the Defendant; that the Plaintiff has been in possession of the suit property since 1993, that the deponent has been advised by his advocates which information he believes to be correct that the Plaintiffs' title to the suit land is indefeasible.

The deponent adds that the Plaintiff acquired the suit land for value and legally having fulfilled all the conditions required of it and paying all the prescribed dues and the Defendant was perpetuating an illegality and corruption by purporting that it is the owner of the suit property with full knowledge that the Plaintiff is the registered owner of the suit land and indeed in possession of the original title documents.

That the Plaintiff acquired title to the land honestly and without any fraud and that the Defendant cannot legally purport to lease it to any one else as they lack the capacity to do so and the land no longer belongs to them.

A replying affidavit dated 18th August 2006 and filed in Court on 21st August 2006 was deposed to by one **M. N. Ng'ethe** the Director Legal Affairs of the Defendant.

According to his averments, the suit property was and is owned by the Defendant. That on the face of title documents, annexed to the application as "**S N1**", the grant was made to the Defendant for a term of 99 years from 1st March 1972.

That the deponent had gone through the record of the Defendant in respect of the suit land and he had not come across any transfer of the suit land to the applicant or any other person; that from the records the deponent had gathered that the original title in respect to **L.R. No. 3734/843** was collected by **Kuria wa Gathoni** and signed for. That **Kuria wa Gathoni** was then the Director of City Planning and Architecture of the Defendant.

That there was no record to show that **Kuria wa Gathoni** ever returned the said documents.

According to the deponent, the Defendant cannot surrender any land without approval of the Minister for Local Government and that there were no minutes showing that the Minister for Local Government sanctioned the alleged transfer to the Plaintiff.

That Section 144(6)(a) of the Local Government Act expressly enacts that the Defendant can only dispose of land that it does not require with the consent of the Minister and that the Minister will direct how the proceeds are to be used pursuant to Section 144(7) of the Local Government Act.

That no record of any consent exists; that no transfer has been produced by the Plaintiff as an exhibit.

That a title without a duly executed transfer is no title in law and the deponent challenged the Plaintiff to produce a duly executed and registered transfer from the Defendant to the Plaintiff.

The deponent also doubted if the Plaintiff Company was fully registered and challenged the Plaintiff to

produce a copy of a Certificate of Incorporation and Memorandum and Articles of Association.

That the title of the Plaintiff was not clean and that the Plaintiff had not come to Court with clean hands and was not therefore entitled to any equitable relief.

These are the averments on the supporting and replying affidavits. Counsel for both the parties appeared before this Court on 18th April 2007 to submit on the application. Counsel for the applicant referred the Court to the application, the grounds on the face thereof and the supporting affidavit. He also referred to the annexures to the said supporting affidavit to confirm ownership of the suit property.

He said on taking immediate possession, the applicant leased it to a tenant, Lavington Motor Mart Limited.

That then unknown people went to the premises in company of the Defendant security men to claim the premises had been leased out by the Defendant to these unknown people.

That the Defendant had instructed its security men to enforce the takeover.

According to counsel the Plaintiff had paid all rates and annual rent on the property and is entitled to quiet possession of the same including its servants, agents and the lessee as its title to the suit premises is indefeasible.

That the action of the Defendant was causing great economic loss and hardship to the Plaintiff.

That the Plaintiff has been the owner of the suit premises since 1993 with nothing due in form of rent and rates from it to the Defendant.

According to the counsel the Defendant was perpetuating an illegality by using corrupt means posing to be owners of the suit property knowing so well that it was the Plaintiff who is the owner of it since 8th March 1993.

That the Plaintiff acquired the suit property honestly and for value and that the Defendant has no locus standi over the suit land.

Counsel referred the Court to the replying affidavit and the annexure thereof and submitted that it was not easy to tell from the annexure if indeed the title to the suit property was collected from the Defendant by one **Kuria wa Gathoni**, the Director of City Planning of the Defendant then.

That in any case, if this dispute involves the said **Kuria wa Gathoni** then the best option for the Defendant is to enjoin him to the suit as a party, or if he claims the same title which the Plaintiff has then he should have sued the Plaintiff over it.

That though on the face of title documents the grant was made to the Defendant it was later transferred to the Plaintiff hence paragraph 4 of the replying affidavit was not correct.

According to the Plaintiff's counsel the Defendant has not produced any document to show that the suit property either belongs to it or to **Kuria wa Gathoni**. That the Plaintiff had proved a prima-facie case and/or that the balance of convenience tilts in its favour which warrants that the order of injunction sought in the application be granted.

Counsel for the Defendant opposed the application on the basis of a replying affidavit filed in Court on 21st August, 2006.

He reiterated that the suit plot is owned by the Defendant and referred the Court to the title movement register annexed to the replying affidavit as **MNN1**.

He submitted that according to this certified copy of the movement register the title to the suit land was collected by ***Kuria wa Gathoni*** on 28th April 1992 and that it has never been returned.

That the Defendant cannot surrender any land without the consent or approval of the Minister for Local Government under Section 144(6) of the Local Government Act.

That as Director of City Planning ***wa Gathoni*** would take any of the titles and convert it to himself.

According to counsel, the lease to the subject plot or transfer to the Plaintiff does not indicate when this was done. That in any case any transfer to the Plaintiff looks suspect and this is why an allegation of fraud has been made against the Plaintiff in the defence.

That no prima facie case with the probability of success has been established to entitle the Plaintiff to the order of injunction sought in the application.

These are submissions advanced by parties on both sides for consideration and decision by this Court.

In the first place and without going into much detail, the Plaintiff has attached to the application the title documents to the suit land transferred to it by the Defendant, then under a Commission, on 8th March 1993. This transfer confirms the Defendant is no longer the owner of this suit land.

Even if, as the Defendant alleges, ***Kuria wa Gathoni***, then Director of City Planning, collected the title to the suit land as is alleged in ***MNN1*** – annexed to the replying affidavit, never to return it or has converted it to his own, and the Defendant is not following him on it, it cannot insist on saying it is the owner of this property. However, I do not consider the contents of ***MNN1*** to hold any water.

Even if it were true that the former City Planning Director of the Defendant was the owner of the suit plot – which is not supported by the submissions made herein, then I do not understand what the Defendant counsel came here to do when ***Kuria wa Gathoni*** himself is not a party to the proceedings in this Court!

Minutes have been produced here for the Council to deliberate over disposal of its non-essential assets and the approval for this to be done. But these are details which are not necessary at this stage.

For the present purpose, the applicant has offered to this Court sufficient material to tilt the balance of convenience by this application, in its favour, one of the main conditions necessary for the issue of a temporary injunction – see ***Giella v. Cassman Brown & Company Limited [1973] E.A. 358***.

I allow this application and make ***orders in terms of prayers 3 and 4*** of the application dated and filed in Court on 27th July 2007, with costs thereof.

Delivered and ***dated*** at Nairobi this 10th day of May 2007.

D. K. S. AGANYANYA

JUDGE