



Ethics & Anti-Corruption Commission v Milly Glassworks Limited [Formerly Bawazir Glass Works Limited] & another (Environment & Land Case E044 of 2022) [2022] KEELC 14752 (KLR) (9 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14752 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E044 OF 2022
SM KIBUNJA, J
NOVEMBER 9, 2022**

BETWEEN

ETHICS & ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

MILLY GLASSWORKS LIMITED [FORMERLY BAWAZIR GLASS WORKS LIMITED] 1ST DEFENDANT

WILSON GACANJA 2ND DEFENDANT

RULING

1. The plaintiff filed the notice of motion under the certificate of urgency dated the April 22, 2022 seeking for the following orders:
 - a. That pending the hearing and determination of this suit, a temporary injunction be issued restraining the defendants by themselves, their servants, agents or any other person from alienating, wasting, transferring, disposing or in any other way dealing with the title number Msa/block/xlvii/156 [Originally sub-divided from Msa/lock/xlvii/109].
 - b. The costs be provided for.

The application is based on the fourteen (14) grounds on its face marked (a) to (n) and supported by the affidavits of Anderson Weru, an investigator with the plaintiff, sworn on the April 22, 2022 and June 21, 2022, deposing to the following among others; that he was part of the team that investigated the issues relating to the irregular acquisition of the suit land by Ms Bawazir Glassworks Limited; that the documents held by the Survey of Kenya, parcel 156 was hived from parcel 109 when it was subdivided to create parcel 156 and 158 in 1995; that the records held by the Mombasa Lands Registry shows the green card for parcel 109 was opened on May 1, 1965 and was vested with East African Railways & Harbours.; that in 1966 the land was leased to the Government of Kenya for 82 years one month from



December 1, 1965 at annual rent of Kshs 4380.00 per annum for use by the Department of Fisheries; that in 1969 the land was vested with East African Railways Harbours Corporation, which changed its name to Kenya Ports Authority {KPA} in 2001; that title to the land was issued to KPA in 2002; that the records held at the Mombasa Lands Registry show that parcel 156, suit land, was first illegally allocated as a new lease to Bawazir Glassworks Ltd *vide* the document forwarded for registration by the Commissioner of Lands on June 28, 1996; that Bawazir Glassworks Ltd has been acquired by Milly Glassworks Ltd, the 1st defendant; that on the land are the Department of Fisheries offices and a temporary order of injunction should issue to secure the suit land, which is a public property, as the suit is heard and determined.

2. The application is opposed by the 1st defendant, through the replying affidavit sworn by Mohamedraza S Rashid, director to the 1st defendant, on the June 15, 2022. It is their case that parcel 156 was subdivided from parcel 109 by the Government of Kenya, without the involvement of the 1st defendant. That the government, as the lessee of parcel 156, allocated it to the 1st defendant on the February 12, 1996 for 99 years from February 1, 1996. That the suit property remains the property of KPA, but under lease to the government, which in turn leased it to the 1st defendant. That the Ministry of Tourism & Wildlife had consented to the lease of the suit land to the 1st defendant, and it is not true to say the acquisition was illegal. That this suit was maliciously filed against the 1st defendant as the government has not lodged any complaint over the lease, and KPA has not terminated its lease arrangement with the government. That the application should therefore be dismissed.
3. That following the directions of the June 27, 2022 on filing of submissions, the learned counsel for the plaintiff and the 1st defendant filed theirs dated the August 1, 2022 and September 21, 2022 respectively.
4. The following are the issues for the court's determinations:
 - a. Whether the plaintiff has made out a *prima facie* or reasonable case, with a probability of success, for the injunctive order sought to issue.
 - b. Who pays the costs of the application.
5. The court has carefully considered the grounds on the application, affidavit evidence by both sides, submissions by the learned counsel, superior courts decisions cited therein and come to the following conclusions:
 - a. That to start with, I wish to observe that whereas the 1st defendant in their replying affidavit, and the plaintiff in their submissions, made reference to a 3rd defendant, the pleadings by both parties filed herein have only two defendants, the 1st and 2nd defendant. That in case there was another party that was left out, the court will wait to be moved accordingly for an order of joinder.
 - b. That both the plaintiff and the 1st defendant are in agreement that parcel 156, suit land, is a subdivision from parcel 109, that was leased to the Government of Kenya by the predecessor of Kenya Ports Authority for 82 years one month from December 1, 1965. It is also not disputed that the 1st defendant was allocated the suit land on or about June 28, 1996, for a term of 99 years with effect from February 1, 1996. What is in dispute is first, whether the subdivision of parcel 109 to create the suit land and another parcel, and the allocation and registration of the lease over the suit land in the name of the 1st defendant, was regularly and legally done. The plaintiff contends it was not, while the 1st defendant takes the position that it was. That



secondly, the parties are in dispute as to whether the plaintiff has established a prima facie case with a probability of success that is deserving of the restraining orders sought.

- c. That both parties are in agreement that the offices of the Department of Fisheries are located on the suit land. That though the 1st defendant has been the registered lessee of the suit land for years, there is no evidence tendered that it has attempted at any time to interfere with the said department's use of, or access to, the offices. It is not apparent what or where the source of the plaintiff's apprehension that made it necessary to seek for the injunctive orders emanated from.
 - d. That even though the court is not expected to make any definite finding on matters of fact at this stage until after hearing the evidence from the parties, the undisputed fact that on the suit land is erected structures used by the Department of Fisheries, and that the commissioner of lands issued the 1st defendant a 99 years lease in 1996, over a portion of a property the government had an 82-year lease from 1965, leads the court to find that the plaintiff's quest for an order aimed at ensuring the property is not adversely affected, is not without basis. It is in the public interest that the public offices on the suit land be allowed to continue with their usual operations as the dispute over the legality or otherwise of the allocation and registration of the suit property moves through the court processes and is determined. That an order to maintain the obtaining status quo on the use and title to the suit land would not prejudice any of the parties herein in the claim or defence.
 - e. That on the issue of costs, the court finds this to be an appropriate case for the costs to be in the cause, the provision of section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya notwithstanding.
6. In view of the above findings, the court orders as follows in respect of the plaintiff's motion dated the April 22, 2022:
- a. That the parties do maintain the obtaining status quo in respect of the use of, and legal title to MSA/BLOCK/XLV11/156, suit land, pending the hearing and determination of this suit.
 - b. The costs of the application be in the cause.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 9th DAY OF NOVEMBER 2022.

S M KIBUNJA, J

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF

.....

DEFENDANTS.....

COUNSEL.....

.....

COURT ASSISTANT WILSON

S M KIBUNJA, J

ELC MOMBASA.

