



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 405 OF 2017

KAHIA TRANSPORTERS

TRADE LEAD LIMITED.....PLAINTIFFS

-VS-

NATIONAL LAND COMMISSION.....DEFENDANT

AND

1. CHUNKY LIMITED

2. CURLY WURLY LIMITED

3. JULIUS KEA MBAWA

(As Administrator of the estate of MBAWA WA MBINU alias MBAWA MBINU deceased)

4. KACHUNGO EDWARD BEKWEKWE

5. CHARLES MULOLE SHANGA

6. HAMISI TSUMA MWERO

7. REDALU MBOVU MGANDI.....I/PARTIES

RULING

1. There are two applications for determination. The first application is the defendant's notice of motion dated 7th February 2018 brought under Section 1A, 1B and 3A of the Civil Procedure Rules and all other enabling provisions of the law, seeking to set aside the ex-parte orders of injunction given on 8th November 2017 restraining the defendant from releasing any money towards whole or part acquisition of plots nos. MN/VI/1040, MN/VI/1040/I, MN/VI/1042, MN/VI/29437/12, MN/VI/29437/11, MN/VI/29437/19, MN/VI/29437/20, MN/VI/29437/21, MN/VI/29437/22, MN/VI/29437/23, MN/VI/910, MN/VI/909, MN/VI/224, MN/VI/1042, MN/VI/745, MN/VI/3888, MN/VI/4838, MN/VI/4948 and MN/VI/4805. The application also seeks to set aside the interlocutory judgment entered in favour of the plaintiff against the defendant on 18th December, 2017 and an order that the plaintiff indemnifies the defendant for interest due and accruing at the prevailing market rates for all the amounts due and pending as compensation for all the properties affected by the said ex-parte orders and/or gives an undertaking for same. The defendant also seeks to have the entire suit dismissed with costs. The application is supported by the affidavit of Brian Ikol.

2. The second application is Notice of Motion dated 2nd November, 2018 by the 3rd Interested Party also seeking orders that the orders given on 8th November, 2017 be vacated and/or set aside in as far as it relates to PLOTS NOS. MN/VI/910, MN/VI/909 and MN/VI/224, and an order do issue compelling the defendant to release the funds to the Interested Party. The application also seeks orders that the entire suit be struck out and/or dismissed with costs to the interested parties. The application is supported by the affidavit of Julius Kea Mbawa.

3. Upon reading the plaintiffs' Notice of motion dated 6th November, 2017 brought under certificate of urgency under Section 68 of the Land Registration Act and inherent powers of the court, Section 63 (e) of the Civil Procedure Act and any other relevant provisions of the law,

and upon reading the supporting affidavit and the annexures thereto sworn by Osman Ahmed Kahia on 6th November, 2017, the Court (L. Komingoi J) ordered as follows:

1. The application be and is hereby certified as urgent.

2. Pending the hearing and determination of the application a temporary and inhibition order be and is hereby issued prohibiting/inhibiting the defendant by itself, its agents and/or assigns from in any manner releasing any money towards whole or part acquisition of plots nos. MN/VI/1040, MN/VI/1040/I, MN/VI/1042, MN/VI/29437/12, MN/VI/29437/11, MN/VI/29437/19, MN/VI/29437/20, MN/VI/29437/21, MN/VI/29437/22, MN/VI/29437/23, MN/VI/910, MN/VI/909, MN/VI/224, MN/VI/1042, MN/VI/745, MN/VI/3888, MN/VI/4838, MN/VI/4948 and MN/VI/4805 situate at Mombasa within Mombasa County.

3. A date be taken in the registry on priority basis.

4. The respondent be served.

4. It is the defendant's submission that the plaintiff herein failed to make material disclosures of the existence of the following numerous suits touching on the affected properties, information that was reasonably within their knowledge;

a) Mombasa ELC NO.273 of 2017 between Kahia Transporters Limited and Trade Lead Limited versus Chunky Limited and Curly Wurly Limited.

b) Constitutional and Judicial Review Petition Number 20 of 2017 between Kahia Transporters Limited versus Director of Survey, Chief Land Registrar and the National Land Commission.

c) Mombasa ELC Number 87 of 2015 (formerly Constitutional Petition Number 21 of 2015) between Stephen M. K. Mbinu and others versus Chunky Limited and Others.

d) ELC Number 247 of 2015 between Curly Wurly Limited versus Chifui Gala Bemngumi and Others.

e) ELC Constitutional Petition No. 171 of 2016 between Miritini Free Port Limited versus Attorney General and Others.

f) ELC Constitution Petition No. 170 of 2016 between Miritini Free Port Limited versus Attorney General and Others.

g) Constitutional Petition No.34 of 2016 between Ali Nyamani versus Miritini Free Port and Others.

h) Mombasa High Court ELC No. 161 of 2013 between Monica Wambui Kamau and Another suing as legal representatives of the estate of James Kamau Thing'o versus Golden Sparrows Trading Company Limited & Another.

i) Mombasa Civil Appeal Number 111 of 2016.

5. It is averred that it has become extremely difficult for the defendant herein to comply with the orders of this court without violating orders issued by the courts of parallel and competent jurisdiction in the above listed matters requiring the defendant to make compensation to some of the property owners whose properties are affected by the orders of this court. That unless this court urgently intervenes by setting aside the ex-parte orders, public funds stand to be unnecessarily wasted by paying of interest at prevailing market rate or at a rate not lower than 6% over all the acquired properties listed in this suit since the government has already taken possession of the suit properties and put them into the use for which they were acquired for. That the plaintiffs have failed to disclose to this court that the Director of Survey has commenced the process of revoking the unlawful new grant and deed plans issued to the plaintiffs after it was established that the same are overlapping/fall inside what is registered freehold properties, and that the plaintiffs have failed to disclose that their alleged properties were not gazetted for compulsory acquisition by the defendant and that no compensation is due and owing to them and in the circumstances there is no basis to withhold compensation to the other property owners on account of interests that are yet to crystalize or be established by any legally recognized means. It is further stated that the plaintiffs have not disclosed to this court that their alleged properties are situate in Mombasa County and not Kwale County where the compulsory acquisition for the specific railway project took place in the year 2015. That all the other properties affected by the orders of this court are situate deep in Kwale County and not Mombasa County. That the plaintiff has failed to disclose to this court that by the time they procured their titles to their alleged properties in the year 2017, compulsory acquisition had already terminated in the year 2015 and the suit properties vested in the government for the use for which it was acquired for, being the standard gauge railway. That the matter is prematurely before this court since the plaintiffs have not exhausted all internal mechanisms before moving court as required by Section 18 of the Land Registration Act which requires that all boundary disputes have to be determined by the District Land Registrar at first instance before the court can be moved. That no prejudice will suffered by the plaintiff since the claim for compensation is liquidated and as such damages would suffice if compensation is paid out and the court thereafter finds in favour of the plaintiffs.

6. The defendant submitted that the plaintiff failed to make full and failure disclosure of facts when they moved the court for orders. It was submitted that disclosure of all the material facts would have affected the decision of the court and that the plaintiff came to court with unclean hands and is therefore underserving of the orders of this court. The defendant's counsel cited Order 40 Rule 7 which states that an order for injunction may be set aside, discharged or varied by the court. Counsel relied on the case of **Gotv Kenya Ltd -v- Royal Media Services Limited & 2 Others (2015)eKLR** and **Hamisi Tsuma Mwero & 9 Others -v- National Land Commission & 2 Others (2017)eKLR**.

7. The application dated 2nd November, 2018 is supported by the affidavit of Julius Kea Mbawa sworn on 2nd November, 2018 in which he has deposed inter alia that he and others are the proprietors of the property comprised in the TITLE NO.CR 4155 (PLOT NO.224/VI/MN) situate in Kwale County whereas the plaintiffs claim theirs is in Mombasa County. The 3rd interested party also submitted that the plaintiffs obtained the ex-parte orders on 8th November, 2017 through deceit and material non-disclosure. It is the 3rd interested party's submission that the plaintiffs moved this court on account of boundary dispute, adding that the plaintiffs' claims that they are the registered owners of PLOT NO.MN/VI/5141, MN/VI/5153 and MN/VI/5154 are misleading because the said properties were not in existence at the time the Government compulsorily acquired the suit properties in 2014 for public purposes while the titles in the name of the plaintiffs were only issued in 2016, way after the Government had taken possession of the land and constructed the standard gauge railway on it. The 3rd interested party submitted that the plaintiffs came to court with dirty hands and therefore the interim order in place should be set aside.

8. The applications are opposed by the plaintiffs through the replying affidavits of Osman Ahmed Kahia sworn on 27th February 2018 and 15th February, 2019. The plaintiffs aver that they acquired the suit properties as innocent purchasers for valuable consideration and that PLOT NUMBER 5141/VI/MN and 5153/VI/MN are registered in the name of the 1st plaintiff while PLOT NUMBER 5154/VI/MN is registered in the name of the 2nd plaintiff. It is the plaintiffs contention that whereas the 1st and 2nd interested parties aver that PLOT NOS. MN/VI/909 and MN/VI/910 are situate in Kwale County where they pay their rates, the annexures indicate that the said pieces of land are situate in Mombasa Municipality in Mombasa County. The plaintiffs contend that it is clear that there is either overlapping or double allocation of titles over the same land subject of this suit in respect of which the disputants hold titles as purchasers and/or alternatively a fraud has been committed which should be thoroughly investigated through a full trial where the parties shall have to be subjected to examination-in-chief and cross-examination as contemplated under Article 50 of the Constitution, considering that both the plaintiffs and the 1st and 2nd Interested Parties hold titles. Relying on the cases of **Otieno -v-Ongo & Another (No.2) (1987)KLR 400**; **Margaret Njeri Muiruri -v- Bank of Baroda (K)Limited Civil Appeal No.9 of 2001 Nairobi**; and **Edward Gichunji Wambiri -v- Hannah Njeri Thubi (2017)eKLR**, the plaintiffs submitted that from the factual foundation of the parties as set out in their affidavits and bundle of documents on record, there are serious issues in this matter that require to be determined through a full trial, hence the need to maintain the interim orders granted on 8th November, 2017 so as to preserve the status quo. The plaintiffs submit that the plaint discloses a prima facie case hence the prayer to strike out and/or dismiss the suit ought to be dismissed with costs. The plaintiffs relied on the case of **D. T. Dobie & Company (Kenya) Limited -v- Joseph Mbaria Muchina & Another (1980)eKLR**, and **Kenya Ports Authority & Another -v- Akaba Investment Limited & 8 Others**. The plaintiffs urged the court to dismiss the applications herein with costs.

9. I have considered the two applications herein and the submissions made. The issues for determination are whether the ex-parte orders of injunction issued on 8th November, 2017 and whether the plaintiffs' suit should be struck out and/or dismissed.

10. The jurisdiction of the court to set aside an order of injunction is outlined under Order 40 Rule 7 of the Civil Procedure Rules which provides as follows:

“Any order for an injunction may be discharged or varied or set aside by the court on application made thereto by any party dissatisfied with such order.”

11. In this case, the plaintiffs have pleaded that they are the registered owners of parcels of LAND TITLE NO.5153/VI/MN/(CR 68637), 5141/VI/MN(CR.68273), 5141/VI/MN(CR 68639) situate at Mombasa within Mombasa County. The plaintiffs' state that the said parcels of land have a boundary dispute with plots nos. MN/VI/1040, MN/VI/1040/I. MN/VI/1040/2, MN/VI/1042, MN/VI/29437/12, MN/VI/29437/11, MN/VI/29437/19, MN/VI/29437/20, MN/VI/29437/21, MN/VI/29437/22, MN/VI/29437/23, MN/VI/910, MN/VI/909, MN/VI/224, MN/VI/1042, MN/VI/745, MN/VI/3888, MN/VI/4948 and MN/VI/4805 which are subject of compulsory acquisition by the defendant. The plaintiffs are seeking inter alia, an order restraining the defendant from paying out any money in the form of compensation in respect of the acquisition touching on the said parcels of land until the dispute touching on the said parcels of land is resolved.

12. On the other hand the defendant and the 3rd interested party argued and pleaded that the said parcels of land have been compulsorily acquired and therefore the owners are entitled to compensation and that the plaintiffs' suit is only meant to frustrate the process. The defendant and the 3rd interested party have accused the plaintiffs of material non-disclosure of facts.

13. The conditions for the grant of an interlocutory injunction are now well settled as stated in **Giella -v- Cassman Brown and Co. Ltd (1973)EA 358**. The principles are (a) an applicant must show a prima facie case with a probability of success (b) in an interlocutory injunction the applicant must show that unless injunctive orders are granted he will suffer irreparable harm which would not be adequately compensated for by damages, (c) And if in doubt in any of the above conditions the court will decide then on a balance of convenience. In the case of **Mrao Ltd -v- First American Bank Ltd & 2 Others (2003) KLR 125**, a *prima facie* case was said to be “one in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

14. In this case, on 8th November, 2017, the court (Komingoi J) issued interim orders of injunction pending inter-partes hearing of the plaintiffs' application dated 6th November, 2017. I see no reason not to believe that the Honourable Judge applied the above conditions while considering the plaintiffs' application under certificate of urgency and subsequently issued the interim orders. What the court was able to gather from the court record is that the said application has never been heard inter-parties. Instead, there have been various applications by the parties in the matter. The record further indicates that on 1st April, 2019 the parties agreed to have all pending application put in abeyance in favour of the hearing of the main suit. Indeed the court directed the parties to comply with the provisions of Order 11 of the Civil Procedure Rules and fixed the case for hearing on 3rd October, 2019. However, on 3rd October, 2019, the hearing of the suit could not proceed as scheduled because the 3rd interested party filed an application dated 18th September, 2019 seeking to strike out the suit. It is worth to note that in the second application herein, the 3rd interested party is also seeking to strike out the plaintiffs' suit. It is not clear why there was a change of mind by the applicants. However, I see no reason why applications have been brought when the parties had earlier agreed to have all pending applications put in abeyance in favour of the hearing of the main suit. Indeed the court had already fixed the matter for hearing. In this case, there is a dispute over the boundaries of what the plaintiffs' regards as their properties. It is the plaintiffs' contention

that the defendants ought to be stopped from paying out compensation until the dispute is resolved.

15. In the case of **National Commercial Bank Ltd- v- Olint Corporation 2009 WLR 1405** the privy council stated that the purpose of interlocutory injunction is to improve the chance of the court being able to do justice after a determination of the merits at the trial. In my opinion therefore the plaintiffs have demonstrated through affidavit evidence that there is a *prima facie* case to be heard at the trial within the principles elucidated in **Cassman Brown and Mrao case**. To me unless the matter goes for inter-parties hearing and witnesses are cross-examined the dispute cannot be wished away at the interlocutory stage, including the basis of the material non-disclosure.

16. Further, the principles which guide courts in determining an application for striking out pleadings are well settled. In the case of **D.T. Dobie & Company (Kenya) Ltd –v- Muchina (1982)KLR**, the Court of Appeal stated as follows:

“.....the power to strike out should be exercised only after the court has considered all facts; but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is beyond redemption and incurable of amendment. As long as a suit can be injected with life by amendments, it should not be struck out.”

17. In the case of **Yaya Towers Limited –v- Trade Bank Limited (In liquidation) (2000)eKLR**, the Court of Appeal expressed itself as follows:

“A plaintiff is entitled to pursue his claim in our courts however improbable his chances of success unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. It cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court....”

18. Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by setting aside the orders issued by the court on 8th November, 2017 and terminating the plaintiffs’ suit at this stage. Unser Article 50 (1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body. Under Article 25 that right cannot be limited. Whereas I agree that the form of a hearing does not necessarily connote adducing oral evidence, and that in appropriate cases hearing may take the form of affidavit evidence, to determine a suit by way of affidavit evidence ought to be resorted to only in clear and plain cases. I am not satisfied that the present case can be termed as clear and plain case.

19. The upshot is that the defendant’s notice of motion dated 7th February 2018 and the 3rd interested party’s notice of motion dated 2nd November, 2018 are without merit and are dismissed with costs to plaintiffs.

DATED, SIGNED and DELIVERED at MOMBASA virtually due to COVID-19 Pandemic this 25th day of January, 2021

.....

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE