



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 6 of 2020

ASHBRO INTERNATIONAL LIMITED.....PLAINTIFF

=VERSUS=

CATHERINE NJERI KAMUNY.....1ST DEFENDANT

RIROY COMPANY LIMITED.....2ND DEFENDANT

NAIROBI CITY COUNTY.....3RD DEFENDANT

DEVELOPMENT BANK OF KENYA LTD.....INTERESTED PARTY

RULING

1. Before court for determination is the plaintiff's application dated 16/1/2020 in which the plaintiff seeks an interlocutory conservatory order restraining the 3rd defendant, together with their agents and servants, against trespassing on, entering, damaging, alienating or building any structures on or dealing with Land Reference Number 209/3694, located in South "B" Area of Nairobi City County, pending the hearing and determination of this suit. The three defendants have opposed the application.

2. The plaintiff was previously known as Ashbro Enterprises Limited. Its name changed to Ashbro International Limited in May 1996 pursuant to a resolution of the Company. The 1st defendant is a director of the 2nd defendant.

3. In 2019, the 3rd defendant awarded a tender to the 2nd defendant pursuant to which the 2nd defendant was contracted to construct an ablution block on what the 3rd defendant describes as "an open space which is public land under the custody of the 3rd defendant". The key prayer in the application indicates that the suit property is located in Nairobi South "B", while the replying affidavit of the 3rd defendant indicates that the suit property is situated in Nairobi South "C". The plaintiff contends that the said land on which the impugned construction works were carried out is their land, surveyed as Land Reference Number 209/3694 and comprised in Grant Number IR 62865, registered on 25/7/1994. This suit and the application under consideration were provoked by the said construction works.

4. The case of the plaintiff is that they purchased the suit property in 1995 from one **Michael Sebastian Kibui (the Vendor)** at a consideration of Kshs 1,500,000. The suit property was registered in the name of the Vendor at the time of purchase. They undertook due diligence before buying the suit property. The suit property is currently charged to M/s Development Bank of Kenya Limited (the Interested Party) as security for a loan of Kshs 32,500,000. On or around December 2019, the 2nd defendant, on behalf of the 3rd defendant, started erecting an ablution block on the suit property. The plaintiff contends that the

actions of the defendants constituted trespass on their private property. Through the application under consideration, they seek an order restraining the 3rd defendant against the said activities, pending the hearing and disposal of this suit.

5. The 1st and 2nd defendants responded to the application through a replying affidavit sworn on 3/2/2020 by Catherine Njeri Kamunyu. (1st defendant). Their case is that the 1st defendant is one of the directors of the 2nd defendant. In 2019, the 3rd defendant, through an invitation published in the local daily newspapers, invited bidders for a tender for construction of an ablution block in Nairobi South Ward, to wit, Tender No NCC/WS & E/T/422/2018-19. The 2nd defendant bade and won the tender. Subsequently, a formal contract was executed between the 2nd and 3rd defendants. On 21/11/2019, the 3rd defendant showed and handed over to the 2nd defendant the site where the proposed construction works were to be erected. The 2nd defendant took possession of the site and proceeded to execute the works. At the time of swearing the replying affidavit, 80% of the construction works had been completed. The 1st and 2nd defendants were not claiming title to the suit property. They fault the plaintiff for not objecting to the construction when the 3rd defendant placed the tenders in the newspapers. They add that the 2nd defendant stands to suffer loss due to heavy investment on the site, including plant and machinery. They further contend that should the court be inclined to grant any interim injunction to the plaintiff, it should order the 3rd defendant to pay the 2nd defendant 80% of the value of the contract.

6. The 3rd defendant opposed the application through a replying affidavit sworn on 16/6/2020 by Ghovel Joseph Cheruiyot. The case of the 3rd defendant is that in 2019, the 3rd defendant contracted the 2nd defendant to construct an ablution block in Nairobi South C Ward on an open space which is public land under the custody of the 3rd defendant and held by the 3rd defendant in trust for the public. The suit property is public land and was never available for allocation to Michael S Kibui or to any other private individual. The 3rd defendant contends that the purported registration of the suit land was done fraudulently between Michael S Kibui and the Office of the Commissioner of Lands.

7. I have considered the parties' respective submissions together with the relevant legal frameworks and the prevailing jurisprudence on the key question falling for determination in this application. The single question falling for determination in this application is whether the plaintiff/applicant has satisfied the criteria upon which our courts exercise jurisdiction to grant an interlocutory restraining order pending the hearing and determination of a suit.

8. The said criteria is spelt out in **Giella v Cassman Brown Co Ltd [1973] EA 358**. First, the applicant must demonstrate a *prima facie* case with a probability of success. Second, an interlocutory order will not be granted unless it is demonstrated that the applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience.

9. The applicant in the present application holds a registered Grant which they contend was issued pursuant to a Part Developments Plan (PDP) dated 6/1/1994. There is no evidence at this stage to suggest that the plaintiff's title has been revoked/cancelled or has been recommended for revocation. In the circumstances, it does appear that the plaintiff has demonstrated a *prima facie* right of ownership in the suit property which has been violated and/or is threatened with violation and which merits protection [see **Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR**]. At this stage, the 3rd defendant has not brought any counter-claim challenging or seeking nullification of the plaintiff's title. The court is, in the circumstances, satisfied that the plaintiff has demonstrated a *prima facie* case with a probability of success.

10. The actions giving rise to this application involve seizure of surveyed and titled land by the 3rd defendant and erection of developments thereon without bothering to apply for revocation of the survey plans and the title held by the plaintiff. Were the said actions to be allowed to continue unabated, there will be a breakdown of the rule of law. No amount of damages can compensate a party exposed to a flagrant violation of the rule of law. In the circumstances, the court is satisfied that the second limb of the principle in **Giella v Cassman Brown (1973) EA 358** has been satisfied. I will not therefore consider the

third limb of the principle in **Giella v Cassman Brown (1973) EA 358**.

11. The court is nonetheless aware that substantial construction works have been executed. The works involve public funds. In the circumstances, the court will protect the plaintiff's right and at the same time preserve the developments which have been erected on the suit property, pending the hearing and determination of this suit.

12. The 1st and 2nd defendants urged the court to order the 3rd defendant to pay the 2nd defendant the equivalent of 80% of the contract value, should the court be inclined to grant a restraining order. I do not think this court is properly seized of a claim relating to the 2nd defendant's contractual entitlements against the 3rd defendant, to warrant grant of that order. I will refrain from purporting to adjudicate a claim which is not before this court.

Disposal Orders

13. In light of the above interlocutory findings, the plaintiff's notice of motion dated 16/1/2020 is disposed in the following terms:

a) An interlocutory order is hereby issued restraining the 3rd defendant together with its agents and servants against continuing with or undertaking further construction works on Land Reference Number 209/3694, pending the hearing and determination of this suit.

b) An order is hereby issued preserving the structures already erected on the suit property by the 3rd defendant using public funds, pending the hearing and determination of the suit herein.

c) The 2nd defendant shall be at liberty to remove from the suit property its construction equipment which may still be there.

d) The Kenya Police Service Commander in Charge of Industrial Area Police Station shall enforce the above orders.

e) Costs shall be in the cause

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH DAY OF FEBRUARY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Ms Karani for the Plaintiff

Mr Khaemba for the 1st and 2nd Defendants

Mr Nyakoe for the 3rd defendant

Court Assistant: June Nafula