



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 1259 OF 2003

TELPOSTA PENSION SCHEME

REGISTERED TRUSTEES PLAINTIFF

VERSUS

MVITA DEVELOPMENT & INVESTMENTS

LIMITED..... DEFENDANT

RULING

This is an application by Telposta Pension Scheme Registered Trustees who have filed an application by way of chamber summons brought under Order 3A Rules 2 (1) (2) 3(1) and 9 of the Civil Procedure Rules.

The Applicant seeks for Orders against Mvita Development and Investment Limited inter-alia as follows

A temporary order of injunction restraining the respondent by itself, its agents, servants from entering, remaining depositing any building materials constructing, a new road or any structures or in any manner interfering with the Applicants' properties known as Land Reference Numbers 209/14990/3 and 209/14990/4 pending the hearing and determination of this application.

Secondly the Applicant seeks for an order that pending the hearing and determination of this suit the Defendant/Respondent by itself, its agents/or servants be restrained by way of an order of injunction from entering remaining, depositing any construction materials, and equipment, constructing, building a road or any structures or in any manner interfering with the Applicant's properties known as land References Numbers 209/14990/3 and 209/144990/4. The application is supported by the affidavits of Paul B Jilani sworn on 2nd December 2003 and a further affidavit sworn on 18/12/03. The gist of the affidavit is that the Applicant who is the predecessor of the defunct Kenya Posts and Telecommunication is by virtue of the vesting made order by the Minister of Finance, the registered proprietor of LR Numbers 209/14990/3 and 209/14990/4 Numbers209/14990/4 and 209/3084.

Secondly the Defendants intend to trespass on the said land by erecting or constructing an access road in the plaintiff's land.

Thirdly the Applicant states that no access road was ever registered to pass through the suit premises and the plaintiff contend that an access road is an easement which ought to have been endorsed in the title and according to the Applicant the attempt by the defendant to build an access road on their parcel of land amounts to trespass.

The fourth issue that was canvassed by the Applicant forced on correspondence that was exchanged between the defunct Kenya Power & Lighting Company, the Commissioner of Lands and the St. George's Secondary School. The Applicants contend that the said correspondence does not bind the Applicant and the contents of the said letters cannot overrule the sanctity of the title by the Applicant.

The Respondent opposed the application most vehemently. The Respondent relied on the replying affidavit sworn by Isaac Rhein Mruttu on 11th December 2003 as well as the grounds stated in the notice of preliminary objection which the Respondent elected to rely on in opposition of the application. The Respondent's counsel submitted that the parcel of land LR NO. 209/11872 was allocated to St Georges Secondary School with the clear intention that the school would dispose of the land and utilize the proceeds for the school's physical developments. Hence by an agreement dated 20th May 1997, the St Georges School executed a sale agreement with the Respondent and the plot was sold to the Respondent. The property is separated from the school by a river and has no access to it. As at the time of the sale the property (suit premises) which could have afforded the access road was registered in favour of the defunct Kenya Posts & Telecommunications Corporation. By a letter dated 1st April 1996, the Commissioner of Lands requested the Managing Director of the Kenya Posts and Telecommunications Corporation for a six metre access road, and in its reply the Corporation confirmed their wiliness to give the six metre access road to the plot belonging to St Georges Secondary School subject to appropriate commercial compensation. The other letter by the corporation is dated 11th May 1998 and it is addressed to the Principal of St Georges Secondary School and it states that the Corporation "decided to waive the assessed compensation of Ksh 200,000/= in the interest of promoting your school as it is a public institution". Counsel for the Respondent submitted that it on the basis of this correspondence that the Respondents proceeded to buy the plot which plot would be useless without the road. Upon the purchase, the Commissioner of Lands instructed the Director of Survey to re-survey the land and curve out an access road out of the Kenya Posts & Telecommunications Corporation land. Meanwhile and pursuant to a legal notice No. 154 the legal status of the Co-operation changed by virtue of the schedule attached thereto, the Minister of Finance vested the suit premises unto the Applicant's Counsel submitted that the Applicant should honour all the obligations and observe all the duties that their predecessor ought to have performed and in particular surrendering the access road as per the above communication.

I have considered the application and all the material placed before me and very candid submission by both counsel for Applicant and Respondent very carefully in determining the following issues that I have formulated:

- 1) Whether the two letters written by the Applicant's predecessor in Title should override the Titles registered in favour of the Applicants.
- 2) Whether the Applicants withheld material facts when the orders of interim injunction was granted by the court.

There are other issues but in determining this interlocutory application I believe those issues will suffice.

I agree with counsel for the Respondent that the Applicant by virtue of section 5 of the Kenya Communications Act, the Applicant was vested with not only the Assets but liabilities of their predecessor in Title hence if there were liabilities such as the access road to provide, they were vested upon the Applicant. My dilemma is whether the letter dated 11th May 1998 which was addressed to the Principal of St Georges School and in response to the letter by the Commissioner of Lands is an obligation that should overrule the Titles. This acceptance by Kenya Posts and Telecommunications to grant the access road was not accepted by the other side. It was not part of the sale agreement and no easement was registered on the Title nor was it included in the Schedule of Assets that were vested upon the Applicants. With respect, I find that the matter of the access road if indeed it was meant to be a serious obligation on the side of the Respondent should not have been left hanging. There was no letter confirming the acceptance of the offer by the School the matter was treated rather casually and now the court is being asked to make a finding that those letters formed a contract which was relied upon and the Respondents have suffered tremendous loss and continue to loose colossal sum of money on a daily basis.

I find it difficult to make a finding based on those two letters in particular because the letters were not even addressed to the Respondent and were not part of the sale agreement. The other issue that the respondent's counsel eloquently addressed was the fact that the interim order was made without material disclosure of vital information which the Applicant withheld from the court. I agree with counsel and the principals advanced in the various authorities quoted herein of the necessity to disclose all the material facts by the Applicant in an ex parte application such is this one. Counsel for the Applicant argued that all the material on their possession was disclosed and especially letter dated 12/11/03 which is an investigation report of the Respondent's claim. He argued that the two letters which were written by the Predecessor on title were not in the Applicant's possession. This is therefore a matter for the trial court to go into.

According to the material before me, I find that the Applicant has made a prima-facie case and on a balance of convenience, the interim injunction as prayed for in paragraph 3 of the application dated 2nd December 2003 should be granted pending the hearing and determination of the suit. Costs shall be in the cause.

Orders accordingly.

Ruling read and signed on 21st January 2004.

M. KOOME

JUDGE