

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.596 OF 2001

MAHICAN INVESTMENTS LIMITED PLAINTIFF

VERSUS

WATAMU WATERWAYS LIMITED DEFENDANT

RULING

Two orders are being sought by this application. These are first a mandatory injunction to order the Defendant to forthwith remove all its container and other properties of whatever nature as well as its guards, servants, and agents from the Plaintiff's properties being Portion numbers 654 and 657 Mambui and second an injunction to restrain the Defendant by itself, its servants, workmen or agents or otherwise howsoever from trespassing into the Plaintiff's said property. The grounds upon which the application is based are that the Plaintiff is the registered owner of the properties being Portion numbers 654 and 657, Mambui having purchased the same from Caluwa Limited free from encumbrances; that the Defendant has no overriding interests over the said properties; and that the Defendant's servants and agents have been trespassing on the said properties and the Defendant has kept thereon containers and other properties and has posted guards thereon which hinder the use of the said properties by the Plaintiff.

In the Affidavit in support of the application sworn by Leonardo Brella, the General Manager of the Applicant company, the Applicant says in brief that on 28.2.2001, it purchased the suit lands from Caluwa Ltd free of any encumbrances. He annexed copies of transfer of the said pieces of land and certificates of Title. The land has Tourist Units and the Plaintiff intends to build more such units on the suit properties. Defendant has occupied approximately one acre of the said land on the basis of an agreement with the former owners which does not bind the Applicant as it was not a party to the said agreement. The Defendant has no overriding interests in the land. The Defendants continued illegal stay on the land is causing suffering to the Plaintiff as it cannot complete developments on the land and it cannot build and complete a wall around the land to keep off animals and trespassers to the land.

The Respondent did not attend court for hearing the application but it did file a Replying Affidavit sworn by Moosa Esmail, one of its Directors.

In that Affidavit it says that the application is defective in that mandatory injunction would not issue in terms of order XXXI Rules 1, 2 and 3 of the Civil Procedure Rules and/or under Section 3A of the Civil Procedure Act, and that the prohibitory injunction cannot issue as the Defendants employees and its machines have all along been on the land since 1996 pursuant to contract agreement dated 10th July 1993 signed between the Previous owner Caluwa Ltd and the Defendant; that the Defendant has remained on the suit premises awaiting further instructions and/or funds from the Previous owner to complete and hand over phase B. It had constructed and handed over phase A of the project to the same former owner Caluwa Ltd in terms of the agreement; that there is an application by the Respondent in which it is seeking leave to issue third party notice to the said Previous Owners and that the Plaintiff/Applicant has all along had notice of the presence of the Respondent on site and understood in what capacity the Defendant has continued to remain on the suit property.

I have perused the Affidavits and the annexures in this application and particularly the contract agreement relied upon by the Respondent. That agreement (annexed as MEI by the Respondent) is an agreement between Caluwa Limited and Watamu Waterways. The Applicant is not a party to it and cannot be bound by it. I have looked at the Transfer and Certificates of Title in respect of both Portion Numbers 654 and 657 Mambui. There is no entry in the same of any overriding interests and certainly

there is no entry in the same of the Respondent's interests. The Respondent is not denying that the Plaintiff/Applicant is the owner of the properties. It is not denying that it is on the property. All it is saying is that it is on the land awaiting further instructions and/or funds from the previous owner so that it may complete and hand over phase B in terms of the agreement. It does not say how the Applicant is in any way bound by that agreement. It also says it has filed application for leave to issue third party notice. That application was apparently filed on 30th April 2002 but to-date has not been prosecuted. In any case even if the Respondent were to remove its properties from the Applicant's land and remove the guards that would not stop it from suing the third party for damages if it feels the third party has breached the contract between it and the third party.

The law is clear, mandatory injunctions can be granted by the court, under Section 3A of the Civil Procedure Act. However it is very rarely granted. It is granted only uncontrovertible cases only i.e. in cases where the court is certain that at the full hearing the court's decision will appear to have been rightly made or in a case where one party is stealing a match on the other party.

In this application it is plainly clear that the Respondent has no claim to the Applicant's land. The agreement that made it get on to the land earlier on was an agreement between it and the previous owner of the land. That previous owner sold the land to the Applicant and gave the Applicant vacant possession free from any encumbrances and without any overriding interest to the Applicant. The Applicant wants to have free enjoyment of its land, and wants to develop it and to ensure its security from the wild animals and the other trespassers. It cannot do the same because the Respondent has its properties on the land and has its guards on the land. I think this is a suitable case for mandatory injunction.

Further, the Applicant, if I understood it well says that once the Respondent removes its properties and guards, it should not go back to the land or take any of its properties there. That is why it wants prohibitory injunction under Order 39 Rules 1, 2 and 3.

As I have stated above, the Respondent has no claim whatever and no defence that I can see as against the Applicants for staying on the land which is no longer belonging to the previous owner and which was handed over to the Applicant free from any encumbrances and free from any overriding interests. I feel that prohibitory injunction should also issue to stop Respondent from trespassing onto the Applicant's land.

The sum total of the above is that this application is granted in terms of prayers 1 and 2. The Respondent has seven days from the date of this Ruling to remove all its containers, and other properties of whatever nature as well as its guards, securities and agents from the Applicant's properties being Portion Numbers 654 and 657, Mambui. Further the Respondent is restrained by itself, its servants, workmen or agents or otherwise howsoever from trespassing onto the Plaintiff's said property with effect from 5th Day of October 2002. The Applicant will have costs of this application. Orders accordingly.

Dated and delivered at Mombasa this 27th Day of September, 2002.

J.W. ONYANGO OTIENO

JUDGE