



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC NO. 145 OF 2019

(CONSOLIDATED WITH 139/2019)

BLUE NILE ROLLING MILLS LIMITED.....PLAINTIFF/ APPLICANT

-VERSUS-

SIIMBOL INVESTMENT LIMITED.....1ST DEFENDANT/RESPONDENT

KARSAN MEGHJI RABADIA.....2ND DEFENDANT/RESPONDENT

NARAN MEGHJI RABADIYA.....3RD DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....4TH DEFENDANT/RESPONDENT

NATIONAL LAND COMMISSION.....5TH DEFENDANT/RESPONDENT

ATTORNEY GENERAL.....6TH DEFENDANT/RESPONDENT

RULING

There are two Notices of Motion Applications herein for determination. The first Notice of Motion is dated **6th September 2019**, and is filed by the Plaintiff/Applicant seeking for the following orders:-

- 1. That the Plaintiff/Applicant be granted leave to institute the proceedings against the 4th and 5th Defendants prior to the expiry of 30 days statutory period in view of the urgency.**
- 2. THAT pending hearing and determination of this suit, the Honorable Court be pleased to issue an order of interlocutory injunction to restrain the 1st, 2nd, 3rd and 4th Defendants' respectively from disposing, alienating, selling, advertising for sale, transferring, occupying, licensing, taking possession, charging or in any manner dealing with all that parcel of land registered as LR No.4953/5879 IR No. 203757, situated at Thika Town off Thika-Garissa Highway.**
- 3. THAT pending hearing and determination of the plaintiff's suit, the Honorable Court be pleased to issue an order of interlocutory injunction restraining the 1st, 2nd and 3rd Defendants respectively their agents and servants from preventing and/or barring service access by the Plaintiff, its servants or agents to their LR No.4953/5879 IR No. 203757, installed in the parcel of Land known as Land Reference Number 4953/5879 IR 2033757, and from evicting the Plaintiff, its servants, and/or agents and or from demolishing the Plaintiff's structures and/or properties.**
- 4. THAT the costs of this Application be awarded to the Plaintiff and be borne by the 1st, 2nd and 3rd Defendants/Respondents respectively.**

The Application is premised on the ground that *the Plaintiff/ Applicant is the registered owner of LR No.4953/2167 IR No. 69027*, which the Plaintiff/ Applicant has built a factory which manufactures steel products and has invested billions of shillings. That there is a parcel of land which has been reserved for public utilities namely service access including electricity, water and sewerage services which services the Plaintiff/ Applicant uses in its premises. That the Plaintiff/ Applicant has also been granted temporary license by the County Government of Kiambu, to use a portion of the said parcel as parking ground and to offload its raw material.

Further that the Plaintiff/ Applicant has established that the 4th Defendant/ Respondent issued a letter of allotment to the 1st Defendant/ Respondent, in respect of the parcel reserved for public use and a Certificate of title known as **LR No.4953/5879 IR No. 203757** was issued. That the Plaintiff's / Applicant's parcel of land risks being rendered obsolete if the title issued to the 1st, 2nd and 3rd Defendants/ Respondents is no cancelled, as it will have no service access to its property and business operations.

In his Supporting Affidavit, **Kranti Kumar**, the Plaintiff's / Applicant's Director and averred that in **May 2019**, the Plaintiff/ Applicant established that an allotment letter was issued on **27th June 1991**, to **Siimbol Investments** for Plot No. **Uns.Industrial PLOT No. N. Thika Municipality** with Plan No. **2316/XXIX /78d**. That pursuant to the letter of allotment, a Certificate of title described as **LR No.4953/5879 IR No. 203757**, was processed by the 4th Defendant/Respondent in conjunction with the Director of Survey and Registrar of titles, in favor of the 1st Defendant/Respondent. Later **LR No.4953/5879 IR No. 203757** was transferred to the 2nd and 3rd Defendants/ Respondents.

That there are no records indicating legal status of **Siimbol Investments** and circumstances under which **LR No.4953/5879 IR No. 203757** was transferred to the 2nd and 3rd Defendants/ Respondents and thus the allocation was **illegal, null and void**, as the suit property was reserved for public use.

He particularized acts of fraud or collusion of the 1st, 2nd, 3rd and 4th Defendants/Respondents amongst other claims, causing **LR No.4953/5879 IR No. 203757**, to be fraudulently transferred to 2nd and 3rd Defendant's/Respondents with the sole purpose of defeating public rights and fraudulently allocating land set aside for public purposes to an entity known as **Siimbol Investments** without following due process.

The application is opposed and the 2nd and 3rd Defendants/Respondents filed **Grounds of Objection** dated **2nd October 2019**, on the grounds that they are the registered proprietors' of **LR No.4953/5879 IR No. 203757**, and the Plaintiff/ Applicant has no proprietary interest over the 2nd and 3rd Defendants/Respondents **LR No.4953/5879 IR No. 203757**. That a temporary occupation license Plaintiff/ Applicant alleges to possess, does not confer rights over **LR No.4953/5879 IR No. 203757**. Further that **LR No.4953/5879 IR No. 203757**, has never been reserved for public use and the Plaintiff/ Applicant having come to Court with unclean hands is not entitled to the writ of injunction. They urged the Court to dismiss the instant application as it is an abuse of the process of court.

The 2nd Notice of Motion Application for determination is the one dated **22nd August 2019**, brought by the 2nd & 3rd Defendants as Applicants seeking for the following Orders.

- 1. That Pending the hearing and determination of this suit a temporary injunction be issued by this Honorable Court restraining the Defendant, its agents and/or servants from trespassing, encroaching, and/or entering the Plaintiffs' LR No.4953/5879 IR No. 203757 and fencing the Plaintiffs' property and committing other acts of waste.**
- 2. That the OCS Thika police station do supervise compliance of this court order.**
- 3. That costs be in the cause.**

The Application is premised on the grounds that the 2nd & 3rd Defendants/Respondents are the registered owners of **LR No.4953/5879 IR No. 203757**. That the Plaintiff/ Applicant and its agents have trespassed on the 2nd & 3rd Defendants'/Respondents' parcel of land and has put up a fence. Further that the Plaintiff/ Applicant is harassing and threatening the Plaintiffs/ Applicants through the CID Thika.

In their Supporting Affidavit, **Karsan Meghji Rabadia and Naran Meghji Rabadiya** averred that in **May 2019**, they noted that the Plaintiff as Respondent herein had trespassed and /or encroached on their parcel **LR No.4953/5879 IR No. 203757**, and had put up a fence and does not have any proprietary rights over their parcel of land which part its using as a parking bay.

The Plaintiff/ Applicant objected to the Application and filed Notice of Preliminary Objection dated **20th September 2019**, on the grounds that the joint Affidavit sworn by the Applicants on **22nd August 2019**, offends the provision of the Civil Procedure Act and Civil Procedure Rules and the Oaths and Statutory Declarations Act and is incurable defective. Further that the joint witness statement made by the 2nd & 3rd Defendants/Respondents expressly offends the provisions of the Civil Procedure Act and the Civil Procedure Rules

In further opposing the Application the Plaintiff/ Applicant swore a Replying Affidavit sworn by **Botu Rao** on **20th September 2019**. He averred that the 2nd & 3rd Defendants/Respondents have not tendered any evidence of Certificate of title or Lease certified by the Registrar of titles. That the Certificate of title shows that a Company by the name **Siimbol Investment**, was the initial lease and they have not shown their connection with the said Company. Further that the 2nd & 3rd Defendants/ Respondents have not tendered evidence to show transfer instrument as between them and **Siimbol Investment Limited**, for the suit property. He also averred that the Certificate of Lease tendered by the 2nd & 3rd Defendants/Respondents does not reflect any consideration in entry number 2, but in the copy supplied to them by the Land Registrar, a consideration is indicated and there are no records indicating the circumstances under which the property was transferred to the 2nd & 3rd Defendants/Respondents.

It was his contention that the purported allocation to **Siimbol Investment**, and subsequent issuance of a Certificate of title registered as **L.R 4953/5879 I.R 421398**, in favour of **Siimbol Investment** and the transfer to 2nd & 3rd Defendants/Respondents was unlawful as the subject property had been reserved for public purpose. That the purported letter of allotment dated **27th June, 1991** for Plot No. **UNS. Industrial Plot No. Thika Municipality**, with plan No. **2316 /XXIX/78d** and Certificate of Lease for **L.R 4953/5879 I.R 203757**, were issued as a result of fraudulent conduct and or collusion. That the Plaintiff/ Applicant is the registered owner of **L.R 4953/2167 I.R No. 69027**, and has constructed a factory. That public service utilities have been installed on the parcel of land, which the 2nd & 3rd

Defendants/Respondents are laying claim to. That as the suit property is public land, the County Government of Kiambu granted the Plaintiff/ Applicant a temporary license to use a portion of the suit property.

That as a result of fraudulent conduct and actions by the 2nd & 3rd Defendants/Respondents, the Plaintiff/ Applicant's parcel of land will have no service access if the orders sought are not granted as he has invested a sum of **Kshs.3 billion** in its factory and employed over 1000 employees and the loss will be irreparable .

The two applications were canvassed together by way of Written Submissions which this Court has carefully read and considered and renders itself as follows;

The Plaintiff/ Applicant has submitted that the swearing of a joint Affidavit is unlawful and the same ought to be struck out. It is not in doubt that the said swearing of the joint Affidavit does not go to the jurisdiction of the Court nor does it prejudice the Plaintiff/ Applicant in any way and therefore there is no basis upon which the Court in its considered view should strike it out . **Order 51 Rule 10(2)** provides that:-

“No application shall be defeated on a technicality or for want of form that does not affect the substance of the application”.

See the case of *Shafina Magre & another v Aga Khan Health Services (K) Limited T/A Aga Khan University Hospital & another [2015] eKLR;*

“As to the second point of joint swearing of the verifying affidavit, the Plaintiffs would have been tidier and less clumsy if each would have sworn a separate affidavit which this court would encourage in the future. However, the joint verifying affidavit is brief and to the point and raised no confusion to the Defendant. If it is imperfect, it would only be so in form. In the circumstances of this case accordingly I would have no valid reason to rule it invalid or defective; I would not even seek an amendment to it.”

Further in the case of *Nicholas Kiptoo Arap Korir Salat ...Vs Independent Electoral and Boundaries Commission & 6 other [2013] eKLR: -*

“Deviations from and lapses in form and procedures which do not got to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion, prejudice or cause miscarriage of justice to the opposite party, ought not be elevated to the level of a criminal offence, attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead in such instances the court should rise to the highest calling to do justice by sparing the parties the draconian approach of striking out pleadings.....”

The Court thus declines to strike out the Supporting Affidavit.

The next issue is whether the Plaintiff/ Applicant ought to be granted leave to institute the proceedings as against the **4th and 5th** Defendants/Respondents prior to the expiry of 30 days statutory period in view of the urgency. As the Application has been brought under Certificate of Urgency, the Court finds that the said prayer is merited and the same is allowed.

As the two Applications are both seeking injunctive reliefs over the same parcel of land to wit **L.R 4953/5879 I.R 203757**, the parties are therefore entitled to denial or grant of the same and is so doing the Court is called upon to determine which of the parties has met the threshold as enumerated in *Giella...Vs... Cassman Brown & Co. Ltd 1973 EA 358*, elaborated in the case of *Kibutiri...Vs...Kenya Shell, Nairobi High Court, Civil Case No.3398 of 1980 (1981) KLR*, where the Court held that:-

“The conditions for granting a temporary injunction in East Africa are well known and these are: First, the Applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which might not adequately be compensated by an award of damages. Thirdly, if the Court is in doubt, it will decide an application on the balance of convenience. See also E.A Industries ..Vs..Trufoods (1972) EA 420.”

Further in the case of *Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002*, the court held that:-

“In an Interlocutory application, the Court is not required to determine the very issues which will be canvassed at the trial with finality. All the Court is entitled at that stage is to determine whether the Applicant is entitled to an Injunction sought on the usual criteria.”

Which party has then satisfied the above criteria?

First, the Applicant needed to establish that he has a *prima-facie* case with probability of success. a *prima-facie* case was described in the case of *Mrao Ltd...Vs...First American Bank of Kenya Ltd & Others (2003)KLR*, to mean:-

“A case 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”.

The Plaintiff/ Applicant in this case **Blue Line Rolling Mills Company** has sought for an injunction against the 2nd and 3rd Defendants/ Respondents. It is thus its duty to satisfy the Court that it has an interest over the suit property, that is likely to be infringed.

It is not in doubt that the 2nd and 3rd defendants /Respondents are the registered owners of the suit property, and the issue of whether or not the same is lawful cannot be determined at this stage, though the Plaintiff/ Applicant has averred that the suit property is public land and that it had been given a license to park in the said property by the County government of Kiambu, no evidence of any such license has been availed in Court and the payment receipt availed only relates to **4953/2167**, which is not the suit property.

Further the development plan alleged to have indicated that the suit property is public land has no such indication. The Court therefore finds and holds that the plaintiff/ Applicant has failed at this juncture to prove that it has any interest in the suit property and therefore failed to establish a prima facie case.

It is not in doubt that the said principles are sequential and failure to meet one automatically invalidates any claim of injunctive orders.

As to whether the 2nd and 3rd Defendants / Respondents have established a prima facie, case, it is not in doubt that they are the registered owners of the said property. Registration of a person means that they have indefeasible and absolute rights unless the same is impugned. Therefore, it means that prima facie, the 2nd and 3rd Defendants/ Respondents have an interest over the suit property.

It has not been disputed that the Plaintiff/ Applicant is in use of the suit property and the Defendants have averred that the Plaintiff/ Applicant has encroached on it and fenced the same. A registered owner of a property has the right to quiet use and enjoyment of their property and any deprivation of the same would only mean that their rights have been breached. Consequently, this Court finds and holds that the 2nd & 3rd Defendant/ Respondents have established a prima facie case.

On whether the 2nd & 3rd Defendants/Respondents will suffer irreparable harm. The Court finds that ‘Irreparable loss’ was described in the case of *Paul Gitonga Wanjau...Vs...Gathuthi Tea Factory Co. Ltd & 2 Others, Nyeri HCC No.28 of 2015*, as *simply injury or harm that cannot be compensated by damages and would be continuous.*

The Plaintiff/ Applicant has acknowledged that they are in possession of part of the suit property and therefore it is not in doubt that having taken possession of the suit property, the 2nd & 3rd Defendants/Respondents are being deprived of their rights over the suit property. In the Case of *Niaz Mohammed Janmohammed ...Vs... Commissioner for Lands & 4 Others (1996) eKLR*, where the Court held that:-

“It is no answer to the prayer sought, that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such right or atone for transgression against the law, if this turns out to have been the case. These considerations alone would entitle the Applicant to the grant of the orders sought”.

Equally in this case, the Court finds that if the Applicant’s rights are infringed, no amount of money can compensate such infringement. Consequently, the Court finds that the 2nd and 3rd Defendants/ Respondents have established that they are likely to suffer irreparable loss and/or injury, which cannot be adequately compensated by an award of damages by being denied the use of their property.

On the third limb *of if the Court is in doubt, then it ought to determine the matter on the balance of convenience, the Court is not in doubt.*

Consequently the Court finds and holds that the 2nd and 3rd Defendants/ Respondents who are Plaintiffs/Applicants in ELC No. **139 of 2019**, are entitled to grant of the injunctive relief Orders as sought, while the Plaintiff/Applicant in **ELC No. 145 of 2019**, is not entitled to the same.

The Upshot of the above is that this Court finds and holds that the Plaintiff/ Applicant in **ELC No. 145 of 2019**, is not entitled to the injunctive orders sought in its Application dated **6th September 2019 in ELC 145 of 2019**. However, the Plaintiff/Applicant is allowed **prayer No. 4** of the said Application of being granted leave to institute proceedings against the 4th and 5th Defendants prior to expiry of **30 days** statutory period. The other prayers are dismissed with costs to 3rd and 4th Defendants/Respondents.

However, the 1st and 2nd Plaintiffs/Applicants (who are 2nd and 3rd Defendants/Respondents in ELC 145 OF 2019) application dated **22nd August 2019**, in **ELC 139 of 2019**, is allowed in terms of prayers No. **3 and 5** only. The Court has not been satisfied that there is need to involve the Police at this juncture as it has not been shown that there would be any disobedience of the Court order .

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 29TH DAY OF APRIL 2021

L. GACHERU

JUDGE

29/4/2021

Court Assistant – Phyllis

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Bundotich for the Plaintiff/Applicant in ELC No. 145/2019

No Appearance for the 1st Respondent in ELC No. 145/2019

M/s Kiarie holding brief for Mr. Ndungu Mwaura for the 2nd and 3rd Defendants/Respondents in ELC No. 145/2019

No appearance for the 4th, 5th and 6th Respondents in ELC No. 145/2019

M/s Kiarie holding brief for Mr. Ndungu Mwaura for Plaintiffs/applicants in ELC No.139/2019

Mr. Bundotich for Defendant/Respondent in ELC No.139/2019.

L. GACHERU

JUDGE

29/4/2021