



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**

**ELC SUIT NO. 442 OF 2018**

**HELLA PROPERTIES LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA AIRPORTS AUTHORITY.....1<sup>ST</sup> DEFENDANT**

**THE CABINET SECRETARY MINISTRY OF TRANSPORT, INFRASTRUCTURE,**

**HOUSING AND URBAN DEVELOPMENT.....2<sup>ND</sup> DEFENDANT**

**THE INSPECTOR GENERAL OF POLICE.....3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

The facts giving rise to this suit are to a large extent not disputed. At all material times, the Plaintiff was the registered proprietor of all that parcel of land known as L.R No. 9042/681 situated at Embakasi, Nairobi together with the developments thereon (hereinafter referred to as “the suit property”) while the 1<sup>st</sup> Defendant was registered as the proprietor of all that parcel of land known as L.R No. 21919 also situated at Embakasi, Nairobi together with the development thereon known as Jomo Kenyatta International Airport (JKIA). The Plaintiff acquired the suit property from Fian Green (K) Limited on or around 30<sup>th</sup> September, 2009 at a consideration of Kshs. 20,000,000/-.

The Plaintiff has averred that after acquiring the suit property, it developed the same extensively and the value thereof has appreciated to Kshs. 700,000,000/- as at the time of filing this suit. The Plaintiff has averred that the suit property is occupied by its sister company Hussein Builders which has employed over 100 people. The Plaintiff has averred that before it developed the suit property with a warehouse and offices, it obtained approvals and consents from all relevant agencies. The Plaintiff has averred that it has enjoyed quiet possession of the property since it purchased it.

The Plaintiff has averred that on 25<sup>th</sup> September, 2018, the 1<sup>st</sup> Defendant through the 2<sup>nd</sup> Defendant purported to issue a general notice with a heading “Removal of illegal structures.” The Plaintiff has averred that the said notice was directed at alleged developers of illegal developments, buildings/structures and go-downs that had encroached on the 1<sup>st</sup> Defendant’s JKIA land, L.R No. 21919, Wilson Airport land, L.R No. 209/13080 and Embakasi Village Airport Staff Quarters to remove the same within 14 days and to vacate the encroached area in default of which the same would be demolished and removed at their own risk as to costs and damage. The Plaintiff has averred that the said notice in its proper interpretation meant that the Plaintiff had encroached on the 1<sup>st</sup> Defendant’s land, L.R No. 21919, that the title deed that it was holding was not an assurance that it was the owner of the suit property and that the developments on the suit property could be demolished at any time.

The Plaintiff has averred that it wrote to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants seeking clarification on the status the suit property in relation to the said notice but no response was received. The Plaintiff has averred that the suit property is not part of L.R No. 21919.

The Plaintiff brought this suit against the Defendants through a plaint dated 11<sup>th</sup> October, 2018 seeking the following reliefs;

- a. A permanent injunction restraining the Defendants, their agents and/or servants from demolishing, evicting and/or in any manner interfering with the Plaintiff’s enjoyment and peaceful occupation of the suit property.

- b. A declaration that the suit property does not constitute part of L.R No. 21919.
- c. The costs of the suit.
- d. Any other relief the court may deem fit to grant in the interest of justice.

Together with the plaint the Plaintiff filed an application by way of a Notice of Motion dated 11<sup>th</sup> October, 2018 seeking a temporary injunction to restrain the Defendants from evicting, demolishing or in any manner interfering with the Plaintiff's enjoyment and peaceful occupation of the suit property pending the hearing and determination of the suit. The application was brought on the grounds set out on the face thereof and on the affidavit and supplementary affidavit sworn by Sajjad Hussein Moossajee on 11<sup>th</sup> October, 2018 and 30<sup>th</sup> September, 2019 respectively. In the said affidavits, the Plaintiff reiterated the contents of the plaint that I have highlighted at the beginning of this ruling. It is not necessary for me to repeat the same here. The Plaintiff added that it had been in possession of the suit property for over 10 years before the said public notice was issued and that it was anxious that the property that it acquired lawfully would be demolished by the Defendants. The Plaintiff averred that it stood to suffer irreparable loss and harm if the orders sought were not granted.

The Plaintiff's application was opposed by the 1<sup>st</sup> Defendant through a replying affidavit sworn by its corporation secretary, Katherine Kisila on 9<sup>th</sup> July, 2019. In the affidavit, the 1<sup>st</sup> Defendant contended that the Plaintiff's suit did not disclose any cause of action against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant contended that the notice complained of by the Plaintiff was issued following investigations of illegal and irregular allocations, acquisitions and excision of portions of the 1<sup>st</sup> Defendant's land known as L.R No. 21919 and the developments that were being put up on the said illegally and irregularly acquired land.

The 1<sup>st</sup> Defendant averred that the said investigations that were conducted by the National Land Commission found that the suit property was overlapping L.R No. 21919. The 1<sup>st</sup> Defendant averred that since the suit property had overlapped on L.R No. 21919, the structures and buildings thereon had encroached on the Plaintiff's said parcel of land and as such the 2<sup>nd</sup> Defendant was justified in issuing a notice requiring the removal of the same. The 1<sup>st</sup> Defendant contended that the structures that had been put up on the suit property posed a serious risk to the general public but more so to the aircrafts using JKIA and as such the orders sought by the Plaintiff could not be granted.

The application was argued by way of written submissions. The Plaintiff filed its submissions on 15<sup>th</sup> October, 2020 while the 1<sup>st</sup> Defendant filed its submissions on 19<sup>th</sup> October, 2020. The other Defendants did not file submissions. The Plaintiff submitted that it had satisfied the principles for granting a temporary injunction. The Plaintiff submitted that it has established a prima facie case with a probability of success and that it will suffer irreparable harm unless the orders sought were granted. The Plaintiff submitted that the issue as to who between the Plaintiff and the 1<sup>st</sup> Defendant was the owner of the suit property could only be determined at the trial. The Plaintiff submitted that until that issue was determined, the court should maintain the prevailing status quo.

The 1<sup>st</sup> Defendant submitted that the Plaintiff had failed to satisfy the principles for grant of a temporary injunction. The 1<sup>st</sup> Defendant reiterated that the plaint disclosed no cause of action against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant contended that the Plaintiff's complaint had no basis since the notice complained of by the Plaintiff was not served upon it. The 1<sup>st</sup> Defendant submitted that if the Plaintiff acquired the suit property lawfully, the Plaintiff had nothing to worry about since the said notice was only served upon persons who had encroached upon the 1<sup>st</sup> Defendant's land.

I have considered the Plaintiff's application together with the two affidavits filed in support thereof. I have also considered the 1<sup>st</sup> Defendant's affidavit in reply to the application. Finally, I have considered the written submissions which were filed the parties' respective advocates and the authorities relied on. What the Plaintiff has sought in its application is a temporary injunction pending the hearing of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must show a prima facie case with a probability of success and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

**“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ... All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”**

From the material before the court, I am convinced that the Plaintiff has satisfied the principles for grant of a temporary injunction. The plaintiff has established that it is the registered proprietor of the suit property. The Plaintiff has established that the suit property is developed and that it is in occupation thereof. The Plaintiff has shown that the defendants have issued a notice requiring the owners of the structures erected on the parcels of land that have encroached on the 1<sup>st</sup> Defendant's land namely, L.R No. 21919 to remove the same and vacate such parcels of land failure to which the same shall be demolished by the defendants. The affidavit evidence before the court shows that 1<sup>st</sup> Defendant has claimed that the suit property and the structures constructed thereon have encroached on L.R No. 21919. There is no doubt therefore that the Plaintiff is one of those targeted by the defendants' demolition notice dated 25<sup>th</sup> September, 2018.

The evidence before the court shows that the Plaintiff acquired the suit property lawfully for valuable consideration. The evidence submitted by the Plaintiff shows further that the Plaintiff obtained all the relevant approvals and consents from the relevant agencies including Kenya Aviation Authority before developing the suit property. The onus was upon the 1<sup>st</sup> defendant to prove its claim that the suit property overlaps L.R No. 21919. What the 1<sup>st</sup> Defendant placed before the court in proof of this allegation was a report by the National Land Commission dated 21<sup>st</sup> January, 2019. The said report was prepared while this suit was pending and the National Land Commission did not make any recommendation in relation to the suit property once it was pointed out to it that the dispute between the parties over the property was pending before this court. The Plaintiff has disowned the said report and has claimed that the rules of natural justice were not observed by the National Land Commission in coming up with the same. I am in agreement with the Plaintiff that it will be for this court to determine whether the suit property has overlapped or encroached on L.R No. 21919. On the evidence before me, I am satisfied that the Plaintiff has demonstrated that his right to property has been threatened with violation by the defendants and that it stands to suffer irreparable harm unless the orders sought are granted.

Even if I had doubt on whether the Plaintiff had established a prima facie case, I would still have granted the orders sought on the basis of a balance of convenience. It is not disputed that the Plaintiff has a title to the suit property and has developed the same. It is not disputed the property is valued at about Kshs. 700,000,000/-. It is not disputed that the Plaintiff has been in occupation of the suit property for over 10 years after developing the same. I am in agreement with the Plaintiff that it would only be fair that the prevailing status quo be maintained pending the determination of the suit. The balance of convenience favours the granting of the orders sought. In Ougo and Another v Otieno [1997] KLR 364, it was held that:

**“the general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”**

The upshot of the foregoing is that the Plaintiff’s application dated 11<sup>th</sup> October, 2018 has merit. The same is allowed in terms of prayer 3 thereof. The costs of the application shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL, 2021**

**OKONG’O**

**JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Ms. Kimani h/b for Ms. Wachanga for the 1<sup>st</sup> Defendant

Mr. Motari for the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants

Ms. C. Nyokabi-Court Assistant