



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO 41 OF 2021

RHINE FORWARDERS LIMITED.....PLAINTIFF

VERSUS

JOSEPH MWANJAU MWANGI1ST DEFENDANT

SHAH V DHAYALAL2ND DEFENDANT

RULING

Introduction

1. Before this Court for determination is the Plaintiff's/Applicant's Notice of Motion application dated 22nd of April 2021 seeking the following orders:

a) That a temporary injunction be issued restraining the Defendants either by themselves, agents, servants and/or employees, proxies or servants from trespassing, fencing, intruding, beaconing, alienating, selling, claiming ownership or interfering with land parcel Mavoko Town Block 93/2 located within the County of Machakos pending the hearing and determination of this suit.

b) That the costs of the application be provided for.

2. The Application is supported by the Affidavit of Denny Kilia, the Director of the Plaintiff herein sworn on the 22nd of April 2021. He deposes that the Plaintiff, duly incorporated on the 11th of September 1995 with a certificate of incorporation no C.66830, is the duly registered owner of the property known as Mavoko Town Block 93/2 (the suit property) within Machakos County having obtained ownership of the said land in or around 5th September 2018.

3. The Plaintiff's director deponed that the Plaintiff has been fully utilizing the suit property; that on 18th of March 2021, the Plaintiff began undertaking sub-divisions, excision of access roads, re-surveying and beaconing of the sub-divided parcels as it set out to implement a proposed housing project and that as they undertook the exercise, the Defendants, aided by policemen from Athi River police station, trespassed onto the suit property claiming ownership thereof and interfering with Plaintiff's use and enjoyment of the suit land.

4. It was the deposition of the Plaintiff's Director that the parties were asked to visit the Athi River police station to present their ownership documents; that while the Plaintiff presented its documents, the Defendants had none; that the police advised the Plaintiff to continue with its developments on the suit property and that notwithstanding the above, the Defendants have continued harassing, threatening and intimidating the Plaintiff's agents by driving them away from the suit property hence necessitating the filing of this suit.

5. In response to the application, the 1st Defendant on his behalf and on behalf of the 2nd Defendant filed a replying affidavit dated 13th of July 2021. In it, the 1st Defendant deponed that the Defendants are the registered proprietors of the suit property known as Land Reference No 21801/1 I.R. 69345 situated at Mavoko within Machakos County; that on the 21st of March 2002, they purchased the suit property from one Alfred Muema Kioko, the then registered owner; that they took possession of the suit property and that they have been paying the requisite land rent and rates.

6. The 1st Defendant deponed that on 20th of March 2021, he was informed that there were freshly erected beacons on the suit property, which information he confirmed after visiting the property; that he thereafter applied for an official search from the lands office which revealed that the original documents from the deed file were missing and had been replaced by documents indicating that the property belonged to the Plaintiff and that he reported the matter at Athi River Police Station who requested both the Plaintiff and the Defendants to submit their respective title documents to the police to enable them undertake investigations to reveal the genuine title.

7. It was the deposition of the 1st Defendant that vide a letter dated 23rd April 2021, the Chief Land Registrar informed the Director of Criminal Investigations that there was an attempted forgery by the Plaintiff; that the records indicated that a certificate of title was issued to Tropical Nectar Limited and that Tropical Nectar Limited transferred the suit property to Alfred Kioko Muema from whom the Defendants acquired the title.

8. He further deponed that vide a letter of 16th of June 2021, the Senior Land Registrar requested the Director of Criminal Investigations to carry out investigations into how the Plaintiff acquired the certificate of title No. Mavoko Town Block 93/2 noting that the Registrar who allegedly signed the lease had disowned it as she had been transferred to Nakuru as at the time of the issuance of the Lease and that an online search equally confirmed that the property belongs to the Defendants.

9. Finally, the 1st Defendant deponed that whereas their title was registered under the Registration of Titles Act, the Plaintiff's certificate of title was issued under the Registered Land Act; that there is no evidence of any conversion of the suit premises from the Registration of Titles Act to the Registered Land Act; that the Plaintiff's certificate of lease is not supported by any lease from the County Government of Machakos and that the Plaintiff has in any event failed to disclose how it acquired the suit property. According to the 1st Defendant, the Plaintiff has come to court with unclean hands and is attempting to acquire the property fraudulently and its application ought to fail.

10. In response to the Replying Affidavit, the Plaintiff, through its Director filed a Further Affidavit in which he deponed that the title document possessed by the Defendants is fraudulent; that the Defendants have not fully demonstrated the manner in which the suit property was conveyed to them and that the Defendants could not have purchased the property from Alfred Muema Kioko because as at 7th November 1996, the date on which Alfred Muema Kioko purportedly acquired the property from Tropical Nectar Limited, the said Tropical Nectar Limited was not yet in existence as it was duly registered on the 12th of July 2013.

11. The 1st Plaintiff's Director deponed that a scrutiny of the Title in the Defendants' possession reveals inconsistencies which point to fraud being; that the title of the suit property was registered in favour of Tropical Nectar Limited on 23rd of May 1996 while the company was registered on 12th July 2013; that the Director of Survey's signature on the Deed Plan annexed to the replying affidavit differs from the signature generated by the Department of Surveys and that the property rates payment's receipt dated 22nd February 2010 adduced by the Respondents indicate the suit property is registered in the name of Alfred Muema Kioko while the undated land rate clearance certificate dated 22nd February 2010 indicates that the suit property belongs to the Respondents.

12. Finally, it was deponed by the Plaintiff's Director that the Defendants are relying on forged documents in an attempt to deprive the Applicant of their property; that the Applicant is justifiably apprehensive that unless injunctive orders are granted, the Respondents will dispose of the property rendering the suit nugatory and that the Applicant has established a *prima facie* case for the issuance of the orders sought in the application.

13. In response to the Plaintiff's Further Affidavit, the 1st Defendant with authority from the 2nd Defendant, filed a Further Affidavit in which he deponed that contrary to the Plaintiff's assertions, they have demonstrated how they acquired the suit premises; that Tropical Nectar Limited was registered on 13th of August 1985 and that the existence of Tropical Nectar Limited registered on the 12th of July 2013 is a likely case of double registration.

14. The 1st Defendant reiterated that the Certificate of Lease held by the Plaintiff is a forgery and is unsupported by documents; that there is no statement by the Director of Surveys to indicate that the Defendants' deed plan is a forgery; that it is common practice for the Municipal authority to issue demand notices in the names of a previous owners of the suit property and that the Municipal Council of Mavoko and Mavoko Municipal Council are one and the same entity.

15. The application was canvassed by way of written submissions. The Plaintiff's Counsel submitted that the issue of grant of injunctive orders was canvassed in the case of Mohamed Ahmed Noor & 3 others vs Bora Developers Limited & 2 ors [2012] eKLR cited in the case of East African Industries vs Trufoods [1972] EA where **Odunga J.** discussed the elements guiding the grant of interlocutory injunctions being;

“Firstly, an 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, which would 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”.

16. Counsel also relied on the case of Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others [2003] KLR 125 where the **Court of Appeal** stated as follows:

“So what is a prima facie? I would say in civil cases a prima facie case is 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 to call for an explanation or rebuttal from the latter.”

17. It was submitted that the Plaintiff is and has always been the lawful registered absolute owner of the suit property and that the title documents by the Defendants is fraudulent and that the Plaintiff only became aware of the fraudulent transactions while re-surveying the suit property prompting them to seek the assistance of the police.

18. Counsel submitted that it is crucial that the suit property be protected pending determination of the suit. In support, he cited the case of Rift Valley Machinery Ltd vs Kings Developers Limited & 6 others [2015] eKLR where the court held that in instances where there are competing interests, the best course of action is to preserve the subject matter pending determination of the suit. In conclusion, counsel submitted that the Applicant has met the threshold for the grant of injunctive orders as per the principles set out in the case of Giella vs

Cassman Brown (1973) EA 358.

19. The Respondent's Counsel submitted that the law on injunctions was set out in the case of Giella vs Cassman Brown (1973) EA 358 and reiterated in the case of Nguruman Limited vs Jan Bonde Nielsen & 2 Others CA No.77 of 2012 (2014) eKLR where the Court of Appeal set out the triple requirements to be established to warrant the grant of interlocutory orders being.

20. It was submitted on behalf of the Defendants that the Plaintiff has not established a *prima facie* case; that the online search established that the Defendants are the registered proprietors of land known as L.R No 21801/1, title number 69345 and that the Defendants have a beneficial interest over it. Counsel cited the case of Mrao Ltd vs First American Bank of Kenya Ltd (2003) eKLR.

21. Counsel submitted that whereas the Defendants have clearly established how they acquired title to the suit property, the Plaintiff has failed to establish the same; that their Certificate of Lease is not supported by any lease from the County Government and that the Defendants will suffer harm if the Plaintiff is granted an order of injunction as the Plaintiff has encroached on the property and is destroying it through the erection of fresh beacons on the land. Counsel cited the case of Pius Kipchirchir Kogo vs Frank Kimeli Tenai (2018) eKLR where court stated thus;

“Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The application should further show that irreparable injury will accrue to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury.”

22. The Defendants' Counsel submitted that greater inconvenience will be suffered by the Defendants as the Plaintiff has greatly damaged the property. Counsel relied on the case of Pius Kipchirchir(supra) which defined the concept of balance of convenience as follows:

“The meaning of balance of convenience in favour of the Plaintiff is that if an injunction is not granted and the suit is ultimately decided in favour of the Plaintiff, the inconvenience caused to the Plaintiff would be greater than that which would be caused to the Defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience, it is really balance of inconvenience and it is for the Plaintiffs to show that the inconvenience caused to them be greater than that which may be caused to the Defendants. Should the inconvenience be equal, it is the Plaintiff who will suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater which is likely to arise from granting.”

23. Counsel also relied on the case of Robert Mugo wa Karanja V Eco bank(Kenya) Limited & Anor (2019) eKLR where the court held that in considering the grant of a temporary injunction under Order 40 Rule 1 of the Civil Procedure Rules, there must be proof that the property in dispute is in danger of being wasted, damaged or alienated, wrongfully sold in execution of a decree or that the Defendant threatens or intends to remove or dispose of the property.

24. Counsel urged that an order of injunction issued to the Plaintiff will be done so on the basis of misrepresentation of facts and that a party seeking an equitable remedy must be honest and candid as expressed in the case of Kenleb Cons Limited Vs New Gatitu Service Station Ltd & Anor [1990] eKLR where the court stated;

“To succeed in an application of injunction an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable which requires protection by the court.”

25. In conclusion, the Defendants' counsel submitted that the grant of injunction would cause irreparable injury to the Defendants; that the Director of Criminal Investigations is carrying out investigations into how the Applicant acquired the suit property and that the Applicant will use the injunction to continue its activities on the suit property.

Analysis & Determination

26. Having considered the pleadings, the sole issue that arises for determination is whether the Applicant/Plaintiff has met the threshold to warrant the grant of a temporary injunction. Being an application for injunctive orders, the same shall be weighed against the requisite essentials set out in the celebrated case of Giella vs Cassman Brown (1973) EA 358 thus:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an 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 would 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.”

27. The Plaintiff in this case is expected to meet those three principles and surmount them sequentially. This was stated by the Court of Appeal in Nguruman Limited vs Jan Bonde Nielsen & 2 Others [2014] eKLR as follows:

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to:-

(a) Establish his case only at a prima facie level,

(b) Demonstrate irreparable injury if a temporary injunction is not granted, and

(c) Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. (See Kenya Commercial Finance Co. Ltd V. Afraha Education Society [2001] Vol. 1 EA 86) If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

28. As correctly cited by the parties, the Court of Appeal in Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others [2003] eKLR defined prima facie thus;

"...So what is a prima facie case? I would say that in civil cases it is 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."

29. More recently, the Court of Appeal in the case of Nguruman Limited v Jan Bonde Nielsen & 2 Others(supra) while agreeing with the definition of a prima facie case in the Mrao Case (supra) went ahead to further expound as follows;

"We adopt that definition save to add the following conditions by way of explaining it. 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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. 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 or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. 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."

30. The Plaintiff contends that it is and has at all times been the duly registered proprietor of the suit property, being in possession and holding title in respect of the same, and have in this respect produced a certificate of lease for the suit property issued on 5th of September 2018.

31. Although the Plaintiff did not exhibit an official search to show that indeed it is the registered proprietor of parcel of land number Mavoko Town Block 93/2, the incomplete letter dated 16th June, 2021 annexed on the Defendants' Replying Affidavit purportedly authored by the Ministry of Lands states as follows:

"On 31st May, 2021 we wrote a letter to the Land Registrar Machakos to confirm the authenticity and registration status of Mavoko Town Block 93/2. The Land Registrar confirmed that there is a white card in respect of Mavoko Town Block 93/2 measuring 2.024Ha. According to that white card the property is registered in the name of Rhine..."

32. The certificate of lease produced by the Plaintiff suggests that parcel of land number Mavoko Town Block 93/2, was directly transferred to the Plaintiff by the County Government of Machakos on 5th September, 2018. The existence of the white card of the said title has been confirmed by the Ministry of Lands in their letter dated 16th June, 2021.

33. The Defendants equally claim proprietorship of the suit property. They have produced a certificate of title indicating that the suit property was transferred to themselves on 15th of July 2007. In the letter dated 16th June, 2021 referred to in the preceding paragraph, the land registrar stated that the Lands Integrated Management System indicates that LR No. 21801/2 was last transferred to the two Defendants, and that the said land is situated in Mavoko Municipality.

34. It is the Defendants' case that a certificate of title was issued to Tropical Nectar Limited and that Tropical Nectar Limited transferred the suit property to Alfred Kioko Muema from whom the Defendants acquired the title. I have perused the copy of the certificate of title in respect of LR No. 21801/2.

35. The certificate of title shows that LR No. 21801/2 was registered in favour of Tropical Nectar Limited on 23rd May, 1996, before the same was transferred to Alfred Kioko Muema on 7th November, 1996. On 15th July, 2002, the land was transferred to the two Defendants as tenants in comm0n.

36. The Plaintiff has alleged that LR No. 21801/2 could not have been registered in favour Tropical Nectar Limited in the year 1996 because the said company was incorporated on 12th July, 2013. The Plaintiff annexed on the Affidavit a letter by the Registrar of Companies dated 17th March, 2021 showing the date of registration of the said company to be on 12th July, 2013. The said letter also shows the Directors of

the said company.

37. The allegation that Tropical Nectar Limited was registered on 12th July, 2013 was countered by the Defendants who stated that there are two companies sharing the name Tropical Nectar Limited, and that the other company which was registered under the same name was registered on 13th August, 1985. The Defendants have annexed a copy of the letter of Registrar of Companies showing the existence of the two companies albeit with the same name, but different Directors.

38. The Defendant's suit is predicated on the fact that LR No. 21801/2 was registered in favour of Tropical Nectar Limited in 1996. Having been faced with the allegation that the said company was not in existence in the year 1996, the Defendants should have annexed a sale agreement between Tropical Nectar Limited and Alfred, which agreement would have shown the directors of Tropical Nectar Limited who dealt with the suit property.

39. In an effort to trace the root of their title, the Defendants exhibited a copy of the agreement, whose date is not clear, between the seller, Alfred Kioko Muema and Joseph Mwangi Wanjau, the 1st Defendant, for LR No. 2180/2. The said agreement does not mention the 2nd Defendant at all. It is therefore not clear at what point the 2nd Defendant was incorporated in the title as a tenant in common, especially in the absence of a registered transfer document.

40. As indicated in the letter of the land Registrar dated 23rd April, 2021, verification of the titles of parcels of land Mavoko Block 93/2 and LR No. 21801/2 is required. Indeed, the trial court will have to address the issue of the registration system that governs the suit property, and which of the two title documents was validly issued.

41. Each of the parties has alleged fraud by the other party. However, the question of the validity of the respective titles is an issue that cannot be determined at this juncture without calling evidence. To so do would amount to conducting a mini trial on an application for injunction.

42. However, to the extent that the Machakos County Government has not denied that it leased the suit property to the Plaintiff; and in view of the absence of a sale agreement to support the averment that it is the Directors of the "first" company that sold the suit property to Alfred Kioko Muema, who then sold it to the Defendants, and the 2nd Defendant having not appended his signature to the sale agreement in respect of the sale of LR No. 21801/2, it is my finding that the Plaintiff has established a prima facie case with chances of success.

43. On the issue of irreparable loss, none of the parties has shown the Court that they have commenced construction of the suit property. However, the 1st Defendant deponed that they have drawings which they intended to use to develop the suit property. If the said development goes on as anticipated by the Defendants, the Plaintiff is likely to suffer irreparable injury that cannot be compensated in damages.

44. For those reasons, I allow the Application dated 22nd April, 2021 as follows:

a) **A temporary injunction be and is hereby issued restraining the Defendants either by themselves, agents, servants and/or employees, proxies or servants from trespassing, fencing, intruding, beaconing, alienating, selling, claiming ownership or interfering with land parcel Mavoko Town Block 93/2 located within the County of Machakos pending the hearing and determination of this suit.**

b) **The Defendants to pay the costs of the application.**

DATES, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

MS NYANGE FOR THE PLAINTIFF

MS WAIRIMU FOR THE DEFENDANTS

COURT ASSISTANT – JOHN OKUMU