



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 320 OF 2019

UNITED CARE LIMITED.....PLAINTIFF

- VERSUS -

ROSELINE NJERI MACHARIA.....DEFENDANT

THE NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

1. The dispute in this suit relates to a parcel of land, a major portion of which is now a public road, situated in the Parklands Area of Nairobi City County. Survey papers presented as evidence in this suit indicate that the land was surveyed as **Land Reference Number 209/12151** measuring approximately 0.0567 hectares. In December 2015, Kenya Urban Roads Authority, through the National Land Commission, [**Interested Party**] compulsorily acquired a portion of the said parcel of land, measuring 0.022 hectares vide Gazette Notice No 9341 dated 18/12/2015 for the Nairobi Eastern Missing Link Roads Project. Roseline Njeri Macharia [**the defendant**] presented herself and was identified by the Commission as the legitimate proprietor of the land on account of Grant No 65237 bearing a registration date of 6/2/1995. She was paid Kshs 31,826,480 as compensation money. The plaintiff contends that they were at all material times the genuine and legitimate proprietors of the said parcel of land and that the compensation paid to the defendant was fraudulent.

2. Consequently, through a plaint dated 30/9/2019, the plaintiff seeks the following verbatim reliefs against the defendant:

a. A permanent injunction restraining the respondent by herself, servants, employees, agents or any other persons acting under his instructions or his interests from accessing, occupying, remaining, possessing, trespassing, using, disposing or in any other manner whatsoever dealing with the remainder of all the parcel of land described more specifically as Land Reference Number 209/12151 off Limuru Road following compulsory acquisition constituting 0.0247 hectares.

b. General damages for trespass to property.

c. An order for the refund of Kshs 31,826,480/= being monies received illegally in respect of compulsory acquisition of part of the suit property.

d. Accrued rent for use of the plaintiff's property being Kshs 31,088/=.

e. Interest on (b), (c) and (d) above.

f. Costs of the suit and interest thereon.

g. Such further or other orders as the court may deem fit

3. Together with the plaint, the plaintiff brought a notice of motion dated 30/9/2019, seeking interlocutory injunctive orders restraining the respondents against accessing, occupying, remaining on, possessing, trespassing on, using, disposing or in any other manner whatsoever, dealing with the remainder of the suit property. The said application is one of the two applications falling for determination in this ruling. The application was supported by an affidavit sworn on 30/9/2019 by Lily Burk.

4. The second application falling for determination in this ruling is the defendant's counter application dated 27/4/2020, similarly seeking interlocutory injunctive orders against the plaintiff as follows:

4. That pending the hearing and determination of the main suit, a temporary injunction do issue restraining the plaintiff/respondent by themselves, and or by their undisclosed principals, agents, employees, servants and any other person acting under his authority from trespassing, remaining in occupation, entering, occupying, dealing and or in any manner interfering with the plaintiff's ownership, occupation possession and use of all that parcel of land known as Land Reference Number 209/12150 situated at Parklands, Nairobi County.

5. That pending the hearing and determination of the main suit, a temporary injunction do issue restraining the plaintiff/respondent by themselves, and or by their undisclosed principals, agents, employees, servants and any other person acting under his authority from interfering with the applicant's frontage of the main road by trespassing, remaining in occupation, entering, occupying, dealing and or in any manner interfering with the remainder of Land Reference Number 209/12151, now a road buffer zone situated at Parklands, Nairobi County.

5. The defendant filed a statement of defence dated 15/11/2019, replying affidavit dated 16/1/2020, and supporting affidavit dated 27/4/2020. She contends that the plaint herein does not disclose a reasonable cause of action; is aimed at achieving a fraudulent intent; is founded on an illegality; and is contrary to public policy. She adds that the suit herein is a fraudulent non-starter because the plaintiff company did not exist in 1997 or 1998 and could not have been allocated the suit property in 1997 because it was incorporated on 10/3/2008. The defendant further avers that she no longer owns the suit property because her interest therein was acquired by the Government for construction of a public road. Lastly, the defendant contends that the plaintiff's claim of ownership of the suit property is founded on fraud, forged documents, and fraudulent collusion between the plaintiff and agents of the interested party.

6. I have considered the two parallel applications together with the parties' respective pleadings, documentary evidence, and submissions. I have also considered the law and the jurisprudential principles that govern the jurisdiction to grant interlocutory injunctive reliefs. I will dispose the two applications sequentially in the order in which they were filed. Before I do that, I will outline the guiding principles when exercising this jurisdiction.

7. The principles upon which our trial courts exercise jurisdiction to grant interlocutory injunctive reliefs are well settled [see (i) **Giella v Cassman Brown Company Limited [1973] EA 358**; (ii) **Mrao Ltd. V First American Bank of Kenya Ltd & 2 others [2003] KLR 125 and** (iii) **Nguruman Limited v Jan Bonde Nielson & Others [2014] eKLR**.

8. In summary, a party seeking an interlocutory injunctive relief is obligated to demonstrate a *prima facie* case with a probability of success. Secondly, he is required to demonstrate that unless the injunctive relief is granted, he would stand to suffer damage that may not be adequately remedied through an award of damages. Thirdly, should the court have doubt on either of the above limbs, the application should be determined on a balance of convenience.

9. The Court of Appeal in **Mrao Ltd. V First American Bank of Kenya Ltd & 2 others [2003] KLR 125** defined a *prima facie* case thus:

“In civil cases, a prima facie case is a case in which on the material presented to 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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard, which is higher than an arguable case”

10. It is also settled that when exercising the above jurisdiction, the court does not make conclusive or definitive findings on the substantive issues in the suit. I now turn to the first application.

11. The plaintiff seeks interlocutory relief on account of a certificate of title signed by the Commissioner of Lands on 19/12/2013, exhibited as “LB-1”. Also presented to the court by the plaintiff as documentary evidence of ownership of the suit property at this interlocutory stage are: (i) Letter of Allotment dated 21/7/1997 from Nairobi City Commission; and (ii) Letter of Allotment dated 26/8/1998 from the Commissioner of Lands. The defendant contends that the said documents are forgeries.

12. I have looked at the above documents of ownership presented by the plaintiff. Without making any conclusive or definitive pronouncements on them, it does appear at this stage that what the plaintiff has presented as evidence of its registered title does not bear a grant number and does not bear any evidence of its registration as a title.

13. Secondly, the Letter of Allotment by the Nairobi City Commission which the plaintiff is waving at this interlocutory stage indicates that it was issued on 21/7/1997. Going by the gazetted administrations of the City of Nairobi, the City of Nairobi was under an elected Council in July 1997. The term of the defunct Nairobi City Commission came to an end through the December 1992 General Elections. The court is at this stage not satisfied that the Commission which ceased to exist in December 1992 issued a Letter of Allotment to the plaintiff in 1997.

14. Thirdly, the plaintiff's second Letter of Allotment indicates that the allotment was made by the Commissioner of Lands on behalf of an unidentified county council on 26/8/1998. Going by the statutory framework in place in August 1998, the suit property fell within the jurisdiction of the City Council of Nairobi. It did not fall under a county council.

15. An applicant seeking protection of a registered interest in land and whose claim of registration and ownership has been challenged by a respondent has an obligation under **Section 107** of the **Evidence Act** to place before court conclusive evidence of registration. Such evidence would include an official search and certified copy of the registered title. Regrettably, the plaintiff has failed to discharge that obligation. Consequently, the court is not satisfied that the plaintiff has satisfied the first limb of **Giella v Cassman Brown (1973) EA 358**. I will in the circumstances not venture to discuss the second and third limbs. The net result is that the plaintiff's application dated 30/9/2019 fails. I now turn to the defendant's application dated 27/4/2020.

16. The defendant's application is supported by a ten paragraph affidavit. Annexed to the affidavit is a bundle of documents filed by the defendant on 20/11/2019.

17. Firstly, the defendant did not file a counter-claim in this cause. The only claim which is pending determination by the court is the plaintiff's suit. The defendant's application is therefore not anchored on any claim that is pending determination. While I appreciate that a court can properly issue an injunctive order at the behest of a defendant within the framework of **Order 40(1) (a)** of the **Civil Procedure Rules** in the absence of a counter-claim, the defendant is obligated to satisfy the requirement of **Order 40(1) (a)**. There is no evidence placed before the court vide the defendant's application to lay a basis for grant of an injunctive order under **Order 40 rule 1 (a)** to the present defendant who does not have a counter-claim.

18. Secondly, the first limb of the defendant's application (prayer 4) is a completely new cause of action relating to a totally different piece of land. The court cannot grant her a relief on the platform of the plaintiff's suit which relates to a different property and a different cause of action.

19. Thirdly, other than challenging the plaintiff's documents, the defendant has not placed before court any conclusive documentary evidence of ownership of either **Land Reference Number 209/12151** or **Land Reference Number 209/12150** presently or in the past. It is not lost to the court that in her defence, the defendant is categorical that her interest in **Land Reference Number 209/12151** was compulsorily acquired by the Interested Party and she no longer has any interest in the said land.

20. The net result is that the defendant has, similarly, not satisfied the first limb of **Giella v Cassman Brown (1973) EA 358**. The defendant's application dated 27/4/2020 is therefore, similarly, rejected for lack of merit.

Disposal Orders

21. In light of the above findings, I make the following disposal orders in relation to the plaintiff's application dated 30/9/2019 and the defendant's application dated 27/4/2020.

- a. The plaintiff's application dated 30/9/2019 is dismissed for lack of merit**
- b. The defendant's application dated 27/4/2020 is, similarly, dismissed for lack of merit.**
- c. Parties shall bear their respective costs relating to the two applications**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF MAY 2021

B M EBOSO

JUDGE

In the Presence of: -

Ms Ngugi holding brief for Ahmednassir SC for the Plaintiff

Mr Abuya for the Defendant

Court Assistant: June Nafula