



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA

ELC CIVIL SUIT NO. 11 OF 2018

THATHINI DEVELOPMENT COMPANY LIMITED.....PLAINTIFF

VERSUS

HONOURABLE ALI HASSAN JOHO.....1ST DEFENDANT

MOMBASA COUNTY GOVERNMENT.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 23rd January 2018. This is brought under Article 40, 42, 70(1) (2) (3) of the Constitution and Order 40 Rules 1 and 2, Order 51 of the Civil Procedure Rules, Section 1A, 1B, and 3A of the Civil Procedure Act and all other enabling provisions of the law.

2. It seeks orders:

i. Spent

ii. Spent

iii. That a temporary order be issued restraining the 1st and 2nd Respondents, their servants and or, employees and or agents and assigns from trespassing, mining, and interfering with the applicants parcel of land otherwise known as Mombasa II/MN/546, II/MN/829/R and II/MN/360 pending hearing and determination of the suit.

iv. That the above order be enforced by the Mombasa County Commissioner Nelson Marwa.

v. That costs be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1-7. I do not need to reproduce them here.

4. The application is supported by the affidavit of Githende Gachanja, a director of the plaintiff/applicant sworn on the 23rd January 2018.

5. The application is opposed. There is a replying affidavit sworn by Lilian Sidi an officer working with the 2nd defendant in the department of Trade, Tourism and Investment. The affidavit is sworn on behalf of the 1st and 2nd defendants'.

6. The defendants/respondents also raised a preliminary objection dated 5th February 2018 and filed in court on 6th February 2018. The grounds are:-

i. The plaintiff's suit against the 1st defendant be struck out with costs for non-compliance with the rules and the law;

ii. The suit against the 1st defendant is motivated by malice meant to embarrass the 1st defendant.

7. It was directed by the court on 6th February 2018 that the preliminary objection and the notice of motion be canvassed together on 19th March 2018. On the 19th March 2018 when the matter came up there was no appearance by counsel for the defendants/respondents. The matter proceeded ex parte.

8. I have considered the pleadings, the application and the supporting affidavit, the replying affidavit and the submissions of counsel. The issue for determination is whether the plaintiff/applicant has made out a good case to warrant the orders sought.

9. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of **Giella vs Cassman Brown and Company Limited (1973) EA 358**. First the applicant must show a prima facie case with a probability of success. Secondly, that 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 should act on a balance of convenience.

10. It is the plaintiff's/applicant's case that it is the registered owner of the suit properties. They have annexed copies of title deeds and rates payments statements. They have also exhibited photographs showing the excavation in progress.

11. The 1st and 2nd defendants/respondents in their replying affidavit in paragraph 4 states:-

“That we received application from the two entities, Sambu Murram Quarry and Hunters Ship Chandlers and General Contractors Ltd for a single business permit”

In Paragraph 6 they state:-

“That it is upon the County Government to verify the ownership of the plot, the subject of excavation.”

12. This confirms that there are third parties undertaking excavation of murrum on the plaintiff's/applicant's suit properties. It is not in doubt that they were issued with single business permit by the 2nd defendant.

13. I have gone through the grounds of the preliminary objection. I agree with counsel for the plaintiff/applicant that the same does not amount to a preliminary objection as described in the case of **Mukisa Biscuits Company Limited vs West End Distributors Limited [1969] EA 696**.

I find that the same does not raise specific issues to do with the law. It is ambiguous and vague. The same is dismissed with costs.

14. Going back to the notice of motion, the Court of Appeal gave a definition of what amounts to a prima facie case in the case of **Mrao Limited vs First American Bank & 2 Others [2003] KLR 125**. I find that the plaintiff/applicant herein has demonstrated a prima facie case with a probability of success at the trial.

15. I also find that the plaintiff/applicant has demonstrated that the continued illegal excavation of the murrum will destroy the landscape and ecosystem of the suit properties. There is need to preserve the suit properties. I also find that the balance of convenience tilts in favour of the plaintiff/applicant who is the registered owner of the suit properties.

16. All in all I find that the application herein has merit and it is allowed as follows:-

i. That a temporary injunction is hereby issued restraining the 1st and 2nd defendants/respondents, their servants and/or employees and/or agents and assigns from trespassing, mining and interfering with the plaintiffs/applicants parcel of land otherwise known as Mombasa/II/MN/546, II/MN/829/R and II/MN/360 pending the hearing and determination of the main suit.

ii. The order above be enforced by the Mombasa County Commissioner.

iii. The costs of the application do abide the outcome of the main suit.

It is so ordered.

Dated and signed in Nairobi on this.....day of2018

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L. KOMINGOI

JUDGE

Dated and delivered at Mombasa on this 5th day of October 2018.

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A. OMOLLO

JUDGE