



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 8 OF 2020

DURUMA ALLIED TRADERS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KAHAWA SUKARI LIMITED.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the **Notice of Motion Application** dated 3rd February 2020, by the Plaintiff/ Applicant seeking for the following orders;

1. That pending hearing and determination of this suit, the Honourable Court be pleased to grant an order of temporary Injunction restraining the Defendant whether by themselves, their directors, agents, employees or anyone claiming under them from subdividing, selling, offering for sale, allotting, developing in any way or interfering with the Plaintiff's possession and ownership of plot Numbers 2003, 2004, 2011, 2012, 2013, 2016, 2017, 2018, 2026 and 2027 situate in all that property known as L.R 10901/20.

2. That Cost of the Application be borne by the Plaintiffs.

The Application is premised on the grounds that the Plaintiff/Applicant is the beneficial owner of the suit properties. That the Plaintiff/ Applicant purchased the suit properties from the Defendant/ Respondent for valuable consideration and holds a valid Certificate of allotment issued by the Defendant/ Respondent. Further that the Plaintiff/ Applicant has learnt that the Defendant/ Respondent is in the final stages of unlawfully subdividing the suit properties and selling them to unsuspecting third parties. That the Defendant's/ Respondent's actions infringes on its right to ownership of the suit property as the Defendant/ Respondent is in the process of evicting the Plaintiff/ Applicant from the unutilized portions to facilitate the illegal sale and has been using armed goons to intimidate the Plaintiff/ Applicant and unless restrained, the Plaintiff/ Applicant will be evicted hence defeating the suit.

In his Supporting Affidavit, **Peter Irungu Kabiru** averred that he is a Director of the Plaintiff/ Applicant duly authorized to swear the Affidavit. That the Defendant/ Respondent is the registered owner of **L.R 10901/20**, which it has subdivided and numbered numerically for Identification purposes. That the Plaintiff/ Applicant is in the business of buying and selling land and in **May 2011**, it desired to buy plots, to which they visited the Defendant's/Respondent's offices and were supplied with various loan Application forms which it duly filed. That it was allotted 10 plots having bought each plot for **Kshs. 1,8000,000/=** which it duly paid in instalments on various dates.

That upon purchasing the said plots, it took possession and has enjoyed quiet possession. That on **22nd January 2020**, together with his Co Directors, they visited the Defendant's/Respondent's office with the intention of paying conveyance fees for issuance of title deeds which they duly paid at **Kshs. 1,000,000/=** and were issued with a receipt. That on **27th January 2020**, they received information that there were goons on their properties and learnt that the Defendant/ Respondent was planning to unlawfully repossess the resulting prime plots, which boarded a new road with the intention of subdividing them and selling to third parties.

The Application is opposed and the Defendant/ Respondent filed a Replying Affidavit sworn by **Alice Waceke**, on **20th July 2020** .She averred that the Defendant/ Respondent is in the process of processing titles for various plots. That in **January 2020**, the **Kahawa Sukari Residents Association**, resolved to have the Commercial plots located in the middle of the residential controlled plots be relocated to the area bordering the Githurai road and that all plot owners whose boundary was on the road would be relocated where the commercial plots are. That following the resolutions, a resurvey was done where only two plots belonging to the Plaintiff/ Applicant being **2026** and **2027**, were to be affected. That the Plaintiff/ Applicant has sought to mislead the Court and that it is only swapping of the plots that is taking place as per the recommendations and resolutions of the residents, where the Plaintiff/ Applicant is a member. That the filing of the instant suit and the injunctive orders issued would put the issuance of over **200 plot owners** on hold including the Plaintiff/ Applicant. That for the sake of harmony and avoiding a costly legal process, the Court was invited to set a site visit off the affected area and verify the Plaintiff's claim. The Court was urged to dismiss the Application.

The Application was canvassed by way of written submissions. By the **9th of April 2020**, the Defendant/ Respondent had not filed its submissions. The Plaintiff/ Applicant filed its written submissions through the **Law Firm of Gikenye Mugo Rienye & Company Advocates**. The Defendant/ Respondent did not file any submissions. The Court has carefully read and considered the Application, the Affidavits, the written submissions together with the provisions of law and finds that the issue for determination is **whether the Plaintiff/ Applicant is entitled to the injunctive orders sought**.

In deciding whether or not to grant injunctive reliefs, the Court is guided by the principles of injunctions as enunciated in the case of **Giella...Vs...Cassman Brown (1973) EA 358**, and as was reiterated in the case of **Nguruman LimitedVs...Jan Bonde Nielsen & 2 others CA No.77 of 2012 (2014)eKLR** where the Court of Appeal held that;

“in an interlocutory injunction application the applicant has to satisfy the triple requirements to (a) establishes his case only at a prima facie level, (b) demonstrates 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 states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially.”

The Plaintiff/ Applicant must establish a prima facie case and in the case of **Mrao LtdVs... First American Bank Of Kenya Ltd (2003) eKLR**, the Court of Appeal gave a determination on a prima facie case. The court stated 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 legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

It is not in doubt that the Defendant/Respondent allotted the suit properties to the Plaintiff/ Applicant to which it has admitted as much. That the Plaintiff/ Applicant duly paid for the suit properties and have been given a Certificate of allotment. It is thus not in doubt that they are the beneficial owners of the suit properties. The Defendant/Respondent has further not denied that they intend on exchanging the Plaintiff's/ Applicant's property with other properties. The Plaintiff/ Applicant contends that the said exchange would be without its consents. The Court finds and holds that indeed there exists a right that is at risk of being infringed and the same calls for a rebuttal. The Plaintiff/Applicant has therefore established a prima facie case with probability of success.

On whether there will be irreparable loss caused to the Plaintiff/ Applicant, the Court finds that in the case of **Olympic Sports House Ltd... Vs...School Equipment Centre Ltd (2012) eKLR**, it was held that:-

“a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction”.

Equally, the Court herein finds that there is no damage that may be able to compensate the plaintiff/ Applicant considering that each land is unique and cannot be equated. The Court further notes that the Defendant/ Applicant has contended that the said exchange was sanctioned by the Residents Association. However, no resolution to the said effect has been produced in Court. The Plaintiff/Applicant has also denied being a member of the said Residents Association and that the said exchange was ever sanctioned. These are conflicts of facts that cannot be resolved at the interlocutory stage. See the case of **Edwin Kamau Muriu Vs Barclays Bank of Kenya Ltd Nairobi HCCC No. 1118 of 2002**, where 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”.

If the Court is in doubt, it is required to determine the case on the balance of convenience. However, this Court is not in doubt, and even if it was, the balance of convenience always tilts in favour of maintaining the **status quo**. The **status quo** herein is that which existed before the wrongful act which is not to allow the exchange of the suit property. See the case of **Virginia Edith Wambui...Vs...Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR**, where the Court of Appeal held that:-

“The general principle which has been applied by this court is where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial.”

The Upshot of the foregoing is that the Court finds and holds that the Plaintiff/ Applicant has establish the threshold for grant of injunctive orders/reliefs and has therefore satisfied the Court that it is entitled to the Orders sought.

Having carefully considered the instant Notice of Motion Application dated **3rd February 2020**, the Court finds it **merited** and the same is allowed entirely with costs to the Plaintiff/Applicant.

It is so ordered

DATED, SIGNED AND DELIVERED AT THIKA THIS 10TH DAY OF JUNE 2021.

L. GACHERU

JUDGE

10/6/2021

Court Assistant - Dominic

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

No appearance for the Plaintiff/Applicant

No appearance for the Defendant/Respondent

L. GACHERU

JUDGE