



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 7 OF 2021

PORTSMOUTH HOLDINGS LTD.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

RULING

The Application

1. By Notice of Motion dated 4/2/2021 and filed in court on 8/2/2021 brought under, **Order 40 Rule 1,2,3** and 4 of the **Civil Procedure Rules, Section 63(e)** of the **Civil Procedure Act, Article 159** of the **Constitution**, the plaintiff/applicant sought for the following orders:

a. ...spent

b. ...spent

c. That pending the hearing and determination of the application and pending the hearing and determination of this suit the defendant, its servants and or agents be restrained by an order of injunction from this honourable court from trespassing or further trespassing into any part of LR.2116/414 in whatsoever manner and not to interfere with the applicant's possession and use of the suit property.

d. That the County Commander of Police in-charge of Trans Nzoia County to oversee compliance of the order.

e. That the costs be provided for.

2. The application is supported by an affidavit sworn on 4/2/2021 by **Anthony Lucas Max**, the General Manager in charge of the plaintiff. The grounds in which the applicant relies are as follows: that the applicant is the registered owner of **LR. 2116/414** and holds a valid Certificate of Title; that the respondent has without any prior notice to the applicant unlawfully entered the suit premises and destroyed almost all improvements thereon; that the respondent is bent on fencing off the suit property in a bid to deny the plaintiff access and possession of the property without any lawful excuse; that the applicant has met the threshold for the grant of orders of injunction and that it will be in the interest of justice to grant the orders sought.

The Response

3. The defendant through its Senior Land Surveyor, **Salome Kamau**, filed its replying affidavit on 12/4/2021. Its response is that land parcel No. **2116/414** lies within the Kenya Railways Station land in Kitale; it is divined by **Survey Plan No. FR.NO. 83/185**; that maps from the Director of Survey's office confirm that the suit land is part of the defendant's land; that the defendant has never disposed of or surrendered the ownership of the suit land to any person including the plaintiff; that the purported acquisition of title by the plaintiff over the suit land is fraudulent and illegal; that the land has never been surrendered by the defendant to the government for re-allocation to any third party; that the plaintiff and other encroachers and trespassers on railway land were issued with public notices on **20/3/2018** and **27/9/2019** and **30/9/2019** to vacate and remove their illegal structures; that the defendant was not involved in any demolition but the demolition complained of was undertaken by Government of Kenya Multi-Agency Team comprised of numerous Department and Units and that the order of injunction sought is not deserved. Further the defendant avers that the applicant has not demonstrated that perchance they succeed in their claim, an award of damages cannot be sufficient; it is stated that the suit land is part of railway land that serves the public and the balance of convenience does not favours the applicant.

Submissions

4. The plaintiff filed its submissions on **22/2/2021** while the defendant filed its submissions on **29/4/2021**. The defendant filed reply to defendant's submissions dated **29/4/2021** on **17/5/2021**.

Analysis and Determination

5. I have perused the application, the supporting affidavits, the replying affidavit and the submissions filed by the parties herein. The issue for determination in the instant application is whether a temporary injunction should issue against the defendant restraining it from interfering with the suit land pending the hearing and determination of the suit.

6. The plaintiff exhibits a copy of a grant apparently issued on **13/2/1960** while the defendant exhibits copies of ancient maps to demonstrate that the suit land falls within the boundaries of land recognized as the defendant's. It appears that several entries were made in that grant.

7. The suit land appears to have been transferred to the plaintiff on **27/7/2017**. The plaintiff avers that the structures on the suit land have been demolished with the exception of a few. The defendant claims that the land represented in the title was fraudulently and illegally hived of its premises. However the invocation of a title by the plaintiff in this matter requires this court to further investigate the matter to determine whether that title was fraudulently obtained. A determination as to fraud cannot be made at the present juncture. It is opinion of this court that a *prima facie* case has been established by the plaintiff.

8. However this court must consider that the defendant being a public corporation has claimed that it is in the process of revitalizing its operations for public good hence the efforts to recover its lands from encroachers. Whether the plaintiff is one of the encroachers or trespassers is yet to be known. It is claimed that the balance of convenience does not therefore favour the plaintiff.

9. The defendant insist that the suit land is within its premises and that the demolition was not conducted by it but by other organs of the government who have not been enjoined in the suit. The issue of whether those organs will be enjoined or not has not been dealt with and may arise in future. However what matters is that the plaintiff has conceded that most of the structures has been brought down except for a few structures. It is also common ground that the defendant's recovery process has affected numerous other persons besides the plaintiff.

10. The defendant is of the opinion that the plaintiff has not demonstrated that damages could not be an adequate remedy if it is successful. I find this to be case because the plaintiff's supporting affidavit to the application holds no evidence of unique loss or damage the plaintiff would sustain if the temporary injunction is not granted. Besides the claim of public interest raised by the defendant cannot be wished away at the moment as it is clear that the purpose of clearing the railway land of trespassers is potentially beneficial to the public. This court is therefore of the view that damages would be an adequate remedy in the circumstances of this case. Besides, even if this court were to rule on a balance of convenience, it appears to favour the denial of orders that would bar the defendant, a public corporation, from further operations on the suit land.

11. The upshot of the foregoing the application dated **4/2/2021** lacks merit and the same is hereby dismissed with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 22ND DAY OF JULY, 2021

MWANGI NJOROGE

JUDGE, ELC, KITALE.