



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 16 OF 2021

APEC HOLDINGS LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

RULING

The Application

1. This is a Ruling of a Notice of Motion dated 22/6/2021 and filed in court on 30/6/2021 brought under **Section 1A, 1B, 3, 3A and 63(c)** of the **Civil Procedure Act, Order 40 Rule 1** of the **Civil Procedure Rules**. The applicant/plaintiff seeks for the following orders:

(i) ...spent

(ii) That pending the hearing and determination of this suit, this honourable court be pleased to issue an order maintaining *status quo* of LR. 2116/415 obtaining prior to 29/1/2021. In the alternative, this honourable court be pleased to issue an order of temporary injunction restraining the respondent, its authorized agents, employees and or servants or any person claiming through them from trespassing, fencing, alienating or in any other manner dealing with the suit property until hearing and determination of this suit.

(iii) That cost of this application be provided for.

2. The application is supported by the affidavit sworn on 22/6/2021 by **Anthony Max Lucas**, the Property Manager of the applicant's company. The grounds upon which the application is made are that the applicant company is the registered owner of the suit property having obtained the same in 2014 under a Certificate of Lease for a period of 69 years commencing 1/7/1978; that the applicant's land is distinct from the property of the respondent; that contrary to that fact, the respondent on 29th and 30th January, 2021 or thereabout trespassed onto the applicant's property and destroyed a perimeter fence put up by the applicant; that the applicant's representatives were present at the time of demolition and tried to explain to the respondent's authorized agents the true position on ownership of the suit property but in vain; that the respondent has continued to harass the applicant and has kept the applicant's agents out of the suit property in spite of the fact that the applicant holds a valid certificate of lease in their name; that if the orders sought are not granted, the applicant will be dispossessed of its rightful property and that it is in the interest of justice that the orders sought are granted.

The Response

3. A replying affidavit of **Salome Kamau**, a Senior Land Surveyor of the defendant was filed on 14/7/2021 in response. She states that the suit property belongs to the defendant and that it falls within the Kitale railway station; that it was leased to the Turkana Fishermen Coop Society Ltd with the consent of the defendant sometime in 1982 for a term of 69 years and 6 months commencing 1/7/1978 and they have never surrendered the property; that the lessees has continued to make payments to the defendant to date; that the defendant has never created a sublease nor issued its consent for the creation of proprietary interest in the form of a sublease over the suit property in favour of the late Kritkumar Nakwarbhai Patel , M/s Jayesh Auto Spares or the plaintiff; that save for the lease aforementioned the defendant has never surrendered the property for allocation to other persons and the plaintiff's purported acquisition of the same is illegal. The defendant therefore denies the claims of trespass on the suit property as it belongs to it. It states that the demolitions affecting the suit land were undertaken by a multi-agency operations team created by the government of Kenya and that as the plaintiff has failed to demonstrate the lawful issuance of title in its name, it has come to court against the equitable doctrine of clean hands and the instant application lacks merit and is an abuse of the process of the court.

The Submissions

4. The plaintiff filed written submissions on **29/7/2021**. The defendant filed its written submissions on **28/7/2021**.

DETERMINATION

5. I have considered the application together with the supporting affidavit, the response and the submissions filed. The main issue arising for determination in the instant application is whether an order of *status quo* existing before **29/1/2021** or an order of temporary injunction should issue restraining the defendant from interfering with the suit land pending the hearing and determination of the suit.

6. The conditions requisite for the grant of an interim injunction are as follows: that the applicant must demonstrate a *prima facie* case; that the applicant must demonstrate that there is risk of loss that can not be compensated for by way of damages should orders sought not issue. Lastly the court may, in certain cases where doubt arises determine the application for an interim injunction on a balance of convenience.

7. The plaintiff's claim is that it has title to the suit land having purchased the same from a third party in **2014**; the defendant avers that it has only consented to title to be issued in favour of only one lessee who is not the person who purportedly transferred the title to the plaintiff.

8. The defendant cited the case of **Hubert L. Martin & 2 Others v Margaret J. Kamar & 5 Others [2016], eKLR**, stating that no party should take it for granted that simply because they have a title deed or Certificate of Lease, then they have a right over the property. The question therefore arises in the main suit as to whether the plaintiff's title was regularly issued.

9. The land reference number for the suit land given by the plaintiff is the same land reference number given by the defendant. The defendant's narrative regarding the issuance of a lease in favour of the Turkana Fishermen Coop Society Ltd is quite detailed.

10. It is evident that the plaintiff's purported title appears to have been derived from the title issued to the Turkana Fishermen Coop Society Ltd. The defendant denies having granted consent to the issuance of a lease in favour of the plaintiff. The plaintiff does not respond to that allegation in an affidavit but in the submissions. I have noted that no transfers are attached showing how the land came into possession of the defendant.

11. There is no response to the narrative given by the defendant and no evidence is therefore available to demonstrate that the defendant gave the consent to any transfer by or sublease from Turkana Fishermen Coop Society Ltd to any other person. The question of whether or not the respondent is responsible for issuance of consent to transfer is raised by the plaintiff. It maintains that the proper persons were the Commissioner of Lands and his successor the National Land Commission.

12. Citing **Funzi Island Development Limited & 2 others -versus- County Council of Kwale & and 2 Others (2014) eKLR** the defendant stated that a registered owner of land enjoys absolute and indefeasible title to property if allocation was legal, proper and regular. **Clause 14** of the lease conditions states that consent is expected to be from the President. None has also been demonstrated by the plaintiff to have been granted.

13. Meanwhile the defendant has indicated by its list of documents to be used at the hearing that the consent of the defendant was required for other parcels in the immediate vicinity and there are correspondences showing such likelihood in the record.

14. I find that these are issues to be delved into at the hearing. At the moment, I must find that in the circumstances of the instant application, the applicant has not demonstrated that it has a *prima facie* case.

15. Regarding loss and damage, it is noteworthy that the applicant's perimeter wall has been brought to the ground. The respondent avers that this was not its doing, but the work of an inter-agency team put together by the government.

16. No other physical damage save the loss of its perimeter wall is being claimed by the plaintiff. The upshot of the foregoing is that the plaintiff has not established that loss or damage of a nature that can not be compensated for by way of damages will occur in the future.

17. In the end, I do not find that the plaintiff has established the two conditions set down in **Giella vs Cassman Brown 1973 EA 358**. I also do not find that the balance of convenience favours the grant of an injunction.

18. In the end I find that the application dated **22/6/2021** lacks merit and the same is hereby dismissed with costs.

It is so ordered.

Dated, signed and delivered at Nakuru via electronic mail on this 30th day of September, 2021.

MWANGI NJOROGE

JUDGE, ELC.