



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. E282 OF 2021

AFRICAN EXPRESS AIRWAYS(KENYA) LIMITED.....PLAINTIFF

VERSUS

KENYA AIRWAYS PLC.....DEFENDANT

RULING

What is before me is an application that was brought by the plaintiff by way of a Notice of Motion dated 30th July, 2021 and the defendant's Notice of Preliminary Objection thereto dated 2nd August, 2021. In the application, the plaintiff has sought the following orders;

1. Pending the hearing and determination of the suit an interlocutory order of injunction be issued compelling the defendant and its agents, contractors, employees and workmen or otherwise howsoever to open the access route to the plaintiff's premises known as L.R No. 9042/584 from Airport North Road, Embakasi, Nairobi (hereinafter referred to as "the suit property").
2. Pending the hearing and determination of the suit a temporary order of injunction does issue restraining the defendant and its agents, contractors, employees and workmen or otherwise howsoever from interfering with the suit property or in any way trespassing upon or entering and occupying, using any part of the property for any purpose unless with the consent of the plaintiff or for the restoration of the pre-Friday 23rd July, 2021 status quo.
3. Costs of the application.

The application was supported by the affidavit and further affidavit sworn by Kaltuma Hassan Bonaya. The plaintiff averred that it was the registered leasehold proprietor of the suit property which measured 1 hectare or thereabouts. The plaintiff averred that its lease from the Government of Kenya was for a term of 99 years with effect from 1st June, 1995. The plaintiff averred that the Grant in respect of the suit property was registered on 15th June, 1995. The plaintiff averred that on Friday, 23rd July, 2021, the defendant through its agents, contractors, employees or workmen without the consent or permission of the plaintiff or any lawful excuse raided the plaintiff's premises on the suit property in a high handed manner and drove the plaintiff and the plaintiff's directors, employees and customers from the premises while at the same time dismantling and removing the plaintiff's movable properties from the premises.

The plaintiff averred that the defendant did not indicate on whose authority it had carried out the said invasion until after driving the plaintiff from the premises when one of those who participated in the invasion produced an order given by the Chief Magistrate's court at Milimani Commercial Court on 16th July, 2021 in MELC No. E235 of 2021 in relation to L.R No. 9042/583 and L.R No. 9042/1051. The plaintiff averred that the said order did not concern the suit property, L.R No. 9042/584. The plaintiff averred that the suit property was valued at over Kshs. 515,000,000/= and that a dispute in respect thereof was outside the jurisdiction of the Magistrate's court in case the said order was supposed to apply to the suit property.

In its supporting affidavit, the plaintiff annexed among others; a copy of the Grant and a valuation report in respect of the suit property. The plaintiff averred that it had developed the suit property intensively with a hangar and office accommodation. The plaintiff averred that the development on the suit property was approved by all the relevant authorities including Kenya Airports Authority. The plaintiff averred that it had over the years paid land rent for the suit property to the Government. The plaintiff averred that it was not a party to the suit in which the court order aforesaid was issued. The plaintiff averred that it had made out a case for the orders sought. The plaintiff averred that as a result of its eviction from the suit property by the defendant it was incurring daily losses of about US \$ 1924. The plaintiff averred that during their eviction from the suit property, several movable properties like furniture and computers were thrown out and several documents and items got lost.

In the plaintiff's supplementary affidavit, the plaintiff averred that since the value of the suit property was over Kshs. 500,000,000/= it was only this court that had jurisdiction to determine the dispute before the court. The plaintiff averred that the Magistrate's court handling the lower court suit, MELC No. E235 of 2021 had pecuniary jurisdiction of Kshs. 10,000,000/= only. The plaintiff stated that it was not aware that the property referred to in the lower court as LR No. 9042/1051 was the same as LR No. 9042/584 (the suit property). The plaintiff averred that it had been using the suit property since 1st June, 1995 and that there has never been any encumbrance against the title of the

property. The plaintiff averred that neither the defendant nor any other person had come to lay a claim to the suit property since the plaintiff acquired the same in 1995. The plaintiff averred that it had been paying land rent for the suit property since 1995. The plaintiff denied that the order that was issued by the lower court was a valid order and stated that in any event, the suit property was not in dispute in that suit. The plaintiff averred that its parcel of land was not the same as the land referred to in the unregistered lease dated 26th April, 2021 which was purportedly renewing a lease that expired in 2011. The plaintiff averred that it held a valid title in respect of the suit property. The plaintiff denied that the suit herein was sub-judice. The plaintiff averred that the issues raised in this suit and in the lower court suit were not the same and as such the principles of res-judicata, sub-judice and estoppel did not apply to this suit. The plaintiff denied that the defendant was the lawful registered owner of the suit property. The plaintiff averred that in any event, the title which the defendant claimed to have over the suit property expired in 2011. The plaintiff denied that its occupation of the suit property was illegal. The plaintiff averred that it would suffer irreparable harm if the orders sought were not granted. The plaintiff averred that it was operating an airline business on the suit property which would suffer since it would not be able to serve its customers if the orders sought were not granted.

The defendant opposed the application through a replying affidavit sworn by Laura Wandera and notice of Preliminary Objection both dated 2nd August, 2021. In its Preliminary Objection, the defendant contended that the issues raised in this suit were the same issues in the suit that was pending in the lower court. The defendant contended that this court lacked jurisdiction to set aside valid orders that had been made by the lower court save on appeal or on application for judicial review. The defendant urged the court to strike out the plaintiff's application.

In her replying affidavit, Ms. Laura Wandera stated as follows: The defendant was the lawful registered proprietor of the suit property. The defendant lawfully took possession of the suit property which was also known as L.R No. 9042/1051 pursuant to a lawful court order made on 16th July, 2021 by the lower court. The plaintiff's application was sub-judice as it dealt with the same issues pending determination in the lower court where the defendant had sued a company known as Seven Four Eight (748) Air Services. This court had no jurisdiction to entertain a matter pending before a court of competent jurisdiction. The defendant's parcel of land measures 0.6083 of a hectare and the same was leasehold for a term of 33 years with effect from 8th July, 1978. The property was known as Grant No. I.R 67128, L.R No. 9042/584. The land reference number had been changed to Nairobi Central Parcel, L.R No. 9042/1051.

Ms. Wandera stated further that: The eviction complained of by the plaintiff was carried out on Nairobi Central Parcel 9042/1051. The same was lawfully carried out pursuant to a lawful court order issued by the lower court which had not been varied or set aside. The developments that the plaintiff carried out on the suit property were as a result of unlawful occupation of the suit property by the plaintiff. If the orders sought by the plaintiff were granted, the lower court proceedings would be thrown into disarray. The defendant had demonstrated that it was the lawful owner of the suit property. The defendant was already in possession of the suit property and as such the plaintiff would suffer no prejudice if that status quo was maintained. In the event that the plaintiff suffers any damage, the same would be compensated by way of damages. The balance of convenience tilted in favour of maintaining the status quo. The application was frivolous, defective, and should be dismissed. Ms. Wandera annexed to her affidavit as exhibits several documents in proof of the defendant's title to the suit property which included a copy of the defendant's expired Grant in respect of the suit property and a copy of a new lease in favour of the defendant in respect of the same property.

The application was argued on 4th August, 2021 when Mr. Mwenesi appeared for the plaintiff while Mr. Ohaga SC appeared for the defendant. In its submissions, the plaintiff reiterated the contents of its affidavit and supplementary affidavit filed in support of the application which I have highlighted earlier. It is not necessary to repeat the same here. The plaintiff submitted that it had established a prima facie case with a probability of success against the defendant. The plaintiff submitted further that it had demonstrated that it would suffer irreparable harm unless the orders sought are granted. The plaintiff submitted that it had developed and occupied the suit property for several years and the defendant had never laid a claim over the property. The plaintiff submitted that its title is earlier in time to that of the defendant and must prevail. The plaintiff urged the court to restore the status quo that was prevailing prior to its eviction from the suit property. The plaintiff submitted that the title relied on by the defendant was incomplete and unregistered.

The plaintiff urged the court to grant the reliefs sought in its application. The plaintiff submitted that there was no relationship between plaintiff and the company that has been sued in the lower court by the defendant. The plaintiff submitted that the defendant in the lower court is not a tenant of the plaintiff. The plaintiff submitted that the defendant in the lower court was not in occupation of the suit property or any property owned by the plaintiff. The plaintiff averred that it was the plaintiff which was evicted from the suit property.

In its submissions in reply, the defendant also reiterated the contents of its notice of preliminary objection and replying affidavit. The defendant submitted that a mandatory injunction can only be granted in very clear cases. The defendant submitted that at the heart of the dispute between the parties was the ownership of the suit property. The defendant submitted that both parties had produced titles to the suit property and the court had been called upon to determine which of the titles was valid. The defendant submitted that the suit property was allocated to the plaintiff while the same was already owned by the defendant.

The defendant submitted that until this suit was filed, the defendant was not aware that the plaintiff had a title to the suit property. The defendant submitted that the plaintiff has a duty to explain to the court how it acquired its title to the suit property in 1995 while the property was already owned by the defendant. The defendant submitted that since the defendant's title was the first in time, it had to prevail against that of the plaintiff. The defendant submitted that it had demonstrated that its lease had been extended even though the extended lease had not been perfected.

The defendant dismissed the development that the plaintiff has carried out on the suit property as irrelevant. The defendant submitted that it had demonstrated that its title to the suit property was the first in time and that until an inquiry was carried out by the court on how the plaintiff acquired its title and the lawful owner of the suit property determined, the defendant must be allowed to enjoy its extended lease. The defendant argued that its lease would not have been extended if there was another title in existence for the suit property. The defendant submitted that the plaintiff had not made out a prima facie case against the defendant to warrant the grant of the orders sought. On whether the lower court had jurisdiction to hear the dispute over the suit property in view of the value thereof, the defendant submitted that what was in dispute in the lower court was not the ownership of the suit property but possession thereof. The defendant submitted that the lower court had jurisdiction to determine the issue of possession of the suit property irrespective of its value.

I have considered the application together with the affidavits filed in support thereof. I have also considered the replying affidavit and notice of preliminary objection filed by the defendant in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the case law cited in support thereof. The following is my view on the matter. I find no merit in the defendant's preliminary objection. The same is overruled. I will give my reasons later in the ruling. The plaintiff has sought temporary prohibitory and mandatory injunction. The principles upon which this court exercises its discretion in applications for interlocutory injunction are now well settled. In Giella v Cassman Brown & Co. Ltd. [1973] E.A 358, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.

In Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014] eKLR the Court of Appeal adopted the definition of a prima facie case that was given in Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003] KLR 125 and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. ...All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, where the court stated that:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.

In Shepherd Homes Ltd. v Shandahu [1971] 1 Ch.304, Megarry J. stated as follows:

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

From the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success against the defendant and that it stands to suffer irreparable harm if the orders sought are not granted. I am also satisfied that the plaintiff's case is clear and that exceptional circumstances exist that warrants the granting of a temporary mandatory injunction.

It is not in dispute that on 23rd July, 2021, the defendant evicted the plaintiff from the suit property. What I need to determine at this stage is whether the plaintiff has demonstrated on a prima facie basis that the said eviction was illegal. The plaintiff has placed before the court evidence showing that it is the leasehold proprietor of the suit property. The plaintiff has also demonstrated that the suit property was developed in 2008 and that all the necessary approvals were obtained. The plaintiff has also demonstrated that the property was valued in 2019 and the value thereof was assessed at over Kshs. 500,000,000/-. The plaintiff has also demonstrated that it has been in possession of the property since 1995 when the same was allocated to it. From the valuation report placed before the court by the plaintiff, the development on the suit property comprises of a 3 storey main office block, Engineers' office block, a hangar and a taxi way. The plaintiff has produced in court its Grant No. I.R 69013 for the suit property. The lease is for 99 years with effect from 1st June, 1995. The Grant was issued on 13th June, 1995 and was registered on 15th June, 1995. The same was issued on the strength of a Deed Plan No. 196068 dated 8th June, 1995. The property under this Grant measures 1 hectare. The plaintiff has demonstrated that from 1995 when the property was allocated to it and a Grant issued, the defendant has never laid a claim to the property. The plaintiff has contended that it is the lawful owner of the suit property and that the defendant's entry onto the suit property without its permission amounted to trespass and as such was illegal.

On its part, the defendant also claimed to be the lawful owner of the suit property. What did the defendant place before the court in proof of its ownership claim? The defendant produced Grant No. I.R 67128 in respect of a lease for the suit property that expired on 8th July, 2011. The lease in respect of which the Grant was issued was for 33 years with effect from 8th July, 1978. The Grant was issued on 25th August, 1995 and registered on 4th October, 1995. The said Grant was issued on the strength of a Deed Plan No. 196437 dated 13th June, 1995. The property the subject of the Grant was indicated as measuring 0.6038 of a hectare.

The defendant contended that after the expiry of this lease in 2011, the same was renewed and it was given a new lease in respect of the suit property for a term of 50 years with effect from 1st April, 1996. The defendant contended that in the new lease, the land reference for the suit property was changed from L.R No. 9042/584 to Nairobi Central Parcel No. L.R 9042/1051. The defendant contended that L.R No. 9042/584 and Nairobi Central Parcel No. L.R 9042/1051 are one and the same parcel of land. The new lease that was produced in court by the

defendant was issued on 26th April, 2021. The same was however neither signed by the defendant nor registered.

There is no doubt from what I have set out hereinabove that the plaintiff's title to the suit property was issued earlier than that of the defendant. Whereas the plaintiff's title was issued on 13th June, 1995 and registered on 15th June, 1995, the defendant's expired Grant was issued on 25th August, 1995 and registered on 4th October, 1995. I am not in agreement with the defendant's argument that although its title was issued later, it was the first in time because the term of the lease was indicated as commencing on 8th July, 1978. The law is settled that priority of registered interests in reckoned from the date of registration. It follows that the plaintiff's title to the suit property having been the first to be issued and registered, the same must prevail over the defendant's title in terms of priority.

In Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, the Court of Appeal cited with approval the High Court case of, Gitwany Investment Limited v Tajmal Limited & 2 others [2006] eKLR where the court stated that:

“My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in Wreck Motors Enterprises vs. commissioner of Lands, C.A. No. 71/1997 (unreported)” – is the “grant [that] takes priority. The land is alienated already.” This decision was again upheld in Faraj Maharus vs. J.B. Martin glass Industries and 3 others C.A 130/2003 (unreported). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel for land, then if both are apparently and in the fact to them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity....”

I am satisfied that the plaintiff has demonstrated on a prima facie basis that its title over the suit property was the first in time. The plaintiff's title must therefore prevail over the defendant's alleged title over the suit property. As I have said earlier, the defendant's alleged lease over the suit property expired in 2011 and the alleged extended lease has not been signed by the defendant neither has it been registered. That in effect means that there is no lease in place in respect of the suit property in favour of the defendant. In the circumstances, I am convinced on a prima facie basis that as at the time the defendant invaded the suit property on 23rd July, 2021 and evicted the plaintiff therefrom, the plaintiff was the lawful owner of the property. The defendant could therefore only enter the suit property with the plaintiff's consent or with lawful excuse.

It is not disputed that the defendant did not obtain the consent of the plaintiff to enter the suit property. The defendant contended however that it entered into the property and evicted the plaintiff therefrom pursuant to a lawful order that was made by the Chief Magistrates Court at Milimani Commercial Court on 16th July, 2021 in MCELC No. E235 OF 2021(lower court suit). I have looked at that order. The first observation that I have made is that the order directed the eviction of the defendant in that suit. The defendant in the lower court suit according to the said order was a company known as 748 Air Services (K) Limited. The plaintiff was not a party to the lower court suit. The plaintiff contended that it had no relationship with 748 Air Services (K) Limited and that it was not its tenant on the suit property. This averment was not rebutted by the defendant herein. Secondly, the order in that suit related to L.R No. 9042/583 and L.R No. 9042/1051. There is no mention in that order of the suit property, L.R No. 9042/584. The defendant had claimed that L.R No. 9042/1051 and L.R No. 9042/584 are one and the same parcel of land. The burden was on the defendant to prove this fact. The defendant placed no evidence before the court showing that L.R No. 9042/1051 and L.R No. 9042/584 are one and the same. In any event, the evidence placed before the court shows that L.R No. 9042/1051 is not in existence since the lease in respect thereof has not been registered. The other issue with the lower court order is that even if it is assumed that L.R No. 9042/1051 and L.R No. 9042/584 are one and the same property and that the plaintiff was a party to the lower court suit which has not been proved, from the value of the suit property that I have mentioned earlier, the lower court had no jurisdiction to preside over a dispute concerning the suit property.

The value of the suit property is over Kshs. 500,000,000/- and I have no doubt in my mind that the defendant was aware of this fact. I find it difficult to resist the plaintiff's argument that the defendant was out to steal a match against the plaintiff by; first, filing a suit against a party who did not own the suit property and secondly, filing a suit in a court without jurisdiction to a void thorough scrutiny by a superior court. I am also at a loss as how the defendant herein managed to get final orders of eviction against the defendant in the lower court suit without a formal proof even if the suit was not defended. I think that I have said enough to show that on a prima basis, the plaintiff has demonstrated that there was no lawful order from a competent court authorizing the eviction of the plaintiff from the suit property or blocking its access to the property. From the valuation report that was produced by the plaintiff in evidence, it is clear that the plaintiff was all along using L.R No. 9042/583 to access the suit property. That right could only be taken away by consent of the plaintiff or through a lawful court order and neither existed in this case.

It is my finding that the plaintiff has established valid grounds for grant of both prohibitory and mandatory injunction and as such it is entitled to the orders sought in its application before the court. For the reasons that I have given above, I need not say more on the defendant's preliminary objection. I have made a finding from the evidence before me that the plaintiff was not a party to the lower court suit and that in any event the court was not seized of jurisdiction to determine a dispute over the ownership of the suit property whose value was in excess of Kshs. 500,000,000/-. I have also made a finding that there is no evidence that the properties that were the subject of the suit in the lower court have any relationship with the suit property. The defendant's argument that the issues raised herein are sub-judice and that the court has no jurisdiction to determine this suit has no basis.

The plaintiff cannot be compelled to go to the lower court where it is not a party and in respect of a dispute over a property the value of which is beyond the pecuniary jurisdiction of the court. I did not quite follow the argument by the defendant's advocate that even though the value of the suit property was in excess of the lower court's pecuniary jurisdiction, the dispute before the lower court was over possession of the suit property and not title and as such, the lower court could handle the matter. I wonder how a court that has no jurisdiction to determine ownership of a property can determine the legality of possession thereof.

The upshot of the foregoing is that the plaintiff's application dated 30th July, 2021 is for granting. The application is allowed in terms of prayers 3, 4 and 5 thereof.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2021

S. OKONG'O

JUDGE

**RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO
CONFERENCING PLATFORM IN THE PRESENCE OF:**

MS. MWENESI FOR THE PLAINTIFF

MR. BWIRE H/B FOR MR. OHAGA SC FOR THE DEFENDANT

MS. C. NYOKABI - COURT ASSISTANT