



REPUBLIC OF KENYA

IN THE ELC AT MOMBASA

ELC CASE NO. 116 OF 2020

FATUMA HAJI ADAM alias FATUMA MOHAMED HAJI ADAM

FATUMA MOHAMED (Suing as the personal representative of the late

HAJI MOHAMED ADAM Pursuant to letters of administrative issued

on 24th June, 1997**PLAINTIFF/APPLICANT**

VERSUS

MOHAMED HURI IBRAHIM.....DEFENDANT/RESPONDENT

RULING

1. What is before the Honorable Court is the Notice of Motion application dated 1st September, 2020. It was filed on 9th September, 2020 by the Plaintiff/Applicant. Also, on 9th September, 2020, the Plaintiff/Applicant filed a Plaint dated 1st September, 2020. Pursuant to the provisions of Order 40 Rules 1 & 2 of the Civil Procedure Rules 2010, she sought for orders as stated herein below:-

(a) Spend;

(b) That this Honorable Court be pleased to issue conservatory Orders of injunction against the Defendant/Respondent together with his servants, agents, and/or workers from doing mining activities under PL/2018/0199 with Wananchi Ranch pending the hearing and determination of this application

(c) That this Honorable Court be pleased to issue conservatory Orders of injunction against the Defendant/Respondent together with his servants, agents, and/or workers from doing mining activities under PL/2018/0199 with Wananchi Ranch pending the hearing and determination of the main suit.

(d) That the Officer Commanding Stations (OCS) of Mwatate Police Station to ensure compliance.

(e) That the Court be at liberty to make such further and other orders that as it deems fit to meet the ends of justice.

(f) Costs.

2. The said notice of motion application is based on the grounds adduced thereof and the averments contained in 15 Paragraphed supporting affidavit of one FATUMA HAJI ADAM sworn and dated on 1st September, 2020 and the annexures attached thereof (Hereinafter referred to as "The Supporting Affidavit"). In the said supporting affidavit, She deponed that she was one of the duly appointed legal Administrator for the estate of the late HAJI MOHAMED ADAM (hereinafter referred as "The Deceased") vide letters of Grant of Administration dated 24th June, 1997. A copy of the said letter was attached to the said application.

3. She held that the deceased was her father. According to her, prior to his demise, the deceased had given her consent to undertake prospecting and mining activities onto the Wananchi Ranch (Hereinafter referred to as "The Suit Property")– the suit property. Thus, it was her deposition that on the strength of this proprietary right, on 7th September, 2018 the Defendant/Respondent and her duly entered into a mining Claim transfer agreement terms and conditions stipulated thereof (Hereinafter referred to as "The Agreement"). Based on the contents of her sworn supporting affidavit, the agreement was with an intention of eventually selling off part of the mining location to the Defendant/Respondent.

4. From the contents of the Supporting affidavit, she asserted that upon paying a down payment of a sum of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-) instead of the agreed upon sum of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) out of humanitarian grounds, she allowed the Defendant/Respondent to take up vacant possession of part of the suit property and commence undertaking the prospecting and mining activities. Verbally, the Defendant/Respondent promised to make further payments while in the course of undertaking the prospecting and the mining activities. She stated that she had been doing so under the cover of her mining license being License No. PL/2018/0199. Despite of this and apart from making some total payment for a sum of Kenya Shillings Three Hundred Thousand and Twenty Five Thousand (Kshs. 325,000/=) via the Safaricom Mobile phone (Mpesa) Services, the Defendant/Respondent had never made any other payments to her. He totally had failed to honor the payments as per the terms as agreed.

5. To worsen the situation, the Plaintiff/Applicant in her pleadings averred that at some point the Defendant/Respondent without the Plaintiff/Applicant's consent blocked the road connecting all the mining locations, destroyed trees vegetation and intruded onto the whole of Plaintiff/Applicant's other reserved location of the suit land. As a result, from the conduct of omission and commission by the Defendant/Respondent, it caused the Plaintiff/Applicant substantial losses and damages onto the mining location which by itself were a clear breach of the agreement. She held that attempts to resolve the matter had become a cropper at the behest of the Defendant/Respondent.

6. Subsequently, and in the pendency of this suit, the Plaintiff/Applicant sought leave of Court and on 28th May, 2021 filed an 11 Paragraphed Supplementary Affidavit dated 16th April, 2021 (Hereinafter referred to as "The Supplementary Affidavit"). From the said supplementary affidavit, she attached copies of a few photographs as documentary evidence ideally indicating the extent upon which the Defendant/Respondent was continuing to undertake the mining and excavation activities onto the suit land. She further vehemently denied that the Defendant/Respondent had ever made any attempts to transfer the alternative Plot situated at Vindo as agreed since the execution of the agreement to date. In any case, it was the Plaintiff/Applicant's contention that the fact that it was now the Defendant/Respondent who had ostensibly purported to be willing and ready to allegedly transfer the said plot to the Plaintiff/Applicant. Unfortunately, the belated offer had been overtaken by events. In saying so, she held that the conduct by the Defendant/Respondent had already frustrated the agreement and causing her to institute the suit seeking for the cancellation of the contract. Therefore, in the long run, she prayed for the orders sought in the afore stated application together with costs.

II. The Defendant/Respondent's case

7. On 15th April, 2021, upon being served with summons to enter appearance, the Defendant/Respondent filed a Defence dated 12th April, 2021, a 7 Paragraphed Replying affidavit sworn by MOHAMED HURI IBRAHIM the Defendant/Respondent herein dated and filed on 19th February, 2021 (Hereinafter referred to as "The Replying Affidavit"). He deposed that according to the terms and conditions of the agreement, he was to have made a down payment of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=) upon its execution. According to him, he held that indeed the said payment was made and which receipt was acknowledged by the Plaintiff/Applicant.

8. Based on the contents of the Replying Affidavit, he held that they had further agreed as additional payment for the prospecting and mining activities on part of the suit land, the Defendant/Respondent was to transfer to the Plaintiff/Applicant an alternative Plot situated at Vindo in Voi measuring 50feet by 100feet which was worth a total sum of Kenya Shillings One Million (Kshs. 10,000,000/=) and the balance of Kenya Shillings Eight Million Five Hundred Thousand (Kshs. 8,500,000/=) was to be payable upon the expiry of five (5) years from the date of the execution of the agreement. He held that he had indeed fully complied with the terms of the aforesaid agreement by:-

- a). making the payment afore – stated;
- b). releasing the plot situated in Vindo and making an attempt to give the Plaintiff/Applicant the original certificate of title deed though she declined to receive; and
- c). Being willing and ready to execute the transfer forms for the said alternative plot thereof.

It was his contention, that the balance of a sum of Kenya Shillings Eight Million Five Hundred Thousand (Kshs. 8,500,000/=) had by the agreement of the parties not fallen due for payment.

Although the Defendant/Respondent admitted carrying out prospecting and mining activities but only stressed that he only did so the portion already transferred to him by the Plaintiff. He denied neither having encroached nor trespassed into other mining locations of the suit land as alleged by the Plaintiff/Applicant in her pleadings. He further denied having ever blocking the road nor destroying trees on the suit land as alleged. He prayed for the dismissal of the application.

III THE SUBMISSIONS

A. The Submissions by the Plaintiff/Applicant

9. The Plaintiff/Applicant's Advocate – the law firm of Messrs. Mwazighe & Company Advocates prepared a brief written submissions dated 25th May, 2021 and filed on 28th May, 2021. Mainly, and as a basis to their arguments in support of the Plaintiff/Applicant's case, the said Advocates framed three broad issues which they urged court to consider and make a determination of the said application. These issues were whether they were entitled to the reliefs sought and who was to bear the cost of the application.

10. While submitting and in order to buttress their case, the Plaintiff/ Applicant advocates relied on the famous decision of *Giella –Vs - Cassman Brown*, and other cases of *Moses C. Muhia Njoroge and 2 others –Vs- Jane W. Lesaloi & 5 Others (2014) eKLR, Kenleb Cons Ltd. –Vs- New Gatitu Stations Ltd. & Another(1990) eKLR and Paul Gitonga Wanjau –Vs- Gathuthia Tea Factory Company Ltd. & 2 others (2016) eKLR*".

In the final analysis, the Plaintiff/Applicant's advocates submitted and urged the honorable court to allow and grant the prayers sought in the Notice of Motion dated 1st September, 2020.

B) The Defendant/Respondent's submissions

11. The Defendant/Respondent's advocate the law firm of Messrs. Kamoti Omollo & Company Advocates also filed a brief written submission dated 29th September, 2021 in court on 29th September, 2021. They framed the issues to be relied on as being whether the Plaintiff/Applicant was entitled to an injunction and who should be awarded costs for the application.

12. The Defendant/Respondent Advocates to buttress their arguments on these issues submitted and relied on the several authorities which included "*Giella -Vs - Cassman Brown & Co. Ltd. (1973) E.A. Page 360; MRAO Ltd. -Vs- First American Bank Ltd. (2003) Klr 125, and the National Bank of Kenya Ltd. -Vs- Pipe Plastic Samkolit (K) Ltd. & Another (2001) eKLR.*

The upshot of all this, they prayed that the aforesaid application by the Plaintiff/Applicant be dismissed with costs.

IV Analysis and Determination

13. In order to arrive at an informed decision, I have keenly read all the pleadings filed hereof, the written submissions and the attached authorities and considered the appropriate and applicable provisions of the Law. The Honorable Court has framed the following issues for determination:-

(a) Whether this suit should be transferred to be heard and determined by the Honorable Sub - ordinate trial Court as a first instance and which court has the pecuniary jurisdiction to do so.

(b) Whether the Plaintiff/Applicant is entitled to the temporary injunction orders sought from the Notice of Motion dated 1.9.2020 under order 40 Rule 1 and 2 of Civil procedure Rules in order to preserved the suit land pending the hearing and final determination of the main suit.

(c) Whether the parties are entitled to the orders sought.

(d) Who will bear the cost of the application.

ISSUE NO.1:- *Whether this suit should be transferred to be heard and determined by the Honorable Sub - ordinate trial Court as a first instance as which court has pecuniary jurisdiction to do so.*

14. Under this sub heading, the honorable court on its own motion – "***Suo Moto***" and based on the facts placed before it by the parties, the relevant provisions of law and precedents strongly, feels and like in all other similar cases on pecuniary jurisdiction, it is imperative to eventually make a decision on whether to have the Plaintiff/Applicant's suit be transferred to heard and determined by the honorable sub ordinate court at Voi where the subject matter is situated or not. In saying so, court has held that the ELC Court was established as a special court pursuant to the Promulgation of the Constitution 2010 – under the provisions of Article 162 (a) (b) of the Constitution of Kenya. In furtherance of this preposition, court has observed that the preamble of the ELC Act No. 2021 holds that ***The Court to deal with the environment and the use and occupation of, and title to, land.....***" while Section 3 of the afore said Act provides for the jurisdiction of the Court.

15. Additionally, "The Magistrate's courts Act, Act No. 26 of 2015", being an Act of Parliament provides formidable strength to this argument. At that particular moment, the Act gave effect to the provisions of Article 23 (2) and 169 (2) of the Constitution of Kenya which conferred jurisdiction functions and powers on the Magistrate's Courts. Section 9 of the Act deals with claim on Employment, Labour Relations claims, Lands and environment cases and provides that:-

"A Magistrate's Court shall:-

(a) In the exercise of the jurisdiction Conferred upon it by Section 26 of the Environment and Land Court Act (Cap 12A) and subject to the pecuniary Limits under Section 7(1) hear and determine m=claims relating to:-

(i) Environment Planning and protection, Climate issues, land use, planning, title tenure, boundaries, rates, rants, valuation, mining minerals and other natural resources.

(ii) Compulsory acquisition of Land

(iii) Land administration and management.

(iv) Public, private and community land and contract, Those in action or other instruments granting any enforceable interest in Land, and

(v) Environment and Land Generally.

While Section 7(1) of the Magistrate's Act Act holds as follows:-

1. "A Magistrate's Court shall have and exercise such jurisdiction and powers in proceedings of a Civil nature which the value of the subject matter does not exceed:-

(a) Kenya Shillings Twenty Five Million (Kshs. 25, 000, 000.) where the court is presided over by a Chief Magistrate

(b) Kenya Shillings Fifteen Million (Kshs. 15, 000, 000.) where the court is presided over by a Senior Principal Magistrate;

(c) Kenya Shillings Ten Million (Kshs. 10, 000, 000.) where the court is presided over by a Principal Magistrate[;

(d) Kenya Shillings Seven Million (Kshs. 7, 000, 000.) where the court is presided over by a Senior Resident Magistrate

(e) Kenya Shillings Five Million (Kshs. 5, 000, 000.) where the court is presided over by a Resident Magistrate

2. "The Chief Justice may from time to time , by notice in the Gazette, revise the Preliminary limits of jurisdiction set out Sub-Section (1) taking into account inflation and change in prevailing economic conditions".

It is quite a relief that recently there was established Small Claims Court which will be dealing with those other case on lower claims than this. Ideally, this court should be dealing with matters where the property are of the worth of more than a sum of Kenya Shillings Twenty Five Million –(Kshs. 25,000,000/=) and above.

16. All these legal prepositions were elaborately and in details extrapolated in the famous authorities of the Supreme Court of Kenya in the **Petition No. 5 of 2015 – Republic - Versus – Karisa Chengo and 2 others and In the Civil Appeal No. 287 of 2016 eKLR Laws Society of Kenya –Vs- Malindi Law Society & Others**= They extensively made a determination and by legislation on the jurisdiction by Magistrate's Court to hear and determine dispute relating to the environment and the use and occupation of , and title to land.

It is from this preposition of law that this Honorable Court under the provisions of Section 18 (1) (a) (b) (i), (ii) and (c) of the Civil Procedure Act Cap 21 thus:-

18 (1) - The Power of a court to transfer case instituted in Sub – Ordinate court – on the application of any parties and after notice to the parties and after hearing such of them as desire to be heard, or if its own motion without such notice, the High Court may at any stage:-

a). transfer any suit, appeal or other pending before it for trial or disposal to any court sub – ordinate to it and competent to try or dispose of the same;

that this court is considering the said transfer of the Plaintiff/Applicant's case to the sub – ordinate court for trial where the subject matter is situated or located. In any case, in the event that a suit is filed in the first instance at the subordinate court, the litigant bears greater chances on the hierarchy of justice to prefer an appeal in case he or she gets dissatisfied by the decision of the lower court.

17. The facts of this case are that the Plaintiff/Applicant entered into an agreement - entitled of "Transfer of Mining Agreement" and dated 7th September, 2018 with Defendant/Respondent terms as stated below:-

(a) The Plaintiff/Applicant as the transferor was a holder of the Mining license No. 278 from the Commissioner of mines and Geology for the mining at Wananchi Ranch, Mwatate Sub-County, Taita Taveta.

(b) The Mining claim to be transferred was one covering one Kilometer by 2 Kilometer of the suit property.

(c) The transfer of the mining claims herein was for the sole purpose of exploring prospecting and engaging in mining activities by the transferee.

(d) The Considerations for the transfer of the mining claim, prospecting and engaging in mining activities by the Transferee was to be a sum total of Kenya Shillings Ten Million (Kshs. 10,000,000) to have been paid off by the Transferee, the Defendant/Respondent herein, to the Transferor, Plaintiff/Applicant as follows:-

(i) Upon execution of the agreement a deposit of Kenya Shillings Five Hundred Thousand (Kshs. 500,000/=.)

(ii) A balance of a sum of Kenya Shillings Eight Million Five Hundred Thousand (Kshs. 850,000,000/=) to have been paid up by the transferee within the expiry of five (5) years from the date of signing of the agreement.

(iii) The transferee, Defendant/Respondent herein, was to have released to the Transferee a plot situated at Vindo in Voi Sub-County within Taita Taveta County measuring 50feet by 100feet valued at a sum of Kenya Shillings One Million (Kshs. 1,000,000.00).

According to the provision of Section 38 of "The Land Act" states as follows:-

No suit shall be brought upon a Contract for the disposition of an interest in land unless:-

(i) It is in writing

(ii) Is signed by all the parties thereto

(iii) The Signature of each party has been attested to by a witness who was present when the contract was signed by such parties.

All these above legal ingredients were fully complied with by the parties hereof.

Clearly, from the facts adduced herein, the value of the contract is at Kenya Shillings Ten Million (Kshs. 10, 000, 000.00). Be that as it may, this court is still to establish the total value of the whole suit land. I feel there is need for the Plaintiff/Applicant to file further documentary evidence such as a true and certified copy by a competent and duly authorized Land Economics expert or valuer a Valuation report. This will enable court establish the total value of the suit land and on its own motion decide whether its is actually the subordinate court bears pecuniary jurisdiction over the subject matter. It is for this reason that this court would like to ascertain whether it should continue to handle the matter at this stage or not.

In the given circumstances, I therefore hereby direct that the Plaintiff/Applicant to furnish this Honorable Court with a recently developed land valuation report for the parcel for land known as Reference – Grant No. CR20403 and Land Ref. No. 12924 before the matter is fixed for a pre-trial conference session under Order 11 of CPR to ascertain the pecuniary value of the suit land.

ISSUE No. 2 - Whether the Plaintiff/Applicant is entitled to the temporary injunction orders sought from the Notice of Motion dated 1.9.2020 under order 40 Rules 1 and 2 of Civil procedure Rules in order to preserve the suit land pending the hearing and final determination of the main suit.

The above notwithstanding, under this issue I have relied on the principles laid down in the above famous precedent, the conditions for granting of an interlocutory injunction were settled as follows:-

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly an interlocutory injunction will be normally 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 will decide an application on the balance of convenience”.

Before proceeding further the fundamental issue to ponder here is whether the Plaintiff/Applicant made “a prima facie case” with a probability of success. In the case of “**MRAO –VS- FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] eKLR 125**” “a prima facie” case was described as follows:-

“A prima facie case in a civil application includes but not confined to “a genuine and arguable case”, it is a case which, on material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

I am to answer whether the Plaintiff/Applicant has a “Prima facie” case in her application to warrant an injunction. Essentially, the matter before court are purely on whether there is a breach of contract or specific performance by the parties or not. The burden of proof in the given circumstances lies squarely onto the Plaintiff/Applicant in the preponderance of probability. This burden can only be easily demonstrated by the Plaintiff/Applicant adducing more cogent both documentary and oral evidence during a full hearing trial. From the provisions of Common Law to include the Law of Contract Cap 23 the agreement and the pleadings by the parties hereof the breach of contract can only be well demonstrated through adducing of material facts for insistence the following issues of contention.

(a) Did the Defendant/Respondent make the payments as stated?

(b) Did the Defendant/Respondent release and/or transfer the alternate land to the Plaintiff/Applicant to mitigate the balance payment?

(c) Whether the Defendant/Respondent ever encroached and/or trespassed into the Plaintiff/Applicant portion of the mining claim and in the process blocked the access road and destroyed the vegetation and trees on the land.

All these are issues which would require evidential proof – examination in chief and cross examination as per the provisions of “The Evidence Act”, Cap 80 of the Laws of Kenya. They cannot be determined adequately and fairly at this interlocutory stage. In the given circumstances this court hold that at the Plaintiff/Applicant has failed to demonstrate it has *Prima facie case*” with a chance of success as set out in the case of ***Giella –Vs - Cassman Brown Case (Supra)***.

It is trite law that the grounds in seeking temporary injunctions are in sequential pattern. Now that the Plaintiff/Applicant has failed to prove

the first grounds, the Honorable Court need not spend more precious time venturing into the other well-known 2 grounds. This position was upheld in several Court of Appeal cases including:-

“Kenya Commercial Finance Co. Ltd. –Vs - Afraha Education Society (2001) L EA 86” and *“Civil Appeal (Mombasa) No. 8 of 2015 Hassan Huri –Vs- Abdulrazak Huri Ibrahim* as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction issequential so that the second condition can only be addressed if the first one is satisfied”

ISSUE No. 3 - Whether the parties are entitled to the orders sought.

In light of the above, this Honourable court hereby, do specifically make the following orders:-

- (a) The Notice of Motion application dated 1st September, 2020 by the Plaintiff/Applicant be and is hereby dismissed with costs to the Defendant/Respondent.
- (b) In order to ascertain the pecuniary jurisdiction of this ELC Court the Plaintiff/Applicant is granted 30 days leave from today to have filed and served an authentic land valuation report on the suit land.
- (c) This matter be mentioned on 8th November, 2021 to full compliance of this orders and taking further directions of this court on fast tracking the case further.

ISSUE No. 4 Who will bear the cost of the application.

The provision of Section 27 (1) of the Civil Procedure Act, Cap 21 is clear on the issue of costs being the expenses incurred in terms of time, man hour and monies by the other party in relation to the suit. Costs follow events. As stated above, it is borne by the Plaintiff/Applicant.

IT IS ORDERED

SIGNED, DELIVERED AND DATED THIS 7TH DAY OF OCTOBER 2021

L. L. NAIKUNI

JUDGE

ELC MOMBASA

IN THE PRESENCE OF:

M/S. YUMNA, COURT ASSISTANT

MWAZIGHA - FOR THE PLAINTIFF/APPLICANT

MR. OMOLLO - FOR THE DEFENDANT/RESPONDENT