



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. E100 OF 2021

KENYA RAILWAYS STAFF BENEFITS SCHEME.....PLAINTIFF

VERSUS

ANGLO AFRICAN PROPERTY HOLDINGS LTD.....1ST DEFENDANT

CHIEF LANDS REGISTRAR.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. Coming up for determination is the plaintiffs' Notice of Motion application dated 18th March 2021 and 1st Defendant's Preliminary Objection dated 5th July 2021. The Plaintiff's application seeks the following orders:

i. Spent

ii. Spent

iii. That pending the hearing and determination of the main suit, a temporary order of injunction do issue restraining the 1st Defendant/Respondent whether by itself or its representatives, servants, agents, and/or assignees from constructing, erecting any structure, alienating, trespassing onto, disposing off by selling or in any manner whatsoever and/or in any other manner whatsoever interfering with or otherwise dealing with all that property known as Title Number L.R 209/13554 (I.R Number 83697).

iv. That the Honourable Court be pleased to order the Officer in Charge (OCS), Capitol Hill Police Station to ensure compliance of the orders.

v. That the costs of the application be in the cause.

2. The application together with the sworn affidavit by James Kanyeki Kariuki are premised on the grounds that the Plaintiff was the legal owner of the property **LR No. 209/12178 (IR No. 83697)** having been conferred possession through a Legal Notice Number 169 of 7th September 2006. The Plaintiff indicated that the 1st Defendant had taken possession of part of this land known as **LR No. 209/13554 (IR No. 83697)** and was in the process of developing it and possibly dispose it off. Therefore, if the orders sought were not granted, then the Plaintiff would lose their property and suffer losses.

3. The 1st Defendant opposed the application vide a preliminary objection dated 5th July 2021 on the grounds that:

i. The Plaintiff does not have capacity to institute the proceedings, thus the suit should be struck out.

ii. The Plaintiff's suit is time barred under Section 4 (2) and Section 7 of the Limitation of Actions Act.

4. The 2nd and 3rd Defendants abstained from responding to the applications on grounds that the applications affected the Plaintiff and the 1st Defendant only.

5. The replying affidavit of the 1st respondent dated 8.10.2021 has been expunged from the records, the reason being that the same did not comply with the timelines given by the court and was filed long after the Applicant had filed their submissions.

6. In their submissions dated 30th September 2021, the Applicants reiterated the averments set out in their application adding that their application had met the threshold to warrant issuance of the injunction. They also stated that the 1st Defendant was in the process of developing the suit property and should it be disposed off, they would suffer irreparable harm which could not be compensated by monetary terms. To this end, the Applicants relied on cases of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR which reiterated the position held in Giella v Cassman Brown (1973) EA, Kenya Commercial Finance Co. Ltd v Afraha Education Society (2001) Vol. 1 EA 86 and Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR. They also relied on the cases of Royal Mabati Factory Ltd v Imarisha Mabati Ltd [2018] eKLR and Marple Brooks Projects Company Ltd & another v I&M Bank Ltd (2019) eKLR which referenced the case of Kanorero River Farm Ltd & 3 Others v National Bank of Kenya Ltd (2002) eKLR where Ringera JA stated that “...No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages...”

7. With regard to the preliminary objection, the Applicant submitted that the same should be raised on a point of law as had been detailed in the cases of Joseph Kibaara M’Icuga v M’Chabari Kinoro [2020] eKLR which cited Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors (1969) EA 696 and Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 others (2014) eKLR. It was argued that the objection raised that the applicant did not have capacity to institute proceedings was not a point of law but fact since it called upon the court to look at the Trust Deed that the 1st Defendant had referred to and that the 1st Defendant had not made the said document available to court.

8. On the issue of limitation, the Applicants submitted that the objection could not stand the test of a preliminary objection since the answers to the issues raised were in the pleadings. The Applicant added that the 1st defendant had acquired the suit property fraudulently thus the time started running after the fraud was discovered as provided by **Section 26 of the Limitation of Actions Act**. To this end, reference was made to the case by Hon. Justice Okong’o in Justus Tureti Obara v Peter Koipeitai Nengisoi [2014] eKLR “...As to when the plaintiff herein discovered the fraud alleged against the defendant is a matter to be ascertained at the trial court...” The applicant also relied on the case of John Peter Mureithi & 2 others v Attorney General & 4 other [2006] eKLR and Justus Tureti Obara v Peter Koipeitai Nengisoi (2014) eKLR.

9. The submissions of the 1st Defendant are dated 8th October 2021, where it is stated that they are the registered owners of parcel LR No. 209/13554 (IR No. 83697) having been given ownership by the government on 17th April 2000 after fulfilling conditions of the allotment letter issued on 20th August 1997 and have since been enjoying quiet possession of the suit property. They stated that the Plaintiff has no locus to institute the suit because the Trust Deed and Rules of the Kenya Railways Staff Benefits Scheme dated 3rd May 2006 under Article 19(d) bestowed upon the trustees powers to carry and defend proceedings relating to the scheme. To this end, the 1st Defendant cited the cases of Patrick Kiseki Mutisya (Suing as the Personal Representative of the Estate of Nzomo Mutisya (Deceased) vs KB Shangani & Sons Limited & Others [2012] eKLR and Pius Watene D. Maina (Suing for and on behalf of the Baptist Convention of Kenya) v Director General Kenya Urban Roads Authority & 5 others [2020] eKLR where it was held “...Where a society’s constitution stipulates that suits can only be instituted or defended by another person or body, the constitution being the supreme law of a society, any other person or body, be they trustees or anything else, cannot operate ultra vires the constitution...”

10. On whether the suit was time barred under **Section 4(2)** and 7 of the **Limitation of Actions Act**, it was submitted that the 1st Respondent obtained title to the suit property in 2000 and the suit was filed in 2021 which was 21 years later without leave to file the suit out of time. They added that the issue of fraud fronted by the Plaintiff was without evidence and that the Plaintiffs had not exercised diligence to ascertain the position of the suit property. To this end reference was made to the cases of Edward Moonge Lengusuranga v James Lanaiyara & Another (2019) eKLR and Margaret Wairimu Magugu v Karura Investment Limited & 4 others (2019) eKLR.

11. With regard to the application for injunction, it was submitted that the same did not meet the threshold set out in Giella v Cassman Brown since the Applicant had not demonstrated a *prima facie* case with a possibility of success. It was stated that the 1st Respondent acquired title to the suit property in 2000 while the Plaintiff stated that they were issued an allotment letter in 2020. Thus an allotment letter could not be superior to a title deed and that the Plaintiff had also not evidenced how their rights had been infringed. To this end, reference was made to the cases of; Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 others 182/1992 9 Nyeri, Dr. Joseph N.K. Arup Ng’ok v Justice Moijo Ole Keiyua & 4 others C.A.60/1997 and Njuwangu Holdings Ltd vs Langata KPA Nairobi & 5 Others (2014)eKLR.

12. In conclusion, the 1st Respondent states that it stands to be prejudiced if the injunction was granted since they had been in possession of the property for over 21years. As such, the balance of convenience tilted towards not granting the injunction.

Analysis and Determination

13. Having analysed the application, objection, rival submissions, legal framework and case laws, this court sums the issues for determination as:

i. Whether the 1st defendant’s grounds for preliminary objection dated 5th July 2021 meets the laid out threshold;

ii. Whether the plaintiff’s Notice of Motion application dated 18th March 2021 meets grounds for grant of temporary injunction.

The Preliminary Objection

14. The preliminary objection seeks to strike out the suit on grounds that the Plaintiff does not have capacity to sue as stipulated by the Scheme’s Trust Deed and that the suit was time barred under **Section 4(2)** and 7 of the **Limitation of Actions Act**. It is trite law that a

preliminary objection should be raised on a point of law as has been embedded in the *locus classicus* case of **Mukisa Biscuit v West End Distributors Ltd [1969] E.A. 696**, where it was stated that;

“... So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose off the suit...”

15. This position was buttressed by the Supreme Court of Kenya in **Kenya National Commission on Human Rights v Attorney General: Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** paragraph 83, where the following pronouncement in relation to preliminary objection was made;

“... we find it quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law...”

16. Therefore is the question of capacity to sue and limitation of time questions of law or facts? In responding to this, the court finds that some questions of law or fact are so intertwined that one cannot be answered without alluding to the other. On the face value, it is accurate to state that they are questions of law. However, in this particular case the court finds that the grounds indicated on the preliminary objection are borderline questions of fact.

17. The 1st Defendant outlined that the Plaintiff's capacity to sue is espoused in the Trust Deed and Rules, particularly under **Article 19(d)** thereof. In order to determine whether the Plaintiff has capacity to sue, the court is called upon to interrogate the said Trust Deed (which should be adduced as evidence). On the issue of limitation, I find that paragraph 8 of the plaint contains the particulars of fraud in the manner the 1st Respondent allegedly acquired the suit property. In order to determine if the suit is barred by time, the court is called upon to investigate the question of ownership and scrutinise documents.

18. In the Supreme Court of Kenya case of **Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others [2014] eKLR** at paragraph 97, the court had this to say on when a question of law becomes a question fact:

... Leoncio v. De Vera, G.R. No. 176842, 546 SCRA 180, 184: “...For a question to be one of law, the same must not involve an examination of the probative value of the evidence presented by the litigants or any of them. The resolution of the issue must rest solely on what the law provides on the given set of circumstances. Once it is clear that the issue invites a review of the evidence presented, the question posed is one of fact...”

19. Quite clearly, the issues raised by the 1st Defendant are not pure points of law hence the Preliminary Objection must fail.

The Application dated 18.3.2021

20. In granting interlocutory injunctions, I make reference to the case of **Giella v Cassman Brown Co Ltd [1973] EA 358** where the following grounds were established. First, the Applicant must demonstrate a *prima facie* case with a probability of success. Secondly, an interlocutory order will not be granted unless it is demonstrated that the Applicant might suffer irreparable injury which would not be adequately compensated by an award of damages. Lastly, if the court is in doubt on the above two requirements, it will decide the application based on the balance of convenience. This was also reiterated in the Court of Appeal case of **Nguruman Limited versus Jan Bonde Nielsen & 2 others (2014)eKLR**.

21. In **Timothy Alvin Kahoho V Secretary General of the East African Community [2012]eKLR**, it was stated that,

“...The grant or refusal to grant a temporary injunction is an exercise of the Court's judicial discretion which must be exercised judiciously. The purpose of a temporary injunction is to maintain the status quo”

22. What is the status quo appertaining to the suit land? The answer is to be found in paragraph 6 of the plaint where the Applicant states that;

“ The 1st Defendant hived off part of the property measuring 0.36 hectares and is in possession of the hived property and upon conducting an official search, the Plaintiff learnt that the 1st Defendant is the registered owner of the hived off property under the title L.R 209/13554 (I.R.NO.83697) hereinafter known as the suit property..”

23. Thus the suit property is in possession of the 1st Defendant who is also the registered owner thereof. The issue as to how the 1st Defendant acquired the suit land, or who ought to be the rightful owner of the disputed portion is a question to be determined in the main trial.

24. The court has also taken into account the nexus between the orders sought in the application *vis a vis* the final prayer (b) in the plaint which is a prayer for mandatory injunction. Having established that the 1st Defendant is the one in possession of the suit property, then the grant of the injunctive orders would amount to granting a major relief at the interlocutory stage. In the case of **Daniel Atibu Jasimba v Ainea Sandanyi Magana [2013] Eklr**, the court had this to say with regard to issuance of a major relief;

“ The court is also reluctant to issue orders to restrain the defendant from entering his residence although such residence

belongs to the Plaintiff. Since the Plaintiff's suit is for eviction of the Defendant from the said residence, such an injunction will amount to granting a major relief in the suit without the benefit of a hearing”

25. In conclusion, I find that both the Application dated **18.3.2021** and the Preliminary Objection dated **5.7.2021** have no merits and are hereby dismissed with each party bearing their own cost. I however give an order that the suit land is not to be alienated.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Onenge and Ms Ongeru for the 1st Defendant

Mrs Mwamboru for the 2nd and 3rd Defendants

Kimeto holding brief for Juma for the Plaintiff

Court Assistant: Eddel Barasa