



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 395 OF 2017

PETRO OIL KENYA LIMITED.....PLAINTIFF

AND

THE NATIONAL POLICE SERVICE COMMISSION.....1ST DEFENDANT

THE OFFICER IN CHARGE TONONOKA POLICE

ADMINISTRATION CAMP.....2ND DEFENDANT

THE ETHICS AND ANTI CORRUPTION COMMISSION.....3RD DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 21st May, 2019 in which the 3rd Defendant/Applicant seeks interlocutory orders of inhibition to restrain the Plaintiff/Respondent, whether by itself or through its agents, servants or assigns from alienating, transferring, charging, leasing, consolidating, disposing of, wasting or undertaking any construction or development of any nature thereon or any part thereof of parcel of land described as MOMBASA /BLOCK XVII/1457 or from howsoever dealing with the said property pending hearing and determination of the 3rd Defendant's counter-claim against the plaintiff herein. The application is founded upon the grounds on the face of the motion and supported by the affidavit Mohamednoor Issack sworn on 21st May 2019 and a supplementary affidavit sworn on 13/8/2019.

2. In a nutshell, the Applicant's case is that the suit property had already been allocated and reserved for public utility for members of the National Police Service attached to the Administration police and as such, the suit property was not an unalienated Government land and was not available for alienation or allocation to the plaintiff or any other preceding person at all. It is the Applicant's contention that the registration of the plaintiff as owner of the suit property, together with the preceding allocation, alienation, ownership, use and occupation was corrupt, irregular, illegal and fraudulent. In its counter-claim, the Applicant seeks inter alia, a declaration that the allocation and/or alienation of the suit property in favour of the plaintiff was irregular, fraudulent, illegal and consequently null and void, and an order for rectification of the register by cancellation of the title and all entries made on the land register in favour of the plaintiff in respect of the suit property as well as permanent order of injunction.

3. In opposing the application, the plaintiff filed a replying affidavit sworn by its Chief Executive Officer Benjamin Kingori on 5th August 2019. It is the Plaintiff's case that it is the registered proprietor of the suit property and denies that the allocation of the suit property and issuance of the certificate of lease over it to the plaintiff was done corruptly, unlawfully and unprocedurally. The Plaintiff further denies that the suit property and issuance of the certificate of lease over it to the plaintiff was done corruptly, unlawfully and unprocedurally. The plaintiff further denies that the suit property is public land belonging to the Government of Kenya. The plaintiff avers that it has a valid title in respect to the suit property and is therefore entitled to the rights of ownership of land as conferred under the Constitution of Kenya and all other laws. Further, that Applicant acknowledged the plaintiff as the legal proprietor of the suit property. That if the orders by the Applicant are granted, the rights conferred by law to the plaintiff as the legal proprietor shall be violated. The plaintiff avers that the Applicant has come to court with unclean hands as it is acting at the behest of the 1st and 2nd Defendants who have failed to comply with the orders issued by the court on 5th October, 2018.

4. I have considered the application and the submissions made. In this case, it is not in dispute that the plaintiff is registered as the proprietor of the suit property. The Applicant however, contends that the suit property was not an unalienated government land, arguing that the same had already been allocated and reserved for public utility for members of the National Police Service attached to the Administration Police and as such the same was not available for alienation or allocation to the plaintiff or any other person. It is the Applicant's contention that the registration of the plaintiff as owner of the suit property, together with the preceding allocation, alienation, ownership, use and occupation was corrupt, irregular, illegal and fraudulent.

5. The principles to be applied when considering an application for injunction such as this are well settled. In the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**, the applicant must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage which would not adequately be compensated by an award of damages, and thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

6. In the case of **Mrao Ltd –v- First American Bank of Kenya (2003) KLR 125**, a prima facie case was said to be one in which on the material presented to the court or 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 opposite party.

7. The courts have also accepted that in dealing with an application for an interlocutory injunction, the court is not necessarily bound by the three principles set out in the Giella case. The court may look at the circumstances of the case generally and the overriding objective of the law. In **Suleiman –v- Amboseli Resort Ltd (2004) KLR 589**, Ojwang Ag. J. (as he then was) stated thus:

“.....counsel for the defendant urged that the shape of the law governing the grant of injunction relief was long ago in Giella –v- Cassman Brown in 1973 cast in stone and that no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover international made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770 – 781. A fundamental principle of.... that the court should take whichever counsel appears to carry the lower risk of injustice if it should turn out to have been “wrong”..... Traditionally, on the basis of the well accepted principles set out by the court of Appeal in Giella –v-Cassman Brown the court has had to consider the following questions before granting relief.

iv) is there a prima facie case....

v) does the applicant stand to suffer irreparable harm....

vi) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory relief, should always opt for the lower rather than the higher risk of injustice....”

8. In the above case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned.

9. In this case, there is a dispute over the ownership of the suit property. Whereas the plaintiff contends that it is the legal proprietor and that it legally acquired the property, the Applicant on the other hand contends that the property is public land that had been reserved for use by the National Police Service and therefore was not available for alienation or allocation to the plaintiff or anyone else. At this interlocutory stage, pending the substantive canvassing of the case, in relation to the prayers sought, my understanding is that the Applicant seeks injunctive relief to the extent that the suit property may not be pre-empted through alienation, disposal or waste. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

10. Having looked at the application and considering the circumstances of this case, I allow the application to the extent that the plaintiff is restrained from alienating, transferring, charging, leasing of the parcel of land known as MOMBASA/BLOCK XVII/1457 until the case is heard and determined. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 9TH DAY OF MARCH 2020.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Kinuthia for plaintiff

No appearance for 1st and 2nd defendants

Makori for 3rd Defendant

Yumna Court Assistant

C.K. YANO

JUDGE