



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 11 OF 2019

CELESTIAL TRADE (K) LTD.....PLAINTIFF

-VERSUS-

MACHARIA S/O MUCHIGI & 20 OTHERS.....DEFENDANTS

RULING

Background

1. This is a ruling in respect of two applications. The first application is dated 24/1/2019. It is brought by the plaintiff and it seeks the following orders:-

1. Spent

2. Spent

3. Spent

4. A temporary injunction be issued restraining the defendants/ respondents whether acting in person, by proxy ,through their agents, servants ,directors ,employees or any other person acting at its behest ,from trespassing, engaging in construction/fencing and/or interfering in any other way with LR No.11026/1 (the suit property), pending hearing and determination of the suit.

5. Spent

6. Spent

7. Spent

8. Costs of this application be provided for.

2. The second application is dated 26/3/2019 it is brought by the 2nd, 4th, 8th, 9th, 10th, 11th, 12th, 13th, 17th, 18th, 20th and 21st defendants and it seeks the following orders:-

1. Spent

2. That pending the hearing and determination of the instant application, this Honourable Court be pleased to grant an order of stay, staying the implementation and/or enforcement of the ex-parte interim orders issued by the Honourable Justice E Obaga on the 30th of January 2019.

3. That pending the hearing and determination of the instant application, this Honourable Court be pleased to discharge, vary, vacate and or set aside the ex-parte interim orders of injunction issued by the Honourable Justice E Obaga on the 30th of January 2019.

4. That the Honourable Court be pleased to strike out the plaintiff's Notice of Motion application dated 24th January 2019 together with the attached plaint dated 24th January 2019.

5. That cost of this application and the main suit be borne by the plaintiff.

6. That any such further orders as this Honourable Court may deem fit.

3. The Plaintiff is the registered owner of **LR No.11026/1** whereas the defendants are the registered owners of **LR No.13166**. The defendants were initially the registered owners of **LR No.8442** which was about 100 acres. This plot was at Njiru. The first President of the Republic of Kenya the late Mzee Jomo Kenyatta asked the defendants to surrender their 100 acres in Njiru in exchange of land of the same acreage at Kahawa west area. The defendants were initially given about 85 acres of land hived off from Kamiti prison land and were later given about another 16 acres of land hived from a neighbouring land. The total came to about 100 acres. The titles to the two plots were amalgamated to form **LR No.13166** which has remained undivided to date because the owners have failed to agree on the mode of distribution.

4. On 25th January 2019, the plaintiff filed a suit against 21 defendants in which it sought a declaration that it is the registered owner of the **LR 11026/1**, a permanent injunction restraining the defendants from interfering with its property and a permanent injunction compelling the defendants to stop interfering with the demarcation exercise being conducted by the Directorate of Surveys to resolve a boundary dispute. The plaintiff contemporaneously filed an application seeking a temporary injunction stopping the defendants from interfering with the demarcation of boundary by Directorate of Survey, leave to serve by substituted service and for OCS Kiamumbi Police Station to provide security during the demarcation exercise.

5. When the application came before me on 28/1/2019, I granted leave to serve by substituted service, injunction to stop defendants from interfering with boundary demarcation and an order for OCS Kiamumbi to provide security. The grant of the three orders ex-parte is what prompted the filing of the second application. In view of what has emerged herein, I will first deal with the second application. **Application dated 26/3/2019.**

Applicants contention.

6. The applicants in this application contend that the ex-parte orders which were granted on 28/1/2019 were granted based on non-disclosure of material facts. The applicants contend that the orders were obtained by the plaintiff who misled the court that the dispute involving the parties herein was one of a boundary dispute when actually the dispute was one of ownership.

7. The applicants contend that the title which the plaintiff has was obtained fraudulently because the land which the plaintiff claims was the same land which was amalgamated to the land the applicants had been given to make it 100 acres which acres are intact and comprised in LR 13166 which has never been subdivided . They contend that the deed plan which the plaintiff has has been disowned by the Director of survey and that the ministry of lands have confirmed that the deed plan which the plaintiff has is the one which was in respect of land which was surrendered and amalgamated to form LR 13166.

8. The applicants also argue that the company which was allegedly granted the land being claimed by the plaintiff that is Magneel Investments Limited was incorporated between 1st to 30th June 1991 whereas the title in its favour was signed in 1999 and the grant took effect from 1971. The applicants argue that it was not possible for the company which had not been incorporated to be given land.

Respondents' contention

9. The plaintiff/respondent in a replying affidavit sworn on 23/4/2019 contends that the letters which the applicants are relying on were authored by biased officers from the lands ministry and Director of surveys; that the argument by the applicant does not make sense and that in any case, the respondent was the third purchaser for value without notice of any defect in the title.

10. The respondent contends that applicants' application is meant to pre-empt the findings of the Directorate of surveys who are yet to complete and file their report. The respondent further argues that the filing of this application is meant to deny the court the opportunity of accessing the only documents which will aid the court in resolving the dispute herein.

Analysis

11. I have carefully considered the applicants application as well as the opposition thereto by the respondent. I have also considered the submissions by the applicants. The respondent did not make any submissions touching on the applicant's application. There are two issues which emerge for determination. The first is whether the injunctive orders given on 28/1/2019 should be discharged. The second is whether this suit should be struck out.

12. On the first issue, it is clear that the respondent in filing the application of 24/1/2019 was not candid. The application was couched in such a way to appear that the only dispute was on boundary. This is why the court granted an ex-parte order restraining the applicants from interfering with the marking of the boundary. It has now turned out that the dispute was on ownership. Had the respondent disclosed that what was in dispute in on ownership, the court would not have granted the ex-parte injunction.

13. It is also clear at least from the documents availed that the title being claimed by the plaintiff was unlawfully obtained. Prima facie, the land was hived off from the 100 acres held by the applicants. It is therefore clear that an injunction obtained by concealing material facts cannot be allowed to stand. It is apparent that the surveyor may have gone and carried out the survey as per the court order. However it is important to note that the surveyor has not compiled a report if her letter of 20/3/2019 is anything to go by. As the survey report has not been completed, I will discharge the ex-parte injunction granted on 28/1/2019 as per 5 of the notice of motion dated 24/1/2019. Consequently any report made pursuant to the said order which has now been discharged shall be of no consequence.

14. On the second issue, I must state at the outset that this is a matter whose one set of officials from the lands office and survey office seem

to be saying two different things. There are those officials who processed the title now in contention who have been acting on it as if it was authentic. On the other hand, there are those officials from the same office who say that the title is not authentic. The officials from survey office on the one hand are the ones who were seeking police assistance and on the other hand the officers from the same office are denouncing the deed plan which the same people were seeking to rely on in their exercise.

15. Striking out of a pleading is an exercise which should only be done in a clear case. This is not a case where the plaint can be struck out. I therefore decline to strike out the plaintiff's suit.

Conclusion

16. In conclusion therefore I allow the application dated 26/3/2019 to the extent that the ex-parte injunction granted on 28/1/2019 as per paragraph 5 of notice of motion dated 24/1/2019 and issued on 30/1/2019 is hereby discharged. Any report made pursuant to the said ex-parte order which has now been discharge shall be of no consequence. Costs of this application shall be in the cause.

It is so ordered.

Application dated 24/1/2019

Applicant's contention

17. In this application, the applicant contends that it is the owner of LR No.11026/1 which borders LR 13166 owned by the respondents. In or around 16/10/2018 the respondents started interfering with its land by encroaching on it. The respondents escalated their acts by clearing the bushes and putting up temporary structures and denying its agents access to the land. The applicant tried to get assistance from Kiamumbi police station in vain. The applicant wrote to the Director of surveyS to come and demarcate the boundary between the two properties but this was not possible as the officers from survey office could not be allowed to do the demarcation. It is on this basis that the applicant is seeking injunctive orders.

1st, 3rd and 7th respondents contention

18. The respondents opposed the applicant's application based on grounds of opposition filed on 28/4/2019. The respondents contend that the applicant's application is misconceived, incompetent, and unsustainable and that it is an abuse of the process of the court. The respondents rely on correspondence from the lands office and survey office who have denounced the deed plan which the applicant has and the letter from the Lands Office which shows that the title held by the applicant is not authentic.

19. I have considered the applicants application as well as the opposition thereto by the respondents. I have also considered the submissions by the applicants. The respondent's submissions did not touch on this application. The only issue for determination is whether the applicant has disclosed a prima facie case to warrant issuance of an injunction.

20. The conditions for grant of an injunction were settled in the case of **Giella Vs Casman (1973) EA 358** .First an applicant must show a prima facie case with probability of success. Second, the applicant has to show that he will suffer irreparable injury which will not be compensated in damages. Third, if the court is in doubt it will decide the application on a balance of convenience.

21. In determining whether an applicant has disclosed a prima facie case, the court is not expected to delve too much into documents or make final findings at interlocutory stage. In the instant case, the documents presented before court show that the title held by the applicant may not have been obtained in a lawful way. The respondents have been in occupation of their property since the 70's. The holder of title who passed it on for it to finally land on the applicant obtained it in 1989. Though the applicant has title, this alone cannot form the basis of a finding that it has established a prima facie case. With these serious doubts, I do not see what prima facie case the applicant has.

22. The land in issue has been vacant and there is nothing to suggest that it will be sold or built up. The respondents themselves have had cases in court over the same and are currently not agreeable on who is to have the compensation which was given following acquisition of part of the land for construction of the Northern by pass. If there is anything which would happen and the applicant finally turns out to be the owner, the applicant will be compensated in damages.

23. The first owner, the second owner and now the applicant as the owner have not occupied the land because the respondents have been defending it. It is therefore clear that even if the court was to entertain any doubts, the balance of convenience will tilt towards the respondents. I therefore find that the applicant's application lacks merit. It is hereby dismissed. Costs shall be in the cause.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 19th day of September 2019.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Njoroge for Mr Kamau for Plaintiff

Mr Muto for Mr Waweru for 1st, 3rd and 7th defendants

M/s Muturi for 2nd, 4th, 8th, 9th, 10th, 11th, 12th, 13th, 17th, 18th, 20th and 21st

defendant

Court Clerk : Hilda

E.O.OBAGA

JUDGE