



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA

At MOMBASA

CIVIL SUIT NO. 5 OF 2016

SAFARICOM LIMITEDPLAINTIFF/APPLICANT

-VERSUS-

EMFIL LIMITEDDEFENDANT/RESPONDENT

RULING

1. The application before court is the Notice of Motion dated 13th January 2016 in which the Plaintiff seeks an order of injunction to restrain the Defendant, its agents and/or assigns from interfering in any manner whatsoever with the Plaintiff's access to or occupation of the leased portion of the leased property namely L.R. No. KWALE/RAMISI/KINONDO SSS/150 and or interfering with the Plaintiff's equipment on the said property pending the hearing and determination of this suit.

2. The Plaintiff's case, in a nutshell, is that it entered into an agreement with JUA MAISHA LIMITED, the registered owner of property known as L.R. No. KWALE/RAMISI/KINONDO SSS/150 (hereinafter "the suit property"), to lease part of the suit property measuring 102.72 square meters for purposes of installation of communication mast. That after the execution of the lease agreement, the Plaintiff expended an amount in excess of Kshs. 12,500,000/= on construction of the site together with erection and installation of communication mast.

3. The Plaintiff pleaded that on or about 2nd October 2015, it received a letter from the Defendant's advocates demanding that it dismantles the mast. That the Plaintiff is now apprehensive that the Defendant may unlawfully interfere with the Plaintiff's lease and or occupation of the suit property thereby occasioning the Plaintiff to and its customers or subscribers suffer irreparable loss and damage.

4. In its written submissions filed on 1st August 2016, the Plaintiff submitted that although the principles enunciated in the case of **GIELLA V. CASSMAN BROWN LTD [1973] E.A** are considered basic, the court in determining an application for injunction can consider the circumstances of the case generally and the overriding objective of the law. To support that, the Plaintiff relied on the case of **JAN BOLDEN NIELSEN V. HERMAN PHILIPUS STEYN & 2 OTHERS [2012] eKLR** in which Mabeya, J. stated that:

*"I believe that in dealing with an application for interlocutory injunction, the court is not necessarily bound to the three principles set out in the **Giella vs Cassman Brown case**. The court may look at the circumstances of the case generally and the overriding objective of the law."*

5. The Plaintiff urged the court to consider the doctrine of sanctity or indefeasibility of title, and in

particular the Torrens System envisaged in the Land Registration Act 2012.

6. On whether it has established a *prima facie* case, the Plaintiff urged the court to be guided by the guideline of what amounts to a *prima facie* case as was set in the case of **MRAO LTD V. FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS [2003] eKLR**, to the effect that the court should consider whether on the material presented, the court properly directing itself can conclude that there exists a right which has apparently been infringed by the other party to call for an explanation or rebuttal from the latter.

7. The Plaintiff submitted that its right had been infringed or threatened to be infringed. The Plaintiff's case is that pursuant to **sections 24 and 25** of the Land Registration Act 2012, it is clear that the Plaintiff was dealing with a registered owner of the suit property who has indefeasible title which has not been revoked by the court. The Plaintiff contended that after it established that the suit property was registered in the name of JUA MAISHA LIMITED, the Plaintiff conducted an official search on 27th November 2013 which confirmed the ownership. That it entered into an agreement with JUA MAISHA LIMITED after establishing ownership. The Plaintiff submitted that it was an innocent party without any knowledge of any defect in title.

8. The Plaintiff submitted that as long as the title is still in the name of JUA MAISHA LIMITED, the issue of ownership between JUA MAISHA LIMITED and the Defendant is still pending in court and the court is yet to cancel the said title, the Plaintiff has a protected interest in the property and any threatened violation of the interest or right should not be condoned.

9. On whether it stands to suffer irreparable loss, the Plaintiff submitted that it has invested a sum of Kshs. 12,500,000.00 in the project which amount is by all means colossal. Further that the booster erected by the Plaintiff boosts its network in Kwale Chale Island and the larger part of Kinondo Beach in South Coast. That the dismantling of the booster will lead to loss of income and also disconnect essential services to the people of South Coast. That this cannot be compensated by an award of damages.

10. On balance of convenience, the Plaintiff submitted that the Defendant does not stand to suffer at all if the orders sought are granted because the Plaintiff is not disposing of or wasting the suit property.

11. The Defendant opposed the application through the Grounds of Opposition and the Replying Affidavit of VINAYCHANDRA DAMODAR POPAT both filed on 29th June 2016.

12. The Defendant's case is that it is the lawful registered owner of 140 plots namely Land Reference Numbers 13433/6-13433/143 situate in South West of Mombasa Municipality in Kwale District under Registration of Titles Act, Cap. 281 Laws of Kenya. That the Defendant was in sole and peaceful occupation of the properties from 1987 to 2007 when the same were invaded by a group of people.

13. The Defendant stated that the invaders claimed that they had been allocated the property by the Director of Land Adjudication and Settlement and had been issued with titles by the Land Registrar. That the new titles were issued under the Registration of Titles Act while the Defendant's original title had been issued under the Registration of Titles Act. That this was despite the fact that the title documents have never been surrendered by the Defendant to the Commissioner of Lands to necessitate the conversion of the registration from one regime to the other. The Defendant contended that the issuance of the titles to the third parties was unlawful.

14. According to the Defendant, it challenged the issuance of the titles to the invaders in **HCCC No. 181 of 2007: Emfil Limited v. Hamisi Mwalimu, the Commissioner of Lands & Others** where judgment was delivered in its favour and the new titles cancelled. The Defendant stated that later, the Attorney General purported to revoke its titles to the said properties through Gazette Notice Number 6652 published on 15th June 2011 prompting the Defendant to challenge the revocation vide **Civil Application JR No. 84 of 2011** in which a stay order was given by Odero, J on 8th August 2011.

15. The Defendant contended that instead of complying with the stay order, the Commissioner of Lands, Registrar of Titles, District and Director Land Adjudication & Settlement proceeded to purportedly issue letters of offer and Certificates of Title in respect of the Defendant's property. That the suit property is one of the properties whose title was issued so unlawfully issued in breach of the court order.

16. That in respect of the actions of the Land Registrar which were undertaken in breach of the court order, the Defendant filed contempt of court proceedings in **Mombasa Constitutional Reference No. 12 of 2012** which was decided against the Defendant. The Defendant appealed the decision in **Civil Appeal No. 312 of 2012** in which judgment was delivered on 18th July 2014 by which the Defendant's titles were restored. The Defendant later published notices of *Caveat Emptor* in local dailies.

17. The Defendant stated that contrary to the court orders mentioned above, the Registrar of Lands, Kwale had continued to deal with the Defendant's properties and allowed transfer of some of the properties. That the Registrar's actions prompted the Defendant to file a case, **ELC No. 113 of 2015: Emfil Limited v. The Hon. Attorney General & 423 others** in which JUA MAISHA LIMITED is named as the 317th Defendant. That the case is still ongoing. The Defendant stated that this court, on 27th May 2015, granted orders to restrain the Defendants from dealing with, trespassing onto, transferring, developing or interfering in any way with the property commonly known as Kwale/Ramisi/Kinondo Squatter Settlement Scheme which orders have been extended to date.

18. It is the Defendant's case that in light of the court orders mentioned above and the Court of Appeal's judgment, no dealings whatsoever can be made in respect of those properties and third parties ought to be restrained from alienating, transferring, developing or dealing with the Defendant's property in any way. The Defendant contended that JUA MAISHA LIMITED entered into the subject lease with the Plaintiff on 26th August 2015 contrary to the judgment and court orders aforementioned.

19. In its written submissions filed on 4th November 2016, the Defendant submitted that the Plaintiff has not satisfied the ingredients necessary for the grant of interlocutory injunctions as established in the case of **Giella v. Cassman Brown Ltd.** On whether the Plaintiff has established a *prima facie* case with a probability of success, the Defendant submitted that the Plaintiff case cannot succeed if the same proceeds to full trial as the parcel of land in question clearly belongs to the Defendant and the Plaintiff has acted in breach of court orders granted in favour of the Defendant.

20. On irreparable harm that cannot be compensated in damages, the Defendant submitted that the Plaintiff has quantified the sum involved in erecting the mast on the suit property at Kshs. 12,500,000.00 and therefore the Plaintiff cannot claim that it will suffer irreparable harm that cannot be compensated by an award of damages.

21. On balance of convenience, the Defendant's case is that it is the registered owner of the suit property and there is no doubt that it has been affected and continues to be adversely affected if the Plaintiff does not vacate the property. Further, the Defendant submitted that it cannot be ignored that there are existing orders that refrain any party from interfering with the suit property. The Defendant therefore submitted that the balance of convenience tilts in its favour.

22. Taking the pleadings filed and submissions rendered, this court is tasked to determine whether the applicant merits the granting of the orders sought. The applicant entered into a lease over the suit property on 26th August 2015 with Jua Maisha Ltd. The pleadings reveal that there is no privity of contract between the applicant and the defendant. This is set out in paragraph 9 in the affidavit in support of the application. The applicant however filed this suit on the basis of a letter written to them by the defendant on 1st October 2015 asking it to dismantle the mast constructed on the suit property which the defendant stated it owns.

23. It is obvious the applicant was aware of the defendant's claim over the suit land before filing of this suit. Due diligence required of the applicant to verify the defendant's allegations before bringing a suit against it to establish whether or not the applicant would be able to establish a case against the defendant.

Do the applicant's pleadings disclose a prima facie case with a probability of succeeding? The applicant pleaded that it did a search which revealed that JUA MAISHA LTD is the registered owner of the suit property hence the reason it entered into the lease agreement. JUA MAISHA LTD is not joined in this suit either as a plaintiff or a defendant. In spite of this omission, the applicant relied on the provisions of section 24 & 25 of the Land Registration Act to submit on the sanctity and or indefeasibility of title that it does not own. In the replying affidavit, the defendant went at length to demonstrate the steps it has taken to protect its title through the various court cases whose pleadings were annexed and have been mentioned in the above paragraphs. At the time the applicant was getting into a lease agreement with the said JUA MAISHA LTD, there was in existence an order of injunction restraining JUA MAISHA LTD amongst others from dealing with the suit property. The defendant stated that they published this order in the local dailies.

24. In my opinion, the fact that there is no privity of contract between the defendant and the applicant; that the defendant holds a decree that has not been set aside; the existence of the temporary orders of injunction at the time the lease agreement was executed; that JUA MAISHA LTD is not joined in this suit and the fact that the applicant was notified in October of the defendant's interest over the land before filing of this suit, I hold that the facts presented do not establish a prima facie case with a probability of succeeding. I say so because in my view, it is not open to the applicant to defend the sanctity of title of JUA MAISHA LTD with no supporting documents attached. Secondly, an injunction is an equitable relief and he who comes to equity must come with clean hands. Having been notified of the existence of the orders of injunction issued by this court, the applicant cannot apply to the same court for similar orders when the same would be in conflict. The best approach in my view would have been to apply to be joined in the former suit and then ask the court to vary and or set aside those orders.

25. The applicant also pleaded that it will suffer irreparable loss if the orders are not granted. As submitted by the defendant, the applicant already gave the cost of putting up the project at Kshs 12500000 which is quantifiable. The applicant did also say that the mast is serving the residents of Chale Island and the surrounding areas using its network. I opine this is not the only parcel where the mast can be placed to serve the said customers. The applicant does have the option of relocating the mast to an alternative land with no dispute and having geographical features as this one to serve its customers/subscribers. No evidence was put forth that such a parcel of land cannot be found in that area. Therefore the only loss which is quantifiable is in terms of the cost of relocating and putting up the mast. The argument for irreparable loss also fails.

26. Further it is my finding that the issues raised in the submissions of the applicant are not supported by the facts contained in the pleadings. There is nowhere in the supporting affidavit or the plaint where the applicant has pleaded issues that would allow it to apply the doctrine of Torrens System of registration. Consequently the case law cited in support of this line of submission does help the applicant's case. Neither is the government who as keeper of the master record of all land and their owners sued. The defendant cannot be made to bear the responsibilities of these third parties whom the applicant has not sued.

27. For the above reasons, I make a finding that there is no merit in this application. The same is dismissed with costs to the defendant.

DATED, SIGNED & DELIVERED AT MOMBASA This 6th Day of April 2017

A. OMOLLO

JUDGE