



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
CIVIL SUIT NO. 2 OF 2017
MOHAMMED BAFFIQ INVESTMENTS LIMITED.....PLAINTIFF/APPLICANT
VERSUS
1. SHELLY HOLIDAY INN
2. SALIM BENDERA
3. ALI BABU
4. RAMA
5. KISAKA
6. RIZIKI
7. ADEM
8. REUBEN
9. GEORGE
10. MOODY..... RESPONDENTS/DEFENDANTS

RULING

1. The application for determination is dated 5th January 2017, it is brought under the provisions of Order 40 Rule 1 and 2 of the Civil Procedure Rules and Sections 1A, 1B and 3 B of the Civil Procedure Act. The applicant seeks the following orders.

1. Spent

2. Spent

3. Spent

4. THAT this Honorable Court do issue a temporary injunction restraining the respondents by themselves, agents, assignees, employees and/or servants from trespassing, constructing

houses or structures and/or having any dealing with the portion of land on plot NO. MOMBASA/M.S/BLOCK V/102 pending hearing and determination of the suit.

5. THAT the OCS Likoni Police Station to supervise execution of this order.

6. THAT the costs of this suit be provided for.

2. The application is made on the grounds that the respondents have trespassed into the applicant's plot and are constructing structures without the applicant's consent and the applicant stands to suffer irreparable loss and damage because the respondents and their agents are excavating the said land to waste. The application is further supported by the affidavit of Mohamed Rafiq sworn on 5th January 2017, and a further affidavit dated 24th February 2017. Briefly the applicant contends that it is the registered owner of PLOT NO. MOMBASA/M.S/BLOCK V/102 and the land was vacant until the respondents invaded it and started constructing illegal structures without the consent of the applicant. That the respondents are excavating sand from the said land which action has made the land lose its value. The applicant further contends that despite its attempt to stop the respondents from carrying on with their unlawful activities, the respondents refused and/or neglected to do so.

3. In opposing the motion, the 9th respondent filed a replying affidavit dated 14th February 2017. Mr. George Obama deposed that the respondents have been in possession and usage of the suit plot for twenty (20) years and that the structures complained of are as old as their occupation of the property. The respondents aver that for all those years, they have been using the suit property as their fishing bay under the name Maphophoni Self Help Group. The respondents denied that the applicant is the registered owner of the suit property.

4. The parties advocates filed written submission in which they fully relied on in arguing this application. Both outlined the facts as contained in their pleadings. The applicant added that it has met out a case for issuance of an interlocutory injunction as set out in the celebrated case of GIELLA –VS- CASSMAN BROWN & CO LTD, because it is the registered owner of the suit land whereas the respondents are mere trespassers.

5. The respondents on their part besides the facts submitted that the applicant has not met the threshold for grant of an interlocutory injunction and that the application is defective, bad in law, misconceived, lacks merit and an abuse of the court process. The respondents further submitted that there was no evidence tendered by the applicant showing that there was encroachment on the suit property. They also submitted that there was no evidence adduced by the applicant to confirm that the land occupied by the respondents is the same one belonging to the applicant. Further that the suit is defective, the authority to appear and plead having been filed after the suit had already been filed. They referred the court to several authorities and urged the court to dismiss the application.

6. I have set out the parties respective rival positions in this matter. What is to be determined is whether in the circumstances of this case the plaintiff would be entitled to the injunctive relief sought. The plaintiff has demonstrated that it is the registered owner of the suit property. The plaintiff has furnished a copy of the title deed showing that the property is registered in its name. The same is marked "MRI" and annexed to the supporting affidavit of Mohamed Rafiq dated 5th January 2017. The annexures attached to the plaintiff's further affidavit dated 24th February 2017 show the history of how the land, which was registered in 1971, changed hands from the previous registered owners to the plaintiff's name. I am satisfied that the plaintiff are vested with the absolute ownership of the suit property and further under Section 25 of the Land Registration Act the rights of ownership acquired by the plaintiff are indefeasible except as provided under the Act. Section 25 (1) of the Land Registration Act provides as follows: -

25 (1) the rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject –

a. To the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, and

b. To such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

7. The plaintiff having been registered as proprietor and having been issued with a title deed over title No. **MOMBASA/M.S./BLOCK V/102** is in terms of section 26 (1) of the Land Registration Act entitled to protection of the Law. Section 26 (1) of the Land Registration Act provide as follows:

26 (1) the certificate of title issued by the registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a. On the ground of fraud or misrepresentation to which the person is proved to be a party,; or

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

8. The respondents' claim that they have been in possession and occupation of the suit land for over twenty years was disputed by the plaintiff. In his supporting affidavit, the plaintiff has attached photographs showing sheds made of makuti as well as heaps of building blocks, ballast and sand which appear to have been recently deposited on the land. In their replying affidavit, the respondents claim that they have been operating from the suit land as Maphophoni Self Help Group. I note, however that the registration certificate attached to the said affidavit is for a different entity known as Timbwani Beach Management Unit and which was issued on 1st April 2015. The landing sites for this group covers Timbwani, Shelly, Mavovoni and Kibuyuni while their physical location is Timbwani Fish Landing Site. Even if it is taken that the defendant operate as both Maphophoni Self Help Group and Timbwani Beach Management Unit, it is clear from their own document that their operations cover several sites and not only the suit property. It is also my view that the defendants' continued occupation of the suit property is at the will of the plaintiff and upon being told to vacate and not to contract or excavate, they were obligated to do so.

9. I have looked at the facts that have emerged in this case and the evidence adduced by way of affidavits. It is clear to me that the plaintiff is registered as the rightful owner of the suit property and the defendants have no valid claim against the plaintiff. The defence filed does not raise any counter-claim. In my view, the plaintiff's title is regular and the same is in terms of sections 25 and 26 of the land registration act indefeasible.

The plaintiff is seeking a prohibitive injunction. The threshold for grant of such orders is as enunciated in the **GIELLA –VS- CASSMAN BROWN** case principles. Applying those principles to the present case, I am satisfied that the plaintiff has established a prima facie case with a probability of success. On the second limb as to whether the plaintiff has demonstrated that they stand to suffer irreparable damage that cannot be compensated in damages in case the injunction is not granted, I take the view that if the construction were to be allowed to go on and the excavation of sand from the land carried out, the loss that will result would be irreparable as the status of the property would have changed completely. The balance of convenience would tilt in favour of the plaintiff so that the status of the land is not changed through the defendants continued activities pending the hearing of the suit.

10. For the reasons advanced, I grant prayers 4 and 5 of the Notice of Motion dated 5th January 2017.

11. The plaintiff shall have costs of the application.

Delivered, dated and signed at Mombasa this 15th day of June 2017.

C. YANO

JUDGE