



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 9 OF 2019

ERDEMANN PROPERTY LIMITED.....PLAINTIFF/APPLICANT

VERSUS

SAFARICOM STAFF PENSION SCHEME REGISTERED TRUSTEES...DEFENDANT/RESPONDENT

RULING

1. In the Notice of Motion dated 31st January, 2019, the Plaintiff/Applicant has sought for the following orders:

a. That the Honourable Court be and is hereby pleased to grant a temporary injunction restraining the Defendant/Respondent whether by themselves, contractors, sub-contractors, servants, agents, representatives, employees and/ or anyone claiming under their name or title howsoever from excavating and or demolishing, destroying whether temporary or permanent or otherwise thereon and/ or in any manner howsoever interfering with the Plaintiff/Applicant's sewer line constructed along Quarry Road and old Mombasa Road for its Great Wall Gardens Project situate in Mavoko Municipality pending inter-partes hearing and determination of the suit.

b. That this Honourable Court be and is hereby pleased to grant such other orders as it may deem fit and necessary for the justice of this dispute and to preserve the subject matter in this suit herein being the sewer line from being wasted away.

c. That costs of this Application be provided for.

2. The Application is supported by the Affidavit of Otieno John Kenneth Rajwayi, the Planning Manager of the Applicant, who deponed that on 31st January, 2019, the Applicant obtained necessary approvals from Kenya Urban Roads Authority, Mavoko Water & Sewerage Co. Ltd and Kenya National Highways Authority to construct a sub-trunk sewer line that was to serve the Great wall gardens, which was a project it was developing.

3. The Applicant's Manager deponed that vide Machakos Petition No. 4 of 2017, this court found that the approvals issued to the Applicant herein were irregular; that aggrieved with the decision of the court, the Applicant filed a Notice of Appeal to the Court of Appeal and that the parties herein have been engaged in the negotiations with a view of settling the dispute out of court.

4. It was deponed that between 29th and 30th January, 2019, the Respondent, without any legal, equitable or whatsoever right over the sewer line, commenced excavation works on the Applicant's sewer line and that the Respondent's actions are destructive and are occasioning wasting away and depreciation of the sewer line, thus prejudicing the substratum of the suit.

5. The Respondent opposed the Application vide a Replying Affidavit deponed on 11th February, 2019 by Richard Gitahi, who is a Trustee and the Secretary of the Respondent. It was deponed that the Respondent is the registered owner of property LR 337/5183 (Original No. 337/974).

6. The Respondent's Secretary deponed that the sewer line that was being constructed by the Applicant conflicted with some of the aspects of the Respondent's project christened "Crystal Rivers" and was also problematic to other stakeholders; that pursuant to negotiations by the parties, it was proposed that a collaborative design should be configured and that the Plaintiff was to stop its ongoing project.

7. The Respondent's Secretary and Trustee deponed that the Respondent moved to court vide Petition No. 4 of 2017 which was heard on merit and that the instant suit is *res judicata*. It was averred that the Applicant was not interested in prosecuting the appeal filed in the Court of Appeal on 16th June, 2017.

8. The Respondent denied demolishing the Applicant's sewer line and deponed that an order of injunction would occasion delays in the Respondent's project. The Respondent's Secretary and Trustee deponed that the Applicant is a vexatious litigant having filed a similar matter before the National Environment Tribunal against the Respondent.

9. Vide a Supplementary Affidavit sworn on 10th March, 2019, Richard Gitahi, on behalf of the Respondent, informed the court that the orders been sought by the Applicant would serve no purpose; that the Application has been overtaken by events as the Applicant opted to have an alternative solution for the sewer problem at the Great wall project and that the Applicant abandoned the sewer line that is the subject of the Application and as such, the injunction order is sought in bad faith.

10. The Application was canvassed by way of written submissions. The Applicant's counsel submitted that the instant suit is not *res judicata* Petition 4 of 2017. While placing reliance on the case of *Giella vs. Cassman Brown & Co Ltd (1973) EA 358*, it was submitted that the Applicant had met the requirements to warrant the grant of orders sought. Counsel relied on numerous authorities which I have considered.

11. The Respondent's counsel submitted that an injunction is an equitable remedy and that he who comes to equity should come with clean hands. It was counsel's submission that the Applicant's case was premised on the allegation that the Respondent destroyed its sewer line and that the allegations of demolition of the sewer line by the Respondent had not been substantiated.

12. The Respondent's counsel submitted that the Applicant's sewer line was condemned in the Judgement that was delivered by this court in Petition No. 4 of 2017 and that no *prima facie* case has been established. It was submitted that damages would compensate the Applicant in the event he succeeds in its suit and that an injunction was not the appropriate remedy.

13. Having considered the pleadings and the submissions of counsel, the only issue that arises for determination is whether the Applicant ought to be granted the order sought. The conditions that have to be fulfilled before the court can exercise its discretion to grant a temporary injunction have been well laid out as follows: The Applicant has to show a *prima facie* case with a probability of success; the likelihood of the Applicant suffering irreparable damage which would not be adequately compensated by an award of damages and where the court is in doubt in respect of the two considerations, then the Application will be decided on a balance of convenience (see *Giella vs. Cassman Brown & Co Ltd (1973) EA 358* and *Fellowes and Son v. Fisher [1976] 1 QB 122*).

14. What amounts to a *prima facie* case, was explained in *Mrao vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125* case as follows:

“...in Civil cases, it is a case in which on the material presented to the Court a 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 latter.”

15. It has been established by the law and the decided cases that the main purpose for issuance of a temporary injunction order is the preservation of the suit property and the maintenance of the status quo between the parties, pending the disposal of the main suit. It is also trite that interlocutory orders are granted without full investigation of the merits of either side's case. To be granted interlocutory relief of injunction, the Plaintiff must show a more than an arguable case. (See *Fessenden v Higgs and Hill Ltd [1935] ALL ER 435*).

16. In *Francome vs. Mirror Group Newspapers Ltd., [1984] 1 WLR 892*, Sir John Donaldson MR, while criticising the expression 'balance of convenience', an expression posited in the House of Lords decision in *American Cynamid v. Ethicon, [1975] AC 396*, said this about the purpose of interim injunctions:

“Our business is justice, not convenience. We can and must disregard fanciful claims by either party. Subject to that, we must contemplate the possibility that either party may succeed and must do our best to ensure that nothing occurs pending the trial which will prejudice his rights. Since the parties are asserting wholly inconsistent claims, this is difficult, but we have to do our best. In so doing we are seeking a balance of justice, not convenience.”

17. The other factor that is relevant to an application for injunction is the extent to which the determination of the application, at an interlocutory stage, will amount to a final determination of the rights and obligations of the parties. That issue was addressed in *NWL Limited v. Woods [1979] WLR 1294* by Lord Diplock as follows:

“Where, however, the grant or refusal of the interlocutory injunction will have the practical effect of putting an end to the action because the harm which will have been already caused to the losing party by its grant or its refusal is complete and of a kind for which money cannot constitute any worthwhile recompense, the degree of likelihood that the Plaintiff would have succeeded in establishing his right to an injunction if the action had gone to trial, is a factor to be brought into the balance by the judge in weighing the risks that injustice may result from his deciding the application one way rather than the other.”

18. Based on the material presented to this Court, and the court properly directing itself thereto, can this court 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 Respondent?

19. The Applicant has raised two pertinent issues. The first is that its sewer line was damaged by the Respondent, and that the Respondent is likely to damage the entire sewer line. The Respondent on the other hand has stated that the sewer line was the subject of a concluded suit; that the Applicant has obtained an alternative sewer line and that the Application has been overtaken by events. According to the Respondent, the injunction will halt the development of the project that it is undertaking.

20. The Respondent's Secretary and Trustee stated in his Affidavit that the net financial and business effect of the injunction that this court granted is that the road works for Quarry 39 and the old Mombasa Roadside have not been executed; that the result has been limited access to

the property and that numerous purchasers have withdrawn their offers and or terminated their leases. That may be so. However, as was stated in the *Francome case* (*supra*), the duty of the court is to seek a balance of justice, not convenience.

21. The Respondent has admitted that for it to construct Quarry road to bitumen standards, it must first of all demolish the existing sewer line infrastructure that has been put up by the Applicant along quarry road. In a nutshell, the substratum of this suit will be completely obliterated in the event the order of injunction is not granted.

22. Although the Respondent has argued that the issue of the sewer line, which is the subject of this suit, has been determined by this court in Petition No. 4 of 2017, the said matter is pending before the Court of Appeal for determination. In addition, the Judgment of this court was in respect of whether or not approvals were procedurally issued to the Applicant before constructing its sewer line. The issue before the court now is whether the Respondent has the mandate to demolish the said sewer line. That is an issue that can only be determined after trial.

23. That being the case, and considering that the mandate to construct public roads is with either the Kenya Urban Roads Authority or Kenya National Highways Authority, who were parties in Petition No. 4 of 2017, it is my finding that there are serious questions to be tried in this matter.

24. Indeed, if the Plaintiff has obtained an alternative for its sewer line, then that evidence ought to be produced in court during trial. That being so, it is my finding that the Plaintiff has established a prima facie case with chances of success.

25. For those reasons, the Plaintiff's Application dated 31st January, 2019 is allowed as follows:

a. An order of temporary injunction be and is hereby granted restraining the Defendant/Respondent whether by itself, contractors, sub-contractors, servants, agents, representatives, employees and/ or anyone claiming under its name or title howsoever from excavating and or demolishing, destroying whether temporary or permanent or otherwise thereon and/ or in any manner howsoever interfering with the Plaintiff's/Applicant's sewer line constructed along Quarry Road and old Mombasa Road for its Great Wall gardens project situate in Mavoko Municipality pending the hearing and determination of the suit.

b. The Defendant/Respondent to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 5TH DAY OF JUNE, 2020.

O.A. ANGOTE

JUDGE