



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELCC NO. 1518 OF 2013

EMCO BILLETS AND STEEL LIMITED..... PLAINTIFF

VERSUS

KIAMBU DANDORA FARMERS COMPANY LIMITED.....DEFENDANT

RULING

I have two applications before me. The first application was brought by the plaintiff by way of Notice of Motion dated 16th December 2013 seeking orders to restrain the defendant from trespassing upon, carrying out unlawful acts of eviction or destruction against the plaintiff or its property and/or interfering with the plaintiff's quiet possession and enjoyment of LR No. 12034 (original number 11344/1), LR No.12504 and LR No. 12247(original number 11344/4) pending the hearing and determination of this suit. The plaintiff sought a further order that the Officer Commanding Buruburu Police Station be directed to deploy sufficient police officers to protect its assets and employees from unlawful acts of destruction and/or injury by the defendant pending the hearing and determination of the suit.

The plaintiff's application is supported by an affidavit sworn on 16th December 2013 by Joseph Chege Ngechu, the plaintiff's administration manager. The plaintiff's case as set out in the said affidavit is that; the plaintiff acquired the parcels of land known as LR No. 12034 (original number 11344/1) and LR No. 12247(original number 11344/4) from Emco Steel Works Kenya Ltd., and LR No. 12504 from Emco Billets Ltd. The three parcels of land are hereinafter referred to as "the suit properties". The suit properties are leasehold from the government of Kenya for a term of 99 years and were acquired by the original proprietors between 1975 and 1989. From the year 2008 when it acquired ownership of the suit properties until 20th September 2012 when the defendant purported to lay a claim over the properties through an advertisement in the Daily Nation newspaper, the legality of the plaintiff's titles over the suit properties had never been brought to question. On 25th November 2013, the plaintiff's advocates received a letter dated 25th November 2013 from the defendant's advocates alleging that the suit properties were located within the defendant's parcel of land known as LR No. 11379/3 and threatened to have the plaintiff evicted therefrom. On 6th and 7th December 2013, the defendant sent a gang of thugs to the plaintiff's office premises who destroyed the plaintiff's perimeter wall and gained access to its factory. The defendant's illegal entry onto the suit properties interrupted its operations and occasioned it massive losses. The defendant had threatened that it would destroy the plaintiff's steel mill business which is worth millions of shillings. It is on account of the foregoing that the present application has been brought.

The plaintiff's application was opposed by the defendant through grounds of opposition dated 23rd December 2013, notice of preliminary objection dated 6th January 2014 and a replying affidavit sworn on

7th January 2014 by Kariuki Njoroge. Kariuki Njoroge who has described himself as a director and trustee of the defendant company has stated in his affidavit as follows. The defendant is the owner of all that parcel of land known as LR No. 11379/3 which measures 818 acres (hereinafter referred to as “the defendant’s land”). The defendant through its members purchased the defendant’s land from Khan family in the year 1966 and five of the defendant’s members were appointed as trustees to hold its title pending incorporation of the defendant. After the incorporation of the defendant but before the defendant’s land could be transferred to the defendant by the said trustees, the said trustees were sued by a company known as Dandora Housing Company Ltd. in HCCC No. 1348 of 1972 concerning the ownership of the defendant’s land which suit was determined in the defendant’s favour in the year 1983.

The defendant’s said trustees died thereafter. Dandora Housing Company Ltd. which lost the suit mentioned above took advantage of this development and came up with forged court orders with the intention of depriving the defendant of its land which orders were set aside on 26th October 1999. As the defendant was in the process of appointing new trustees, it became embroiled in yet another dispute with a company known as Dandora Housing Scheme Ltd. The Commissioner of Lands took advantage of this dispute and purported to compulsorily acquire the defendant’s land. This purported acquisition of the defendant’s land was fraudulent as the land was not intended for public purposes but rather to reward loyal politicians and civil servants. The defendant challenged the acquisition in court through HCCC No. 932 of 2002 in which an injunction was issued restraining the Commissioner of Lands from surveying the defendant’s land.

The Commissioner of Lands engaged the defendant in discussions with a view to settle the dispute out of court. These discussions led to the surrender to defendant of part of its land. A large part of the defendant’s land however remained in the hands of third parties. The defendant came to the conclusion that the dispute was not going to be resolved amicably and decided to file a constitutional petition against the Commissioner of Lands namely, Nairobi Constitutional Petition No. 47 of 2011. The defendant was ordered by the court to advertise the filing of the said petition in a daily newspaper so that whoever may wish to join the same can do so. The advertisement was placed in the Daily Nation of 28th November 2011. The plaintiff herein did not apply to court to be added as a party to the said petition.

After the defendant had filed the said petition, the National Land Commission notified the public of its intention to review grants including that of the defendant’s land to determine the legality thereof. For the purposes of the said exercise, the National Land Commission stayed all further dealings or actions touching on the defendant’s land. The defendant has contended that this suit is intended to circumvent the Constitutional Petition No. 47 of 2011 as well as the directions of the National Land Commission aforesaid in respect of the defendant’s land. The defendant has contended that it has no interest in LR No. 12034 and LR No. 12247. The defendant has contended that its interest is on LR No. 12504 which measures 24.484 acres which it claims to be situated within its parcel of land and whose title it seeks to have cancelled.

The plaintiff’s application which was filed under certificate of urgency came up for hearing on 24th December 2013 when the court directed that the status quo with regard to LR No. 12034, LR No. 12504 and LR No. 12247 be maintained. That order restrained the defendant from trespassing upon, undertaking acts of destruction on or interfering with the plaintiff’s use and occupation of the said properties. On 8th January 2014, the court after considering the nature of the dispute between the parties directed them in the spirit of Article 159 of the Constitution to liaise with the National Land Commission with a view to having the dispute settled out of court. On 24th July 2014, a representative of the National Land Commission attended court and informed the court that the commission was in the process of investigating the issues which have been raised herein by the parties. On 14th May 2015, the court directed the National Land Commission to file in court a report on their investigations within 60 days. On 20th August 2015, the National Land Commission submitted its report to court as earlier directed. In the report, the National Land Commission made a finding that LR No. 12504 which is owned by the plaintiff falls within the defendant’s land, LR No.11379/3 and that its allocation to the initial owner was irregular.

Following this report, the defendant filed an application by way Notice of Motion dated 20th August 2015

seeking to discharge, vary or set aside orders of status quo that had been issued herein on 24th December 2013. The defendant also sought an order to consolidate this suit with Constitutional Petition No. 47 of 2011, Abdullahi Muiruri Muigai vs. National Land Commission for hearing and final disposal. This is the second application before me. The defendant's application is supported by an affidavit sworn on 20th August 2015 by Joseph Mwangi Karanja, a director of the defendant company. The application is based on the grounds that the orders of status quo made herein on 24th December 2013 are not sustainable as they seek to prevent a registered proprietor of land from dealing with his land freely and from evicting a trespasser. The defendant has contended that following orders issued by the court on 14th May 2015 directing the National Land Commission (the "Commission") to file a report on the status of the disputed land, the Commission filed its report on 20th July 2015 in which it indicated that LR No. 11379/3 comprising 818 acres belongs to the defendant. The defendant has contended that the said report has concluded that the title held by the plaintiff in respect of LR No. 12504 is invalid and of no effect since LR No. 12504 was carved out of LR No. 11379/3 which was private land.

The application was opposed by the plaintiff through grounds of opposition dated 22nd September 2015. The plaintiff contended that the application is an abuse of the court process since it is intended to frustrate the hearing and determination of the plaintiff's application dated 16th December 2013. The plaintiff contended that the issues raised by the defendant in its application could be competently adjudicated within the framework of the said application dated 16th December 2013. The plaintiff contended further that its title to LR No. 12504 has not been revoked by the Commission or a court of law and that it is in the circumstances entitled to protection of its private property through the injunctive orders that were issued herein on 24th December 2013. On the defendant's prayer for consolidation of this suit with Petition No. 47 of 2011, the plaintiff opposed the same on the ground that it is not a party to the said petition and that its claim against the defendant herein related to the defendant's persistent invasion of its private property without any right to do so.

On 1st October 2015, the court consolidated the two applications and directed that the same be heard by way of written submissions. In its written submissions dated 12th October 2015, the plaintiff submitted that it acquired LR No. 12504 (hereafter "the disputed property") for value without notice of the dispute that the defendant had with the government with respect to the compulsory acquisition of the original title. The plaintiff submitted that its title to the disputed property has not been revoked by the Commission under section 14 of the National Land Commission Act or pursuant to a lawful court order. The plaintiff submitted that in its report which is the basis of the defendant's application herein, the Commission made a finding to the effect that the plaintiff is an innocent purchaser for value without notice and as such its title is protected by section 14(7) of the National Land Commission Act.

The plaintiff relied on the case of **Kuria Greens Ltd vs. Registrar of Titles and another (2012) eKLR** where the court stated that even if there was fraud or misrepresentation in alienating land to the original proprietor, the Registrar of Titles could not arbitrarily revoke the title of the said parcel of land without following the due process of the law. The plaintiff also referred the court to the case of **Cherotich vs. Timsales Ltd KLR (E & L) 611** where the court upon finding that the validity of the applicant's title was not in issue, proceeded to grant an interlocutory injunction.

The plaintiff submitted that there was no contention that it was the current registered proprietor of the suit property which it acquired procedurally and legally. The plaintiff submitted that its right to the disputed property is protected by Article 40 of the Constitution and urged the court to dismiss the defendant's application and confirm prayers 2(ii) and 3(ii) of the application dated 16th December 2013.

In its submissions in reply dated 16th November 2015, the defendant submitted that this suit is incompetent having been caught up by the provisions of section 6 of the Civil Procedure Act. The defendant submitted that the court has no option but to stay this suit and discharge the orders of maintenance of status quo since the Petition No. 47 of 2011 which had been filed earlier over the same subject matter is still pending.

The defendant cited section 75 of the repealed Constitution and submitted that it was unlawful for the Commissioner of Lands to compulsorily acquire its property for allocation to politicians, business men and civil servants and not for public purposes. The defendant submitted that such land remained the property of the original owners and further, that where compensation was not paid in accordance with the Constitution, the acquisition was unlawful and the land reverted back to its owners. The defendant argued that no person could claim to have acquired a good title over such land or give a good title over the same to another person. The defendant contended that the defence of innocent purchaser for value without notice cannot arise where there was gross violation of the constitution.

The defendant referred the court to the case of **Re Kisima Farm Ltd (1978)KLR 36** and **Commissioner of Lands & another vs. Coastal Aquaculture Ltd CA No. 252 of 1996** for the proposition that the test of the legality of an acquisition is whether the land is required for a public body for a public benefit. The defendant also referred the court to principles for grant of an interlocutory injunction as were enunciated in the case of **Giella vs. Cassman Brown & Company Ltd (1973) EA 358**. The defendant also cited the case of **Satrose Ayuma & 11 others vs. Registered Trustees of the Kenya Railway Staff Retirement Benefit Scheme & 2 others (2011) eKLR** for the proposition that in an application for interlocutory injunction to restrain breach of a fundamental right, the court may go beyond the test stated in **Giella vs. Cassman Brown(supra)** and consider whether the grant or denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the bill of rights. The defendant argued that the suit was about its right under Article 40 of the Constitution and that the effect of the Commission's finding that there was no valid acquisition of its parcel No. 11379/3 wherein the disputed property lies was that it did not lose its right over the said property since the titles that had been issued in respect thereof were illegal, null and void.

The court was also referred to the case of **Niaz Mohamed Jan Mohamed vs. The Commissioner of Lands & others (1996)eKLR** where the court stated that there was no right of compulsory acquisition of land by the government for purposes other than those provided under section 75 of the repealed Constitution. The defendant submitted that the granting of the injunction sought by the plaintiff would be a perpetuation of gross injustice against the defendant which would have been deprived of its property. The defendant submitted that the plaintiff cannot sustain a suit against it. The defendant submitted that the plaintiff's suit should have been directed against the government. The defendant submitted that the plaintiff has not established a prima facie case. In conclusion the defendant submitted that no amount of damages can compensate it since the harm being inflicted against it relates to infringement of a fundamental right.

The issues that arise for determination herein are two fold, namely;

- a) Whether the plaintiff has satisfied the conditions for grant of interlocutory injunction as enunciated in the case of **Giella vs. Cassman Brown & Co. Ltd (1973) EA 358?**
- b) Whether this suit should be consolidated with Petition No. 47 of 2011 and the orders issued herein on 24th December, 2013 discharged?

On the first issue, the plaintiff was under a duty to show that it has a prima facie case with probability of success against the defendant and that it stands to suffer irreparable harm which cannot be compensated in damages unless the order is granted. If the court is in doubt as to the foregoing, the application is to be determined on a balance of convenience. The plaintiff placed before the court a copy of Grant No. I.R. 33501 for the disputed property. The said grant shows that the disputed property was registered in the name of Steel Billet Castings Limited as the first leasehold proprietor thereof from the government on 7th July 1979 and that the same was transferred by Steel Billet Castings Limited to the plaintiff on 27th August 2008.

It is clear from the parties' pleadings and submissions which I have highlighted above that the plaintiff's title over the disputed property is highly contested by the defendant. As stated above, the defendant has contended that the disputed property is part of its parcel of land LR No. 11379/3 which was unlawfully acquired by the government. The defendant has contended that it is still in possession of the original title

for its said parcel of land and that the purported compulsory acquisition of the same by the Commissioner of Lands and subsequent allocation to among others the plaintiff's predecessor in title was fraudulent. The defendant has contended that no compensation was paid to it following the purported compulsory acquisition. The defendant's case finds support in the report dated 20th July 2015 by the National Land Commission which was filed in court on 21st August 2015. The Commission made a finding that the disputed property is within LR No. 11379/3 owned by the defendant and that the process of compulsory acquisition of LR No. 11379/3 was never completed. In the same report, the Commission noted that the plaintiff was a bonafide purchaser of the disputed property for value without notice of the irregularities in the root of its title. As matters stand now, both the plaintiff and the defendant have laid a claim over the suit property. The defendant's title over LR No. 11379/3 is not in doubt. There is also prima facie evidence before me that the disputed property has its origin in LR No. 11379/3 and that it is situated within that parcel of land. The circumstances under which LR No. 11379/3 was subdivided to give rise to among others, the disputed property is contentious and the same is the subject of a constitutional petition pending before the Constitutional Division of the High Court. It has not been settled conclusively that the compulsory acquisition process through which the government purportedly acquired LR No. 11379/3 from the defendant and allocated portions thereof to third parties including the plaintiff's predecessor in title was illegal. There has been no judicial pronouncement that the plaintiff's title over the disputed property is illegal. The plaintiff's title over the suit property has not been revoked or cancelled. I am in agreement with the plaintiff's submission that the said title can only be revoked or cancelled through the due process of the law. Until the said title is declared null and void through a legal process, it remains valid for all intents and purposes and unless there are exceptional circumstances that would sway the court such as public interest, the title is entitled to protection of law.

It was not open to the defendant to take the law in its own hands by forcefully taking possession of the disputed property from the defendant. So long as the plaintiff's title over the suit property has not been revoked or cancelled, the acts such as that of the defendant amounts to trespass. This court cannot lend its aid to acts of lawlessness. I am satisfied that the plaintiff has established a prima facie case of trespass against the defendant. I am also satisfied from the material before me that the plaintiff would suffer irreparable harm which cannot be compensated for in damages if the injunction sought is not granted. The plaintiff has therefore met the conditions for grant of interlocutory injunction.

Even if I am wrong on the above finding, I would still have allowed the application on another ground namely, to preserve the disputed property pending the hearing and determination of this suit. It is clear from the submissions by both parties that the highly contested issue of the legality of the plaintiff's title over the disputed property can only be determined at the trial. I am of the view in the circumstances that justice would be better served if the prevailing *status quo* is maintained pending the hearing of the suit. This view finds support in the case of **Ougo & another vs. Otieno (1987) KLR 364**, where it was stated that **"The general principle is that where there are serious conflict of facts, the trial court should maintain the status quo until the dispute has been decided at the trial."**

Having reached the conclusion that the plaintiff has satisfied the conditions for granting interlocutory injunction, the prayers in the defendant's application seeking to discharge the interim orders that were granted on 24th December 2013 must fail. This leaves the defendant's prayer for consolidation of this suit with Petition No. 47 of 2011. In the petition, the defendant has sought among others the following reliefs:-

- a) A declaration that the petitioner's fundamental right to protection against arbitrary deprivation of private property under Article 40 of the Constitution have been grossly infringed and violated by the respondent purported acts to compulsorily acquire their land parcel LR No. 11379/3
- b) A declaration that the purported compulsory acquisition of the petitioners' Land Parcel No. 11379/3 vide Kenya Gazette Notices Nos. 840 and 841 of 15th March 1974 was unlawful, null and void ab initio.
- c) An order that all consequent dealings by the Commissioner of Lands in respect to LR No. 11379/3 or any part thereof following the purported compulsory acquisition including issuance of

any allotment letter, leases and/or titles therefrom to any third parties are null and void.

d) An order directing the Commissioner of Lands to cancel any such allotments, leases and or titles issued to 3rd parties and to remove forthwith from any part of LR 11379/3 persons, individuals, companies or institutions in occupation or possession thereof within 30 days of the order in default of which the petitioners be at liberty to cause the removal of such persons, individuals or companies at the respondent's costs.

In my view, the determination of Petition No. 47 of 2011 will have an impact on the suit herein. Both parties herein have made ownership claims to the suit property. In my view, some of the prayers sought in Petition No. 47 of 2011 surrounding the compulsory acquisition of LR No. 11379/3, if granted, will dispose of this suit. In the case of **Kenya Anti-corruption Commission vs. Wilson Gachanja & 2 others (2014) eKLR** the court in considering an application for consolidation stated that:-

“In my view the various actions in the separate suits touch and concern the same subject matter and although there are different plaintiffs and different defendants, the plaintiff in ELC No. 347 of 2013 can be said to be common as they claim the parcels of land that even the other plaintiffs in the other suits claim and the issue to be determined is who of the various claimants is entitled to the suit land or portion of the suit land. I am satisfied that the issue for determination in the various suits is common and in my opinion it would be expedient and time saving to try all the 5 cases together to obviate the necessity of having conflicting decisions on the same subject matter being rendered by different courts which could lead to “Judicial Confusion”.

In the case of **David Ojwang’ Okebe & 11 others vs. South Nyanza Sugar Company Limited & 2 others Kisumu CA (Appl) No. 139 of 2008**, the Court of Appeal discussed the main object of consolidation as follows:-

“...to save costs and time by avoiding a multiplicity of proceedings covering largely the same ground. Thus where it appears to the court that there are common questions of law or fact; that the right to relief is in respect of the same transaction or series of transactions; or that for some other reason, it was desirable to make an order for consolidation of one or more cases, then the court will do so.”

From the foregoing, I am satisfied that the defendant has made out a case for the consolidation of this suit with Constitutional Petition No. 47 of 2011 for hearing and disposal by this court.

In conclusion, I will make the following orders on the two applications before me;

1. The plaintiff's application dated 16th December 2013 is allowed in terms of prayer 2 thereof.
2. The officer commanding Buruburu Police Station shall ensure compliance with order 1 above.
3. High Court Constitutional Petition No. 47 of 2011, Abdulahi Muiruri Muigai & 5 others vs. The Attorney General is transferred to this court for hearing and final determination if the same has not yet been transferred. The Executive Officer shall assign the court file Environment and Land Court number once the same is received at the registry.
4. The plaintiff herein, **EMCO BILLETS AND STEEL LIMITED** is joined in the said petition as **INTERESTED PARTY**.
5. The petitioner shall amend the petition within 21 days from the date hereof to effect the joinder of the plaintiff in the said petition.
6. The plaintiff shall be at liberty to respond to the petition within 21 days from the date of service of the amended petition.

7. The said petition and this suit shall be heard together.

8. The costs of the plaintiff's and the defendant's applications shall be in the cause.

Delivered and Signed at Nairobi this 1st Day of July, 2016

S. OKONG'O

JUDGE

In the presence of

Mr. Omuga **for the Plaintiff**

Mr. Njiru **for the Defendant**

Kajuju **Court Assistant**