



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 352 OF 2013

KEZA LIMITED.....APPLICANT

VERSUS

FAISAL DAUD ALI1ST RESPONDENT

CITY COUNCIL OF NAIROBI.....2ND RESPONDENT

SMATT PETROLEUM CENTER.....3RD RESPONDENT

RULING

Coming before me for determination is the Plaintiff's Notice of Motion dated 13th March 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendants from entering, trespassing upon or in any other manner interfering with the Plaintiff's occupation and quiet enjoyment of that parcel of land known as L.R. No. 209/12085 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this Application and suit and that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Mandip Singh Amrit, a director of the Plaintiff/Applicant, sworn on 13th March 2013 in which he averred that pursuant to a Grant Number I.R. 61872, the Plaintiff was allocated the Suit Property. He produced a copy of the title document. He further swore that upon such allocation, the Plaintiff/Applicant has taken possession of the Suit Property and has been paying the required annual rent and rates to the 2nd Defendant. He further averred that without any color of right, on 24th February 2013, the 1st Respondent forcefully invaded and entered the Suit Property and fenced off the same using iron sheets. He further stated that upon the happening of this event, the Plaintiff/Applicant reported the same to the Parklands Police Station for investigations. He further indicated that upon making enquiries, they learnt that the 2nd Respondent licensed the 1st Respondent to take over possession of the Suit Property for purposes of setting up a car wash business. He further stated that on account of the unauthorized and illegal actions aforesaid, the Plaintiff/Applicant has suffered substantial damage and will continue to suffer the same incapable of being compensated with an award of damages.

The Application is contested. The 2nd Defendant/Respondent filed the Replying Affidavit of Karisa Iha, the Director of Legal, who averred that the Suit Property is a public road which was illegally and fraudulently allocated to the Plaintiff and the legitimacy of the title documents in the name of the Plaintiff is strongly put into question. Further, he stated that the Plaintiff alleges to have a grant issued to him without having made an application for allotment nor having allotment issued as a result of which the grant issued to the Plaintiff was irregular, illegal and fraudulent. He further stated that the Plaintiff failed to comply with the Special Conditions enumerated in the alleged grant which include submitted building plans within 24 months. He further stated that the Plaintiff was fully aware of its illegality and failed to comply with the mandatory condition having been granted the property on 1st February 1994. He further indicated that the property having fallen on public road, the 2nd Defendant deemed it fit to issue a temporary occupational license to have a car wash business on the Suit Property. He further stated that the Plaintiff has never made any development application to the 2nd Defendant and that failure to do so confirms that the Plaintiff is fully aware that the Suit Property he claims is a public road which cannot be alienated.

The Application is further contested by the 1st Defendant, Faisal Daud Ali, who filed his Replying Affidavit sworn on 3rd July 2013 in which he stated that sometime in February 2013, he was instructed by Smatt Petroleum Limited to fence off the Suit Property which is a portion of Riverview Road in Westlands Area, Nairobi. He further stated that the said company handed him a Temporary Occupation Licence dated 8th January 2012 from the 2nd Defendant allowing them to occupy the said road reserve on a temporary basis for car wash purposes only. He produced a copy of the letter dated 8th January 2012 from the 2nd Defendant granting the Temporary Occupation Licence to Smatt Petroleum Limited. He further stated that he proceeded to fence off the Suit Property. He further stated that he is not an employee, shareholder nor a Director of Smatt Petroleum Ltd. He further stated that while completing the said fencing, he was served with the present suit papers together with the ex-parte court order and that the suit is therefore misplaced. He further stated that apart from the fencing, he has nothing to do with the Suit Property or the said Smatt Petroleum Ltd.

The Plaintiff/Applicant filed the Supplementary Affidavit of Mandip Singh Amrit, sworn on 5th August 2013 in which he stated that under section 23 of the Registration of Titles Act, the title to the Suit Property issued to the Plaintiff states that the Plaintiff's interests and rights over the Suit Property are indefeasible. He further stated that the Defendant's claim that the Suit Property was fraudulently and irregularly allocated to the Plaintiff or falls on a public road has not been proved. He further stated that the Suit Property has for the entire period from 1994 to date been in its possession and at no time has it been utilized as a road as claimed by the Defendant. He further stated that all the lawful procedures pertaining to the allotment of the Suit Property to the Plaintiff including surveying and payment of the requisite premium were observed culminating in the issuance of the Grant held by the Plaintiff. He further stated that the 2nd Defendant has continued to receive rates from the Plaintiff in respect of the Suit Property and it was misleading for the 2nd Defendant to claim that the same is a public road. On failure to comply with the special conditions, He stated that the same is speculative and argumentative and does not amount to evidence of fraud as respects the allocation of the Suit Property to the Plaintiff. He further stated that the issuance of the Grant to the Plaintiff makes the Suit Property a private property giving the Plaintiff indefeasible rights and interest therein including exclusive possession and occupation and the purported licensing of the same to the 2nd Defendant to third parties has no basis in law. He further stated that as the 1st Defendant had admitted that he entered the Suit Property and undertook the fencing exercise thereon, he is a necessary party to these proceedings.

The Application is further contested by the 3rd Defendant/Respondent who filed the Replying Affidavit of Abdulkadir Ibrahim Aden sworn on 24th October 2013 wherein he stated that he is a Director of the 3rd Defendant. He further swore that the Suit Property is public land on a road reserve and that the Plaintiff has no title to the same hence the allocation and subsequent issuance of a Grant was illegal and unconstitutional. He further stated that the Plaintiff has never been in possession of the Suit Property and it is only after the 3rd Defendant took possession of the same in February 2013 that the Plaintiff rushed to

court to obtain an injunction. He further stated that the 3rd Defendant did not invade the Suit Property but was given a Temporary Occupation Licence and the 1st Defendant, who was his employee, was tasked to fence the plot and construct a car wash. He further stated that the 3rd Defendant has been paying the monthly licence fees of Kshs. 5,000/- and to date there are no arrears. He further stated that in preparation for the commencement of the car wash business on the Suit Property, the 3rd Defendant has already made an investment of machines and equipment of Kshs. 8 million which machines were imported and are already in the country. He further stated that the Plaintiff's title to the Suit Property was revoked by the Government by the Senior Registrar of Titles vide Kenya Gazette Notice Numbers 9229 and 9230 of 29th July 2011 on the grounds that the Suit Property was reserved for public purposes and was allocated illegally and unconstitutionally. He attached a copy of the Gazette Notice.

In response to the above, the Plaintiff/Applicant filed its 2nd Supplementary Affidavit sworn on 2nd December 2013 in which he stated that under section 23 of the Registration of Titles Act (now repealed), pursuant whereto the title to the Suit Property was issued to the Plaintiff, the Plaintiff's interests and rights over the Suit Property are indefeasible. He further stated that the Defendants did not exhibit any evidence whatsoever to back their claims that the Suit Property was fraudulently and irregularly allocated to the Plaintiff or that it falls on a public road. He further stated that at no time has the Suit Property ever been used as a road since it was allocated to the Plaintiff in 1994. He further stated that the purported entry of the 1st and 3rd Defendants on the Suit Property amounted to unlawful invasion in light of the Plaintiff's proprietary rights over the Suit Property. He further stated that he came to learn of the purported cancellation of the Plaintiff's title in these proceedings and that that cancellation is null and void as the Registrar does not have the power to cancel titles unilaterally.

The Plaintiff/Applicant, 2nd and 3rd Defendants filed their written submissions which have been read and taken into account in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiff, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case 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.”

Looking at the facts of this case, it is plain to see that the Plaintiff bases its claim of ownership of the Suit Property on a Certificate of title which it produced to this court. However, it has been stated by the Respondents to this Application that that title document was revoked by the Registrar of Titles and a copy of Gazette Notice No. 9229 and 9230 of 29th July 2011 was produced to this court. There were also assertions under oath that the Suit Property is a public road. These assertions cannot be ignored by this court. This court can therefore not rely on the Certificate of title produced herein in favour of the Plaintiff. To that extent therefore, I find that the Plaintiff has not established a *prima facie* case with high chances of success at the main trial.

Since the Plaintiff has failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 2ND DAY OF MAY 2014

MARY M. GITUMBI

JUDGE