



*No.39/2014*

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC PETITION NO.166 OF 2011**

**DIESEL CARE LTD ..... PLAINTIFF**

**VERSUS**

**MEGVEL CARTONS LTD ..... 1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. On 11.7.2011 the Plaintiff filed suit seeking the following reliefs:
  - a. A permanent injunction to be issued, restraining the Defendants whether by themselves, their agents and servants and/or whomsoever is acting upon their instructions or on their behalf from entering upon or remaining thereon, selling, allocating or alienating or denying the Plaintiff access to it or in any way interfering with the Plaintiff's quiet and peaceful possession and ownership of the premises/property more specifically known as LR. No.1504/11 (IR.85400) situated in Mavoko.
  - b. Damages for trespass.
  - c. General damages.
  - d. Costs of the suit and interest thereon.
  - e. Any other relief that this Honourable Court may deem fit and just to grant in the interest of justice.

It contemporaneously with Plaintiff, filed Chamber Summons dated 11.7.2011 seeking orders:

1. That service upon the Defendants/Respondents be dispensed with in the 1<sup>st</sup> instance and the matter be certified urgent for exparte hearing.
2. That interim orders be granted exparte in terms of prayer (3) here below pending the inter partes hearing of this application.
3. That a temporary injunction be issued pending hearing and determination of this application to restrain the Defendants, their servants, agents or contractors or whomsoever is acting on its behalf or upon its instructions and all and each of them whether by themselves or otherwise howsoever from entering upon, remaining on the Plaintiff's property or selling or allotting or alienating, evicting or denying the Plaintiff access to it and or in any way interfering with the Plaintiff's lawful

and legal enjoyment of a quiet and peaceful possession of the Plaintiff's premises being on LR No.1504/11 (I.R.85400) or any part thereof, till further orders of this court.

4. That the application be served upon the Defendants/Respondents for inter partes hearing on a date to be given by this court on priority basis.
5. That an injunction be issued pending the hearing and determination of this suit restraining Defendants, their servants, agents or contractors, and all and each of them whether by themselves or otherwise howsoever from entering upon or remaining on the Plaintiff's property or selling or allotting, alienating, evicting or denying the Plaintiff access to it and or in any way interfering with the Plaintiff's lawful and legal enjoyment of a quiet and peaceful possession of the premises on LR.No1504/11 (I.R.85400) or any part thereof.
6. That the Respondents do pay the costs of this application.
7. That such further or other order be made as may deem just to this Honourable court.

2. The same application is supported by the affidavit of Joseph Karuoro Claudio sworn on 11.7.2011. The application is based on the grounds:

- a. The Plaintiff is the legal and rightful registered owner of L.R. No.1404/11 situated in Mavoko Municipality.
- b. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are attempting to allocate the property to third parties.
- c. The Defendants have continued to disturb the quiet and peaceful enjoyment of the suit land.
- d. The Plaintiff/Applicant has rights over the suit premises which right deserves protection of this honourable court.
- e. The Applicant has invested heavily and will suffer irreparable loss if such kind of harassment subsists.
- f. The Defendants should be restrained from evicting or harassing the Applicant from the suit premises.

3. The Applicant has also a further affidavit sworn by Joseph Karuoro Claudio on 20.3.2013. The 1<sup>st</sup> Respondent has filed replying affidavit sworn by Prasul Jayantilal Shah on 21.7.2011 and a further affidavit sworn on 21.7.2011. The first Defendant also filed defence and counter claim dated 12.9.2011 where it seeks the following reliefs:

- a. A declaration that the Grant I.R. No.85400 L.R. No.1504/11 is null and void and of no effect.
- b. That the 1<sup>st</sup> Defendant to the Counterclaim be restrained by an Order of this court by itself, its servants, agents, employees from entering upon L.R. No.25064 selling, charging, allotting, interfering with the quiet possession or howsoever with the ownership of the Plaintiff/Counterclaimant.

4. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendant/Respondents filed grounds of opposition dated 22.2.2001, a replying affidavit sworn by Charles Ngetich on 2.3.2012 and a defence dated 3.4.2012. On 12.7.2001 the court granted interim orders in terms of prayer No.3 of the Chamber summons dated 11.7.2011 pending interpartes hearing.

5. On 9.12.2011 the parties appeared before the court and argued on whether the orders should be executed or not with 1<sup>st</sup> Respondent contending the orders were preventing the 1<sup>st</sup> Respondent access to the subject matter in which it operates a godown and a factory facts which were not disclosed by the Applicant at the stage of procuring the ex parte orders.

6. After hearing the arguments by the advocates the court modified the orders to read that the "***status quo as it persisted at institution of the suit to remain***". The order is to remain in force with further orders of the court.

7. The Applicant's case is that, it is the registered owner of LR.1504/11 (I.R.854000) and it has grant JK. It has also land rent slips, rent demand slips, payment slips and clearance slips. It has official search and all other supporting documents. However, the 1<sup>st</sup> Defendant without any colour of

right has been passing off the Plaintiff's property as its own and has made attempts to enter into it claiming to have title issued by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

8. Further the 1<sup>st</sup> Defendant has at various instances intimidated Plaintiff agents who go to the suit property to construct a perimeter wall and clearing the grounds claiming it owns subject suit premises. The Applicant thus seeks the orders to preserve and protect its investment which it could otherwise lose and may not be compensated in damages.
9. In the Applicants further affidavit sworn by Joseph Karuoro Claudio on 1.12.2011 the Applicant allege that after their complaint over the 1<sup>st</sup> Respondent documents IR.85088 LR.35064, a copy of new title was issued upon surrender of LR.No.1504/11 being LR.25064, IR No.85088. In the year 2006 the dead file of the Commissioner of Lands was said to be missing and Joseph Odero executed a deed of identity to facilitate opening another deed file dated 17.2.2006.
10. The 1<sup>st</sup> Respondent avers that it has been in occupation of the suit property since 2009 and is operating a factory manufacturing cartons thereon. This was a fact which had not been disclosed by the Applicant from inception of suit. The CID confirmed same to be forgeries and the 1<sup>st</sup> Defendant has refused to surrender the original documents.
11. The 1<sup>st</sup> Respondent's case is that it purchased LR. No.25064 from Jewel Holdings Ltd who had in turn bought from Joseph Odero who had bought a portion of 9.186 Ha being LR No.1504/11 from Margaret Wamaita Humphrey and attaches PJS 'A'. Joseph Odero in 1998 applied to change LR. No.1504 from Agricultural to Industrial and the Commissioner of Lands approved the same.
12. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent case is that IR. No.41771 (LR.1504/11) was booked for surrender for issue of new grant on 5.12.2000 and Mr. Odero actually surrendered the title. The Respondents No.2 and 3 investigations reveal that the title IR.85400 purportedly registered in the names of DIESEL CARE LTD on 30.5.2001 is a forgery. The fraudsters used LR. No. and deed plan IR.41771 which had been presented for surrender to prepare a forged title. Title IR 85088 (LR.25064) registered on 5.12.2000 as per day book No.184 is the genuine one.
13. After perusing the affidavits herein and the pleadings in the matter, I find the following issues emerge:
  - i. Whether the Plaintiff/Applicant has proved a case for issuance of interim injunctions in line with principles of **GIELLA VS. CASSMAN BROWN CASE?**
  - ii. What are the appropriate orders in the case herein?
  - iii. What is the order as to costs.
14. It would appear on the prevailing facts presented that the Plaintiff/Applicant document of ownership LR.1504/11 (IR No.85400) and the 1<sup>st</sup> Defendant LR. No.25064 (IR.85088) refers to the same subject matter. The Plaintiff/Applicant has not narrated as to how it acquired the ownership of the suit property. The 1<sup>st</sup> Defendant graphically narrates how the property moved to the present day and annexed documents to that effect.
15. The Applicant alleges the 1<sup>st</sup> Respondent documents are a forgery but there is no annexed Forensic report to that effect. The 2<sup>nd</sup> and 3<sup>rd</sup> Respondent who are Land officials have alleged to have conducted an investigation and found that the Applicant documents are a forgery.
16. The court finds that the parties and their witnesses are to be heard to establish actually between the two sets of documents, which ones are genuine. On the face of the 2 sets of documents being challenged on their authenticity, the court finds that the Plaintiff/Applicant has not established a

prima facie case due to the doubts lingering in court's mind on the ownership documents.

17. On the issue of the other 2 limbs of conditions of grant of interim injunction, the court need not consider the same in view of the failure to establish the first limb. However, the court notes that the 1<sup>st</sup> Defendant is in occupation of the suit property and is operating a factory therein, a fact not denied by the Plaintiff/Applicant and which the Applicant had failed to disclose. Obvious the orders sought would shut down the factory and deny the 1<sup>st</sup> Defendant access to the suit property. On the other hand the Plaintiff documents have to be tested during hearing as to their authenticity.

18. Taking to account that there are orders of status quo in force, this court makes the following orders:

1. **Status quo be maintained until suit herein is heard and determined.**
2. **Costs in the cause.**
3. **Parties to comply with order 11 Civil Procedure Rules 2010 to expedite hearing of the suit.**

**Signed and Delivered at Machakos this 5<sup>th</sup> day of December, 2014.**

**CHARLES KARIUKI**

**JUDGE**