



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 149 of 2012

SHAYONA TIMBER LIMITED.....PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT

RULING

This is the Plaintiff's application by way of Notice of Motion dated 25th April 2012 under section 1A, 1B and 3A of the Civil Procedure Act and Order 40 Rule 2(1) and Order 51 Rule 1 of the Civil Procedure Rules, under a certificate of urgency seeking an order of temporary injunction to restrain the Respondent by itself, its agents or servants from invading, claiming ownership, developing or interfering with the Plaintiff's quiet possession of land parcel **L.R. No. 9950/8 (original No. L.R. No. 9950/1/3) East of Nakuru Municipality** (hereinafter referred to as the suit land pending the hearing and determination of this suit, as well as the costs of the application.

The application is based on the following grounds.

1. The Plaintiff is the owner of the subject parcel of land herein.
2. The Defendant, without any justifiable cause or lawful reason invaded, claimed ownership and directed the Plaintiff's director to pull down a perimeter fence, thus interfering with the Plaintiff's quiet possession.
3. The act of the Defendant amounted to trespass and conversion, and is a clear violation of the Plaintiff's constitutional and property rights
4. The Plaintiff has a *prima facie* case with a probability of success. The Applicant will suffer irreparable loss and damage and it is in the best interest of justice that this application should be allowed.

This application is supported by the affidavit of Jayen Motich and Dodhia sworn on 25th April 2012 who depones that he is the Managing director of the Plaintiff company, the owner of the suit property. The Government had previously purported to acquire the suit property compulsorily on 13th March 2009 but this was halted by a ruling delivered in **Nakuru High Court Judicial Review Application No. 2 of 2010** on 24th September 2010. That notwithstanding the defendant through its agents had invaded the plaintiff's parcel of land and claimed ownership.

This application is opposed through the replying affidavit sworn on 22nd May 2012 by Thomas Gicira Gacoki, the Manager(survey) at Kenya National Highways Authority, who depones that the plaintiff is not entitled to the orders sought, the application is frivolous, bad in law and incompetent. He further states

that there was a Gazette Notice published on 13th March 2009 signalling an intention to compulsorily acquire the suit property for the rehabilitation of the Lanet -Njoro turn off road which belonged to one Richard Ingram Crawford. The inspection and valuation was carried out and the land valued at Kshs 7,797,690. Based on the valuation the Chief Engineer Roads prepared an individual cheque for the sum of Kshs 7,707,590 for transmission to the land owner, Richard Ingram Crawford.

The Plaintiff knew the land was earmarked for compulsory acquisition and its directors even attended an inquiry sitting where it was identified as an interested party. The Plaintiff armed with this information has encroached on the land, and has failed to adduce any evidence showing that it is the owner of the suit property.

In a further supporting affidavit by Jayen Motichand Dodhia sworn on 28th May 2012, the Plaintiff denies the assertions of the Defendant, and states that the Plaintiff had already bought the land from the said Richard Ingram Crawford through a sale agreement dated 18th December 2008 and a subsequent one dated 25th September 2009. The plaintiff took possession of the land before transfer was affected; and although Ingram Crawford purported to vitiate the sale agreement, the parties settled the matter. Richard Ingram Crawford through his advocates, advised the Commissioner of Lands to deal with the Plaintiff on the matter of compulsory acquisition as the owner of land parcel **L.R. No. 9950/8 (original No. L.R. No. 9950/1/3) East of Nakuru Municipality**.

The plaintiff knowing the Government still intended to acquire the suit land, filed Nakuru H.C.J.R Application No.2 of 2010 wherein the Government's intentions and process to acquire were halted. On 28th December 2011, the Land Registrar registered the suit property in the name of the Plaintiff which title has not been extinguished to date by any other title. At no time did the Government make payment to the plaintiff for its parcel of land. If the Defendant alleges that full and final payment was made for the suit land, it is their burden to prove that indeed this payment of 7,707,590 was made to Crawford Richard Ingram and further explain why if indeed it was paid why it was paid to a person whom the Government had been barred from dealing with in relation to the suit land.

In his submissions counsel for the plaintiff relied on the case of *Giella vs. Cassman Brown and Company Ltd*(1973)EA 358 which sets out the grounds for seeking an interlocutory injunction:

- (a) An application must show that he/she has a *prima facie* case with a probability of success.
- (b) An interlocutory injunction will not normally be granted unless the Applicant would suffer an injury which cannot be adequately compensated in damage and
- (c) Where the court is in doubt, it should decide on a balance of convenience.

He submitted that indeed the plaintiff had established a *prima facie* case as it was the owner of the suit land, the suit land was never compulsorily acquired, no payment for the said intention to acquire was ever paid out to the plaintiff and that the defendant was guilty of trespass. Secondly, it was clear the plaintiff would suffer irreparable injury not adequately compensated by an award of damages as the plaintiff would be deprived of the proprietorship of the suit land, and his constitutional rights would be violated.

Counsel for the defendant in his submissions stated that the plaintiff has not satisfied the threshold to be granted an injunction for the following reasons:

1. The acquisition of the suit land was in public interest to promote public benefit by expanding Lanet Njoro road to improve infrastructure and economy of the area. In compliance with Section 3 of the Land Acquisition Act Cap 295 Law of Kenya, the Commissioner of Lands published Gazette notice No 2401 published on 13th March 2009 of the intention to acquire 1.1909 Ha. from land parcel LR .No 9950 belonging to Richard Ingram Crawford. The plaintiff was not the owner of the suit land as the land was registered in the name of Crawford Richard Ingram

2. The plaintiff at the time of acquisition was identified only as an interested party.
3. No transfer of LR 9950 had been concluded in favour of the plaintiff at the time of acquisition.
- 4 Valuation and compensation was made out to the owner of the land and interested parties.
5. The Defendant was not guilty of trespass but rather the Plaintiff is the one who had encroached on the Defendants parcel of land and any claim the plaintiff had would best be addressed to Crawford Richard Ingram to whom full payment was made as the owner of the land.

When considering whether or not there is a *prima facie* case, the court is not expected to make any definite findings either of fact or of Law as such findings can only be made at the trial .At this stage, it is sufficient that the court is satisfied from the pleadings that there is apparent violation of the Applicant's rights by the Respondents which would warrant a rebuttal from the latter .***See Mrao Limited vs. First American Bank(k) Ltd.(2003)LR.125.***

Although the plaintiff has stated that it is the owner of the suit land ,no copy of title proving ownership has been exhibited .However the correspondence exhibited by the Defendant shows that the Plaintiff was entitled as an interested party to compensation of 1,500,000/= which payment the plaintiff states it never received and the Defendant has not proved otherwise. If indeed the Plaintiff is the owner of the suit land, then the court has a duty as per Article 40(3) of the constitution “to protect the Plaintiff from deprivation of property by the state unless the deprivation is for public purpose or in public interest and is carried in accordance with the constitution or an Act of Parliament and prompt payment in full of just compensation.

I am satisfied from the pleadings that there is apparent violation of the Applicant's rights by the Respondents. An award of damages may not be sufficient to compensate the Plaintiff, the subject matter being land.

For this reason I will allow the application with costs but urge the parties to consider settling this matter out of court.

Dated and delivered at Nakuru this 1st day of February 2013

L N WAITHAKA

JUDGE

Present

N/A for Plaintiff

Mr Kilila for 1st Defendant

Mr Odhiambo for 2nd & 3rd Defendant

CC: Stephen Mwangi