



REPUBLIC OF KENYA

High Court at Machakos

Civil Case 255 of 2012

CORAL LAND LIMITED PLAINTIFF

VERSUS

1. MASTERMIND TOBACCO LIMITED

2. MANAGING DIRECTOR

3. ISAAC LERAPTO

4. MUNICIPAL COUNCIL OF MAVOKO

DEFENDANTS/RESPONDENTS

R U L I N G

The **Notice of Motion** dated 30/7/2012 is brought under Order 40 Rule 1 (a) and 10 (1) a and 51 Rule 1 of the Civil Procedure Rules, the Civil Procedure Act Chapter 21 Laws of Kenya and all other enabling provisions of the law.

The application seeks the following orders:-

1. (Spent).

2. (Spent).

3. THAT this Honourable Court be pleased to grant temporary injunction orders pending hearing and determination of this application and suit.

4. THAT the Honourable Court be pleased to make an order compelling the Defendants to remove

the accumulated soil and waste on the Plaintiff's private land.

5. THAT the Honourable Court be pleased to order the Defendants to pay damages for loss of use of property "profit mesne".

6. THAT the Honourable Court be pleased to order the Defendants to provide compensation to the Plaintiff."

The application is supported by the affidavit sworn on 30/7/2012 by **Khalid Sharrif Alwy** the **Chief Executive Officer** of the Company.

The background facts according to the said affidavit is that the Plaintiff Company is the registered proprietor and owner of the parcel of land known as **LR 12715/408** measuring about ten acres situated in **Mavoko Municipality** in the **North West of Athir River** in **Machakos District**. The Plaintiff Company purchased the said parcel of land from the **National Security Social Fund (N.S.S.F) Board of Trustees** vide a sale agreement dated 25/11/2011 and the land was transferred to the Plaintiff Company's name on 19/3/2012. The Plaintiff Company's complaint is that the 1st, 2nd and 3rd Defendants have trespassed into the Plaintiff Company's aforesaid parcel of land and have been dumping black cotton soil and other waste material there purportedly with the permission of the 4th Defendant. According to the Plaintiff Company, the said dumping has diminished the value of the said property. That the 1st, 2nd and 3rd Defendants have failed to stop the dumping hence the orders sought herein.

In opposition to the application, the 1st, 2nd and 3rd Defendants filed a replying affidavit sworn on 7/8/2012 by **Robert M Mutuma**, the Company Secretary to the 1st Defendant and a further affidavit sworn on 25/9/2012 by **Njenga Njihia**. It is denied that the 1st, 2nd and 3rd Defendants have been dumping any wastes at the suitland. The 1st, 2nd and 3rd Defendants' assertion is that they applied for authority from the **Mavoko County Council** to dump black cotton soil at the **Syokimau Dam Site** which authority was granted on 12/9/2010. According to the 1st, 2nd and 3rd Defendants, there is only one dam site in **Syokimau** which has been in use as a dumping site since the 1990s. The 1st, 2nd and 3rd Defendants further stated that by the time of the transfer of the suit property to the Plaintiff, the property was being utilized as a dump site by members of public.

The 1st, 2nd and 3rd Defendants' stand is that when they were served with the notice by the Plaintiff's advocate, they stopped depositing the black cotton soil on the suit property.

The 4th Defendant, the Municipal Council of **Mavoko** in opposition to the application swore a replying affidavit on 5/9/2012 through the Town Clerk, **Joshua Sitienei**. The council's position is that the 1st Defendant applied for authority and the same was granted for the 1st Defendant to excavate black cotton soil from its factory's construction site and dump the same at the council's **Syokimau** dump site which is

located in Plot No. LR 12718/409. The council denied dumping any soil or being an accessory to any dumping on the Plaintiff's plot No. 12715/408 (suitland).

The firm of **Yunis Mohamed Advocates** appeared for the Defendant while **Macharia Kahonge Advocates** appeared for the Defendant.

The application was canvassed by way of written submissions which I have duly considered.

It is not in dispute that the Plaintiff is the registered owner of the suit property. It is also not in dispute that the Plaintiff's said property abuts the council's dumping site. The further affidavit by the 1st, 2nd and 3rd Defendants does not deny dumping black cotton soil on the Plaintiff's property. What the 1st, 2nd and 3rd Defendants have stated is that after being served with the notice by the Plaintiff's Advocate, they stopped depositing the soil at the Plaintiff's property. The 1st, 2nd, 3rd Defendants have also contended that the Plaintiff's property has been used as a dump site by members of public since the 1990's, a fact that the plaintiff was aware of before the property was purchased and transferred to the Plaintiff. Whether the members of public have been dumping waste on the Plaintiff's property is another matter. The authorization by the council was for the 1st Defendant to dump the black cotton soil at the council's dam site which the council has stated is on plot No. 12715/409 and on the Plaintiff's plot No. 12715/408. There is no evidence to show that the council has been dumping any waste on the Plaintiff's property.

Prima facie, the Plaintiff's case meets the threshold for the grant of injunctive orders against the 1, 2 & 3rd Defendants. However, prayers for the removal of the accumulated soil and waste, payment of damages for loss of use of the property and compensation can only be dealt with in the main suit.

With the foregoing, I allow prayer for orders of injunction restraining the 1st, 2nd and 3rd Defendants from dumping black cotton soil or any other waste on the Plaintiff's LR No. 12715/408 situated in **Mavoko Municipality**.

Costs in cause.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this 11th day of April 2013.

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JUDGE