



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 634 OF 2010

NAIROBI BOTTLERS LIMITED1ST PLAINTIFF

KENYATTA INTERNATIONAL CONFERENCE CENTRE.....2ND PLAINTIFF

-VERSUS-

CITY COUNCIL OF NAIROBI..... DEFENDANT

RULING

1. Before me is the plaintiffs' chamber summons dated 16th December 2010. The plaintiffs pray for injunctive relief against the defendant. The plaintiffs aver that the defendant, without any colour of right, has issued a notice to vacate and has threatened to evict the plaintiffs from a property bordering Parliament road, City Hall way and Sheria House in Nairobi. The property is said to belong to the 2nd plaintiff who has leased it, for consideration, to the 1st plaintiff.

2. The defendant is a local authority. It claims that it is owed by the plaintiffs land rates and penalties. It has rendered a demand. On 7th December 2010, it also issued a notice to vacate to the 1st plaintiff. That notice is made to Rosinje Soda Distributor who has deposited a soda container on the suit property. The defendant's case is set out in a replying affidavit of Christine Caleb, a director of the City Inspectorate Department. The defendant avers that the unsurveyed suit land was allocated to it by the Government of Kenya. There is pending another suit being High Court Miscellaneous Application 128 of 2003 in which the 2nd plaintiff has sought a declaration that the suit land and LR 209/11157, on which Kenyatta International Conference Centre stands, belongs to it. The defendant avers that the soda container at the corner of City Hall way and Parliament road are on its land. The purported lease between the plaintiffs is thus impugned for want of capacity of the lessor. The defendant also contends that the 2nd plaintiff has acknowledged it and has been paying rates to the council. That *ipso facto* is a concession that the land belongs to the council. The defendant urged the court to dismiss the application with costs.

3. I have heard the rival arguments. I take the following view. I have studied a letter from the Permanent Secretary, Ministry of Lands dated 21st October 2009. The ministry states that it received a request from the 2nd plaintiff, a state corporation, to be allocated a unsurveyed "government land forming the open grounds bordering the back of Sheria house, Parliament road and City Hall way". The ministry also noted that the defendant has also laid a competing claim to the property. That is the property in dispute in this

case. The letter in the material part states;

“However, neither of the two parties can advance valid legal reasons on why it should be allowed to manage the space and collect all the revenue to the exclusion of the other party. The portion of the land in question is still unsurveyed government land and, therefore, under the management of this Ministry. Both the Nairobi City Council and KICC Corporation should, therefore, maintain the status quo pending wider consultations on the way forward. Allocation of L.R. No.209/11157 on which the KICC building stands to the Corporation will also depend on the outcome of the High Court Miscellaneous Application No. 128 of 2003 wherein KANU was challenging an Executive Order of the Government to take over KICC. The case is now in the Court of Appeal, after it was struck out by the High Court on technical grounds”.

4. On a preponderance of the evidence, I find that the suit land belongs to the government. Neither the plaintiffs nor the defendant has a title over it. But I also note that the suit land has been fenced off permanently as part of the grounds of the Kenyatta International Conference Centre forming a square bordered by City Hall Way, Parliament road, Sheria house and the Law courts. The 2nd plaintiff is thus in possession. Pending the determination of allotment of the suit land, the 2nd plaintiff has a superior claim based on possession. I say so because the 2nd plaintiff runs the building known as Kenyatta International Conference Centre standing on LR No 209/11157 adjacent to the suit land. I am well alive that the ownership of that building is the subject of litigation arising out of High Court Miscellaneous Application 128 of 2003. That is the suit referred to by the defendants. It is not litigation between the present parties but between the 2nd plaintiff and a party known as Kenya African National Union. The receipt for payment of rates marked “MC 3” to the supporting affidavit is for rates over the land LR 209/11157 and not the suit land. It is thus erroneous for the defendant to aver that the 2nd plaintiff has, by that payment, conceded to the council’s ownership of the suit land. In a synopsis, the defendant has not presented cogent evidence to demonstrate its claim of ownership or superiority over claims by the 2nd plaintiff. I am not saying the 2nd plaintiff has established ownership either. That will be for the trial court on tested evidence. All that I am saying is that the evidence of possession by the 2nd plaintiff with the acquiescence of the government through the Ministry of Lands has defanged the defendant’s claims. The 2nd plaintiff, as a corollary, is then entitled to lease a portion of the suit land to the 1st plaintiff. Logically, and subject to compliance with local licences, the 1st plaintiff is entitled to injunction.

5. When a litigant approaches the court for injunction, he must rise to the threshold for grant of interlocutory relief set clearly in *Giella Vs Cassman Brown and Company Limited* [1973] E.A 358. Those principles are first, that the applicant must show a *prima facie* case with a probability of success; secondly that he stands to suffer irreparable harm not compensable in damages; and thirdly, if in doubt, the court must assess the balance of convenience. Being a discretionary remedy, there is also ample authority that a party, who has misconducted himself in a manner not acceptable to a court of equity, will be denied the remedy. See *Kenya Hotels Limited Vs Kenya Commercial Bank and another* [2004] 1 KLR 80.

See also the *Public Trustee Vs Nicholas Kabucho Murimi* HCCC ELC 610 of 2011 [2012] e KLR, *George Munge Vs Sanjeev Sharma & 3 others* HCCC ELC 677 of 2011 [2012] e KLR.

6. I have thus come to the conclusion that the plaintiffs have established a strong *prima facie* case with a probability of success. I am of the view that the application by the plaintiff has then reached the threshold for grant of interlocutory injunctive relief. In the result I order that an injunction do issue restraining the defendant, its servants, employees or agents from interfering, developing, leasing, collecting rent, trespassing, evicting or in any other manner affecting the business of the 1st plaintiff conducted on an unsurveyed property or grounds at the corner of City Hall Way and Parliament road adjacent to Garden Square Restaurant.

7. As the issue of title is under contest between the 2nd plaintiff and the defendant, I shall order that costs abide the judgment.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 10th day of July 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Ms Onsare for the Plaintiffs.

No appearance for the Defendant.

Mr. Collins Odhiambo Court Clerk.