



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 534 OF 2015

SIMARCH KENYA LIMITED.....PLAINTIFF/APPLICANT

=VERSUS=

BENGAL TRADING COMPANY.....1ST DEFENDANT/RESPONDENT

CHIEF LAND REGISTRAR.....2ND DEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 16th June 2015 brought under Article 40 of the Constitution of Kenya 2010 order 40 rule 1, order 51 rule 1 of the Civil Procedure Rules 2010, Section 1A, 1B and 3A of the Civil Procedure Act and all enabling provisions of the law.

2. It seeks order:-

(1) Spent

(2) Spent

(3) That the court be pleased to grant an injunction restraining the respondents whether by themselves, their agents, and or servants from trespassing on, wasting, construction on, alienating or otherwise interfering or dealing with the plaintiff's property, being land reference number 21880 Nairobi in any way whatsoever pending the hearing and determination of this suit.

(4) That costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph 1 to 4.

4. The application is supported by the affidavit of Simon Musyoka Kaingo the managing director of the plaintiff/applicant sworn on the 15th June 2015.

5. The application is opposed. There is a replying affidavit sworn by Omar Shariff, a director of the 1st defendant/respondent sworn on the 28th July 2015. There are grounds of opposition dated 28th July 2015.

6. By a consent order dated 30th July 2015, the Chief Land Registrar was enjoined in this suit. There is a replying affidavit sworn by Gordon Odera Ochieng Senior Assistant Director, Lands Administration, with the department of lands ministry of Lands and Housing on the 1st March 2018.

7. The application was canvassed by way of oral submissions.

It is the plaintiff/applicant's case that it is the registered proprietor of LR NO. 21880 situated in Nairobi. That the 1st defendant/respondent has been interfering with the said property by trespassing thereupon and damaging the boundary, perimeter wall and erecting unauthorized structures on the suit property. The plaintiff/applicant relies on certificate of title annexed and marked "SMK1". It shows that the IR NO. 92931 was issued on the 9th December 1997 for a lease of 99 years with effect from 3rd October 1997.

8. It is the plaintiff's/applicant's submissions that this document emanates from the commissioner of lands. That for this reason the plaintiff/applicant states it has established a prima facie case with a probability of success at the trial. That it is likely to suffer substantial

loss if these orders are not granted as damages will not suffice. They urge that the application be allowed.

9. It is the 1st defendant's/respondent's case that it is the bona fide purchaser for value having purchased the suit property from Microtech Accessories Limited and therefore it is entitled to protection. That the plaintiff/applicant have not provided a history of how it acquired the suit property. The title is not genuine. They urge that the application be dismissed with costs.

10. It is the 2nd defendant's/respondent's case that the office of the Chief Land Registrar has no records in respect of LR NO. 21880 IR NO 92931 and that the documents exhibited by the plaintiff/applicant is a forgery. Further that, LR NO. 21880 IR NO 92931 issued on 3rd October 1997 is a work of fraud and did not emanate from the ministry of lands.

11. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the grounds of opposition and the replying affidavits. I have considered the oral submissions of counsel and the authorities cited.

The issues for determination are:-

(a) Whether or not the plaintiff/applicant's application meets the threshold for grant of temporary injunctions.

(b) Who should bear costs

12. It is the plaintiff's/applicants case that it is the registered proprietor of LR NO. 21880 in which the 1st defendant/respondent has trespassed. The 1st defendant/respondent on the other hand claims to have bought LR NO. 209/9715 from Microtech Accessories Limited and therefore it is entitled to protection.

13. At this juncture it is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman brown & Co. Ltd [1973] EA 358**. In the Case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.

14. I have considered the rival submissions. I have gone through the replying affidavit of Gordon Odera Ochieng, the Senior Assistant Director, Lands Administration with the Ministry of Lands and Housing.

In paragraph 10 he deposes:-

“That the title LR NO. 21880 IR 92931 for a term of 99 years from 3rd October 1997 is a work of fraud and never emanated from the Ministry of Lands and Physical Planning.”

In paragraph 12 he deposes:-

“That from our records the suit property herein is registered in the name of Bangal Trading Limited as LR NO. 209/19715 I.R 124269.”

These averments are echoed by his colleague, Edwin Munoko Wafula, in his affidavit sworn on the 1st March 2018. This therefore means that the title which the plaintiff/applicant bases its claim on the suit property is not genuine. I find that the plaintiff/applicant has failed to establish a prima facie case with a probability of success at the trial.

15. In the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & Another 1990 KLR 557 Bosire J (as he then was)** held that:-

“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”

I am not satisfied by the facts presented by the plaintiff/applicant that it deserves this kind of protection.

16. I also find that the plaintiff/applicant has failed to demonstrate that it will suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted.

17. I find that the balance of convenience titles in favour of the 1st defendant/respondent whose records as to ownership of the suit property can be traced in the office of the Chief Land Registrar.

18. All in all, I find no merit on this application and the same is dismissed. The costs do abide the outcome of the main suit. It follows that any interim orders previously issued are hereby vacated.

It is so ordered.

Dated, signed and delivered in Nairobi on this 31st day of January 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the 1st Defendant

.....Advocate for the 2nd defendant

.....Court Assistant