



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 282 OF 2018

KENYA PORTS AUTHORITY.....1ST PLAINTIFF

KENYA PORTS AUTHORITY PENSION SCHEME

(Suing through its registered trustees)2ND PLAINTIFF

VERSUS

AKABA INVESTMENT LIMITED.....1ST DEFENDANT

KEMO CONTRACTORS LTD.....2ND DEFENDANT

HASSAN ABUBAKAR.....3RD DEFENDANT

SAMUEL KIPCHUMBA T/A INVESTMENT.....4TH DEFENDANT

HILLARY OSODO T/A HIRIRA ENTERPRISES.....5TH DEFENDANT

ABUBAKAR KISILO AND SHABANISMAIL T/A

SHABAN BLUE ENTERPRISES.....6TH DEFENDANT

THE NATIONAL LAND COMMISISON.....7TH DEFENDANT

THE LAND REGISTRAR.....8TH DEFENDANT

THE ATTORNEY GENERAL.....9TH DEFENDANT

RULING

1. By a Notice of Motion dated 4th December, 2018 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiffs/Applicants are seeking the following orders:

1. That this matter be certified as urgent and service be dispensed with in the first instance.

2. That this Honourable Court be pleased to issue order of injunction restraining the 1st and 2nd Defendants their agents and/or assigns from developing and/or constructing on plots MOMBASA/BLOCK XXIII/227, MOMBASA/BLOCK XXIII/228, MOMBASA/BLOCK XXIII/229 and MOMBASA/BLOCK XXIII/230 illegally created on the public access road pending the hearing and determination of this application inter-partes.

3. That this Honourable Court be pleased to issue order of injunction restraining the defendants, their agents and/or assigns from interfering in any manner whatsoever with the public access road serving the plaintiffs created on the former MOMBASA/BLOCK XXII/179 to serve plot NOS. MOMBASA/BLOCK XXII/412 – 226 AND 231 – 244 pending the hearing and determination of this application inter-partes.

4. That this Honourable Court be pleased to issue order of injunction restraining the 1st and 2nd Defendants, their agents and/or assigns from developing and/or constructing on plots MOMBASA/BLOCK XXIII/227, MOMBASA/BLOCK XXII/228, MOMBASA/BLOCK XXIII/229 and MOMBASA/BLOCK XXIII/230 illegally created on the public access road pending the hearing and determination of the suit.

5. That this Honourable Court be pleased to issue order of injunction restraining the Defendants, their agents and/or assigns from interfering in any manner whatsoever with the public access road serving the Plaintiff created on the former MOMBASA/BLOCK XXIII/179 TO SERVE PLOTS NO. MOMBASA/BLOCK XXIII/412 – 226 and 231 -244 pending the hearing and determination of this suit.

6. That costs of this application be provided for.

2. The application is premised on the following grounds:

i. The 1st Plaintiff was the legal or beneficial owner of the fee simple interest in properties known as MSA/BLK/XXIII/179 which property was inherited from the East African Railway and Harbours Administration and subsequently the East African Harbours Corporation vide Legal Notice No.19 of 1969 and Legal Notice No.160 of 2001 respectively.

ii. The 1st Plaintiffs developed MOMBASA/BLOCK XXIII/179 to house its staff and sometimes in 1999, the property was subdivided to create a public access road and also to create individual titles for each of the houses on the property resulting in creation of plots namely MOMBASA/BLOCK XXIII/214 – 226 AND 231-244.

iii. The Commissioner for Lands purported to illegally create plots NUMBER MOMBASA/BLOCK XXIII/227, MOMBASA/BLOCK XXIII/228, MOMBASA/BLOCK XXIII/229 AND MOMBASA/BLOCK XXIII/230 on an area reserved for a public access and purported to allocate the same to the 3rd to 6th Respondents who subsequently purported to transfer to the 1st Respondent.

iv. The 1st and 2nd Respondents are developing the said property on the public access road therefore impeding access to the plaintiff's properties and unless restrained by this Honourable Court, the Defendants shall occasion the Applicants irreparable loss.

v. It is in the interest of justice and the overriding objective principle that the Defendants be restrained from developing the suit property pending the hearing and determination of this suit.

3. The Application is supported by the affidavits of Moses Otieno and John Turasha both sworn on 4th December 2018. Briefly, it is the Applicants case that the 2nd Applicant is the registered pension scheme sponsored by the 1st Applicant and the members of the scheme are both the current and former employees of the 1st Applicant. That the 1st Applicant was the owner of the freehold interest in the property then known as MOMBASA/BLOCK XXIII/179 which was developed and subsequently subdivided into various plots namely Plot No. MOMBASA/BLOCK/XXIII/214-226 and 231-244 and also to create a public access road. That the 1st plaintiff subsequently transferred to the 2nd plaintiff PLOTS NO. MOMBASA/BLOCK XXIII/214-226 and 231-244 to settle the debt owed by the 1st plaintiff to the 2nd defendant and now the leasehold interest in the property is registered in the name of the 2nd plaintiff while the 1st plaintiff is still the freehold owner of the suit property following the decision of the court in **HCCC No.245 of 2004, Kenya Ports Authority –v- G. Wayumba & Others.**

4. It is the Applicant's contention that the Commissioner for Lands purported to create plots MOMBASA/BLOCK XXIII/227, 228, 229 AND 230 on the Land exercised from MOMBASA/BLOCK XXIII/179 and reserved for a public access road when there was no land available for allocation as there was no unalienated government land for allocation. They further contend that the Commissioner for Lands acted illegally, unlawfully and without jurisdiction and that the 1st and 2nd Defendants are developing on the public road access and therefore impeding access to the plaintiffs' properties and their actions amount to trespass.

5. The Applicants have annexed copies of the judgment in **HCCC No. 245 of 2004**, copy of the title to MOMBASA/BLOCK XXIII/179 and map, copies of **Legal Notice No.19 of 1969** and **Legal Notice No.160 of 2001** showing how the assets moved from East African Harbours Corporation (EAHC) and East African Railway and Harbours Administration (EAR and HA). The plaintiffs state that although the dispute was subject of **High Court Misc. Application No.124 of 2001 – Republic –v- Commissioner of Lands, Municipal Council of Mombasa & Akaba Investments Ltd Ex-parte Kenya Ports Authority and Civil Appeal No. 255 of 2003**, the dispute over the allocation of the said properties is yet to be heard by any competent court on merits. They have attached the ruling and judgment of the High Court and Court of Appeal respectively.

6. The application is opposed by the 1st and 2nd Respondents. The 1st Respondent filed a replying affidavit sworn by Abdulbasit Swaleh on 17th December 2018 and a Notice of Preliminary Objection dated 17th December 2018. He depones inter alia, that the 1st Respondent has genuine title for the suit plots and are therefore the legal and undisputed owners of the suit property. That the properties were created as a subdivision of a larger property by the Commissioner for Lands who has competent authority and were registered in the names of the 3rd, 4th and 6th Respondents, who in turn sold to the 1st Respondent for valid consideration. They deny the allegation that the properties are on public access road and maintain that they are carrying developments on their private properties. The 1st respondent avers that the Court of Appeal had made a decisions in its favour and therefore the court should not entertain this application, adding that the suit is malicious, frivolous and vexatious and an abuse of the process of the court.

7. The 2nd Respondent filed a replying affidavit sworn by Francis Ogeso Kemo on 29th January 2019 in which he depones inter alia, that he is trading as Kemo construction and not Kemo Contractors Limited. He denied dealing with any of the defendants and has never undertaken any works, projects, developments, buildings or constructions on the suit properties.

8. In his submissions, Mr. Wafula, counsel for the Applicants reiterated the contents of the affidavits in support of the application. Relying on the case of **Henry Muthee Kathurima –v- Commissioner of Lands & Another (2015)eKLR** he submitted that once the suit property was allocated for public use, the same was not available for allocation by the Commissioner of Lands. He also cited the case of **Nelson Kazungu Chai & 9 Others –v- Pwani University College (2017)eKLR**. Mr. Wafula submitted that the case is not res judicata as no final decisions has been made in the former suit which were judicial review proceedings. He cited the case of **Kenya Commercial Bank Ltd –v- Benjoh Amalgamated Ltd (2017)eKLR; Commissioner of Lands -v- Kunste Hotels Ltd (1995-1998)1 EA 1; Republic –v- Land Registrar, Taita Taveta District & Another (2015)eKLR and Livingstone Mumini Ntutu –v- Minister for Lands & 4 Others (2014)eKLR**.

9. Mr. Munzyu, learned counsel for the 1st Respondent submitted that the matter is res judicata as the dispute was dealt with in **Judicial Review No.124 of 2001** and **Civil Appeal No. 255 of 2003** between the same patties and over the same subject matter. He submitted that the plaintiffs have failed to prove any right of ownership and have come to court with unclean hands, adding that the 1st Respondent obtained the suit properties legally. It was his submissions that the Applicants could have made an application under Section 9 of the Public Roads and Roads of Access Act Cap 399 Laws of Kenya. He urged the court to uphold the preliminary objection and dismiss the plaintiff's suit and the application with costs.

10. Mr. Onyango, counsel for the 2nd Respondent submitted that the Applicants have not met the conditions for grant of temporary Injunction as set out in the famous case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**. That no prima facie case has been established against the 2nd defendant who has denied knowledge of the suit properties and states that he has never been engaged by any of the other defendants to do any project in the properties in question.

11. I have considered the application, the affidavits in support and against and rival submission made as well as the authorities relied on. The principles upon which an interlocutory injunction may be granted are well settled. One has to establish a prima facie case with a probability of success and an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. If in doubt, the court will decide the matter on a balance of convenience.

12. It is not in dispute that the 1st defendant has titles for the properties known as **MOMBASA/BLOCK XXIII/227, MOMBASA/BLOCK XXIII/228, MOMBASA/BLOCK XXIII/229** and **MOMBASA XXIII/230**. The said plots were initially one plot No. **MOMBASA/BLOCK XXIII/179** which was owned by the 3rd, 4th, 5th and 6th defendants who subdivided it and sold to the 1st Defendant.

13. The plaintiffs' claim is that there was an organization known as East African Railways and Harbours Administration which in turn was succeeded by East African Harbours Corporation. The first organization was the registered owner of **MOMBASA/BLOCK XXIII/179** but upon the demise of the organization, it was succeeded by the East African Harbours Corporation. **MOMBASA/BLOCK XXIII/179** devolved upon the latter corporation. The corporation in turn met its demise in 1969 and was succeeded by the 1st Plaintiff. According to the plaintiffs, **PLOT NO.MOMBASA/BLOCK XXIII/179** was one of the properties which devolved upon the 1st Plaintiff by **Legal Notice No.19 of 1969** but the property remained registered in the name of East African Railways & Harbours Administration until 2001 when it was sub-divided as already stated and registered in the name of the 1st defendant.

14. It was after the land had been registered in the name of the 1st defendant that the 1st plaintiff moved to court in Mombasa **HC Misc. Civil Suit No.124 of 2001** to have the certificates quashed and as the land had never been registered in the 1st plaintiff's name at any stage, the plaintiff could only claim it by inheritance. The High Court issued an order of certiorari quashing all the titles issued to the 1st defendant.

15. Being dissatisfied with the judgment in **HC Misc. Civil Suit No.124 of 2001**, the 1st defendant filed **Civil Appeal No.255 of 2003**. By its judgment dated 16th March, 2007, the Court Appeal allowed the appeal, set aside all the orders made by the High Court and substituted therefore an order dismissing **HC Misc. Civil Suit No. 124 of 2001**. In its judgment, the Court of Appeal stated inter alia, that:

“It is not to be forgotten that the procedure of judicial review only applies to the decision making process, not the merits of the decisions. It is accepted that the respondent was not the registered owner of the property. Strictly speaking the respondent was not entitled to be heard before the decision was made; ownership of land is manifested not by Legal Notices but by ownership of title documents. Again there was the unchallenged evidence of the appellant that it has acquired the lands for valuable consideration from named and identifiable individuals/entities. Those individuals or entities were not available before the learned Commissioner of Assize to be heard on how they themselves had acquired the interest (s) which they were able to sell to the appellant. We think that in all the circumstances of the case, the remedy of certiorari was inappropriate and was not, therefore available to the respondent. If the respondent was of the view that it has been wrongly deprived of its property, it ought to have sued in the ordinary way so that all issues could be ventilated before the court” (emphasis added)

16. It is clear from the above decision that the matter herein was not heard and finally decided by the court as contemplated under the provisions of Section 7 of the Civil Procedure Act. The court of Appeal was categorical that the dispute could still be resolved in the ordinary way such as a civil suit like the present one. For this reason, I find the objection by the 1st defendant herein has no merit and the same is overruled.

17. It is apparent that both the plaintiffs and the 1st defendant claim the same land. The 1st defedant has title documents in its favour while the plaintiffs are basing their claim on Legal Notices. Whereas it should be noted that it is difficult at this stage for the court to ascertain the correct position from the disputed affidavits and documents, it is my belief that that does not preclude the court from making a determination on the application before court.

18. The crucial issue for determination is whether the plaintiffs should be granted the orders sought given the circumstances of this case. To my mind, the injunction sought is for purposes of maintaining the respective parties' position in the suit properties until the dispute is determined. Courts have granted an injunction on the general principle that is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing of the case, find that a greater injustice has been occasioned. The court may look at the circumstances of the case generally and the overriding objective of the law.

19. In **Suleiman – v- Amboseli Resort Ltd (2004) KLR 589**, Ojwang, Ag. J (as then was) at page 607 delivered himself thus:

*“.....counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago in **Giella –v- Cassman Brown, in 1973** cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of **Films Rover International** made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770 – 781: A fundamental principle of ... that the court should take which ever course appears to carry the lower risk of injustice if it should turnout to have been “wrong”... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in **Giella –v- Cassman Brown** the court has had to consider the following questions before granting injunctive relief.*

iv) is there a prima facie case...

v) Does the applicant stand to suffer irreparable harm....

vi) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.... ”

20. In that case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned. The guiding principle of the overriding objective is that the court should do justice to the parties before it and their interests must be put on scales. Both the plaintiffs and the 1st Defendant are claiming ownership of the suit property. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

21. Having looked at the facts that have emerged in this case and the evidence adduced by way of affidavits, it is the view of the court that the plaintiffs have established a *prima facie* case with a probability of success against the defendants. In my view, it is clear that the plaintiffs have shown their right over the suit property. As regards irreparable damage, I take the view that should the suit land be developed to conclusion, it will have changed totally and the plaintiffs will have suffered loss which may not be quantified in damages. The balance of convenience would tilt in favour of the plaintiffs in order to safeguard the current status of the subject matter pending hearing and determination.

22. Arising from all the above reasons, I find merit in the application. Accordingly, I grant the order for temporary injunction in terms of prayer 4 and 5 of the notice of motion dated 4th December, 2018. Considering the circumstances of this case, I order that the costs of the application shall be in the cause. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 27th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Wafula for Plaintiff/Applicant

Munzya for 1st Defendant

Cheloit for Onyango for 2nd Defendant

No appearance for 3rd – 9th Defendants

Yumna Court Assistant

C.K. YANO

JUDGE

27/2/19