



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC CASE NO. 121 OF 2019

BOS SHIPPING (EAST AFRICA LIMITED)PLAINTIFF

VERSUS

ABDALLA ABDUL REHMAN

TEXAS ALARMS (K) LTD.....DEFENDANTS

RULING

(Application for injunction; principles to be considered; plaintiff displaying title documents to the suit land; none filed by defendants to demonstrate any rights over the suit land; respondent only raising technical objections to the suit and the application on the day of the hearing of the application; unfair to the applicant for the court to consider those issues raised late in the day and court directs the said to be substantively canvassed at a later time; prima facie case established and application for injunction allowed)

1. This suit was commenced through a plaint which was filed on 1 July 2019, by the law firm of M/s Kabiro Ndaiga & Company Advocates. In the plaint, the plaintiff averred that she is the registered proprietor of the land identified as Plot Number MN/1/890 vide a Grant No. CR 9291/1 delineated in survey plan No. 39643. She pleaded that on 25 March 2019, the 2nd defendant acting on instructions of the 1st defendant, posted security guards on the suit property and broke into it, which the plaintiff contends is an act of trespass. In this suit, the plaintiff has sought orders inter alia that she be declared the rightful owner of the suit land, a mandatory injunction compelling the defendants to get out of the property, special and general damages.

2. Together with the plaint, the plaintiff filed an application seeking orders to have the defendant restrained by way of an injunction pending the hearing and determination of the suit. The supporting affidavit to that application is sworn by Ayoob Mohamed Bashir, who deposed that he is the Finance Director of the plaintiff company and is authorized to swear the affidavit on its behalf. The application came under certificate of urgency before Justice Anne Omollo who directed that the application be heard inter partes on 17 September 2019.

3. The defendants entered appearance through the law firm of Marende Necheza & Company Advocates on 16 July 2019. At the same time, the said firm filed a notice of preliminary objection as follows :-

(i) *That the application is misconceived and an afterthought and a nullity.*

(ii) *That the plaintiff/applicant (sic) suit is defective and incompetent as it offends Section 27, 37, 40 and 41 of the Companies Act, No. 17 of 2015, in bring this (sic) proceedings and instructing the firm of M/s Kabiro Ndaiga & Company Advocates to represent it in this matter.*

(iii) *That Mr. Ayoob Mohamed Bashir lacks the requisite locus standi to bring this proceedings and/or depone on behalf of the plaintiff/applicant as he offends Section 40 and 41 of the Companies Act, No. 17 of 2015.*

(iv) *That the plaintiff's action (sic) are malicious and the said application is a total breach and abuse of the court process.*

(v) *That the application is an abuse of court process and waste of court's time as it is trying to circumvent the courts and/or legal process to the disadvantage of interested parties.*

4. On 17 September 2019, when the application came up for inter partes hearing, Mr. Mogaka, learned counsel holding brief for Mr. Kabiro for the plaintiff, complained that it was only that morning that he had been served with the preliminary objection despite the same being filed on 16 July 2019. He submitted that the court should not entertain such ambush. He referred me to Order 51 Rule 14. He pointed out that the factual basis for the application has not been opposed as the applicants have exhibited documents of title to the suit land and are in

occupation.

5. Mrs. Kyalo for the defendants submitted that a preliminary objection can be filed at any time and asked that the same be termed as a response to the application. She more or less reiterated what is noted in the preliminary objection and asked that the application and suit be struck out. She submitted that there is no resolution appointing M/s Kabiro Ndaigwa & Company Advocates, and that Mr. Ayoob Bashir lacks locus standi.

6. I have considered the matter. As I pointed out earlier, what came up on 17 September 2019 was an application for injunction. Order 51 generally prescribes the manner in which applications are to be disposed with. In respect of a reply to an application, Order 51 Rule 14 applies and it provides as follows :-

Grounds of opposition to application in High Court :-

(1) Any respondent who wishes to oppose any application may file at any one or a combination of the following documents —

(a) a notice preliminary objection: and/or;

(b) replying affidavit; and/or

(c) a statement of grounds of opposition;

(2) the said documents in subrule (1) and a list of authorities, if any shall be filed and served on the applicant not less than three clear days before the date of hearing.

(3) Any applicant upon whom a replying affidavit or statement of grounds of opposition has been served under subrule (1) may, with the leave of the court, file a supplementary affidavit.

(4) If a respondent fails to file to comply with subrule (1) and (2), the application may be heard ex parte.

7. It will be seen from the above, that where one opposes an application, such person is supposed to file and serve his preliminary objection, replying affidavit or grounds of opposition, not less than three clear days before the date of the hearing. The respondents are in clear breach of this rule for they only served counsel for the applicant on the morning of the hearing of the application despite having filed the said documents more than two months prior. No explanation was given as to why the respondents had to hold onto the documents for two months only to unleash them on the applicant when the application was due for hearing *inter partes*. I can only think that the respondents wished to steal a march on the applicant and I do not see why they should gain percentage from such acts. In my view, in the circumstances of this case, it would be unfair to consider the technical aspects raised in the preliminary objection alongside the application for injunction. The respondents can take another date for hearing of that preliminary objection after the applicants have had time to respond to, or reflect on it. I do not see any prejudice that will be caused to the respondents by this order, for what they have raised are points of law, which can be raised and dealt with at any time of the proceedings.

8. On whether or not an injunction should issue, the principles upon which an injunction may be granted are set out in the case of ***Giella vs Cassman Brown (1973) EA 358***. One needs to demonstrate a prima facie case with a probability of success, show that they stand to suffer irreparable loss, and where the court is in doubt, it will decide the application on a balance of convenience.

9. I have looked at application and I note that the applicant has displayed a copy of title. The respondents have not displayed any. In fact, the respondents have not offered any explanation to justify their interference with the suit premises. I am thus persuaded that the applicant has displayed a prima facie case with a probability of success and stands to suffer by the continuous interference by the respondents. Even if I was to consider the balance of convenience, it tilts in favour of the applicant, for from the evidence before me, the applicant was in possession prior to the interference by the respondents.

10. Given the above, I do allow this application for injunction. I issue orders that pending the hearing and determination of this suit, the 1st and 2nd defendants be and are hereby restrained by an order of injunction, from being upon, entering, placing guards or other personnel, and/or in any other way interfering with the plaintiff's possession of the suit property. If there are any guards placed on the property by the defendants, they must remove themselves forthwith. The plaintiff will also have the costs of this application.

11. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of September 2019.

MUNYAO S.

JUDGE.

IN THE PRESENCE OF:

Mr. Mogaka holding brief for M/s Kabiro Ndaigwa & Co. Advocates for the Plaintiff/Applicant.

Mr Ondieki holding brief for Mr. Shimaka for the Defendants/Respondents.

Court Assistant; Mr. Koitamet.

MUNYAO S.

JUDGE.