



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 90 OF 2018

MANSUKHLAL VERSHI SHAH.....PLAINTIFF

VERSUS

PETRO OIL (K) OIL.....DEFENDANT

RULING

1. By a Notice of Motion dated 17th April 2018 brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Order 40 Rules 1, 2, 3, 4 and 9 and Order 51 of the Civil Procedure Rules and all enabling provisions of law, the Plaintiff/Applicant seeks the following orders:

1. Spent

2. Spent

3. Pending the hearing and determination of this suit, the Defendant/Respondent by themselves, their agents, servants and/or employees be restrained from wasting, damaging and/or alienating or any other way dealing with the pavement/walk way/access road in front the properties known as MOMBASA/BLOCK XVII/538 AND MOMBASA/BLOCK XVII/740.

4. The costs of this application be paid for by the Respondent.

2. The Application is premised on the following grounds:

i. That the Plaintiff/Applicant is one of the bona fide registered owners of the properties known as MOMBASA/BLOCK XVII/538 and MOMBASA/BLOCK XVII/740. He acquired the properties in the years 1986 and 1992.

ii. That the Plaintiff/Applicant has been in quiet possession and enjoyment of the properties since then. The front part of the properties faces Ronald Ngala Highway, and has two gates, with pavement/walk way next to the road that has been used by the occupants of the properties and the general public.

iii. That in or around the 26th March 2018, the Plaintiff/Applicant was informed that there was a construction ongoing on one of the adjacent plots that was encroaching on a pavement/walkway that also contains access gates to the properties. The said encroachment meant that the pavement/walkway was being converted into a feeder road leading to the plot where a petrol station was being constructed. The Plaintiff/Applicant was appalled by that information.

iv. That the said encroachment is infringing on the access, use, and occupation of the properties by the Plaintiff/Applicant and other inhabitants thereof as it is very dangerous and inconveniencing. The pavement/walkway was also serving the general public.

v. The Plaintiff/Applicant is apprehensive that unless the orders sought herein are granted the defendant/Respondent will proceed to unlawfully convert the said pavement into a feeder road, and cause irreparable harm to the Plaintiff/Applicant, the properties and the occupants thereof and the general public as a whole. The Plaintiff/Applicant has a prima facie case against the Defendant/Respondent with a very high probability of success.

vi. It is just and meet to prohibit the Defendant/Respondent, their agents, servants, or any other persons from wasting, damaging and/or alienating or otherwise dealing with the pavement/walkway in front of the properties to enable the court to hear this matter to its conclusion and to ensure justice prevails.

3. The Application is supported by the affidavit of the Plaintiff sworn on 17th April 2018 and a further affidavit sworn on 31st October 2018. The Plaintiff reiterates that he is one of the registered owners of the suit properties. That the said properties have a pavement /walkway and two gates lying between them and Ronald Ngala Highway. That the pavement/walkway also acts as access to the said properties but are nevertheless used by them sometimes as a parking and are also used by the general public who troop up and down Ronald Ngala Highway. The Plaintiff avers that on 26th March 2018, the Defendant encroached the pavement with the intention of converting it into a feeder road for a petrol station constructed on the plot next to the Plaintiff's properties. That the affected parties wrote to the National Environment Management Authority (NEMA) protesting the same and also questioned how a petrol station is being constructed in a residential neighbourhood. The Plaintiff averred that they felt that the conversion of a pavement into a feeder road affects the enjoyment and use of their properties, is inconveniencing and very dangerous. He stated that Ronald Ngala Highway serves a lot of traffic to and from Nyali Bridge, and removal of the pavement in front of the suit properties will seriously impact on the safety of pedestrians along the said highway. It is further averred that there was no consultation at all on the construction of the feeder road by the defendant. It is the Plaintiff's contention that if no action is taken, then a dangerous precedent is being set in illegal conversion of public property for private use. The Plaintiff urged the court to grant the orders sought, arguing that unless the court intervenes, the Plaintiff and members of the public stand to suffer irreparable loss.

4. In opposing the Application, the Defendant filed a Replying Affidavit sworn by Ben Kingori on 8th August 2018 in which it is deponed *inter alia*, that the Defendant is the registered owner of **LAND REFERENCE NO.MOMBASA/BLOCK XVII/739** where it has constructed a Tier 1 Petrol Station; that the Defendant applied for and obtained all relevant approvals for the development and that the road reserve has nothing to do with the Plaintiff's property and the access thereto, hence no legal rights. It is the Defendant's contention that this court is not the right forum for this suit and application.

5. The Application was canvassed by way of written submissions. The Plaintiff filed his submissions on 3rd December 2018, while the defendant filed their submissions on 28th March 2019. The Plaintiff submitted *inter alia*, that he has a *prima facie* case against the defendant and that he has discharged his duty to show that he deserves the orders sought. On its part, the Defendant submitted *inter alia*, that the Plaintiff has not met the conditions laid down in the case of **Giella –v- Cassman Brwon & Co Ltd (1973)EA 358**.

6. I have considered the Application, the affidavits filed in support and against and the rival submissions made as well as the authorities relied on. The principles to be applied when considering an Application for injunction such as this are well settled. In the case of **Giella –v- Cassman Brown & Co. Ltd (supra)**, the Plaintiff must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage which would not adequately be compensated by an award of damages and thirdly, if the court is in doubt, it will decide the matter on the balance of convenience.

7. In this case, the Plaintiff prays for judgment against the Defendant for *inter alia*, an order directed to the defendant to stop any construction and to restore the pavement/walkway into its original state before the conversion into a feeder road as well as a permanent injunction. In his submissions, the Plaintiff admits that the construction of the petrol station by the defendant is complete and the petrol station is fully operational. The Plaintiff now wants the court to issue an order restraining the Defendant from dealing with the pavements/access road in front of the plaintiff's properties. This order, in my view, is in the nature of a mandatory injunction as if granted, it will mean the removal or eviction of the Defendant from the said portion. The law as regards the principles to be applied when considering whether or not to grant an interlocutory mandatory injunction is different from the principles set out in **the Giella-v- Cassman Brown** case for the standard of approach is higher.

8. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986)1 ALL 901**, it was stated:

“A mandatory injunction ought not to be granted on an application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court had to feel a high sense of assurance that at the trial it would appear that the injunction had rightly been granted that being a different and higher standard than required for a prohibitory injunction.”

9. In this case the Defendant avers that it applied for and obtained all the relevant approvals for the development from the relevant agencies and bodies, including NEMA, Kenya National Highways Authority, (KENHA), Energy Regulatory Commission and the County Government of Mombasa. Copies of the approvals and licences have been exhibited by the Defendant. I note that a public notice for change of user was put up by the Defendant in the Daily Nation Newspaper on 19th October 2016. There is no evidence showing that the Plaintiff raised any objection with the said bodies for the Defendant's actions.

10. Having carefully considered the material before me, in my humble view a case of a mandatory injunction has not been made out. No special circumstance have been shown by the Plaintiff and the case is not one I can consider a clear one that can be decided at once or in a summary manner. From the evidence on record, I find that the Plaintiff has not established a *prima facie* case with a probability of success against the Defendant. Secondly, the Plaintiff has not shown that he stands to suffer irreparable harm not compensable in damages. Whatever damage the Plaintiff may suffer, in my view can be quantified in damages. The balance of convenience if I had doubt rests with the Defendant who applied for and was granted approvals and licences to develop and operate the petrol station and who is currently in possession and occupation.

11. The upshot is that the Notice of Motion dated 17th April 2018 is without merit and the same is hereby dismissed with costs to the Defendant. It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ojwang holding brief for Oluga for Defendant

No appearance for plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE