



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 280 OF 2018

REGIONAL CONTAINER FREIGHT STATIONS LTD.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

1. By a notice of motion Application dated 20th December, 2018, the Plaintiff/Applicant seeks an order of a temporary injunction restraining the Defendant by themselves, agents, servants, and/or anyone claiming under the defendant from re-entering, trespassing, onto, cultivating, interfering with or in any other manner whatsoever dealing with the suit land that is MI/BLOCK XLVII/157 and MI/BLOCK XLVII/10 pending hearing and determination of this application. The application is premised on the following grounds:

- a. The Applicant's/Plaintiff's access road to its property has been blocked by a third party.***
- b. The Respondent/Defendant granted and easement to the Applicant that is on MI/BLOCK XLVII/10 for it to access MI/BLOCK XLVII/157 which it has since denied.***
- c. The respondent/defendant has unlawfully demolished the Applicant's/Plaintiff's wall over MI/BLOCK XLVII/10***
- d. The Applicant has been unable to make good use of its land as a result of the said demolition and blockage.***
- e. The applicant/plaintiff is reasonably apprehensive that its proprietary rights will be infringed on.***

2. The application is supported by the affidavit of Abdulbasit Swaleh Muhsin, a director of the Applicant sworn on 19th December, 2018. The Applicant's case is that it is the registered proprietor of the property known as MI/BLOCK XLVII/157 with leasehold interest from the Government of Kenya for 99 years. That the land adjacent to the Applicant's land is owed by Ocean Freight Limited which was granted access road to parcel MI/BLOCK XLVII/157 by the respondent thereby blocking the applicant's access to the said land. The Applicant states that by a letter dated 10th October 2013, the Applicant wrote to the County Government of Mombasa informing it of its incapability to utilize MI/BLOCK XLVII/157 as a result of the blockage and requesting its assistance to remove the same. That consequently, the county government after its own investigations arrived at the conclusion that Ocean Freight Limited did indeed construct the boundary wall blocking the Plaintiff's parcel of land and wrote to Ocean Freight Limited notifying it of an impending demolition of its boundary wall. The Applicant avers that the Respondent undertook that it would create and provide another access road solely for the Applicant's user and benefit. Further that the Respondent in a letter dated 30th May 2014 expressly allowed the Applicant to use part of MI/BLOCK XLVII/10 as means of access and to also utilize the same for parking as it was of no viable economic importance or use to the Respondent. That by a letter dated 4th April 2014, the Applicant requested the Respondent as a matter of reference and to avoid any future disputes that may arise, to officially record that a right has been created over MI/BLOCK XLVII/10 in favour of the Applicant, but the Respondent did not honour that request. The Applicant states that it proceeded to build a perimeter wall and parking yard around its property and MI/BLOCK XLVII/10 following gazettelement in the Kenya Gazette and subsequent approval by the county government and the office of the physical planner. That on 15th February (in a year not indicated) the Respondent through its agents illegally and without authorization demolished the perimeter wall on the basis that it was erected illegally. It is the Applicant's contention that the Respondent had consented to the Applicant's use of MI/BLOCK XLVII/10 and that the Applicant relied on this representation to legally utilize the said piece of land but the Respondent has now, contrary to the aforesaid representation denied having created the same. The Applicant states that it has suffered damage as a result of the demolition and has been unable to use its property, hence this application. The applicant states that it is reasonably apprehensive that unless interlocutory orders are granted, then its proprietary rights will be jeopardized, adding that the orders sought will not be prejudicial to the Respondent.

3. The Respondent opposed that Application through a replying affidavit sworn by Mohammed Nazir on 2nd April 2019. The Respondent states that the property MOMBASA/BLOCK XLVII/157 is leased to the Applicant by the Government of Kenya. The Respondent further

states that a stonewall fence was hurriedly and with no lawful authorizations, erected on MSA/BLOCK XLVII/10, thereby giving illegal allocation of the suit property to the Applicant's property MSA/BLOCK XLVII/157 to create an access road. That the stonewall on MSA/BLOCK XLVII/10 was done on a road reserve thereby impeding the ongoing construction works by a contractor on the Respondent's property at Dockyard section. That the matter was reported to the Ethics and Anti-Corruption Commission (EACC) by the Respondent to investigate the matter and take action against the persons responsible for the construction of the wall and the irregular allocation of public land and that EACC responded confirming undertaking the said investigations. The Respondent vehemently denies allocation of the suit property MSA/BLOCK XLVII/10 to the Applicant, stating that it had no capacity to allocate the land to the applicant as it does not have title to it. The respondent further states that it demolished the stonewall illegally erected on the road reserve as it was impeding the expansion of the road. It is the Respondent's contention that the Applicant erected the wall on the property MSA/BLOCK XLVII/10 and created an easement as an access road to the property MSA/BLOCK XLVII/157 in contravention of the law and that investigations by EACC are still ongoing.

4. The application was canvassed by way of written submissions which were duly filed by the advocates for the parties who also highlighted the same. Ms. Rukia learned counsel for the applicant submitted that the respondent should be estopped from denying that they made a representation to the applicant and relied on the case of **Augustine Odhiambo Abiero –v- K. K. Security Ltd (2014)eKLR**. It was the Applicant's submission that even if the Respondent claims that it does not own parcel MI/BLOCK XLVII/10, by making a representation to the contrary, it should not be a reason for the Applicant to be denied the access road and parking area on the said parcel. The Applicant further submitted that any illegality that the Respondent is alleging has emerged from the Respondent and that it was only after the Respondent gave the applicant an easement over the said property that the applicant erected the wall that has since been demolished. It was the applicant's submission that it followed due process before erecting the wall and obtained necessary authorization. Relying on the case of **Giella –v- Cassman Brown & Co. Ltd (1973)EA 358 and Mrao Limited –v- First American Bank of Kenya Ltd & 2 Others (2003)KLR 125**, Ms. Rukia submitted that the Applicant has met the test for grant of injunctive orders. It was submitted that it is uncontested that the Applicant is the registered proprietor of MI/BLOCK XLVII/157 and that since the respondent had authorized a 3rd party to use the applicant's access road, and undertook to cure it by giving the applicant the remainder of MI/BLOCK XLVII/10 not being a road reserve to the applicant.

5. It was the Applicant's submission that the letter dated 30th May 2014 from the Respondent created an easement the dominant land being MI/BLOCK XLVII/157 and the servient land being MI/BLOCK XLVII/10. The applicant further submitted that the Respondent has breached section 4(3) of the Fair Administrative Action Act as it was not involved in any investigations. The applicant further submitted that even if the court finds that the Applicant's loss may be adequately compensated by damages, an injunction should issue because the respondent has breached an express provision of law. The applicant's counsel cited the case of **Olympic Sports House Limited –v- School Equipment Centre Limited (2012)eKLR** where the court held that once a party establishes that a defendant has breached an express provision of the law, an injunction should issue to aid the law. The applicant also relied on the court of appeal decision in **Aikman –v- Muchoki (1984) KLR 353**.

6. Ms. Ikegu learned counsel for the respondent submitted that the applicant has failed to satisfy the tests set out in the **Giella-v- Cassman Brown case (supra)** and relied on the case of **Kirobon Farmers Co. Ltd –v- Samuel O. Nyarangi (2017)eKLR** where the application was dismissed as there was no prima facie case established. The respondent further submitted that the Applicant has not demonstrated that it would suffer irreparable injury or loss unless the order is issued and relied on the case of **Nguru man Limited –v- Jan Bonde Nielsen and 2 Others (2014)eKLR**. Further, the respondent's submission is that the balance of convenience tilts in its favour for the reason that the property known as MI/BLOCK XLVII/10 is public land and therefore public interest outweighs the interests of the Applicant. The Respondent relied on the case of **Redcliff Holdings Limited –v- The Registrar of Titles & 2 Others (2017)eKLR** and **Films Rover International –v- Cannon Films Sales Ltd (1986)3 ALL ER 772** and urged the court to dismiss the application with costs.

7. I have considered the Application, the affidavits in support and against and the rival submissions as well as the authorities cited. The orders sought by the applicant in this application are of temporary injunction and the courts apply the established principles as laid down in the case of **Giella –v- Cassman Brown (supra)**. The principles to be considered are that the applicant must show a prima facie with a probability of success; the applicant must show that he would suffer irreparable injury which would not normally be compensated by an award of damages; and when court is in doubt, it will decide the application on the balance of convenience .

8. The procedure followed is to decide the issues by affidavit and such applications are meant to effect a speedy and effective remedy to a person aggrieved by clear breach by another and where the dispute turn on a question of fact about which there is conflict of evidence the courts will genuinely decline to interfere and leave the matter to be determined through a hearing by evidence. The application for interlocutory relief is made under order 40 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act by invoking the inherent jurisdiction of the court. Having gone through the facts and evidence, I would like now to apply them to these principles of law. In the case of **Stanley Munga Githunguri –v- Jimba Credit Corporation Limited, Civil Appeal No. 144 of 1998**, the Court of Appeal stated that at the stage at which this matter is presently, all that I am required to do is to determine whether the Applicant in this case has presented a prima facie case which may well succeed. In the case of **Mrao Ltd –v- First American Bank of Kenya Limited & 2 Others (2003)eKLR**, a prima facie case was described as follows:

“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

9. In this case, there is no dispute that the property known as TITLE NUMBER MOMBASA/BLOCK XLVII/157 is registered in the Applicant's name as lessee from the Government of Kenya for a term of 99 years from 1/3/1996. The Applicant has exhibited the certificate of lease as well as approvals for development of a parking yard and access road to the said property. It is also apparent that the access to PARCEL NO. MOMBASA/BLOCK XLVII/157 was through PARCEL NUMBER MOMBASA/BLOCK XLVII/10 which has been leased by the respondent to a 3rd party namely Ocean Freight Ltd, who have utilized the access road to the Applicant's Title Number MOMBASA/BLOCK XLVII/157 therefore blocking the access by the Applicant to its property. In the letter marked “AS-4” the Respondent had expressed a no objection for the Applicant to use a small part of PARCEL NO. MOMBASA/BLOCK XLVII/10 remaining as an access and parking to the Applicant's TITLE NO. MOMBASA/BLOCK XLVII/157. The respondent now avers that there allocation of

MOMBASA/BLOCK XLVII/10 to the Applicant and the construction of a road was irregular. The matter is now subject of investigations by the Ethics and Anti-Corruption Commission pursuant to a request by the Respondent. The investigations is said to be ongoing.

10. The issue of whether or not the allocation of part of TITLE NO. MOMBASSA/BLOCK XLVII/10 was irregular is in my view a matter that can only be determined at the trial and after the said investigations have been completeD. From the evidence on record, it is clear to this court the Respondent had granted an easement to the applicant that is on the title no. MOMBASA/TITLE MOMBASA/BLOCK XLVII/10 for the applicant to access its TITLE NO. MOMBASA/BLOCK XLVII/157. The same has now been denied without according the Applicant an opportunity to be heard. Even where the Respondent was entitled to terminate the easement, it could only do so through lawful means. Indeed the letter by the Ethics and Anti-Corruption Commission stated that the Respondent could take necessary measure to bring down the wall if indeed it was true that the said wall was erected within the Respondent's land and the wall constructed without permission. The court has noted that there are conflicting letters from the respondent regarding the Applicant's actions. Whereas some letters appear to have given the Applicant permission, there are other correspondences faulting the process through which the Respondent is purported to have allocated the parcel to the Applicant. The correct position cannot be ascertained at this stage. These are issues that can only be dealt with at the trial.

11. From the evidence on record, I find that the Applicant has established a prima facie case with a probability of success. I am also satisfied that the Applicant is likely to suffer irreparable loss not compensable in damages as its proprietary rights have been jeopardized. The balance of convenience, if I have doubt, rests with the applicant who it is not denied, is and has been in possession and occupation of the suit property.

12. The upshot is that the notice of motion dated 20th December 2018 is merited and the same is allowed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 15th day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Rukia for Plaintiff

Cheruiyot holding brief for Ms. Ikegu for defendant/respondent

Yumna Court Assistant

C.K. YANO

JUDGE