



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 358 OF 2016

FREEDOM LIMITED.....PLAINTIFF

-VERSUS-

OMAR AWADH MBARAK.....DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 11th October, 2019 in which the Defendant/Applicant seeks orders that pending the hearing and determination of the suit, the Plaintiff be restrained whether by itself, its servants or agents or otherwise howsoever from subdividing, fencing or carrying out any new/fresh/further subdivisions, demarcations and occupation, selling, charging or leasing, fencing and erecting permanent structures and/or carrying out acts of construction of boundary wall with the sole aim of further alienating and further disposition to third parties the suit property known as PLOT NO.287 OF SECTION V CR. NUMBER 6302 containing by measurements 983 acres or thereabouts.
2. The application is premised on the grounds on the face of it and it is supported by the affidavit of Omar Awadh Mbarak, the Applicant sworn on 11th October, 2019. The applicant avers that he is entitled to the suit property herein as a beneficiary of the estate of his deceased grandfather, Mbarak Awadh Salim who purchased the suit property from the previous owner one Mohamed Afzal Khan. That without any lawful justification or explanation and without consulting or otherwise obtaining the defendants' consent as the rightful heir of the registered owner of the suit property, the plaintiff have inter alia constructed a wall and other permanent structures and further develop and alienate and have demonstrated an intention of subdividing and disposing of the suit property to themselves and third parties while the suit is still pending in court.
3. In opposing the application, the plaintiff filed a replying affidavit sworn by Harji Govind Ruda on 25th October, 2019, in which it is deposed inter alia, that the application is an abuse of the process of the court and deliberate and deceitful attempt to mislead the court particularly in light of the order of the court given on 2nd October, 2018 by which it was agreed by all parties to forego the various applications (including the plaintiff's application for injunction against the defendant) and move on with the pre-trial conference and hearing. That this case is part-heard having been heard by this court on 22nd January, 2019 and 17th May 2019 and was fixed for further hearing on 14th November 2019. The Plaintiff avers that it has always been in possession of the property and that the works on the land have been on-going since 2012/2013. The plaintiff state that the defendant is relying on documents whose authenticity are in question in the present application and in respect of which the defendant has been charged in Criminal Case No.1278 of 2017, and that the defendant is underserving of the orders sought.
4. I have considered the application and the submissions made by Mr. Gakuo learned Counsel for the defendant and Mr. Ondego learned Counsel for the plaintiff.
5. The case is part-heard having been heard on 22nd January 2019 and 17th May, 2019. The case was scheduled for further hearing on 14th November, 2019. However, the matter could not be heard on 14th November 2019 as scheduled because of this application which was filed on 11th October 2019.
6. The court record indicates that on 28th November, 2016, the plaintiff filed an application seeking orders restraining the defendant from interfering with the suit property pending hearing and determination of the suit. Even though that application came up for hearing on various dates, the same was never heard. On 2nd October, 2018, the advocates for the parties agreed to forego the said application dated 28th November 2016 in favour of the hearing of the main suit. I believe this was meant to expedite the hearing and determination of the suit. It was because of that understating that the matter proceeded to hearing of the main suit on 22nd January, 2019 and on 17th May, 2019.
7. In the present application, the defendant's complaint is that the plaintiff is carrying out construction of a wall and other permanent structures and that it has demonstrated an intention of subdividing and disposing of the suit property. On its part, the plaintiff denies the

allegation and states that the works have been on-going since 2012/2013.

8. As already stated, this case is part-heard and both parties had earlier agreed to forego interlocutory applications in favour of the hearing of the main suit. Indeed the matter was scheduled for further hearing on 14th November, 2019 but could not proceed because of the current application. The courts have accepted that in dealing with an application for an interlocutory injunction, the court is not necessarily bound only by the three principles set out in the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358**. The court may look at the circumstances of the case generally and the overriding objective of the law. In **Suleiman –v- Amboseli Resort Ltd (2004) KLR 589** Ojwang Ag. J (as he then was) at page 607 stated thus:

“.....Counsel for the defendant urged that the shape of the law governing the grant of injunction relief was long ago in Giella –v- Cassman Brown, in 1973 cast in stone and that 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 whichever counsel appears to carry the lower risk of injustice if it should turn out 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 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 relief, should always opt for the lower rather than the higher risk of injustice.....”

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 the hearing the case, find that a greater injustice has been occasioned.

9. In this case both the plaintiff and the defendant are claiming the suit property. At this interlocutory stage, pending the substantive canvassing of the case, in relation to the prayers sought my understanding is that he defendant seeks injunctive relief to the extent that the suit property may not be pre-empted through alienation, disposal or waste. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined.

10. Having looked at the application and considering the circumstances of this case, I allow the application to the extent that the plaintiff is restrained from selling, alienating, subdividing and carrying out any new developments or constructions, including erecting a new boundary wall until the case is heard and determined. Costs of the application shall be in the cause.

DATED, SIGNED and DELIVERED at MOMBASA this 14th day of November 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ondego for plaintiff

Ms. Nafula holding brief for Gakuo for defendant/applicant

Yumna Court Assistant

C.K. YANO

JUDGE