



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 158 OF 2019

NEEM PROPERTIES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

WELLS FARGO LIMITED.....DEFENDANT/RESPONDENT

RULING

1. By a notice of Motion dated 2nd September, 2019 and brought under Order 40 Rules 1, 3 and 4, Order 51 Rules 1 and 3, of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act and Article 159 (2) of the Constitution of Kenya, the Plaintiff/Applicant seeks the following orders:

1. That this Application be certified as urgent, and service thereof be dispensed with in the first instance and heard ex-parte.
2. That this court be pleased to issue an order evicting the Defendant/Respondent its employees servants from those parcels of land being SUBDIVISION NUMBER 3362 (ORIGINAL NUMBER 957/1) SECTION 1 MAINLAND NORTH and SUBDIVISION NUMBER 3363 (ORIGINAL NUMBER 957/2) SECTION 1 MAINLAND NORTH.
3. That this court be pleased to issue a temporary injunction prohibiting, preventing or restraining the Defendant whether by themselves, their agents, employees and servants from trespassing on, wasting, alienating or otherwise interfering or dealing with those parcels of land being SUBDIVISION NUMBER 3362 (ORIGINAL NUMBER 857/1) SECTION 1 MAINLAND NORTH and SUBDIVISION NUMBER 3363 (ORIGINAL NUMBER 957/2) SECTION 1 MAINLAND NORTH pending hearing and determination of this suit.
4. That this court be pleased to issue in the alternative to prayer 3, a permanent injunction prohibiting, preventing or restraining the Defendant whether by themselves, their agents, employees and servants from trespassing on, wasting, alienating or otherwise interfering or dealing with those parcels of land being SUBDIVISIONS NUMBER 3362 (ORIGINAL NUMBER 957/1) Section 1 mainland north and SUBDIVISION NUMBER 3363 (ORIGINAL NUMBER 957/2) SECTION 1 MAINLAND NORTH.
5. That this court be pleased to issue in a temporary injunction restraining the Defendant, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing to remain in occupation of those parcels of land being SUBDIVISION NUMBER 3362 (ORIGINAL NUMBER 957/1) SECTION 1 MAINLAND NORTH and SUBDIVISION NUMBER 3363 (ORIGINAL NUMBER 957/2) SECTION 1 MAINLAND NORTH and for the unconditional release handover and return of parcels of land to the plaintiff, its employees or the plaintiff's duly authorized agents pending hearing and determination of this suit.
6. That this court be pleased to issue in alternative to prayer 5, a permanent injunction restraining the Defendant, whether by themselves or their servants or agents or otherwise howsoever, from remaining on or continuing to remain in occupation of those parcels of land being SUBDIVISION NUMBER 3362 (ORIGINAL NUMBER 957/1) SECTION 1 MAINLAND NORTH and SUBDIVISION NUMBER 3363 (ORIGINAL NUMBER 972/2) SECTION 1 MAINLAND NORTH and for the unconditional release handover and return of the parcels of land to the plaintiff, its employees or the plaintiff's duly authorized agents.
7. That this court be pleased to issue an order granting vacant possession of the parcels of land being SUBDIVISIONS NUMBER 3362 (ORIGINAL B NUMBER 957/1) SECTION 1 MAINLAND NORTH and SUBDIVISION NUMBER 3363 (ORIGINAL NUMBER 957/2) SECTION 1 MAINLAND NORTH to the plaintiff.
8. That the Officer Commanding Station (OCS) Nyali Police Station to enforce compliance of the orders granted.

9. That costs of this Application be provided for against the defendant.

10. That this honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.

2. The Application is based on the grounds on the face of the motion and is supported by the affidavit of Mary Wangari Mbugua sworn on 2nd September, 2019. The Applicant avers that it is the duly registered proprietor of the suit properties which are contained in one compound with one boundary wall and a main gate. That the Applicant at all material times enjoyed peaceful, uninterrupted and exclusive occupation and possession of the properties. The Applicant avers that on or about 12th June 2019 at about 10.00 am, seven of the Respondent's security guards and two unknown male individuals accompanied by the police arrived at the Applicant's premises and unlawfully and forcibly gained entry into the suit property without the consent or permission of the Applicant or of its caretaker, evicted the plaintiff's agents and took occupation and possession of the properties, with the two unknown individuals claiming ownership of the same. That the matter was reported to the police and despite demands that the Respondent's guards vacate and handover possession to the Applicant, they refused. It is the Applicant's contention that the Respondent's action amounts to trespass and are not only unwarranted but have also infringed on the Applicant's constitutional right to access, remain upon and use and have quiet enjoyment of its properties. The Applicant avers that there is a high probability that its equipment, machinery and personal property situated in the property shall be stolen, wasted, lost or damaged occasioning irreparable loss and damage to the Applicant. That no prejudice shall be occasioned to the Respondents if the orders sought herein are granted.

3. The Application is opposed by the Respondent through a replying affidavit sworn by Evans Soita China on 7th October 2019. The Respondent's case is that it is a private security firm that specializes in providing security services to customers including financial institutions, banks, individuals, private and public corporation. It is deposed that upon instructions from Middle East Bank Limited exercising rights under charge registered over the suit properties, the Respondent on 12th June 2019 on behalf of the said bank entered upon and took possession of and is providing security over a property known as SUBDIVISION NUMBER 903 SECTION 1 MAINLAND NORTH which adjoins the suit properties. The Respondent has denied entering, taking over possession, trespassing on or interfering with or depriving the Applicant of possession of or rights over the suit properties. It is the Respondent's contention that the Application does not meet the legal threshold of grant of the reliefs sought and that the suit is fatally defective and should be struck out in limine.

4. In her submission, Ms. Wamithi, learned counsel for the Applicant reiterated the facts in the affidavit in support of the motion and submitted that no valid reason has been given for the occupation of the suit properties by the Respondent. She relied on the case of **Maher Unissa Karim –v- Edward Oluoch Odumbe (2015)eKLR** on the threshold in mandatory injunctions. Counsel also relied on the case of **Tom Onyango –v- Mimosa Investments Limited (2017)eKLR**. Relying on the case of **Mrao Ltd –v- First American Bank of Kenya Ltd & 2 Others (2003) eKLR**, Ms. Wamithi submitted that the Applicant has made out a prima facie case. She submitted that the Applicant has a right to the suit properties as provided under Article 40 of the Constitution and Section 24 and 25 of the Land Registration Act and relied on the case of **Kiplangat Chesenge –v – Joseph Rotich & David Rotich (2018)eKRL** and **Elizabeth Chemutai & Another –v- Janeth Chepkoech & Another (2019)eKLR**, arguing that if the orders sought are not granted, the Applicant will suffer irreparable loss. The Applicant's counsel also relied on the case of **Paul Gitonga Wanjau –v- Gathuthi Tea Factory Company Ltd & 2 Others (2016) eKLR** and **Zephania Khisa Saul –v- School Committee St. Anne's Secondary School (2019)eKLR**.

5. Mr. Mokaya, learned counsel for the Respondent submitted that the Applicant has failed to disclose material facts as to why the Respondent is in possession of the suit properties. Mr. Mokaya submitted that the Respondent, a security company, is on SUBDIVISION 903 which is charged to Middle East Bank Limited and in which the Applicant has defaulted in servicing the loan advanced by the said bank, forcing the bank to exercise its statutory power as chargee and taken possession and appointed the Respondent to guard that property. That the Applicant has failed to disclose plot no.903 and is trying to beat the bank by kicking out the security out of that property. It is the Respondent's submissions that the Applicant has come to court with unclean hands and that if it was aggrieved, they should have enjoined the bank to this suit. The Respondent's counsel submitted that the Applicant has not met the principles in the Giella case and that the suit and the Application are misplaced.

6. I have considered the Application and the submissions made. The principles to be applied when considering an Application for injunction are well settled. In the famous Giella case, the Applicant must show that he has a *prima facie* case with a probability of success; that he stands to suffer irreparable damage not compensable in damages; and if the court is in doubt, it will decide the matter on a balance of convenience.

7. The Applicant besides seeking interlocutory injunction is also seeking interlocutory mandatory injunction for vacant possession against the Respondent from the suit properties. The law as regards the principles to be applied when considering the prayer for mandatory injunction is different from the principles set out in the Giella case for the standard of approach when considering whether or not to grant an interlocutory mandatory injunction is higher than that of prohibitory injunction. In the case of **Locabail International Finance Ltd –v- Agro Export & Another (1986) 1 ALL ER 901**, it was stated:

“A mandatory injunction ought not to be granted on an interlocutory 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 has 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 end of the trial it would appear that the injunction has rightly been granted, that being a different and higher standard than required for a prohibitory injunction.”

8. The courts have been reluctant to grant mandatory injunctions at the interlocutory stage. However, where it is prima facie established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure that justice is meted out without the need to wait for full hearing of the entire case.

9. In this case, it is not disputed that the Applicant is the registered owner of the suit properties. The Respondent has stated that upon

instructions from Middle East Bank Limited, it entered upon and took possession of SUBDIVISION NO.903 SECTION 1 MAINLAND NORTH with a view to providing security. If that be the case, in my view, the Respondent has no justification to insist on occupying or remaining in possession of SUBDIVISION NO.3362 and 3363. There is no dispute that the instructions given to the Respondent by Middle East Bank Limited were limited to property known as SUBDIVISION NO. 903 SECTION 1 MAINLAND NORTH. The Respondent therefore ought to limit their occupation and possession to SUBDIVISION NO 903 SECTION MAINLAND NORTH.

10. Having carefully considered the material before me, I am satisfied that the Applicant has established a *prima facie* case with a probability of success to warrant the injunctive orders sought. Further, in my view, a case of mandatory injunction has been made out. There is no doubt that the Applicant will suffer irreparable loss not compensable in damages if it is prevented from utilizing its properties which are not subject of any encumbrance such as the stated charge with the Middle East Bank Limited. The balance of convenience if I had doubt rests with the Applicant which is the registered owner of the suit properties and which properties are not encumbered.

11. The upshot is that the Notice of Motion dated 2nd September 2019 is allowed with costs to the Applicant. For avoidance of doubt, the Respondent is at liberty to continue its occupation and possession of SUBDIVISION NUMBER 903 SECTION 1 MAINLAND NORTH which is not subject of this case.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Wamithi for plaintiff

Mokaya for defendant

Yumna Court Assistant

C.K. YANO

JUDGE