



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO. 371 OF 2016

THATHINI DEVELOPMENT CO. LTD.....PLAINTIFF

VERSUS

MOMBASA WATER & SEWERAGE COMPANY.....1ST DEFENDANT

COAST WATER SERVICES BOARD.....2ND DEFENDANT

RULING

1. This is the Notice of Motion dated 30th November, 2016. It is brought under Order 5 Rules 17, Order 40, rules 1, 2 & 3 of the Civil Procedure Rules, Section 1A, 1B, 3A & 63 of the Civil Procedure Act Chapter 21 Laws of Kenya and all other enabling provisions of the law.

2. It seeks orders;

1. Spent.

2. Spent.

3. That a permanent order do issue restraining the 1st and 2nd Respondents, their servants, contractor, assigns or representatives from further trespassing, dredging and laying huge pipes in plot known as Mombasa/Mainland North/Block 4/221 pending the full hearing and determination of the suit.

4. That a further order do issue directing the 1st and 2nd Defendants to remove and relocate the huge pipes which they have illegally put up in plot belonging to the applicant.

5. That the costs of this application be provided for.

3. The grounds are on the face of the application and are;

i) That the Applicant is the registered owner of Plot known as Mombasa/Mainland North/Block 4/221.

ii) That the 1st and 2nd Respondents have invaded the said portion of land and are busy dredging and laying huge pipes without consent and/or authority of the Applicant.

iii) The continued trespass dredging and laying pipes is destroying the ecosystem of the Applicant's land.

iv) It is prudent that the said trespass is stopped forthwith.

4. The application is supported by the affidavit of Githende Gachanja one of the directors of the Plaintiff/Applicant sworn on the 30th November, 2016.

5. Upon being served with copies of plaint and summons to enter appearance, the Defendants entered appearance through the firm of M/S L. N. Momanyi And Company Advocates. The said Advocate also filed a statement of defence on behalf of both Defendants.

6. There is also a notice of change of Advocates filed by the firm of M/S Muturi Gakuo And Kibaara who state they are appearing for the 2nd Defendant. They have filed a memorandum of appearance and grounds of opposition dated 26th April 2017. The application is therefore opposed.

7. On the 7th November, 2017 Mr. Masila holding brief for Mr. Kibaara sought leave which was granted to file a replying affidavit within seven days.

8. On the 27th April 2017 by consent the parties agreed to dispose the application by way of written submissions.

9. On the 19th December, 2017 Mr. Kariuki for the Plaintiff/Applicant confirmed that they had filed their written submissions. The Defendants/Respondents had not filed theirs. A date was given for ruling.

10. I have considered the Notice of Motion, the supporting affidavit and the annexures. I have considered the grounds of opposition.

11. It is the Plaintiff/Applicant's case that it is the owner of the suit land. A copy of title and search certificate annexed. They have also exhibited photographs to show the invasion.

12. The 2nd Defendant/Respondent in its grounds of opposition dated 26th April 2017 prays that the Plaintiff/Applicant's notice of motion be dismissed as it lacks merit.

13. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the precedent setting case of *Giella versus- Cassman Brown And Company Limited (1973) EA 358*.

14. In the case of *Mrao Limited –versus- First American Bank Limited and 2 Others (2003) KLR 125* the Court of Appeal gave a definition of what amounts to a prima facie case.

15. Has the Plaintiff/Applicant made out a prima facie case with a probability of success at the trial? It is not in dispute that the Plaintiff/Applicant is the registered owner of the suit property. They have annexed a copy of title deed and a copy of certificate of search.

They have also annexed photographs showing the pipes and other installations on the ground. There is no opposition from the 1st Defendant.

16. The 2nd Defendant only filed grounds of opposition. I have considered the same and find that it does not answer to the specific allegations of trespass in the Plaintiffs/Applicants application.

17. I find that the Plaintiff/Applicant has demonstrated that they have a prima facie case with a probability of success at the trial.

18. They have also demonstrated that they are likely to suffer irreparable injury that cannot be compensated by an award of damages if these orders are not granted.

19. I have considered prayer (4) of the application and I find that it cannot be granted at this stage hence I decline to grant it.

20. All in all I find merit in this application and I grant the orders sought namely;

a) That an order do issue restraining the 1st and 2nd Respondents, their servants, contractor, assigns or representatives from further trespassing, dredging and laying huge pipes on plot known as Mombasa/Mainland North/Block 4/221 pending the hearing and determination of the suit.

b) The costs of this application do abide the outcome of the main suit.

It is ordered.

Dated, Signed and Delivered at Mombasa on the 20th day of March 2018.

L. KOMINGOI

JUDGE

20/3/2018