



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAKAMEGA

ELC NO. 196 OF 2016

HADIYA CONSTRUCTION & MINERAL LTD.....PLAINTIFF/APPLICANT

VERSUS

AJABU EAST AFRICA LTD.....DEFENDANT/RESPONDENT

RULING

The application is dated 7th October 2016 seeking the following orders;

1. That this matter be certified as urgent and service thereof in the first instance be dispensed with.
2. That pending the inter parties hearing of this application this honourable court be pleased to restrain the defendant from accessing and/or interfering with Nos Isukha/Shirere/3634, 3635, 3636, 3637, 3638, 3639, 3676, 3677, 3678, 3679, 3680, 3681, 3687, 3688, 3689, 3690, 3701, 3704, 3705, 3706, 3719, 734, 3754, 3755, 3758, 3760 and 3761 belonging to members of the Municipal Housing Co-operative Society Limited.
3. That pending the determination of this application this honourable court be pleased to restrain the defendant from accessing and/or interfering with NO.s Isukha/Shirere/3634, 3635, 3636, 3637, 3638, 3639, 3676, 3677, 3678, 3679, 3680, 3681, 3687, 3688, 3689, 3690, 3701, 3704, 3705, 3706, 3719, 734, 3754, 3755, 3758, 3760 and 3761 belonging to members of the Municipal Housing Co-operative Society Limited.
4. That the officer commanding, Kakamega Police Station to be directed to enforce any orders emanating from this application.
5. That costs be provided for.

The applicants submitted that, pending the inter parties hearing of this application this honourable court be pleased to restrain the defendant from accessing and/or interfering with No.s Isukha/Shirere/3634, 3635, 3636, 3637, 3638, 3639, 3676, 3677, 3678, 3679, 3680, 3681, 3687, 3688, 3689, 3690, 3701, 3704, 3705, 3706, 3719, 734, 3754, 3755, 3758, 3760 and 3761 belonging to members of the Municipal Housing Co-operative Society Limited. That on the 27th day of July, 2015 the plaintiff company entered into an agreement with Municipal Housing Co-operative society Limited wherein plaintiff company leased the parcels of land referred to above for a period of 3 years beginning the 1st day of August, 2015 for the purposes of removing heaps of soil therefrom at a consideration of Ksh. 1,500,000/= only. Annexed as exhibit 'MHM 1' is a copy of the said agreement.

That however, the defendant company has mobilized equipment in preparation to move onto the aforementioned parcels of land claiming that an unnamed 3rd party has granted it the right to remove the said heaps of soil. That the Municipal Housing Co-operative Society Limited has made it clear to the plaintiff company that it has never authorized the defendant company to access the parcels of land. That the orders sought herein will not prejudice the defendant company since the plaintiff company has been in possession of the parcels of land from the 1st day of August, 2015. That in the interests of justice it would only be fair that the defendant is restrained from trespassing onto the suit properties until the judge considers this application.

The defendant's/respondent's filed a replying affidavit dated 14th October, 2016 opposing the plaintiff's/applicant's application. It is evident from the said plaintiff's/applicant's application that the orders being sought by the plaintiff/applicant in prayer 3 are similar to interim orders in prayer 2 that were granted on interim basis, which have since lapsed. That there is nothing pending for hearing and final determination as parties are bound by their own pleadings. The only determination as pertains to prayer 3 is for the court to find that prayer 3 was granted alongside prayer 2 and lapsed, it has no merit and it is an abuse of the court process as no prayer is pending for hearing and determination as it was granted in prayer 2 and eventually lapsed.

Therefore, prayer 3 is fundamentally defective, misconceived, waste of courts time and overtaken by events. The parties are bound by their own pleadings. The prayer being sought by the plaintiff/applicant reads as follows.

“That pending the determination of this application this honourable court be pleased to restrain the defendant from accessing and/or interfering with LR. NO. Isukha/Shirere/3634, 3635, 3636, 3637, 3638, 3639, 3676, 3677, 3678, 3679, 3680, 3681, 3687, 3688, 3689, 3690, 3701, 3704, 3705, 3706, 3719, 734, 3754, 3755, 3758, 3760 and 3761 belonging to members of the Municipal Housing Co-operative Society Limited”.

It is the defendant's/respondent's submissions that the interim orders granted by this court earlier, which have lapsed, in essence disposed off prayer 3 of this application. Therefore, there is nothing remaining to be heard and determined by this honourable court as parties are bound by their own pleadings.

The affidavit dated 21st February, 2017 sworn by one Beda Mutesa Otuoma is misconceived, vexatious and afterthought. The said deponent has no capacity to swear and depone to any addition or further affidavit to the plaintiff's/applicant's application dated 7th October, 2016 as the supporting Affidavit was sworn by one Mohammed Hassan Maalim. It is only Mohammed Hassan Maalim who can swear and/or depone or adduce any additional information through an affidavit in support of the plaintiff's/applicant's application.

Furthermore, the affidavit being sought to be relied upon in the plaintiff's/respondent's submissions is a replying affidavit replying to an application dated 17th November, 2016 as per its paragraph 2 which application has since been disposed off by this honourable court.

The respondent submitted that, as the said replying affidavit dated 21st February, 2017 forms part and parcel of the court record, the deponent who purports to be the secretary of the plaintiff/applicant has annexed annexures marked “B.M.A.1” which is the purported authority from the five members alleged of the Kakamega Municipal Housing Co-operative Society which was obtained on 4th November, 2016 after the filing of this suit, which is a clear indication that it is an afterthought and the agreement entered herein by the plaintiff has no lawful enforcement as it was entered into without consent and authority of the alleged members, if any. That further, the court in disposing off the plaintiff's/applicant's application should have a look at a further affidavit sworn by the said Beda Mutesa Otuoma dated 18th November, 2016 at paragraph 5 which confirms the contents of the defendant's/respondent's replying affidavit in essence that the plaintiff/applicant herein have no authority over the said properties and which contradicts the plaintiff/respondent averments in paragraph 3 of the affidavit in support of the Notice of Motion.

From the aforementioned further affidavit of Beda Mutesa Otuoma the only title that was registered in the names of Kakamega Housing Co-operative Society and which closed on sub-division and transfer was title number Isukha/Shirere/3077 and new numbers issued as per annexures marked “B.M.O.2”. Thus, Kakamega Housing Co-operative Society, the purported lessor of the said agreement has no title, no locus nor legal entity and interest over any property unless otherwise proved at the full hearing hereof apart from title number Isukha/Shirere/3761, which was registered in the said names as per the Further Affidavit paragraph 4 annexures “B.M.O.2”.

Further, the plaintiff's/applicant's has not proved to this court if the alleged Kakamega Municipal Co-operative Society is a registered entity or not, have not attached any authority from the alleged members authorizing the purported officials to transact any lawful transaction on behalf of the members and the alleged agreement entered into was and has not been registered and stamp duty paid since entering into the said agreement on 27th July, 2015 up to date. In an upshot it remains to be a fraudulent transaction purported to be entered into by the plaintiff/applicant which cannot be enforced.

The plaintiff/applicant since entering into the purported agreement on 27th July, 2015, have not taken possession nor commenced work on the said parcels up to date, which clearly indicates that the plaintiff/applicant will suffer no irreparable loss if the orders sought are denied. It is worth noting that some of the parcels of land are reserved for public utility for the general public and no individual can purport to have authority over them apart from the government. No injunctive orders can be issued against such public utility or entities as per the Government Act. These plots are ISUKHA/SHIRERE/3758 reserved for Municipal Housing Primary School, ISUKHA/SHIRERE/3760 reserved for Municipal Housing Shopping Centre.

Further under article 159 of the Constitution, the court is under duty to determine cases on merit and not on technicality. The plaintiff/applicant has failed to prove the merit of the application as compared to the lawful authority granted to the defendant/respondent by the County Government of Kakamega.

The necessary ingredients for the grant of interlocutory injunction whether it is of restraining nature or compulsive or mandatory injunction are set out and established in the case of *Giella vs. Cassman Brown Ltd* (973) E.A. 358 as relied on in *Kenya Hotels Limited vs. Kenya Commercial Bank Ltd* and *Another, Nairobi H.C.C.C. No. 8 of 2004*. On the foregoing grounds, the plaintiff's/applicant's application dated 7th October, 2016 should be dismissed with costs.

This court has carefully considered both the applicant's and the respondent's submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear. As stated in the case of ***Giella vs. Cassman Brown (1973) EA 358***.

“The conditions of granting an injunction are now, I think well settled in East Africa. First an applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of ***Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003)*** Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

The application is based upon the affidavit of Mohammed Hassan Maalim and the following grounds; that members of the Municipal Housing Co-operative Society Limited are the proprietors of LR. Nos Isukha/Shirere/3634, 3635, 3636, 3637, 3638, 3639, 3676, 3677, 3678, 3679, 3680, 3681, 3687, 3688, 3689, 3690, 3701, 3704, 3705, 3706, 3719, 734, 3754, 3755, 3758, 3760 and 3761. That the plaintiff company entered into an agreement with Municipal Housing Co-operative society Limited wherein the plaintiff company leased the parcels of land referred to above for a period of 3 years beginning the 1st day of August, 2015 for the purposes of removing heaps of soil therefrom at a consideration of Ksh. 1,500,000/= only. That however, the defendant company has mobilized equipment in preparation to move onto the afore-mentioned parcels of land claiming that an unnamed 3rd party has granted it the right to remove the said heaps of soil. That the Municipal Housing Co-operative Society Limited has made it clear to the plaintiff company that it has never authorized the defendant company to access the parcels of land. That under section 21 of the Practice Directions and Proceedings before the Environment and Land Court pursuant to Kenya Gazette Notice No. 5176 of the 28th day of July, 2014 the Deputy Registrar has jurisdiction to consider this application. That the orders sought herein will not prejudice the defendant company since the plaintiff company has been in possession of the parcels of land from the 1st day of August, 2015. The prayer being sought by the plaintiff/applicant reads as follows.

“That pending the determination of this application this honourable court be pleased to restrain the defendant from accessing and/or interfering with LR. NO. Isukha/Shirere/3634, 3635, 3636, 3637, 3638, 3639, 3676, 3677, 3678, 3679, 3680, 3681, 3687, 3688, 3689, 3690, 3701, 3704, 3705, 3706, 3719, 734, 3754, 3755, 3758, 3760 and 3761 belonging to members of the Municipal Housing Co-operative Society Limited”.

The court will safely assume that they meant “pending the hearing of this suit”.

There is no evidence to show that Kakamega Housing Co-operative Society, the purported lessor of the said agreement has title to these properties or locus or is a legal entity and/or interest over any property unless otherwise proved at the full hearing hereof apart from title number Isukha/Shirere/3761, 3077, 3758 and 3760 which was registered in the said name as per the further affidavit paragraph 4 annexures “B.M.O.2”. What about the other parcels of land to be leased? It has not been established that they belong to the society. Again the plaintiff’s/applicant’s has not proved to this court if the alleged Kakamega Municipal Co-operative Society is a registered entity or not, have not attached any authority from the alleged members authorizing the purported officials to transact any lawful transaction on behalf of the members and the alleged agreement entered into was and has not been registered and stamp duty paid since entering into the said agreement on 27th July, 2015 up to date. I find that the applicant has failed to establish a prima facie case with a probability of success.

This court notes that the plaintiff/applicant since entering into the purported agreement on 27th July, 2015, have not taken possession nor commenced work on the said parcels up to date, which clearly indicates that the plaintiff/applicant will suffer no irreparable loss if the orders sought are denied. I also find that the orders sought are final orders and cannot be granted at this interlocutory stage. Secondly they have not shown that they will suffer irreparable injury, which would not adequately compensated by an award of damages. This application has no merit and I dismiss it with costs. Parties are advised to take a hearing date of the main suit in this matter.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 7TH DAY OF MARCH 2018.

N.A. MATHEKA

JUDGE