



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO. 751 OF 2017**

**SAMCO HOLDINGS LTD**

**T/A EKA HOTEL.....PLAINTIFF**

**VERSUS**

**PATRICK NYAMWEYA.....DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of Motion dated 11<sup>th</sup> December 2017, in which the applicant seeks the following reliefs:-

**1. Spent**

**2. Spent**

**3. That pending the hearing and determination of this suit, an order of injunction be issued restraining the defendant, whether acting by himself, agents, servants, employees, security personnel, contractors and/or by any other persons whatsoever, from entering upon, trespassing upon, taking over, excavating, damaging, constructing on, developing, marketing, offering for sale, selling, transferring, charging or in any other manner howsoever from interfering with the plaintiff's quiet enjoyment, possession and proprietorship rights of that property known as land reference number 209/14067 contained in Grant No.I.R 119254, situate on St. James Road, off Mombasa Road, Nairobi, otherwise adjacent to the premises known as EKA HOTEL.**

**4. That owing to the security threat arising from the defendant and the armed gangs who carried out the illegal acts complained of, the orders of the court ensuing from this application be served and enforced with the assistance of the officer in charge of police division Langata (OCPD), and officer in charge of Langata Police Station (OCS), being the officers vested with the mandate to deal with the security incidents arising from the area where the suit property is situate.**

**5. Spent**

**6. That the costs of this application be provided for.**

2. The applicant contends that it is the registered owner of LR No.209/14067 Grant No.IR 119254 (suit property). The applicant purchased the suit property from Rock Development Limited which had purchased it from its original allottee Uchumi Trust Limited. The suit property was purchased on 22<sup>nd</sup> March 2017 at a consideration of Kshs.335,000,000/=. As at the time of purchase, the vendor M/s Rock Development Ltd had erected a perimeter fence around the suit property.

3. The applicant engaged the services of a security company called Seneca International Limited to guard the suit property. On 8<sup>th</sup> December 2017 the respondent forcefully moved into the suit property with the help of gangs armed with crude weapons and pulled down the gate to the entrance of the property and erected his own gate. The applicant contends that it reported the activities of the respondent to Langata Police Station who seem not to act as the respondent apparently enjoys protection from unknown persons. It is on this basis that the applicant seeks injunctive orders against the respondent.

4. The respondent has opposed the applicant's application based on a replying affidavit sworn on 12<sup>th</sup> April 2018. The respondent states that he is the managing director of a company called (Infield Investments Limited) which is the registered owner of a property known as LR No.209/11822 Grant No.IR 57090 which is along St. James Road, off Mombasa Road adjacent to Eka Hotel. The respondent further states that his company's property appears to be the same on the ground as the suit property though the property has two different titles.

5. The respondent contends that the property was transferred to his company by its previous owners Uchumi Trust Limited in June 1999. His company has been enjoying quiet possession until the applicant illegally gained access to it and started cutting down trees on it and deposited building materials on it with intent to commence construction. The respondent contends that he cannot be a trespasser to his own property and that he was the first one to file a case against the applicant being ELC No.748 of 2017 **Infield Investments Limited Vs Eka Hotel.**

6. I have considered the applicant's application as well as the opposition to the same by the respondent. I have also considered the submissions by the parties herein. This being an application for injunction I have to decide whether the applicant has met the threshold for grant of injunction as prayed. There is no doubt that though the applicant and the respondent have separate titles to their respective properties, the property on the ground appears to be the same and is along the same road next to Eka Hotel.

7. The applicant maintains its property is LR No.209/14067 Grant No.IR 119254. The respondent maintains his company's property is LR No.209/11822 Grant No.IR 57090. The disputants trace their respective titles to Uchumi Trust Limited which they both claim were the original allottees. The title held by the respondent shows that its company's land is 1.200 hectares whereas the title held by the applicant shows that the company's land is 0.9003 hectares.

8. The titles held by the applicant was registered in the name of Uchumi Trust Limited on 11<sup>th</sup> September 2009. It was later transferred to Rock Development Limited on 29<sup>th</sup> December 2009 before being transferred to the applicant on 3<sup>rd</sup> August 2017. The title to the respondent's company was registered in his company's name on 30<sup>th</sup> June 1999.

9. I have gone through the documents relied on by the parties herein. The applicant has annexed documents to the supporting affidavit which suggest that LR No.209/11822, was cancelled in the year 2000. This document is marked "**MSA**" 5(b). According to this document, LR No.209/14067 is 1.00 hectares. The applicant claims that this title was surrendered so that an area which had encroached on to the southern bypass could be removed. There is no document which shows when this was done.

10. There are serious conflicts of facts in this case. The law is that where there are serious conflicts of facts, the court has to maintain status quo until the dispute is heard and determined in a trial. This was the holding by the court of Appeal in the case of **Ougo & Another Vs Otieno( 1987) KLR 364** where it was held as follows:-

***" The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided in a trial".***

11. The applicant in its submissions refer to affidavits filed in ELC 748 of 2017. This is a different case and if the applicant wanted the issues raised in those affidavits considered in this case, they should have been introduced by way of a further affidavit for which this court had granted leave. What was raised in that case cannot be raised in submissions and the applicant expects the court to call for that file to peruse what was said therein. Even if the court were to call for that file and consider the affidavits, the law is clear that in considering if a party has disclosed a prima facie case, the court is not expected to make conclusive findings based on affidavits. In this regard I agree with the finding of **Lord Diplock** in the case of **American Cynamid Co. -vs- Ethicon [1975]. ALL ER 504** where it was held as follows:-

***" It is no part of the court's function at this stage of litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial".***

12. As there appears to be two titles in respect of one parcel on the ground, I will order that the status quo be maintained. For avoidance of doubt, the status quo is that there is no development going on in the disputed property described as LR No.209/14067 or LR 209/11822. Neither the applicant nor the respondent should, develop, lease or dispose of the disputed properties until this dispute is heard and determined. The maintenance of status quo order granted herein effectively discharges the injunction orders granted on 7<sup>th</sup> February 2018 and subsequently extended.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **28<sup>th</sup>** day of **June 2018**.

**E.O.OBAGA**

**JUDGE**

In the presence of :-

Mr Abdullahi for Chege Njoroge for applicant

M/s Mailu and Mr Gikonyo for respondents

Court Clerk: Hilda

**E.O.OBAGA**

**JUDGE**