



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 217 OF 2014

AZZURI LIMITED.....PLAINTIFF

VERSUS

CHARO LAWRENCE KADENGE ZIRO

KAMBI KADENGE ZIRO

VALERIO BUCCIARELLI.....DEFENDANTS

AND

KADZIRO BEACH LIMITED

SETTLEMENT FUND TRUSTEES.....NECESSITY PARTIES

RULING

1. Before me for determination is the 4th Defendant Notice of Motion dated 14th December 2016. The same prays for orders that:-

2. An inhibition and/or Conservatory order and/or injunction is issued barring the Plaintiff by itself, its servants, workmen and/or agents, or otherwise howsoever, from erecting walls/fences/structures, trespassing onto and/or in any other way dealing with the suit property known as Chembe/Kibabamshe/356 pending the hearing and determination of the suit.

3. In the alternative, a temporary injunction do issue to restrain the Plaintiff by itself, its servants, workmen and/or agents, or otherwise howsoever, from dealing with, damaging, wasting, constructing or occupying, or continuing to build perimeter walls alienating or otherwise dealing with property known as Chembe/Kibabamshe/356, until the determination of the suit, or until further orders of this Court;

4. A mandatory injunction do issue to compel the Plaintiff to bring down at its expense the perimeter wall erected around Plot Chembe/Kibabamshe/356; so as to restore the land to the state it was in before the forcible taking of possession;

6. The costs of the application be provided for.

2. The application is supported by an Affidavit sworn by Kenneth Nyaga Mwige, a director of the 6th Defendant herein and is premised on the grounds that:

i) The Plaintiff alleges that it was the first to execute an agreement for sale of the suit property, which is the bone of contention between the Plaintiff and Kadziro Beach Ltd;

ii) Through an order of Court dated 1/4/16, the Court ordered the maintenance of status quo and issued an inhibition restraining all the parties to the suit from wasting or otherwise developing or dealing with the suit property in any manner whatsoever. However the Plaintiff has disobeyed the same and it is erecting a wall around the suit property and the matter has not come to a conclusion on the disputed issues yet, as such, the Plaintiff's directors should be cited for contempt of Court for disregarding the order of the Court.

iii) A mandatory injunction to bring down the wall should issue to restore the land to the state it was in before the forcible

possession and disposition, and to guarantee equality of arms at trial; and otherwise obviate a situation where the Plaintiff would steal a march and maintain a position of advantage at the trial;

iv) Given the foregoing chronological events stated in the previous application dated 12/5/2015, by the 1st Applicant/Interested Party, the Court ought to stamp its authority and stop all activities in the suit property, to prevent a travesty of justice.

3. In a Replying Affidavit filed herein on 3rd February 2017 and sworn by the Plaintiff's Managing Director Anthony Safari Kitsao, the Plaintiff accuses the 4th Defendant of being part of a cartel of fraudsters that are well bent on trying to deprive the Plaintiff of its lawfully acquired property. It further accuses the 4th Defendant of securing ex-parte orders on its application by blatant non-disclosure and concealment of material facts.

4. According to the Plaintiffs, there is no order dated 1st April 2016 in the Court Record. The Plaintiff avers that the only order is that delivered by the Court on 14th November 2016 but there is nowhere therein where the Court ordered for the maintenance of the status quo as stated by the 4th Defendants.

5. The Plaintiff further avers that the only orders alive in the Court record are those made on 19th June 2015 in which the Court restrained any person from interfering with the Plaintiff's ownership, use and possession of the suit property. It is accordingly the Plaintiff's prayer that the Ex-parte orders obtained herein by the 4th Defendant be set aside.

6. I have considered the application and the response thereto. I have equally considered the written submissions filed herein by the Learned Advocates for the parties.

7. The facts leading to the filing of the present application are in my view clear and straight-forward. By a Plaint dated 19th November 2014, the Plaintiff, Azurri Limited filed this suit against Charo Lawrence Kadenge Ziro, Kambi Kadenge Ziro and Valerio Bucciarelli. The Plaintiffs claim against the said Defendants is that the 1st and 2nd Defendants had by an agreement dated 14th June 2014 agreed to sell the suitland to the Plaintiff at an agreed consideration of Kshs 18,900,000/-. A deposit of Kshs 500,000/- was made upon execution and subsequently the Plaintiff took possession and paid a further sum of Kshs 13,000,000/- to the 1st and 2nd Defendants. As it were, the 1st and 2nd Defendants are said to have breached the Sale Agreement after which they purported in conjunction with the 3rd Defendant to file a suit against the Plaintiff claiming an interest in the suit property. The said suit was however subsequently withdrawn.

8. By an application dated 19th November 2014 filed contemporaneously with the suit, the Plaintiff sought orders of injunction restraining the Defendants from obstructing the Applicant from taking vacant possession of the suit property and/or disposing it off, transferring, alienating, charging and/or interfering with the same in any manner whatsoever. Having heard the said application, the Honourable Angote J allowed the same as prayed on 19th June 2015.

9. Thereafter by an application dated 1st April 2016, a number of parties including the 4th Defendant sought to be enjoined as necessary parties. Again having heard the same and by a Ruling delivered on 14th November 2016, the Honourable Angote J allowed the application. Having been so enjoined, and having filed its Defence and Counterclaim, the 4th Defendant filed the present application before me on 15th December 2016 seeking an order of inhibition and/or conservatory orders to issue to bar the plaintiff from erecting and/or continuing to erect a perimeter fence and/or in any other way dealing with the suit property pending the hearing of the application and the suit.

10. The Plaintiff is vehemently opposed to the issuance of the orders sought herein. They have strongly criticized the conduct of the 4th Defendant/Applicant herein. In particular, they accuse the Applicant of lying through its teeth and misleading the Honourable Justice Chitembwe before whom the matter was placed on 15th December 2016 (in the absence of Angote J) into issuing ex-parte orders through blatant non-disclosure and/or concealment of material facts.

11. I have considered the circumstances of this case. As Angote J found in his Ruling delivered herein on 14th November 2016 aforesaid, it is apparent from the record availed to the Court that there are two letters of allotment in respect of the self same suit property. There further appears to be two different registers and two title deeds, one that was issued to the Plaintiff/Respondent and another that was issued to the 4th Defendant/Applicant. That was the scenario that led the Learned Judge to conclude that the dispute herein cannot effectually and completely be determined without the Applicant being enjoined in these proceedings.

12. It is now the 4th Defendants case that following the ruling on the Plaintiff's application for injunction that was granted on 19th June 2015, the Plaintiff/Respondent embarked on an accelerated pace of construction to finish its intended project on the suitland. While that may have probably been in order in the scenario prevailing as at the date of the ruling in 2015, this Court is now faced with the scenario where there have been produced two title deeds in respect of the same suit property. The ownership of the property thus remains heavily contested. That being the case, the issue of which one amongst the two titles is valid will have to be determined by this Court.

13. In these circumstances and given the uncontroverted assertion by the 4th Defendant/Applicant that the Plaintiff is bent on proceeding with construction on the suit property, I think there is need to evenly balance the interest of the parties herein by preserving the suitland as it is.

14. Accordingly, I find merit in the 4th Defendant's application dated 14th December 2016. The orders issued herein on 19th June 2015 are accordingly varied and/or discharged. In its place, there shall issue an inhibition in respect of the suit property as sought at Prayer No. 2 of this application.

15. The costs of the said application shall be in the cause.

Dated, signed and delivered at Malindi this 11th day of October, 2018.

J.O. OLOLA

JUDGE