



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 85 OF 2018

EXPORT MILLING (EPZ) LTD.....PLAINTIFF

VERSUS

H. YOUNG & CO. (EA) LTD.....1ST DEFENDANT

KENYA PORTS AUTHORITY.....2ND DEFENDANT

EXPORT PROCESSING ZONES AUTHORITY.....3RD DEFENDANT

R U L I N G

1. The application before this court for determination is the Notice of Motion dated **12th April, 2018** seeking an order of injunction restraining the 1st defendant from entering upon, or carrying out any construction of any nature on the suit premises known as **Subdivision Number 4785 (Original Number 3842/2/3) of Section V1 Mainland North** pending the hearing and determination of the suit and the Notice of Motion dated **23rd April, 2018** by the 2nd defendant seeking orders to lift and to set aside the interim order of injunction given on 12th April, 2018. The court lifted the order of injunction given on 12th April, 2018 on terms that the 2nd defendant deposits in court or in the joint names of the Advocates for the parties the sum of **Kshs.125,000,000/=** within 21 days which condition has been met by the 2nd defendant.

2. The undisputed facts of this case are that the subject matter of the suit is the construction of the road known as **Kipevu Road, Mombasa** passing through all that piece or parcel of land known as Land Subdivision Number 4785 (Original Number 3842/2/3) of Section V1 Mainland North registered in the name of the 3rd defendant. The 2nd defendant granted a lease of the suit premises to the plaintiff for a period of **fifty (50) years** from **1st August, 2013**.

3. The 2nd defendant has expressed interest to acquire the suit parcel of land and other parcels of land belonging to the 3rd defendant for purposes of expanding the Kipevu Road, Mombasa. The construction of the said road is underway and the 1st defendant is undertaking the construction which is passing through the suit property.

4. The plaintiff's application is supported by the affidavit of Martin Mwangome Munga sworn on 12th April, 2018 and a further affidavit sworn on 9th July, 2018. Briefly, the plaintiff contends that as the registered proprietor as lessee of the suit premises, it is entitled to possession thereof. Alternatively, that it should be adequately compensated before construction of the road can proceed. That the 2nd defendant could not purport to give authority to the 1st defendant to commence construction of the said road on the suit land without consent from the plaintiff or the 3rd defendant.

5. The 1st defendant opposed the application and filed a replying affidavit sworn by Richard Kobala on 18th April, 2018 while the 2nd defendant filed a replying affidavit sworn by Michael Sangoro on 23rd April, 2018 in opposition to the said application. It is their contention that the plaintiff has not established a *prima facie* case with a probability of success and has not demonstrated that it stands to suffer irreparable loss that cannot be compensated by way of damages as the suit property has been valued and its value has been ascertained or is capable of being ascertained. That the balance of convenience tilts in favour of the construction of the road which is already underway and that it is in the public interest that the construction of the said road proceeds unhindered. The 2nd defendant further avers that it has been and is willing to pay full compensation agreed upon to the rightful party and based on the valuation report by the Government Valuer. To this end, the 2nd defendant has already deposited the sum of Kshs.125,000,000/= to the court.

6. The plaintiff's application is supported by the 3rd defendant through a replying affidavit sworn by Famuel Kiduda on 4th July, 2018 in which it deposes, inter alia, that the 2nd defendant expressed an interest in acquiring the suit premises and other parcels of land way back in the year 2013 and was informed at that time premises was leased to the plaintiff. That negotiations have been ongoing in which it had been agreed that the amount of compensation due to the plaintiff would be set by the National Land Commission. The 3rd defendant contends that

the 2nd defendant acted with impunity when it instructed the 1st defendant to enter the suit premises without the consent of the plaintiff and the 3rd defendant and without due compensation to the plaintiff.

7. The parties filed written submissions which largely reiterated the facts as set out in the parties filed affidavits. The court has considered the applications, the affidavits and the annexures thereto and has reviewed and considered the submissions filed by the parties together with the authorities relied on. The issue for the court to determine is whether the material and evidence presented to the court by the plaintiff has established and/or demonstrated that it has a *prima facie* case with a probability of success to enable the court grant the plaintiff an order of injunction.

8. In the case of *Giella -vs- Cassman Brown & Company Ltd [1973] EA 358*, an applicant needs firstly to establish and demonstrate that he has a *prima facie* case with a probability of success, secondly that he stands to suffer irreparable damages/loss that cannot be compensated in damages if the injunction is not granted and he is successful at the trial, and thirdly, in case the court is in any doubt in regard to the first two conditions, the court may determine the matter by considering in whose favour the balance of convenience tilts.

9. In the present case there is no dispute that the plaintiff has a registered lease issued to it by the 3rd defendant which is the registered proprietor of the suit property. The plaintiff's lease is for 50 years from 1st August, 2013. The lease in favour of the plaintiff is therefore still in force. **Section 24 of the Land Registration Act 2012** states that:-

24. subject to this Act -

”(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant therefor: and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease”.

10. The title issued to the 3rd defendant conferred absolute rights of proprietorship and the privileges that go with ownership in terms of **Section 25 (1) of the Land Registration Act 2012**. **Section 25** provides:-

(1) The rights of a proprietor, whether acquired on first registration or subsequently of valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor together with all privileges and appurtenances belonging thereto, free from all interests and claims whatsoever, but subject -

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register”.

11. The plaintiff was lawfully leased the suit land and pursuant to **Article 40 of the Constitution** it is entitled to protection of their property and in particular it should not be arbitrarily deprived of the same unless such deprivation is done in accordance with the law and in compliance with the Constitution and it is promptly compensated for the property. **Article 40(3) of the Constitution** provides as follows:-

(3) The state shall not deprive a person of property of any description, or of any interest in or right over, property of any description, unless the deprivation -

(a) results from an acquisition of land or an interest in or a conversion of an interest in land or title to land, in accordance with chapter five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any act of parliament that-

(i) requires prompt payment in full, of just compensation to the person and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

12. The only limitation to the protective rights to property conferred under **Article 40 of the Constitution** is where there has been found that the property was unlawfully acquired. There is no allegation that the suit property herein was acquired unlawfully.

13. Having regard to all the material presented by the plaintiff and the defendants, I am satisfied the plaintiff has established that it has a *prima facie* case with a probability of success. The plaintiff's case meets the threshold of what constitutes a *prima facie* case as defined by *Bosire JA in Mrao Limited -vs- First American Bank & 2 Others [2003] KLR 125* where he states as follows:- **“I would say that in civil case it is a case in which on the material presented to the court or a tribunal properly directing itself would 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”.**

14. The plaintiff has demonstrated that it has an interest in the suit property having been regularly leased by the 3rd defendant. The plaintiff's

position is supported by the 3rd defendant who is the registered owner of the suit property and further supported by the negotiations that have been going on between the parties.

15. On the second limb as to whether the plaintiff has demonstrated it stands to suffer irreparable damage that cannot be compensated in damages in case the injunction is not granted the court has to consider the rival arguments by the parties. The plaintiff argues that it has been deprived the use of its premises by the 1st and 2nd defendants actions. For their part, the 1st and 2nd defendants argue that construction of the road would serve the public at large and that the plaintiff can be compensated by damages. Indeed the 2nd defendant has deposited Kshs.125,000,000/= as security towards compensation as ordered by the court. It is my view that in this case, the plaintiff can be adequately compensated in damages. I have no doubt it would be possible to obtain an appropriate valuation of the property for purposes of compensation.

16. The balance of convenience would be against hindering the completion of the construction of the Kipevu road, a project that has already been commenced and no doubt involves the expenditure of colossal public funds.

17. In the premises therefore even though the plaintiff has demonstrated a *prima facie* case I have come to the conclusion that the plaintiff can infact be adequately compensated in damages and that the balance of convenience tilts in favour of allowing the construction of the road to proceed unhindered.

18. From the documents filed and the material placed before me, there is no dispute that the parties have been engaged in negotiations over the matter. Indeed the only issue left in the negotiations is the specific amount of compensation payable in respect of the suit property. The 3rd defendant is in agreement that the plaintiff is the one entitled to the compensation for the suit property. The court had already lifted the injunction initially granted to the plaintiff on condition that the 2nd defendant deposits the sum of Kshs.125,000,000/=, a condition that has already been met by the 2nd defendant. The said sum of Kshs.125,000,000/= was deposited in court. I now order that the said sum of Kshs.125,000,000/= deposited in court by the 2nd defendant be released to the plaintiff as part of the compensation pending the hearing and determination of the suit.

I further direct that each party meets their own costs for these applications.

Dated, signed and delivered at Mombasa this 17th day of December, 2018.

C. YANO

JUDGE