



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUITNO. 253 OF 2016

SILIPET PROPERTIES LIMITED.....1ST PLAINTIFF

GEOFFREY KIMANI KIRUNYU.....2ND PLAINTIFF

VERSUS

CHEGE MWAURA.....1ST DEFENDANT

NAIROBI CITY COUNTY GOVERNMENT.....2ND DEFENDANT

RULING

The plaintiff brought this suit on 14th March 2016 seeking among others, an order for the eviction of the 1st defendant from an access road to the 1st plaintiff's parcel of land known as L.R No. 209/1954/2 situated in Nairobi County (hereinafter referred to as "the suit property") and a permanent injunction restraining the 1st defendant from trespassing, remaining upon, occupying, leasing, licensing, letting, constructing upon, carrying on any form of business, renting to tenants, or otherwise howsoever dealing in the access road to the suit property. Together with the plaint, the plaintiff brought an application by way of Notice of Motion dated 11th March 2016 seeking the following orders:-

1. A temporary injunction to restrain the 1st defendant from trespassing, remaining upon, occupying, leasing, licensing, letting for a peppercorn fee, constructing upon, carrying on any form of business, renting to tenants or otherwise howsoever dealing in the access road to the 1st plaintiff's parcel No. L.R No. 209/1954/2 ("the suit property") situate in Nairobi County pending the hearing and determination of this suit.
2. The 1st defendant does forthwith remove at his own expense the metallic container now blocking access road to the suit property.
3. The Pangani OCS does oversee the enforcement of the orders issued herein.
4. The costs of this summons to the applicants in any event.

The application was supported by affidavit sworn by the 2nd plaintiff on 11th March 2016. The plaintiff's case against the defendants as set out in the said affidavit is as follows. The 1st plaintiff is the registered proprietor of the suit property while the 2nd plaintiff is a director of the 1st plaintiff. The 1st plaintiff acquired the suit property in the year 2009. The suit property is designated as residential cum business plot. The plaintiffs were desirous of developing the suit property by putting up residential and business

premises thereon. The plaintiffs obtained approvals from the 2nd defendant for the project. In preparation to commence the project, the plaintiffs assembled construction material to be delivered to the suit property. The plaintiffs were unable to deliver the said construction materials to the suit property because the 1st defendant had trespassed upon and illegally erected a metallic container on the access road to the suit property without the plaintiffs' knowledge and consent. The plaintiffs' efforts to seek assistance from the area chief, Ethic and Anti-Corruption Commission, Kenya Urban Roads Authority and the 2nd defendant to have the said container removed did not bear fruit necessitating the filing of this court.

The plaintiffs have contended that the 1st defendant has no right to occupy the said access road. The plaintiffs have contended that as a result of the 1st defendant's occupation of the said access road, they have been denied the use and enjoyment of the suit property. The plaintiffs have contended that they stand to suffer irreparably if the orders sought are not granted since they are unable to develop the suit property. The plaintiffs annexed to the affidavit in support of the application among others, a copy of Grant No. IR122854, copies of photographs of the container in dispute, a copy of a building plan and copies of correspondence exchanged with various parties on the dispute.

The plaintiff's application was opposed by the defendants. The 1st defendant in his replying affidavit sworn on 18th July 2016 admitted that the container complained of by the plaintiffs was installed next to the suit property by him. The 1st defendant stated that the site at which the said container has been installed was allocated to him by the 2nd defendant through a Temporary Occupation Licence (T.O.L) for selling building materials. The 1st defendant stated that he had carried on business from the said container for over 8 months without any complaint from the owners of adjacent properties including the 2nd plaintiff herein who had earlier consented to his occupation of the site.

The 1st defendant contended that having lawfully acquired a licence from the 2nd defendant to operate his business from the disputed site, his eviction therefrom would affect his business and legitimate expectation of uninterrupted occupation of the site. The 1st defendant contended that the access road in contention had many other obstructions including gates constructed by adjacent property owners and a wall blocking the same from the main road. The 1st defendant contended that he had complied with all the conditions set out in the T.O.L and that the access road the subject of the plaintiffs' claim falls within the jurisdiction of the 2nd defendant and Kenya Urban Roads Authority. The 1st defendant contended that the site on which he has placed the container in dispute is a road reserve next to the suit property in respect of which the plaintiff has no proprietary interest.

The 1st defendant stated that this suit which seeks to evict him from the disputed access road is actuated with malice because for the 8 months that he was in occupation of the said road prior to the suit, the plaintiffs never complained or approached him with an aim of addressing the alleged obstruction. The 1st defendant stated that the plaintiffs' claims were baseless since the container in dispute had not denied the plaintiffs access to the suit property. The 1st defendant contended that the plaintiffs were guilty of material non-disclosure and that they had approached the court with unclean hands with the aim of tainting his name as a land grabber. The 1st defendant denied having trespassed on the suit property. The 1st defendant contended that no basis had been laid to warrant the issuance of the orders sought.

The 2nd defendant opposed the application through a replying affidavit sworn by its assistant director of legal affairs, Mr. Erick Abwao on 15th August 2016. In his affidavit, Mr. Abwa stated that, the land on which the 1st defendant's container has been installed is a road reserve which belongs to the 2nd defendant. He denied that the said container has been placed on an access road and termed the plaintiffs' claim malicious. He denied further that the said container had restricted access to the suit property as claimed by the plaintiffs. Mr. Abwao contended that the 2nd defendant had the mandate to lease or do whatever it pleased with the land on which the said container is standing on a temporary basis. He confirmed that the 2nd defendant had issued a T.O.L to the 1st defendant in respect of the said road reserve at a renewable annual licence fee of Kshs 7,500/-.

The application was argued before me on 3rd October 2016 when Mr.Kinyanjui appeared for the plaintiff, Mr. Anyona for the 1st defendant and MrMorara for the 2nd defendant.I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the affidavits which were filed by the defendants in opposition to the application. Finally I have considered the submissions by the parties' respective advocates. This is the view I take of the matter. The Plaintiffs have sought both prohibitory and mandatory temporary injunction.

The principles upon which the court exercises its discretion in applications of this nature are now well settled. As was stated in the case of Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358,which was cited by the plaintiffs, an applicant for a temporary injunction must demonstrate that he has a prima facie case against the respondent with a probability of success and that, unless the order sought is granted, he will suffer irreparable harm. If the court is in doubt as to the above, the court will determine the application on a balance of convenience.

For a temporary mandatory injunction, an applicant must establish more than a prima facie case. The granting of a temporary mandatory injunction effectively determines a case without the benefit of a trial. An applicant for a temporary mandatory injunction must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success here must be higher than that which is required for a prohibitory injunction. Such applicant must also satisfy the normal conditions for granting temporary injunction such as showing that he will suffer irreparable harm unless the orders sought are granted. In the case of Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901,it was stated that:

A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.

In the case of Shepherd Homes Ltd. vs. Sandham [1971] 1 ch.304,Meggary J.stated as follows;

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation”.

In the case of Redland Bricks Ltd vs. Morris [1970] AC 652, it was stated that jurisdiction to issue a mandatory injunction;

“...is a jurisdiction to be exercised sparingly and with caution but in a proper case, unhesitatingly”.

In the Court of Appeal case of, Jaj Super Power Cash and Carry Limited vs. Nairobi City Council & 2 others, Nairobi, Civil Appeal No. 11 of 2002, the court observed that a mandatory injunction at an interlocutory stage;

“...merely serves to redress the status quo ante in deserving cases until the main dispute is determined.”

Applying the foregoing principles to this case, the question that I need to answer is whether the plaintiffs have satisfied this court that they have unusually strong and clear case against the defendants that would warrant the issuance of the prohibitory and mandatory interlocutory injunctions sought.It is not disputed that the 1st defendant is the owner of the suit property. It is also not disputed that the 1st defendant is

entitled to the full benefit and unrestricted use and enjoyment of the suit property save as otherwise provided by law. Section 25 (1) of the Land Registration Act, 2012 provides as follows:-

1. The rights of a proprietor whether acquired on first registration or subsequently for 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 other interests and claims whatsoever but subject:

2. To the leases, charges and other encumbrances and to the conditions and restrictions if any shown in the register; and

3. To such liabilities rights and interests as affect the same and are declared by section 28 not to require noting in the register unless the contrary is expressed in the register.

It is common ground that there is a 10 feet wide lane adjacent to the suit property which was meant for the use of the owners of the properties in the area where the suit property is situated and the area residents in their daily movements in the area. The 1st defendant as the owner of the suit property was entitled to the benefit of the said lane together with the other property owners and area residents. Survey maps annexed to the 1st and 2nd defendants' replying affidavits show that the suit property has an access to Murang'a road at the front and between the suit property and LR No. 209/2693 is a 10 feet wide lane which connects Murang'a Road to a 20 feet wide lane at the rear of Plot No. 1954/3 which neighbours the suit property.

The plaintiffs' complaint is that the 2nd defendant has allocated to the 1st defendant the said lane on temporary basis to carry out business of selling building materials. Following the said allocation, the 1st defendant has taken possession of the said lane and has placed thereon a metallic container from which he operates his business. It is not in dispute that the said container has completely blocked movement through the said lane. The plaintiffs have contended that the existence of the said container on the said lane has restricted their access to the suit property. The plaintiffs have contended that the purported allocation of the said lane to the 1st defendant by the 2nd defendant and the 1st defendant's occupation thereof are unlawful. The plaintiffs have contended that when they acquired the suit property in the year 2009, the disputed lane was vacant. The 1st defendant's response to the plaintiffs' claim is that he acquired the suit property lawfully from the 2nd defendant and that he is not the only one blocking the said lane. The 2nd defendant's response is that the said lane is a road reserve whose ownership vests on it and as such it is within its right to do whatever it deems fit with the same including letting out the same on a temporary basis.

On the material before the court, I am satisfied that the plaintiffs have established a strong case against the defendants with a high probability of success. It is not in dispute that the 10 feet wide lane in dispute is vested on the 2nd defendant. I am of the view however that the 2nd defendant holds the said lane in trust for the public more particularly the owners of the properties abutting the said lane and the area residents. As a trustee of the said lane, the 2nd defendant cannot deal with the same in a manner inconsistent with the purposes for which the lane was reserved and contrary to the interests of the area residents without consulting them. I am not in agreement with the contention by the 2nd defendant that it has unfettered discretion to deal with the said lane.

It is not disputed that the purpose for which the defendants have put the disputed lane is not what it was meant for. It is also not in dispute that the user for which the said lane has been employed by the defendants has interfered with the normal use of the said lane which is supposed to aid free movement in the area. There is also no doubt that the plaintiffs are affected by the defendants' conversion of the said lane from an access road to a shop. There is no evidence before the court that the plaintiffs or other area residents were consulted by the 2nd defendant before it allocated the said lane to the 1st defendant. There is also no evidence that the procedure for allocating public land was followed during the allocation of the said lane to the 1st defendant. The 2nd defendant had argued that the disputed lane is not a road but a road

reserve. According to section 2 of the Public Roads and Roads of Access Act, Chapter 399 Laws of Kenya, a road reserve is a public road. The defendants have no right to block or close a public road without following the due process. For the foregoing reasons, I am of the view that the allocation of the said lane to the 1st defendant by the 2nd defendant was wrongful. The 1st defendant's occupation of the said lane is similarly illegal. I don't think that the situation is helped by the fact that there may be other people blocking the said lane at the opposite end.

The plaintiffs have contended that their access to the suit property is impeded by the container which the 1st defendant has placed on the said lane. I am persuaded that the loss likely to be suffered by the plaintiffs if the injunction sought is not granted is unquantifiable and as such is not capable of being compensated in damages.

In view of the foregoing, I am satisfied that the plaintiffs have met the conditions for granting both prohibitory and mandatory injunction sought. Consequently, I hereby allow the plaintiffs' application dated 11th March 2016 in terms of prayers 3 and 4 thereof. The 1st defendant shall remove the container that he has placed on the lane adjacent to L.R No.209/1954/2 forthwith and in any event not later than thirty (30) days from the date hereof. The plaintiffs shall have the costs of the application.

Delivered and Signed at Nairobi this 24th day of February, 2017.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the Plaintiff

Mr. Otieno for the Defendant

Kajuju Court Assistant