



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELCCASE NO. 309 OF 2016

WESTERN SEED COMPANY LTD.....PLAINTIFF

VERSUS

ABSALOM NGALO.....DEFENDANT

RULING

What is before me for determination is the plaintiff's Notice of Motion application dated 1st April 2016 and the defendant's preliminary objection dated 11th April 2016.

In its application, the plaintiff has sought the following substantive orders:-

1. That an interlocutory order does issue restraining the defendant from entering and/or remaining, trespassing, encroaching, dealing with, alienating and/or interfering with the plaintiff's peaceful enjoyment of the suit premises known as Land Reference No. 209/11935 pending the hearing and determination of this suit.
2. That the OCS Kayole Police Station assists in the enforcement of the orders.
3. That costs of the application be awarded to the plaintiff.

The application is supported by the affidavit of Albert Ayiro, sworn on 1st April 2016. The plaintiff's case as set out in the said affidavit is that it is the registered owner of LR No. 209/11935 measuring approximately 0.6546 hectares (hereinafter "the suit property") and that the defendant who has no right or legal claim over the property had made attempts to forcefully enter the suit property on 31st March 2016 with the intention of subdividing the same. The plaintiff has averred that during the incident, the defendant caused the destruction of a perimeter wall which the plaintiff had put up around the suit property. The plaintiff exhibited a copy of Grant No. I.R 59646 as evidence of its ownership of the suit property. The plaintiff also annexed copies of receipts for the payment it had made to Nairobi City County on account of rates for the suit property. The plaintiff averred that prior to the defendant's attempt to enter and take possession of the suit property as aforesaid, it had enjoyed quiet possession and use of the property from the time the same was registered in its name on 2nd September 1993. The plaintiff averred that unless the defendant is restrained by this court, he would accomplish his threat to dispossess the plaintiff of the suit property an act that would cause the plaintiff great suffering.

The plaintiff filed a supplementary affidavit sworn by Saleem Esmail on 15th April 2016. In the said affidavit, the plaintiff contended that this suit and the present application were brought in good faith to

seek a remedy for trespass on its property. The plaintiff contended that the suit property which is the subject matter of this suit had been valued at Kshs. 64,000,000/- which exceeds the pecuniary jurisdiction of the subordinate court. The plaintiff contended further that CMCC No. 1502 of 2016 which was filed by the defendant was against another party and the parcel of land in dispute in the case was not the same as the suit property herein. The plaintiff averred that although the order issued in the said case was directed against a different party and concerned a different parcel of land, the defendant tried to use the same to evict the plaintiff from the suit property.

The plaintiff averred that it had filed an application to be joined as an interested party in CMCC No. 1502 of 2016 (hereinafter "the lower court case") which application was dismissed for non-attendance although it had not been listed in the cause list. The plaintiff averred further that as at the time the said application was being dismissed, it had filed a notice of withdrawal of the same. The plaintiff averred that after the dismissal of the said application and an application which it filed subsequently in the lower court, the defendant mobilized a large group of people and entered the suit property with the intention of subdividing and apportioning the same to various people and that is what led to the filing of this suit. The plaintiff averred that it filed this suit in a desperate attempt to save its property. The plaintiff contended that no prejudice would be suffered by the defendant by the existence of this suit and its consolidation with the lower court case since this court would be able to conclusively deal with all matters and each party would have an opportunity to be heard. The plaintiff averred that it had always been in possession of the suit property and that save for the defendant's attempt to forcefully take over the property, the defendant had never been in possession of the property. The plaintiff averred that its title to the suit property is valid and has not been revoked or cancelled. The plaintiff reiterated that unless restrained by the court, there was a risk of the defendant subdividing the suit property and selling it off to third parties thereby defeating its claim.

The application was opposed by the defendant through his replying affidavit sworn on 10th March 2016 and Notice of Preliminary Objection dated 11th April 2016. The defendant contended that the pleadings filed herein by the plaintiff are fatally defective, incompetent, misconceived, bad in law and without merit. The defendant contended that the plaintiff's application should be struck out for being vexatious, scandalous and an abuse of the court process. The defendant contended that the application has been brought in breach of the mandatory provisions of Order 2 Rule 15(d) of the Civil Procedure Rules and Sections 5, 6, 7 and 8 of the Civil Procedure Act.

The defendant averred that the plaintiff made two applications in the lower court case seeking orders similar to the ones sought in the instant application. The defendant stated that the plaintiff's first application dated 23rd March 2016 was dismissed on 29th March 2016 for non-attendance and that the plaintiff's second application seeking similar orders was dismissed by the court on a preliminary objection. The defendant contended that the plaintiff obtained the orders herein without disclosing that there was a similar suit between the same parties over the same subject matter in the chief magistrate's court.

The defendant contended that the plaintiff obtained orders from this court using falsehood and deliberately concealing the existence of a similar suit between the parties herein. The defendant averred that the interim orders which were made herein in favor of the plaintiff should be set aside or vacated the same having been obtained fraudulently with the intention of prejudicing the lower court case. The defendant contended that he is the registered owner of the property known as "Jua Kali plot, Dandora Industrial Area part of LR No. 11344/R, Kangundo Road plot A" (plot A). The defendant contended that the plaintiff had encroached on and trespassed on this parcel of land which the plaintiff referred to as LR No. 209/11935. The defendant contended that the plaintiff had not come to court with clean hands and as such its prayers should not be entertained.

The plaintiff's application and the defendant's preliminary objection were heard by way of written submissions. The plaintiff in its written submissions dated 10th May 2016 argued that the defendant had not denied its ownership of the suit property and had instead claimed that he was the owner of plot A which he alleged the plaintiff had trespassed on. The plaintiff submitted that whereas the plaintiff had presented to the court a copy of its title, survey map and a search identifying it as the proprietor of LR No.

209/11935, the defendant had not presented any title document or search to show his ownership of the alleged plot A. The plaintiff cited the case of Giella vs. Cassman Brown & Co. Ltd. (1973) E.A 358 and submitted that the plaintiff had established a prima facie case with a probability of success and that it would suffer irreparable harm if the orders sought are not granted. The plaintiff reiterated that whereas the plaintiff had presented proof of its title over the suit property which had not been contested by the defendant, the part development plan presented to the court by the defendant was not proof of ownership. The plaintiff submitted further that the defendant had not presented any documents to prove the existence of LR 11344/R.

On the preliminary objection, the plaintiff made reference to the case of Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd. (1969) E. A 696 and submitted that the defendant's Notice of Preliminary Objection lacked merit as the issues raised therein would require evidence to determine. The plaintiff argued that the preliminary objection raised by the defendant could not dispose of the main issue in contention in this suit which is whether the plaintiff was entitled to remedies against trespass by the defendant.

As to whether the application is vexatious, scandalous and an abuse of the court process, the plaintiff stated that striking out pleadings is a drastic remedy which must be spared for the clearest of cases. For this submission, the plaintiff relied on the cases of Nyati(2002) Kenya Ltd vs. Kenya Revenue Authority (2009) eKLR and Said Hamad Shamisi vs. Diamond Trust of Kenya Ltd (2010) eKLR. The plaintiff submitted that the suit and the application herein are not hopeless to warrant the draconian remedy of striking out.

In his submissions in reply dated 28th July 2016, the defendant argued that, the plaintiff's application and suit are an abuse of the court process and are intended to defeat the ends of justice. The defendant submitted that the plaintiff had obtained ex parte orders herein unlawfully by use of falsehoods and non-disclosure of the fact that there was a similar suit between the parties in the lower court. The defendant submitted further that the application herein is an abuse of the court process and should not be entertained since the plaintiff did not disclose that he had filed a similar application in the lower court. The defendant cited the case of Mukisa Biscuits Manufacturing Company Ltd vs. West End Distributors Ltd. (supra) and contended that his preliminary objection has merit. The defendant submitted that the plaintiff had offended the provisions of Order 2 Rule 15(d) and Order 12 Rule 7 of the Civil Procedure Rules and Sections 5, 6, 7 and 8 of the Civil Procedure Act.

I wish to deal first with the defendant's preliminary objection which touches on the competency of the plaintiff's suit and application. I have considered the preliminary objection together with the authorities cited in support thereof. I have also considered the plaintiff's response to the objection. In the case of Mukisa Biscuits Co. Ltd -vs- West End Distributors Ltd (supra) which was cited by both parties, Sir Charles Newbold, P. stated at page 671 as follows;

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

In the case of Oraro vs. Mbaja [2005]1KLR141, it was held that;

"A preliminary objection correctly understood is a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. The court's discretion is never exercised just on the basis of propositions of law; there must be a factual situation of which the court takes cognizance, and in relation to which its equitable conscience is exercised."

The defendant's objection was grounded principally on section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya which provides that:

"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties, or between the parties under whom they or any of them claim, litigating under the same title where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

The defendant has contended that the plaintiff had no right to bring the present suit and application because there was already a suit and similar application before the lower court between the parties concerning the same subject matter. I am in agreement with the submission by the plaintiff that the defendant's preliminary has no merit. I have perused the pleadings in the lower court case. I have noted that the plaintiff was not a party to that suit and its application to be added as a party to the suit was dismissed by the court. I have also noted that the subject matter of the lower court case is not the same as the suit property herein. The objection fails also on another ground. The plaintiff has contended that the value of the suit property herein is Kshs. 64,000,000/- A copy of a valuation report has been placed before the court. The plaintiff has contended that even if the suit property herein was the subject of the lower court case, the lower court could not have had pecuniary jurisdiction to handle the plaintiff's claim herein. To determine whether or not the plaintiff's contention is correct, the court will have to determine the value of the suit property. Whether or not the value of the suit property is Kshs. 64,000,000/- as claimed by the plaintiff is a factual issue which the court cannot determine on a preliminary objection. For the foregoing reasons, the defendant's preliminary objection must fail.

The disposal of the objection takes me to the plaintiff's application for injunction. The principles upon which this court exercises its discretion in applications of this nature are now well settled. In the case of Giella vs. Cassman Brown and Co. Ltd. (supra) which was cited by the Plaintiff in support of its submissions, it was held that an applicant for a temporary injunction must establish:-

- i. A prima facie case with a probability of success
- ii. That if the injunction is not granted, he will suffer irreparable injury that cannot be compensated by an award of damages and;
- iii. If in doubt, the court shall determine the application on a balance of convenience.

In the of Mrao Limited vs. First American Bank Limited & 2 Others (2003) KLR 125, the court defined a prima facie case as;

"a case in which on the material presented to the court a 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."

In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 others [2014] eKLR, the court stated that;-

"The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion."

On the material before me, I am satisfied that the plaintiff has established a prima facie case with a probability of success. The plaintiff has placed sufficient material before the court in proof of the fact that it is the owner of the suit property. The defendant has not challenged the evidence placed before the court by the plaintiff in proof of its claim over the suit property. The defendant who claims to be the owner of "Jua Kali Plot-Dandora Industrial Area Part of LR. No. 11344/R, Kangundo Road Plot A" has not placed any evidence in proof of his alleged ownership of the said plot. The defendant has also not placed any

material before the court showing that the said plot and the suit property have any connection. I am also satisfied that the plaintiff stands to suffer irreparable harm which cannot be compensated in damages if the injunction sought is not granted. The evidence before the court shows that the defendant had made attempts to dispossess the plaintiff of the suit property. The defendant has not denied this fact in his affidavit in opposition to the application.

The upshot of the foregoing is that the plaintiff has met the conditions for granting interlocutory injunction. I would therefore dismiss which I hereby do the defendant's preliminary objection dated 11th April 2016 and allow the Plaintiff's Notice of Motion dated 1st April 2016 in terms of prayers 4 and 5 thereof. The plaintiff shall have the costs of the application and the preliminary objection.

Delivered and Signed at Nairobi this 17th day of February, 2017

S. OKONG'O

JUDGE

In the presence

Mr. Dar for the Plaintiff

Mrs. Omwakwe for the Defendant

Kajuju Court Assistant