



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.25 OF 2016

KENYA ELECTRICITY GENERATING COMPANY LIMITED.....PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF NAKURU.....DEFENDANT

RULING

(application for injunction; plaintiff claiming to own certain land; defendant moving in to construct stalls on the argument that the site is a road reserve; plaintiff demonstrating prima facie that the construction is within its land; defendant not tendering any evidence that the construction is within any road reserve; order of injunction issued)

1. This suit was commenced by way of a plaint that was filed on 2 February 2016. The plaintiff has sued the defendant over what it terms to be illegal construction works being carried on by the defendant on the plaintiff's land parcel No. 8704/2. It is pleaded that on 21 January 2016, the plaintiff's attention was drawn to the said construction works which the plaintiff believes were carried out without any colour of right. In the suit, the plaintiff seeks to have orders of permanent injunction against the defendant from the land parcel No 8704/2 (hereinafter the suit land), orders of demolition of the structures erected by the defendant; vacant possession; general damages; mesne profits and costs of the suit.

2. Together with the plaint, the plaintiff filed an application seeking orders of injunction against the defendant, so as to have the defendant restrained from any further development within the suit land. In the same application, the plaintiff has also sought orders of eviction of the defendant. It is that application which is the subject of this ruling.

3. The supporting affidavit is sworn by Jennifer A. Oduor, the property manager of the plaintiff. She has deposed inter alia that the plaintiff is the registered proprietor of the suit land; that on 21 January 2016 she was informed by the plaintiff's Senior Security Officer, one Ephantus Mbui, that the defendant has deployed earth moving equipment on the suit land; that she contacted personnel from the plaintiff's survey department who confirmed that the construction is on the plaintiff's land; and that unless stopped, the defendant will continue with its illegal construction.

4. The defendant entered appearance and has filed Grounds of Opposition to oppose the motion. Four grounds are raised in the following terms :-

(i) The application has not satisfied the conditions for granting a temporary injunction.

(ii) The application lacks merit as the defendant sought to put up market stalls in accordance with

the law.

(iii) The application is bad in law and incurably defective and based on misrepresentation of facts.

(iv) The applicant has failed and/or ignored to exhaust the administrative remedies available under the Physical Planning Act, Cap 286, Laws of Kenya.

5. A statement of defence was also filed vide which the defendant denied undertaking any construction on any portion of the plaintiff's land.

6. Both Mr. Adipo for the applicant, and Mr. Madialo for the respondent, filed written submissions which I have considered. I have taken note that in his submissions, Mr. Madialo has contended that the land upon which the construction is ongoing is a road reserve and that the Commissioner of Lands and Director of Surveys ought to be parties. He also submitted that the order of eviction is a remedy that cannot be obtained at this stage.

7. There is no dispute that the plaintiff is the owner of the land parcel No. 8704/2. I have indeed seen a copy of the plaintiff's title annexed to the affidavit of Ms. Oduor. What is in contention is whether the construction works are within the plaintiff's land or within a road reserve. The plaintiff contends that the construction is within its land whereas it appears as if the defendant wishes to argue that the construction is within a road reserve. In her supporting affidavit, Ms. Oduor annexed a copy of a sketch prepared by the plaintiff's surveyors which indicates that the construction is within the plaintiff's suit land. Other than merely alleging that the works are within a road reserve, the defendant has not annexed any document to demonstrate that the works are not within the plaintiff's land but in a road reserve. Indeed, no replying affidavit was filed and the facts as deposed by Ms. Oduor, to me appear uncontroverted.

8. There is mention that the plaintiff ought to have exhausted the mechanism in the Physical Planning Act, but in his submissions, Mr. Madialo made no mention of any provision of the Physical Planning Act which applies to the nature of the dispute herein. I have also not seen any defect in the plaintiff's application and the defendant has not demonstrated that the market stalls it intends to put up are being put up in accordance with the law.

9. In my view, the plaintiff has demonstrated, prima facie, that the defendant has embarked on developments within land that the plaintiff owns. If this is to continue, the plaintiff of course stands to suffer irreparable loss since the character of the land will change permanently. I am of the view that the plaintiff has demonstrated a prima facie case with a probability of success. I therefore do issue an order of injunction stopping the defendant from proceeding with any construction works within the area under dispute irrespective of whether or not the defendant considers the same to be upon a road reserve. I also bar the defendant from placing any construction materials or construction equipment within this disputed area. In addition the defendant is barred from entering, being upon, or in any other way interfering with the area under dispute and specifically with the land parcel No. 8704/2. The defendant is also ordered to move out its equipment and personnel from the site forthwith. These orders to subsist until the hearing and determination of this suit.

10. On the prayers for eviction, I really do not see the place of it at this stage of the proceedings. I have already issued an injunction barring the defendant from the site in dispute and to me that is good enough. The defendant must of course move out its equipment and personnel and keep away from the disputed land until this case is heard and determined. These orders are interlocutory in nature and will subsist until the suit is heard on merits.

11. On costs, the plaintiff shall have the costs of this application.

12. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 29th day of March 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of: -

Ms.Nyabando present for the plaintiff applicant

No appearance on the part of S. O Madialo& Company Advocates for the defendant .

CA: Nelima

MUNYAO SILA

JUDGE

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