



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 944 OF 2015

EQUATOR INN LIMITED T/A TSAVO INN HOTEL.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL OIL CORPORATION OF KENYA LIMITED....DEFENDANT/RESPONDENT

RULING

Introduction

1. This Ruling relates to the Plaintiff's Notice of Motion dated 30/9/2015 through which the Plaintiff seeks the following orders: -

“(3) Pending the hearing and determination of this suit, an interim injunction do issue restraining the Defendant or its agents, servants and or employees from constructing or further constructing a wall across the Plaintiff's access to the Nairobi – Mombasa Highway or from harassing, threatening or otherwise adversely interfering with the Plaintiff's fundamental proprietary right of way with respect to the Defendant's Parcel L.R. No. 11794/2 (formerly 11487/1) and right of enjoyment of Plaintiff's parcel L.R. No. 11794/2(formerly 11487/2).

(4) Pending the hearing and determination of this suit, a mandatory injunction do issue compelling the Defendant or its agents, servants and or employees to remove any obstruction of the entrance to Tsavo Inn Hotel and Plaintiff's right of way through the Defendant's Plot.”

The key issue to be determined in the Application is whether the Applicant has satisfied the criteria for grant of an interlocutory injunction.

Background

2. This suit was commenced by the Plaintiff through a Complaint dated 30/9/2015 and filed in court on the same day. In the said Complaint, the Plaintiff contends that it is the registered proprietor of L.R. No. 11794/1 while the Defendant is the registered proprietor of a neighbouring piece of land, L.R. No. 11794/2 (formerly L.R. No. 11487/1). Both pieces of land are located at Mtito Andei in Makeni County. The Plaintiff contends that for over 43 years, he has run a hotel, Tsavo Inn Hotel, on its piece of land. It avers that its property is bordered by the Tsavo National Park and the Defendant's Plot and that the only access to the Nairobi - Mombasa Highway is through the Defendant's Plot. The Plaintiff avers that it has always enjoyed unrestricted right of way from its plot through the Defendant's plot and onto the Nairobi-Mombasa Highway, with the knowledge and acquiescence of the Defendant and the Defendant's predecessors, making it an encumbrance on the Defendant's Title.

3. The Plaintiff alleges that in 2015 the Defendant put up a wall across the entrance to the Plaintiff's

hotel, effectively blocking the way to the Plaintiff's hotel. This is what prompted the Plaintiff to commence this suit, seeking the following prayers: -

(a) A declaration do issue that the property known as L.R. No. 11794/2 (formerly 11487/1) is subject to an encumbrance in favour of a right of way for the property known as L.R. No. 11794/1 (formerly 11487/2).

(b) An Order of injunction do issue restraining the Defendant or its agents, servants and or employees from constructing or further constructing a wall across the Plaintiff's access to Nairobi – Mombasa Highways or from harassing or otherwise adversely interfering with the plaintiff's fundamental proprietary right of way with respect to the Defendant's parcel L.R. No. 11794/2 (formerly 11487/1) and right of enjoyment of Plaintiff's parcel L.R. No. 11794/1 (formerly 11487/2).

(c) An Order of mandatory injunction do issue compelling the Defendant or its agents, servants and or employees to remove any obstruction of the entrance to Tsavo Inn Hotel and Plaintiff's right of way through the Defendant's Plot.

(d) A Declaration do issue that the Defendant's acquisition and registration as proprietor of the property known as L.R. No. 11794/2 (formerly 11487/1) is unlawful, null and void.

(e) Special damages in an amount to be assessed by the court for loss of use from 1st May, 2015 until right of way is finally re-instated to the Plaintiff.

(f) General damages for mistreatment and nuisance by the Defendant.

4. Together with the Plaint, the Plaintiff presented the Notice of Motion subject of this Ruling. The Application is predicated upon the principal ground that the Plaintiff has for over 43 years enjoyed a right of way through the Defendant's plot to and from the Nairobi-Mombasa Highway. The Application is supported by an Affidavit by the Plaintiff's Chief Executive, Nila Desai, sworn on 30/9/2015.

5. The Defendant filed a Statement of Defence dated 7/12/2015 in which it denies most of the allegations made in the Plaint. The Defendant avers that the Plaintiff's property has direct access to the Nairobi-Mombasa Highway and contends that the Plaintiff has been trespassing onto the Defendant's property. Besides the Statement of Defence, the Defendant's Company Secretary, Pauline Kimotho, swore a Replying Affidavit dated 27/11/2015 in which she depones that both the Plaintiff's property and the Defendant's property have direct access to the Nairobi-Mombasa Highway. She further contends that the Plaintiff's suit herein is *res judicata* because the Plaintiff previously filed against the Defendant Machakos ELC No. 287/2011 and Machakos BPRT Case Number 39 of 2011. She contends that the Plaintiff's Application does not disclose a prima facie case. She further depones that the material works were duly authorized by the Makueni County Government.

6. On 1/10/2015, Hon. Gitumbi J granted the Plaintiff an interim injunction limited to a period of 14 days. The same was extended on 15/10/2015 and 3/11/2015. Parties opted to canvass the application by way of written submissions.

Submissions

7. The Plaintiff relied on Section 28(1) of the Land Registration Act, No. 3 of 2012, which creates and categorizes the right of way as an overriding interest. It also relies on Section 32 of the Limitation of Actions Act which provides for the various means through which easements may be acquired. Counsel for the Applicant further submitted that the Applicant's hotel has been in existence for over 43 years, and has evolved into a legacy and a brand. He further submitted that blockage of the entrance will not only deny the Plaintiff's visitors access to the hotel but will also destroy the historical value and legacy of the Plaintiff's hotel which will have an impact on the Applicant's future earnings for which damages would not be an adequate remedy. The Plaintiff argued that grant of the interlocutory orders would not interfere

with the Defendant's enjoyment of their property rights because the access passage covers only a fraction of the Defendant's property. The Plaintiff contended that the balance of convenience tilts in favour of the Plaintiff.

8. The Plaintiff relied on **Giella – vs- Cassman Brown & Co. Ltd 1973 (EA) 358** which laid down guiding principles in an application for interlocutory injunction. The Plaintiff further relied on **Mrao – vs – First American Bank Limited & 2 others (2003) eKLR 125** which defined a prima facie case; **American Cyanamid Co. – vs – Ethicom Ltd [1975] AC 396** which laid down the criteria to be applied in determining whether or not damages would be an adequate remedy. Lastly they relied on **Maher Unissa Karim – vs – Edward Oluoch Odumbe, Civil Appeal No. 91 of 2015**; **Locabail International Finance Ltd – vs – Agro Export & another [1986] ALL ER 901** and **Abdi Hassan – vs – Nadhif Jama Adan CA 121/2005 [2006] eKLR** all which advance the view that, in special circumstances, a mandatory injunction may be granted.

9. In their response, the Defendant submitted that the Plaintiff's suit is *res judicata* because in 2011 the Plaintiff filed a reference at the Business Premises Rent Tribunal at Machakos alleging that it had been forcefully evicted from L.R. No. 11487/1. Secondly, the Plaintiff filed Machakos ELC 287/2011 making similar allegations as those it made in the Tribunal Reference. The Defendant relied on Section 7 of the Civil Procedure Act. The Defendant also relied on **John Florence Maritime services Ltd & another – vs – Cabinet Secretary for Transport & infrastructure**; and **Henderson – vs – Henderson [1843] 67 ER 3113** both of which define the essential ingredients of and rationale for *res judicata*.

10. On whether or not the Plaintiff's Application meets the threshold established in **Giella - vs – Cassman Brown & Co. Ltd**, the Defendant argued that the Plaintiff's Application is based on apprehension, which is not a sufficient basis for grant of an interlocutory injunction. The Defendant contended that the construction of the wall will not in any way interfere with the Plaintiff's legacy. The Defendant contended that Section 24(a) of the Land Registration Act (Act No. 2 of 2012) vests in the registered owner of land the absolute ownership of that land together with rights and privileges belonging or appurtenant to the land.

11. The Defendant argued that the right of way is a privilege to use another's land where the dominant tenement would otherwise be inaccessible and would exist where the dominant tenement is tucked and fully land-locked and cannot be accessed in any other way. The Defendant argued that a parcel of land would have a right of way if that route is the only means of access between the public highway and that piece of land. They contended that the Plaintiff's land is not land-locked. Lastly, the Defendant submitted that the construction of the wall is already complete and an injunction at this point would be in vain.

12. The Defendant further relied on the following cases: **Vitalis Peter Lukiri – vs – George Odongo Ogwang [2015] eKLR**; **Giella – vs – Cassman Brown & Company Ltd**; **Mrao Ltd – vs- First American Bank of Kenya Limited [2003] eKLR 125**, **Nairobi Kiru Line Services Ltd – vs – County Government of Nyeri & 2 others [2016] eKLR**; **Danson Ndegwa – vs – Raphael Anselmina Ruggieri & 2 others [2015] eKLR**; **Homescope Properties Limited & another – vs – David Gachuki & Pamela Odera [2014] eKLR**; **Vivo Energy Kenya Limited – vs – Maloba Petrol Station Limited & 3 others [2015] eKLR**; **Kenya Breweries Ltd – vs – Okeyo [2002] EA 109**; **Shepherd Homes Limited – vs – Shandahu [1971] 1Ch. 34** and **Sharriff Abdi Hussen – vs – Nadhif Jama Adan CA 121 2005 [2006] eKLR** all of which deal with the subject of injunction. The Defendant urged the court to disallow the Application.

Determination

13. The issue for determination in this Application is whether the Applicant has satisfied the criteria for grant of an interlocutory injunction. This criteria was laid down in **Giella vs. Cassman Brown & Co. Ltd (1973) E. A 358**. In summary, the Plaintiff must establish that he has a prima facie case with a probability of success; that he will suffer irreparable injury that cannot be compensated by an award of damages if the injunction is not granted; and if the court is in doubt, the application is to be determined on

a balance of convenience.

14. A prima facie case was defined in the case of **Mrao Limited vs. First American Bank of Kenya Limited & 2 others (2003) KLR 125** 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 to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”

15. In the case of **Nguruman Limited vs. Jan Bonde Nielsen & 2 Others [2014] eKLR**, the court outlined the key ingredients of a prima facie case as follows:

“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. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities.”

16. In making a determination as to whether or not the Applicant has satisfied the guiding criteria for grant of an interlocutory injunction, it is necessary that I outline the legal basis of the Plaintiff’s claim and the Defendant’s defence thereto. I must however caution myself that I should refrain from delving deep into the merits and otherwise of the respective parties’ cases at this interlocutory point.

17. The basis of the Plaintiff’s claim is that, for over 43 years, it has always enjoyed a right of way through the Defendant’s piece of land. This scenario prevailed long before the Defendant acquired the material piece of land, LR No.11794/2. The Plaintiff contends that its continuous and unrestricted right of way through the Defendant’s piece of land has crystallized into an overriding interest within the framework of Section 32 of the Limitation of Actions Act and Section 28 of the Land Registration Act. The Plaintiff has exhibited photographs of the material access way bearing iron sheets purportedly erected across the access way by the Defendant. The photographs contain landmark structures resembling elephant tusks. The Plaintiff contends that the continuous enjoyment of the right of way has been with the knowledge and acquiescence of the Defendant and the Defendant’s predecessors in title.

18. On its part, the Defendant does not controvert the Plaintiff’s contention about the continuous enjoyment of a right of way through the Defendant’s land for over 43 years. The Defendant acquired the piece of land in 2010 and the instrument of transfer in favour of the Defendant was registered in 2012. The Plaintiff contends that the Plaintiff’s land touches the Nairobi-Mombasa Highway, hence the Plaintiff is not entitled to an easement against the Defendant’s land. Secondly, the defendant argues that the Plaintiff’s land is not landlocked. The Defendant further contends that the Plaintiff’s suit is *res judicata*.

19. The right of way is an easement recognized as an overriding interest under Section 28 of the Land Registration Act. Section 28 of the Land Registration Act provides as follows: -

“28. Unless the contrary is expressed in the register, all registered land shall be subjected to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register-

(a).....

(b).....

(c) rights of way, rights of water and profits subsisting at the time of first registration under this Act.

(d)

(e).....

(f).....

(g).....

(h) rights acquired or in process of being acquired by virtue of any written law relating to the limitation of actions or by prescription;

(i)

(j) any other rights provided under any written law.”

2. Under Section 32 of the Limitation of Actions Act, an easement crystallizes into an absolute and indefeasible right upon the lapse of twenty years of peaceable, open and uninterrupted enjoyment of the easement. Section 98 of the Land Registration Act provides a framework for creation of easements through formal instruments. However, the easement pleaded by the Plaintiff in this Matter is not the type acquired through a formal registered instrument.

21. The absoluteness and indefeasibility of an easement was reaffirmed by the Court of Appeal in the case of **Kamau Vs Kamau (1984) eKLR** in the following words:

“Where any way or watercourse or the use of any water has been enjoyed as an easement peaceably and openly as of right, and without interruption, for twenty years, the right of such way or watercourse is absolute and indefeasible according to the written law on the limitation of actions. This period of twenty years is the period beginning before or after December 1967.”

22. The legal ramification of the foregoing statutory framework and judicial pronouncements is that a land owner who allows another the peaceable, open and uninterrupted enjoyment of an easement against his land, will stand precluded from exercising his proprietary right against that other person to the extent of the easement upon crystallization of the easement. The running of time for purpose of crystallization is not disrupted by change of ownership of the subject land.

23. From the material placed before court, it is not disputed that the Plaintiff has been enjoying the right of way through the Defendant’s piece of land. It is also not in dispute that what triggered this suit and application is the Defendant’s decision to erect a boundary wall to block the entrance to the Plaintiff’s Hotel. Whether the right of way enjoyed by the Plaintiff has crystallized into an absolute and indefeasible easement within the framework of Section 28 of the Land Registration Act and Section 32 of the Limitation of Actions Act is a question to be answered at the substantive hearing of this case.

24. The second key ground of opposition to the Application for an interlocutory order is the plea of *res judicata*. The Court of Appeal gave a rendition of the doctrine of *res judicata* in **John Florence Maritime Services Limited & Ano. Vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) e KLR** in which it cited verbatim the following paragraph in **Henderson Vs Henderson (1843) 67 ER 313**.

“.....where a given matter becomes the subject of litigation in any adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought, only because they have from negligence, inadvertence or even accident, omitted part of their case. The plea of res judicata applies, except in special cases not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward at the time.....”

25. The rationale behind res judicata was outlined in the above case as follows:-

“The rationale behind res judicata is based on the public interest that there should be an end to litigation over the same matter. Res judicata ensures the economic use of the court’s limited resources and timely termination of cases. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.”

26. In my view, where a plea of res judicata is invoked and proved, the court should strike out the offending suit and uphold the doctrine of res judicata. I have however carefully examined the exhibits attached to the affidavit of Pauline Kimotho. The dispute in the BPRT was **between Rajni Desai t/a Tsavo Inn Service Station – Vs – National Oil Corporation of Kenya**. The dispute related to a petrol station dealership licence whose termination the dealer, Rajni Desai contested. The dispute in the case before me is between **Equator Inn Limited t/a Tsavo Inn Hotel – Vs – National Oil Corporation of Kenya**. The dispute herein relates to the Defendant’s closure of an access way serving the Plaintiff’s Hotel.

27. The dispute in Machakos ELC 287 of 2011 was again between **Rajni Desai t/a Tsavo Inn Service Station – vs – National Oil Corporation of Kenya Limited**. The Plaintiff challenged the Defendant’s termination of a petrol station dealership licence which had been granted to the Plaintiff by the Defendant’s predecessor through a retailer agreement.

28. It is clear from the material placed before me that the parties, the subject matter, and the causes of action in Machakos ELC 287 of 2011 and Machakos BPRT Reference No.39 of 2011 are not the same as the parties, subject matter, and cause of action presently before this court. Consequently, the doctrine of *res judicata* cannot be invoked in the circumstances of the case before me. I would say no more on that ground of opposition at this interlocutory stage.

29. Looking at the materials placed before the court, it is clear that the Plaintiff has enjoyed the right of way through the Defendant’s piece of land over a period of time. Whether this continuous enjoyment over a period of time has crystallized into an absolute and indefeasible easement within the framework of Section 28 of the Land Registration Act and Section 32 of the Limitation of Actions Act is a question to be answered conclusively at the substantive hearing of this suit. The question as to whether an alleged right of way which is alleged to have crystallized into an easement within the framework of the statute is extinguished by dint of the fact that the piece of land which the easement serves has an alternative access road to the highway is again one to be answered at the hearing of the main suit. For now, this court’s determination is restricted to the evaluation of the Plaintiff’s case against the threshold and guiding principles on interlocutory injunctions.

30. Taking into account the totality of the evidence before the court, the existing legal framework and the prevailing jurisprudence I am satisfied the Plaintiff has established a reasonable legal and evidential basis that would constitute a *prima facie* case. I am also satisfied that damages would not be an adequate remedy in the circumstances of the dispute before court. Consequently, I make the following orders in disposing the Plaintiff’s Notice of Motion dated 30/9/2015.

(a) Pending the hearing and determination of this suit, the Defendant, its agents and servants are restrained from blocking the Plaintiff's access to the Nairobi-Mombasa Highway through the Defendant's piece of Land, L.R. No. 11794/2 (formerly 11487/2), specifically the access which is the subject matter of the dispute in this Matter.

(c) In the event that there is any wall or other form of blockage erected by the Defendant, the Plaintiff shall be at liberty to remove it to allow access to its hotel as before. The Area OCS shall ensure law and order during the Plaintiff's removal of the blockage.

(c) In view of the fact that the suit properties are situated at Mtito Andei in Makueni County, I hereby transfer this suit to Wote ELC in Makueni County for hearing and disposal. Mention at Wote ELC on 25/4/2017.

(d) The Plaintiff shall have costs of this Application.

Dated, signed and delivered at **Nairobi** this 6th day of April, 2017.

B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant