



REPUBLIC OF KENYA
ENVIRONMENT & LAND COURT

AT MILIMANI

ELC SUIT NO 1264 OF 2015

KULWANT SINGH CHADHA.....PLAINTIFF

-VERSUS-

KENYA AIRPORT AUTHORITY.....1ST DEFENDANT

THE CHIEF LAND REGISTRAR.....2ND DEFENDANT

THE HON.ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated **10th December 2015**, and a preliminary objection dated **28th January 2016**. The Notice of Motion was brought by **Kulwant Singh Chadha** the Plaintiff/ Applicants in this case. The preliminary objection was raised on behalf of Kenya Airports Authority, the first Defendant/ Respondent in this case.

2. The Notice of Motion seeks the following reliefs:-

i. Spent

ii. Spent

iii. That a temporary prohibitory injunction do issue restraining the first Defendant/Respondent by itself , its servants, employees and/or agents from trespassing, encroaching ,evicting, excavating, arbitrary registration or in any other manner interfering with the Plaintiff/Applicant's peaceful occupation of that property known as Land Reference No.209/14702, Nairobi pending the hearing and determination of this suit.

iv. That the officer commanding Police Division and Stations Langata Police Station do provide assistance to ensure compliance with Order 2 and 3 above.

v. That the costs of this application be borne by the Defendant/Respondents.

3. The first Defendant/Respondents in the preliminary objection contends that:-

i. The entire suit offends the provisions of Section 34(a) as read with Section 12 of the Kenya Airports Authority Act.

ii. The suit is statute barred by dint of the provisions of Section 34(b) of the Kenya Airports Authority Act.

4. I will first deal with the points raised in the preliminary objection by the first Defendant/Respondent. The first Defendant/Respondent contends that the Plaintiff/Applicant did not comply with the provision of Section 34 (a) of the Kenya Airports Authority Act. Section 34 of the Kenya Airports Authority Act states as follows:-

“Where any action or other legal proceedings is commenced against the authority for any act done in pursuance or execution , or intended execution of this Act or of any Public duty or authority, or in respect of any alleged neglect or default in execution of this Act or any such duty or authority , the following provisions shall have effect”.

The action or legal proceedings shall not be commenced against the Authority until at least one month after written Notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Managing Director by the Plaintiff or his agent.

5. The Plaintiff/Applicant has demonstrated in his supplementary affidavit sworn on **8th August 2016**, that prior to commencement of this suit, he served a demand Notice dated **29th June 2015**, upon the Managing Director of the first Defendant/Respondent. This Notice was responded to by the acting Managing Director on the **4th July 2015**. This response is annexed to the Plaintiff/Applicant’s Supporting Affidavit. That Notice met the requirements of the provisions of **Section 34(a)** of the Kenya Airports Authority Act in that it gave particulars of the act complained of and gave Notice of intention to bring proceedings against the authority. The current suit was filed on **10th December 2015**, a period of almost six months after the Notice. It is therefore clear that the Plaintiff/Applicant fully complied with the requirement that no proceedings should be commenced at least 30 days after written Notice to the Managing Director is given.

6. Section **34(b)** of the Act provides as follows:-

“The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of continuing injury or damage, within six months after the cessation thereof”.

7. From the contents of the affidavits in support of the applicants application, it is clear that the first defendant/applicant is constructing an extension of the runway. Construction of a runway is an action within the mandate of the defendant/applicant. There is no evidence that construction of the runway has been completed or has been stopped. It is the applicant’s contention that construction is still going on and this fact has not been controverted. The trespass to the suit property is still continuing. This fact is confirmed by the applicant’s affidavit sworn on 30th June 2016, in which the applicant deponed that the first Defendant /Respondent has now started constructing a wall round the property. This affidavit was sworn in support for granting of injunctive orders which were sought vide application dated **10th December 2015**.

8. It is therefore clear that the Plaintiff/Applicants suit is not statute barred. The injury being caused to the property is a continuing one. Since the injury has not stopped the plaintiff/Applicants has not been caught with the limitation period set out under section **34(b)** of the Kenya Airports Authority Act. I therefore find that the preliminary objection has no merit and the same is hereby overruled with no order as to costs.

9. I now turn to the applicant’s Notice of Motion. The applicant contends that he is the registered owner of **LR No. 209/14702**. That he purchased this property from its previous owner in 2004. Thereafter he obtained title in his name on **12th April 2006**. The applicant contends that he purchased the property after due diligence was undertaken. There was confirmation from the Commissioner of lands that the property was not in the list of the Ndugu report and that the property was not part of the land held by the first Defendant/ Respondent who operate Wilson Airport.

10. Though the applicant has not indicated when the trespass to the suit property started, correspondence between the applicant and the officials of the first Defendant/Respondent show that the trespass started in or around *October 2014*.

11. The applicant's application is opposed by the first Defendant/ Respondent through a replying affidavit sworn by Rashid Abdullahi on **8th June 2016**. The Respondent contends that **LR No. 209/14702** (suit land) is part of the land owned by the Respondent. That the survey plain in respect of the suit land overlaps that of the Respondent's property. That the Respondent was registered as owner of its property in **1996** and that there was therefore no land capable of being given to the vendor who sold the suit land to the applicant. That the applicant has not exhibited any sale agreement or evidence that he paid any stamp duty.

12. The Respondent further contends that the applicant has been guilty of delay in bringing up this application and that he has not met the threshold for grant of injunction as set out in the case of **Giella Vs Cassman Brown & Co.Ltd (1973) EA 358**

13. This being an application for injunction, the applicant is expected to show that he has a prima facie case with probability of success. That he will suffer loss which will not be capable of being compensated in damages. If the court is in doubt, it will decide the application on a balance of convenience.

14. The applicant is contending that he is an innocent purchaser for value without notice of any defect in the title. He argues that he bought the suit land with intention of developing residential houses. The title annexed to the applicant's application shows that the suit land was given to one **Francis Kimani Ngugi** on **1st April 1999**, on leasehold basis for 99 years. The suit land was transferred to the applicant on **12th April 2006**.

15. In all the documents annexed to the applicant's affidavit, land rent and rates have been paid in respect of the suit land by corporate entities known as **Chadha Investments Ltd** and **Ramco Agencies Limited**. There is no single payment made by the applicant in his own name. It is not known how these entities came to pay rates and rent yet they were not the registered owners of the suit land.

16. The suit property was allegedly purchased in 2004, but transfer was done in 2006. The applicant says that the intention was to build residential houses but **10 years** since purchase, nothing seems to have happened until the act being complained of occurred. There is no evidence that the applicant engaged the services of a surveyor to confirm that the land was not falling within that held by the Respondent.

17. The Respondent's affidavit is sworn by a surveyor who has annexed documents which show that the suit land falls within the land held by the Respondent. This fact is not controverted by the applicant through a further affidavit. If the documents annexed to the replying affidavit are anything to go by, then it is clear that there was no land to be allocated to the vendor who sold the same to the applicant. One could not alienate land which had already been alienated and was in the hands of Kenya Airports Authority. To this extent I do find that the applicant has not shown that he has a prima facie case with probability of success.

18. Besides title document, the applicant was expected to show that he purchased the property openly without any Notice of any defect in the title. Considering the location of the land vis a vis the Wilson Airport , the applicant had every reason to be extra careful before committing himself. The delay in transfer and development of the suit land is a pointer that the applicant may have had reason to doubt the genuineness of the ownership of the land by the vendor. This is further confirmed by the kind of correspondence received by the applicant some of which are alleged to be from the Defendant /Respondent itself.

19. The purpose of an injunction is to prevent injury to a property. It is never meant to undo what has already been done unless it is a mandatory one. The construction of the runway started way back in 2014. This application was filed a year later. From the subsequent affidavits by the applicants, it is clear that the respondent is at the stage of securing the suit land by construction of a perimeter fence. There will be no

purpose of granting the injunction in the way it is for, it will serve no purpose. This perhaps explains why the applicant's advocates did not bother to file written submissions despite being given ample time to do so.

20. The applicant in his first demand letter to the Respondent readily offered the suit land to the Respondent at the current market rate. This is a demonstration that if the court finally finds that the suit land belongs to the applicant damages will be an adequate remedy and in such case there is no need for grant of injunction.

21. Even if the balance of convenience were to be considered, the same would tilt in favour of the Respondent who is in possession of the suit land. I therefore find that the applicant's application lacks merit. The same is hereby dismissed with no order as to costs given the fact that the Respondent's preliminary objection was also overruled with no order as to costs.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this 3rd day of *April* 2017.

E.O .OBAGA

JUDGE

In the Presence of :-

Mr Kamu for Mr Njoroge for 1st Defendant/Respondent

Court Assistant: Hilda

E.O .OBAGA

JUDGE