



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 180 OF 2015

KENYA RAILWAYS CORPORATION.....PLAINTIFF/APPLICANT

-VERSUS-

ZAHARIA MOHAMED MAWIA.....1ST DEFENDANT/RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....2ND DEFENDANT/RESPONDENT

REGISTRAR OF LANDS, MOMBASA REGISTRY.....3RD DEFENDANT/RESPONDENT

CYKA HOLDINGS LIMITED.....4TH DEFENDANT/RESPONDENT

HUSSEIN A ABDIRAHMAN.....5TH DEFENDANT/RESPONDENT

RULING

1. The notice of motion dated 4th August 2015 is brought pursuant to the provisions of Order 40 of the Rules, Section 1A, 3A and 63 (e) of the Act and Article 40 of the Constitution. In this motion, the Plaintiff/Applicant sought for orders that:

1. Spent

2. Spent

3. There be a temporary injunction restraining the 1st and 2nd Defendants/Respondents by themselves, their servants and or agents from evicting the Kenya Railways Corporation and its tenants or from entering, demolishing, constructing or otherwise interfering with the Kenya Railway's possession and quiet enjoyment of the suit property now referred to as Msa/Block 1/525 and Msa/Block 1/526 pending the hearing and determination of this suit.

4. Costs of the application.

2. The applicant pleads that it is the owner of the suit property which the respondents have colluded to sub-divide and register in the name of the 1st Respondent. The applicant pleads further that on the weekend of 1st and 2nd August 2015, the 1st Respondent used hired goons and rogue police officers to break into and demolish the structures of the plaintiff. The applicant also accuses the 1st Respondent of previously attempting to evict her using irregular order in MSA CMCC 2892 of 2007 which suit was later

withdrawn.

3. The application is supported by the affidavit of David Njogu, her legal officer. Mr Njogu deposes that the applicant acquired the suit property from her predecessor East African Ports & Harbours of Kenya vide gazette notices Nos 440 of 12.7.1963 and No 29 of 22.2.1986. He deposes that the applicant owned the suit property, structures and buildings erected therein long before the sub-divisions or the purported registrations of the 1st and 2nd defendants, the structures having been built by her predecessors. It is the applicant's position that the said registrations and or sub division is illegal, null and void and gave reasons why in paragraph 5 (a) & (k) and the title if any is held must be illegal because the applicant was not involved in the purported allotment. That unless the orders sought are granted, the entire application and suit will be rendered nugatory.

4. The application is opposed by the 1st and 2nd Respondents. The 4th & 5th Respondents were joined but did not file any document. The 1st Respondent swore a replying affidavit dated 24th September 2015 stating thus as follows:

That she was allocated the suit plots by the defunct Municipal Council of Mombasa and subsequently issued with a lease and certificate of lease. The 1st Respondent deposed that negotiations over this dispute with the applicant decided that she pays for the developments on the plot as upon valuation being undertaken as per the letter dated 15th April 2012 annexed as ZMM4. The same was valued at Kshs 740000 and she paid as per annex ZMM5 – 7.

5. The 1st Respondent continued that this money has never been refunded to her by the applicant. According to her, the plaintiff has no claim over the suit property. The 1st Respondent also deposes that she has sold her interest in the suit land. She also deposes that the 2nd Respondent deposes confirmed that the suit properties did not belong to the plaintiff. She has urged the Court to dismiss the application.

6. Mr Jimmy Waliaula swore an affidavit dated 9th September 2015 on behalf of the 2nd Respondent. In it, he deposes that he is the director of legal services of the 1st Respondent who is registered as the lessor of the suit properties. Further that the applicant has not produced any ownership documents to prove they own the suit plots. He urged the Court to dismiss the application and vacate the orders issued earlier.

7. The three parties filed written submissions which was majorly on the three principles to be considered for granting an injunction. In brief, the applicant states that her application meets the threshold because she has presented the gazette notices which vested the property on her. She also submits that she has been in possession. The applicant went on to submit that the property was illegally acquired but which in my view is premature at the interlocutory application stage. On irreparable harm, the applicant submits that if her staff and tenants are evicted or if the intended demolition is carried out she will have been wrongfully dispossessed of the suit property and that the balance of convenience tilts in her favour as she is in possession.

8. Both Respondents submitted that the applicant had a duty to place before this Court materials to show she owns the property and which duty she failed to fulfil. On this account, she failed to demonstrate a prima facie case hence the issue of irreparable loss does not lie. The 1st Respondent quoted the Court of Appeal in **Kenya Finance Co Ltd vs Afraha Education Society (2001) IEA 86** at page 89 to support this line of submission. At page 89, the Court of Appeal had this to say, “.....”

On balance of convenience the Respondents submitted that it is in favour of the orders not being granted.

9. I have considered all the issues raised via the pleadings and submitted on. It is not in dispute that the applicant has no title to the suit land as she refers to it as unsurveyed. She also deposed that the sub-division and registrations undertaken by the 1st 2nd and 3rd Respondents were illegal and null and void. The pleadings also reveal that there was a previous suit MSA CMCC 2892 of 2007 between the applicant and the 1st defendant regarding the same subject matter. The issue before Court is therefore not a fresh

dispute.

10. Further, the 1st Respondent has shown that it secured the registration of the two titles into her names vide certificate of titles issued on 7th December 1999 and annexed in the pleadings by the applicant and 1st & 2nd Respondent. The applicant has questioned the validity of the two titles thus forming the matter in dispute, which dispute is yet to be determined. The 1st Respondent annexed letters dated 1.5.2002 and 28.5.2002 regarding valuation of the structures on the suit property. The 1st Respondent also annexed a bankers cheque dated 5th February 2007 issued in favour of the applicant being compensation for the said structures. The applicant did not contest these facts by filing a supplementary affidavit.

11. Taking the materials presented before the Court at their face value, I am not satisfied that the applicant has shown a prima facie case to warrant the orders sought being granted. As pointed out by the Respondents, the applicant has not demonstrated that the suit property belonged to East African Ports and Harbours Ltd. The gazette notices referred to vests all unalienated crown land or land vested in the Trust Land Board which was reserved for use by the East African Railways & Harbours Administration for purposes contained in (a) – (g). The applicant did not plead under which paragraph the suit property was classified.

12. On irreparable loss, the applicant stated that its properties will be demolished. Yet she has not contradicted the evidence that she received compensation for the said structures from the 1st Respondent. Lastly on balance of convenience, the applicant annexed 4 – 5 being the order issued in 2892 of 2007 and memo of appeal. The photographs annexed as *N3* shows some demolition having taken place. It is therefore not clear who is in possession. The applicant having failed to establish prima facie case or irreparable loss, in my opinion, the balance of convenience is not to grant the orders as the 1st Respondent being the registered owner of the suit property is entitled to enjoy it until such a time when proof is made that she acquired the titles through fraud to which she is a party to as provided in section 26 of the Land Registration Act.

13. In conclusion therefore I find this application as lacking in merit and hereby dismissed. The orders earlier given on 5th. 8. 2015 are vacated forthwith. Each party shall bear their respective costs.

Dated, signed and delivered at Mombasa this 3rd day of May 2017.

A. OMOLLO

JUDGE