



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO. 213 OF 2015

MERCY ZILIA MWAKERA

RAYMOND MWANGOLA

JOHN MENGO suing as officials of

WUMWERI GHWA MWATATE CBO.....APPLICANTS/PLAINTIFFS

VERSUS

DAVIS MINING CO. LIMITED..... RESPONDENT/DEFENDANT

RULING

1. The application under consideration is the Notice of Motion dated 10th September 2015 in which the plaintiffs/applicants are seeking for orders that pending hearing and determination of this application inter-partes and of the main suit, the Honourable Court be pleased to grant orders restraining the defendant/respondent either by itself, its servants, agents, officials, employees and/or otherwise against any person acting on its behalf or claiming under them from trespassing, encroaching entering, upon, interfering, alienating, erecting, excavating, disposing and/or in any other manner whatsoever dealing with unsurveyed parcel of land at Chunga Unga Village/Area in Mwatate sub-county specifically bound by the following coordinates 0421819/9599689, 0421951/9600245, 0422570/9600040 and 0422290/9599396 and marked as portion "A" in annexure "MM4 (a)". The applicants also seek an order directing the officer commanding Mwatate Police Station to ensure the respondent complies with the orders of the court and costs of the application.
2. The application is based on the grounds on the face of the motion and supported by the affidavit of Mercy Zilia Mwakera sworn on 10th September 2015. Briefly the applicants contend that they are the executive officials of Wumweri Ghwa Mwatate, a community based organization comprised of Members from Chunga Unga Village and are owners of the unsurveyed land in Chunga Unga Village (hereinafter referred to as the suit property). The applicants aver that they sought approvals and consents from relevant bodies to carry out mining on the suit property but before they rolled out the program, they found the defendant/respondent had entered into and dug and/or excavated soil and started the process of mining on the suit property. That attempts made to resolve the issue with the defendant were unsuccessful. According to the applicants, the respondent's action amounts to trespass and constitute a violation of their right to property as guaranteed by the constitution of Kenya. The applicants claim that they have invested all their life savings in the project they intended to carry out on the suit property and unless the respondent is restrained, their livelihood and existence will be threatened.
3. The application is opposed by the defendant, who filed a replying affidavit sworn by NAUSHAD

DAUDI OSMAN on 15th October, 2015. Briefly, was deposed on behalf of the respondent that the defendant is the owner of several registered mining locations having acquired the same by way of transfer dated 23rd February 1998 and that the defendant has been carrying out mining operations at those locations since 1998. According to the respondent, the suit property falls within the location registered and held by them, and the reasons for the dispute between the applicants and the respondent is that the applicants believe their application for locations fall on land that is available for mining. It is the respondent's contention that it is the applicants who have attempted to trespass on the respondents' registered locations, prompting the respondent to report the matter to the Commissioner of Mines and Geology to make a decision as per the Provisions of the Mining Act, Cap 306 Laws of Kenya. The respondent further avers that the Minister for Mining has the exclusive jurisdiction in this matter as per the provisions of the said Act and the this Honourable Court lacks jurisdiction as the minister's decision is final and conclusive. The respondent accuses the applicants of failing to make full and frank disclosure, hence did not come to court with clean hands.

4. Both parties filed written submissions which I have read and I need not reproduce their contents here. This court is tasked to determine whether this application meets the principles laid down for granting injunctions. The principles to be applied when considering an application such as this one before me are now well settled. In the case of **GIELLA –V CASSMAN BROWN & CO LTD (1973) E.A. 358** it was held that :

- a. An applicant must show a prima facie case with a probability of success.
- b. An injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury.
- c. When the court is in doubt it will decide the application on a balance of convenience.

An injunction is an equitable remedy and therefore it behoves an applicant to come to court with clean hands. He or she must also make full disclosure of all material facts to enable the court make an informed decision.

5. In their application, the applicants have stated that before they rolled out their mining project on the suit property in August 2015, the respondent entered, dug and/or excavated soil and subsequently started the process of mining thereon. The respondent has however, placed before the court uncontroverted evidence which shows that it has been in occupation of the suit property for several years and that it is the applicants who have been making forceful attempts to enter it licensed locations. There is also overwhelming and uncontroverted evidence showing that the activities complained of by the plaintiffs started before the defendant had the same transferred to it in 1998 contrary to the plaintiffs' claim that the defendant's activities sought to be restrained herein started in or around the month of August 2015. It is also clear that the dispute herein started several years before the suit was filed and has been ongoing.

6. The defendant has demonstrated that it has a genuine interest in the suit property and that it is not a mere trespasser as claimed by the applicants. It is the defendant which is in occupation and has been in occupation since 1998. I am in agreement with the submissions of the respondent that the applicants are guilty of non-disclosure. The applicants presented the respondent as a stranger who only entered the suit property around August 2015 and commenced the activities complained of. The applicants failed to disclose that the respondent has been in occupation for several years and that there have been disputes in the matter between the parties over the suit property. If the court were inclined to grant the orders sought, it would mean that the respondent be evicted. Such an order would be in the form of a mandatory injunction which the applicants are not seeking and which in any event, has not been proved. Mandatory injunction can only issue in very clear and special circumstances which is not the case in the present case.

7. Having considered the plaintiffs' application together with the affidavits in support and against as well as the submissions made, I am not satisfied on the material before me that the plaintiffs have established a prima facie case against the defendant with a probability of success. On whether or not the applicants would suffer irreparable harm if the orders sought are not granted, I take the view that the loss that may

result if the orders are not granted can be quantified in damages as the income derived from the mining activities on the suit property can be ascertained. As for the balance of convenience, I take the view that the same tilts in favour of the respondent which is in occupation of the suit property and has been in occupation for several years. Removing them at this preliminary stage will mean there is no other issue left for the main trial.

8. The upshot of the foregoing is that the plaintiffs have failed to satisfy the conditions for granting the orders sought. In the circumstances, I find no merit in the Notice of Motion dated 10th September 2015 and the same is hereby dismissed with costs to the respondents.

Dated, signed and delivered at Mombasa this 15th day of June 2017.

.....for the applicant

.....for the respondent

C. YANO

JUDGE