



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO .96 OF 2017

JAMES NJIHIA GICHURA.....PLANTIFF

VERSUS

1. NATIONAL LAND COMMISSION

2. KENYA RAILWAYS CORPORATION

3. CHINA ROAD & BRIDGE CORPORATION (K) LTD...RESPONDENTS

RULING

1. By Notice of Motion dated 22nd March 2017, the Plaintiff seeks an order of injunction to restrain the Respondents and in particular the 2nd Respondent by themselves, their agents, servants and/or whoever purports to act on their behalf from pulling down, entering upon, destroying and/or in anyway interfering with the Plaintiff's **PARCEL NO.MBOLOLO/TAUSA/4256** other than the 0.5787 hectares portion already acquired and for which the Plaintiff has been compensated pending hearing and determination of the application and the suit.

2. The application is supported by the Affidavit of the Plaintiff sworn on 23rd March 2017, and the grounds set out in the Motion being principally that:

i) The Plaintiff is the owner of the parcel of land known as MBOLOLO/TAUSA/4256 which measures 1.30 hectares.

ii) The 1st Respondent acquired 0.5787 ha thereof for the 2nd Respondent for purposes of the construction of the standard gauge railway and the Plaintiff has since been compensated for the said portion.

iii) The 2nd Respondent has inexplicably and for no known reason unlawfully and unconscionably demanded that the applicant pulls down the structures on the uncompensated remainder and vacate the same.

iv) The said action is clearly unlawful and is set to occasion the Plaintiff irreparable loss and damage if allowed to subsist.

3. In his said affidavit, the Plaintiff has deponed that he is the owner of the parcel of land known as **MBOLOLO/TAUSA/4256** measuring 1.30 ha out of which 0.5787 ha thereof was excised by the 1st Defendant in compulsory acquisition for purposes of the construction of the standard gauge railway for the 2nd Defendant and the Plaintiff has duly been compensated. The Plaintiff depones that on diverse

dates from 21st February 2017, he has received calls from one Mr. Wahome, a senior employee of the 2nd Defendant demanding that the Plaintiff pulls down all the structures on the remaining portion of his land, failure to which the 2nd Defendant shall proceed to destroy the said structures. The Plaintiff further depones that he has learnt that the 2nd Defendant has commenced demolition of structures at Mackinon Road and the destruction of his property is imminent, an act that will occasion him irreparable loss and damage.

4. There was no opposition to the application. The Defendants were duly served with summons to enter appearance as well as the application. When the application came up for inter-partes hearing on 31st May 2017, only the Plaintiff's and the 1st Defendants counsel were present. Mr. Wahome, counsel for the 1st Defendant informed the court that the 1st Defendant was not opposed to the application. The 2nd and 3rd Defendants were not in court and had not filed any response to the application.

5. In his submissions, Mr. Mwakireti counsel for the Plaintiff relied on the grounds on the face of the motion and the contents of the supporting affidavit.

6. I have carefully considered the application herein. The main issue that I now have to determine is whether the Plaintiff has satisfied the conditions for grant of interlocutory injunctions as laid down in the **GIELLA VS- CASSMAN BROWN & CO. LTD** case. First, the Plaintiff must show that he has a prima facie case with probability of success, secondly, that he would suffer irreparable damage which would not adequately be compensated by an award of damages, and thirdly, if the court is in doubt, that the balance of convenience lies in his favour.

7. As already stated, the application is not opposed as the Defendants, though duly served, did not file any response. The 1st Defendant through his counsel does not object to the application. Section 25 (1) of the Land Registration Act provides as follows:

“25 (1) The rights of a proprietor, whether acquired on first registration or subsequently, for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject-

a. to the leases, charges and other encumbrances and to the conditions and restrictions if any, shown in the register; and

b. to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register”

8. The Plaintiff being the registered proprietor and having title deed over title **NO.MBOLOLO/TAUSA/4256** is in terms of Section 26 (1) of the Land Registration Act entitled to protection of the law. Section 26 (1) of the land Registration Act provides as follows: -

“26 (1) The certificate of title issued by the Registrar upon registration, to a purchaser or land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except –

a) On the ground of fraud or misrepresentation to which the person is proved to be a party; or

b) Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

9. The Plaintiff has demonstrated that he is the registered owner of the suit property. He has furnished a copy of a Kenya Gazette Notice and other documents showing that only 0.5787ha out of the said land has been acquired and paid for by the Defendants. The same are marked "A1", "A2" and "A3" and annexed to the affidavit in support of the motion. It is clear that the Defendants only acquired a portion of the Plaintiff's land measuring 0.5787 ha. As per the above provisions of the law, the Plaintiff is vested with the absolute ownership of the remainder of the suit property after the lawful excision of 0.5787 ha. The Defendants' interest, if any, is restricted to the 0.5787ha. The Defendants did not file any response and the court cannot anticipate the 2nd Defendant's interest in the remainder of the Plaintiff's land.

10. On the material before the court, I find that the Plaintiff has established a prima facie case with a probability of success. On whether or not the Plaintiff would suffer irreparable harm if the orders sought are not granted, I take the view that should the 2nd Defendant not be restrained and goes ahead to destroy the Plaintiff's property outside the area that was lawfully acquired by the Defendants, the loss that may result may not be quantified in damages. In addition, the balance of convenience, if I had doubt in the matter, lies with the Plaintiff who is the registered proprietor of the suit property rather than with the Defendants.

Accordingly, I find merit in the application and grant the order for an interlocutory injunction in terms of prayer (c) of the Notice of Motion dated 22nd March 2017. Costs in the cause.

Delivered, dated and signed at Mombasa this 17th day of July, 2017.

C. YANO

JUDGE