



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1528 OF 2016

GORI INVESTMENT LIMITED.....
PLAINTIFF

VERSUS

BASCO PRODUCTS (K) LIMITED.....1ST
DEFENDANT

DAVID N GICHOHI2ND
DEFENDANT

RULING

The plaintiff commenced this suit by way of a plaint dated 28th November, 2016. Together with the plaint, the plaintiff filed an application by way of Notice of Motion of the same date brought under Section 1A, 1B, 3A, 63 (c) and (e) of the Civil Procedure Act and Order 40 Rule 1(a) and Order 51 rules (1) and (3) of the Civil Procedure Rules, seeking among others the following orders;

1. That pending the determination of the suit, the honourable court be pleased to issue a temporary injunction restraining the defendants or their agents, employees, servants, assigns or any other person whomsoever from dealing or interfering with, constructing, developing and/or trespassing over L.R. No 209/9329 situated on 1st Parklands Avenue within Nairobi City County (hereinafter referred to as “the suit property”).
2. That the honorable court be pleased to grant the applicant leave to forcibly evict the defendants from the suit property.
3. That the defendants be ordered to hand over vacant possession of the suit property to the applicant forthwith.
4. That the OCS Parklands Police Station or any other officer in charge of administration does implement, enforce and supervise the defendants’ forceful eviction from the suit property.

The plaintiff’s/applicant’s case:

The application was brought on the grounds set out on the face thereof and on the supporting affidavit of GOPAL DHANJI PATEL a director of the plaintiff sworn on 1st November, 2016. The plaintiff has contended that it is the registered owner of the suit property and as such entitled to possession thereof. The plaintiff has contended that the defendants have wrongfully entered and taken possession of the suit property and have commenced construction thereon in total disregard of the plaintiff’s proprietary rights

over the same. The plaintiff has contended further that the defendants have applied for development permission from the Nairobi City County to amalgamate the suit property with LR No 209/9330 which is adjacent to the suit property and for change of use of the suit property from single to multi-dwelling (apartments). The plaintiff has contended that the defendants' said acts of trespass and wrongful occupation of the suit property has subjected the suit property to waste and has deprived the plaintiff of the use and enjoyment thereof. The plaintiff has contended that the defendants have never enjoyed peaceful, uninterrupted and/or exclusive occupation of the suit property and as such they cannot claim any right over the same. The plaintiff has annexed to its affidavit in support of the application, a certified copy of Grant Number I.R 68428 which was issued to it on 16th February, 1996 and photographs showing the construction being undertaken on the suit property by the defendants as exhibits "GDP1" and "GDP2" respectively.

The defendant's/respondent's case:

The application was opposed by the 1st defendant through a replying affidavit of its director, ANILKUMAR AMRATLAL TARACHAND SHAH sworn on 16th December, 2016. The 1st defendant has denied the plaintiff's claim and termed the plaintiff a victim of fraudsters. The 1st defendant has contended that it purchased the suit property from its previous owners KIRITKUMAR HARIPRASAD DAVE and SHRADHA KIRITKUMAR DAVE (hereinafter referred to as "previous owners") on 6th July, 2010. The 1st defendant has contended that it has been in occupation of the suit property since it purchased the same from the previous owners. The 1st defendant has contended that prior to the sale of the suit property to it, the property was occupied by one, ROSE SABURI MWENI who vacated the property pursuant to a decree which was issued in ELCCNo. 131 of 2009 on 12th July, 2010 at the instance of the previous owners. The 1st defendant has annexed to the said affidavit of ANILKUMAR AMRATLAL TARACHAND SHAH a copy of the sale agreement pursuant to which it acquired the suit property as exhibit "AS1". The 1st defendant has contended that after vacant possession of the suit property was granted to the previous owners, the property was transferred to it after the necessary conveyancing formalities. The 1st defendant has annexed to the said replying affidavit, a copy of a registered instrument of transfer and a copy of its title, Grant Number I.R 34465 dated 3rd March, 1980 as exhibits "AS4A" and "AS4B" respectively. The 1st defendant has contended that after the suit property was transferred to it on 16th December, 2010, it took possession thereof, fenced the same and placed a day and night guard to look after the same. The 1st defendant has contended that it has enjoyed uninterrupted possession of the suit property since then and at no time did the plaintiff take possession of the property. The 1st defendant has averred that it has been paying all statutory charges for the suit property since it acquired the same. The 1st defendant has annexed to the replying affidavit, copies of land rate payment receipts from 2013 to 2016 and a copy of rates clearance certificate as exhibits "AS5A", "AS5B", "AS5C", "AS5D", and "AS5E" respectively. The 1st defendant has averred that in the year 2016, it obtained a financial facility from Barclays Bank of Kenya Limited on the security of the suit property and that the property was charged to the said bank after the said bank had carried out due diligence on the ownership of the property. The 1st defendant has averred that the financial facility which it obtained from Barclays Bank of Kenya which is worth Kshs. 400,000,000/- was to be utilized to finance the development of the suit property and that a contractor is already on site. The 1st defendant has contended that it will suffer irreparable harm if the injunction sought by the plaintiff is granted. The 1st defendant has contended that the title held by the plaintiff over the suit property is fraudulent in that whereas the said title was issued in 1996, the 1st defendant's title was issued in 1980. The 1st defendant has averred that it cannot trespass on its own property in respect of which it holds a valid title. The 1st defendant has urged the court to dismiss the applicant's application so that it may have peaceful enjoyment on the suit property.

The application was argued by way of written submission. The applicant filed its submissions on 10th February, 2017 while the 1st defendant filed its submissions on 17th February, 2017.

Determination:

I have considered the application and the affidavit filed by the 1st defendant in opposition thereto. I have also considered the parties' respective submissions and the authorities that were cited in support thereof. The plaintiff has sought both prohibitory and mandatory interlocutory injunction. The principles upon which this court exercises its discretion in applications for temporary injunction are now well settled. In the case of, Giella vs. Cassman Brown & Co. Ltd (1973) E.A 358, it was held that an applicant for interlocutory injunction must show a prima facie case with a probability of success and that such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In the case of Nguruman Limited vs. Jan Bonde Nielsen & 2 Others (2014) Eklr the Court of Appeal adopted the definition of a prima facie case that was given in the case of Mrao Limited vs. First American Bank of Kenya Limited & 2 Others (2003) KLR 125 which has been cited by the plaintiff and went further to state 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. ...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 threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide 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. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

The general principles which the court applies when determining applications for interlocutory mandatory injunction were set out in the case of Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901, as follows:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibitory injunction.”

I am not satisfied on the material before me that the plaintiff has satisfied the conditions for granting the orders sought. I have noted that both the plaintiff and the 1st defendant have titles for the suit property. In my view, this is a case of double allocation of land by the Commissioner of Lands. The plaintiff's title, Grant No. I.R 68428 was issued on 16th February, 1996 and registered on 20th February, 1996. On the other hand, the 1st defendant's title, Grant No. I.R 34465 was issued on 3rd March, 1980 and registered on 4th March, 1980. From the foregoing, it appears that the plaintiff's title was issued 16 years after the 1st defendant's title. This means that the 1st defendant's title was first in time. The 1st defendant's title in my view would take priority over the plaintiff's title. The suit property having been allocated and a title issued and registered on 3rd March, 1980, the same was not available for allocation to the plaintiff in 1996. I am also persuaded that the 1st defendant has had continuous possession of the suit property from the year 2010. There is no evidence that the plaintiff has been in possession of the suit property at any time. I see no reason why the status quo should be disturbed. For the foregoing reasons, I am not satisfied that the plaintiff has established a prima facie case with a probability of success against the defendants. I am also of the view that there are no special circumstances that would justify the grant of a temporary mandatory injunction. With those findings, it is not necessary for me to consider whether or not the plaintiff would suffer irreparable injury if the injunction sought is not granted.

