



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA
LAND CASE NO. 318 OF 2016

KIHUBA HOLDINGS LIMITEDPLAINTIFF

VERSUS

IS-HAK YASIN MOHAMED 1ST DEFENDANT

COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT

RULING

1. There are two applications coming up for hearing. There is the Notice of Motion dated 31/10/2016. It is under Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules and all other enabling provisions of the Law and the inherent jurisdiction of the court.

2. It seeks orders that;

i) Spent

ii) Spent

iii) Upon the hearing of this application inter-partes the court do issue a temporary injunction restraining the 1st Defendant from entering, trespassing, constructing on and/or evicting the Plaintiff from the suit premises known as Mombasa/Mwembelegeza/1473 and/or in any way interfering with the peaceful occupation either by himself, through his agents or servants and/or employees pending the hearing of this suit.

iv) Costs be in the cause.

3. The grounds are on the face of the application listed as paragraph a – h. I do not need to reproduce them here.

4. It is supported by the affidavit shown by Genoveva Wangare Mugo, the director of the Plaintiff sworn on the 31/10/2016.

5. The application is opposed. There is a replying affidavit sworn by Is-Hak Yasin Mohammed, the 1st Defendant/respondent sworn on the 30/11/2016.

6. The 1st Defendant also filed a Notice of Motion dated 13/4/2017. It is brought under Article 40, and

159 (2) of the constitution of Kenya 2010, Order 40 Rule 2 (1), Order 2 Rule 15 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law.

7. It seeks orders;

a) Spent

b) That the Honourable Court be pealed to issue a permanent injunction restraining the Plaintiff from interfering with the 1st Defendant's possession, occupation and use of Plot Number Mombasa/Mwembelegeza/1626.

c) That the Plaintiff/Applicant's suit be struck out under Order 2 Rule 15 of the Civil Procedure Rules.

8. The grounds are on the face of the application and are listed as paragraph 1 – 13. The application is supported by the affidavit of Is-Hak Yasin Mohammed, the 1st Defendant herein sworn on the 13/4/2017.

9. The application is opposed. There is a replying affidavit sworn by Genoveva Wangare Mugo, sworn on the 10/5/2017.

10. On the 3/4/2017 the parties agreed the two applications be canvassed together. It was further agreed that the two applications be disposed of by way of written submissions. Only the Plaintiff and the 1st Defendant put in written submissions.

11. I have considered the pleadings, the Notice of Motion dated 31/10/2016, the supporting affidavit and the annexures. I have also considered the replying affidavit and the annexures. I have also considered the Notice of Motion dated 13/4/2017, the supporting affidavit and the annexures, the replying affidavit. I have considered the written submissions of counsel and the authorities cited.

THE PLAINTIFFS SUBMISSIONS.

12. It is the Plaintiff's case that it was granted a temporary occupational licence in respect of Plot Number Mombasa/Mwembelegeza/1473. That it uses it for parking for its patrons.

The temporary licence of occupation has not been revoked. That the said plot is meant for public utility.

13. The Plaintiff is the bona fide occupier of Mombasa/Mwembelegeza/1473 and the 1st Defendant has trespassed and begun measuring the suit property without authority or consent.

The Plaintiff has established a prima facie case as they have produced a copy of temporary occupational licence.

14. That have relied on the case of **Board of Governors Afraha High School And Another –versus- Kenya Commercial Bank (2004) eKLR.** That the Plaintiff will suffer irreparably as it will not have a parking lot for its patrons that visit its bar and restaurant.

That the balance of convenience tilts in favour of the Plaintiff/Applicant.

15. With respect to the 1st Defendant/Respondent application, the Plaintiff's contentions that it has no merit and ought to be dismissed. That the dispute revolves around Plot Number Mombasa/Mwembelegeza/1473 and not Plot Number Mombasa/Mwembelegeza/1626. The 1st Defendant has no claim on Plot Number Mombasa/Mwembelegeza/1473. That Order 2 Rule 15 of the Civil Procedure Rules also provides for an amendment of pleadings where necessary. That the 1st Defendant has not set out concisely the grounds upon which the suit ought to be dismissed.

THE 1ST DEFENDANT'S SUBMISSIONS

16. The Plaintiff in paragraph 4 of the affidavit of Genoviva Wangare Mugo, states that the Plaintiff was allocated the subject plot No 1473 by the District Commissioner, Kisauni. That the District Commissioner has no capacity to allocate public utility land to the Plaintiff as the same contradicts Article 62(2) of the Constitution.

17. The Plaintiff has not met the threshold established in the case of **Giella –versus- Cassman Brown And Company Limited (1973) EA 358.**

The Plaintiff has not demonstrated a prima facie case within high chances of success at the trial as the letter from the District Commissioner is not proof of ownership. The Plaintiff has not demonstrated what loss or damage it will suffer if the injunction is not granted. The balance of convenience tilts in favour of the 1st Defendant who has a valid certificate of title.

18. They have relied on the case of **Panari Enterprises Limited –versus- Mrs. Lijoodi And 2 Others Nairobi ELC No 779 of 2013.** That the Plaintiff's application dated 31/10/2016 be dismissed with costs.

19. With respect to the application dated 13/4/2017 the 1st Defendant is the registered owner of Plot No. 1626. That the Plaintiff does not deny the existence of Plot No. 1626. They have cited the case of **Matter Unisa Karim –versus- Edward Oluoch Odumbe Nairobi HCCC No 91 of 2015.** That the Plaintiff trespassed on the 1st Defendant plot and ought to give vacant possession to the 1st Defendant to continue to built the wall and secure his plot. The Plaintiff has no cause of action against the 1st Defendant and the entire suit ought to be dismissed. That the Plaintiffs case is frivolous. The 1st Defendants materials for construction of the wall continues to go to waste with the pendency of this suit.

20. The issues for determination are ;

- a) Whether the Plaintiffs/Applicant's case has met the threshold for grant of temporary injunctions.
- b) Whether the 1st Defendants application is merited.
- c) Who should bear costs?

21. I will start with the Plaintiff's Notice of Motion dated 31/10/2016. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down on the precedent setting case of **Giella –versus- Cassman Brown And Company Limited (1973) EA 358.** First the Applicant must show a prima facie case with a probability of success.

Secondly, that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt it should act in a balance of convenience.

22. In the case of **Mrao Limited –versus- First American Bank Limited And 2 Others (2013) eKLR** the court in determining what amounts to a prima facie case stated,

“So what is a prima facie case? I would say that in a civil case, it is a case in which or the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

23. Has the Plaintiff made out a prima facie case with a probability of success? The Plaintiff does not own Plot No Mombasa/Mwembelegeza/1473. It admits it is land set aside for public utility. That is holds a temporary occupational licence issued by the District Commissioner. The Plaintiff relies on a letter from

the District Commissioner Kisauni marked as Annexure “GWM3”. The same is headed “Lease of Plot No 1473 Mwembelegeza.”

24. Article 62(2) of the Constitution states,

“All public land shall vest in and be held by the county government in trust for the people resident in the county and shall be administered on their behalf of the National Land Commission.”

I agree with the counsel for the 1st Defendant that the District Commissioner is not the county government nor the National Land Commission. The District Commissioner had no capacity to give out a temporary licence.

The letter is of no consequence. I therefore find that the Plaintiff has failed to demonstrate a prima facie case with a probability of success.

25. The plaintiff has also failed to prove that it will suffer any damage and/or injury if these injunctive orders are not granted. The Plaintiff has not disputed that the 1st Defendant is the owner of Mombasa/Mwembelegeza/1626 distinct from 1473. The Plaintiff has failed to demonstrate what loss it will suffer if the 1st Defendant proceeds to construct the wall.

I find that the balance of convenience tilts of favour of the 1st Defendant who is the registered owner of Plot No Mombasa/Mwembelegeza/1626.

26. All in all I find that the Plaintiff/Applicant’s Notice of Motion dated 31/10/2016 has no merit. I decline to grant the orders sought.

27. Will respect to the 1st Defendant’s application dated 13/4/2017. The 1st Defendant seeks a permanent injunction restraining the Plaintiff from interfering with the 1st Defendant’s possession and occupation and use of Plot NO 1626.

I find that these are not orders that can only be granted after a full hearing. They cannot be granted at an interlocutory stage.

28. Order 2 Rule 15, in my humble view the court has discretion not to dismiss the suit. The order is not set in mandatory terms. I rely in the case of *D. T Dobie (K) Limited – versus- Joseph Muchina (1980) eKLR.*

I find that striking out the Plaintiff’s suit at this stage would be too drastic.

29. In conclusion, I find that the Plaintiff’s Notice of Motion dated 31/10/2016 lacks merit and the same is dismissed.

The 1st Defendant’s application dated 13/4/2017 is also dismissed.

Each party to bear its/his own costs.

It is so ordered.

Dated, signed and delivered at Mombasa on the 24th day of October 2017.

L. KOMINGOI

JUDGE

24/10/2017