



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 141 OF 2017

KISHUSHE RANCHING CO-OPERATIVE SOCIETY LIMITED ..APPLICANT/PLAINTIFF

-VERSUS-

1. WANJALA MINING COMPANY LIMITED

2. SAGHANI LIMITED.....RESPONDENT/DEFENDANTS

RULING

1. This is the Notice of Motion dated 20th April 2017. It is brought under Section 1A, 3A 63(e) of the Civil Procedure Act, Order 40 Rules 1, 2,3, 4 and 5 of the Civil Procedure Rules 2010.

2. It seeks orders;

a) Spent.

b) Spent.

c) That upon hearing of this application an injunction be issued restraining the Defendants/Respondents by themselves, agents, servants or otherwise howsoever from entering upon the property known as L.R. 28984 within Taita Taveta County save for the purpose of removing there from their equipment lying there in and that they be barred from removing there from iron ore or other excavated material until the suit filed herein is heard and determined.

d) That there be an order for the costs of this application.

3. The grounds are on the face of the application and set out in paragraphs 1 – 7. I do not need to reproduce them here.

4. The application is supported by the affidavit of Elistone Mbela, chairman of the Plaintiff sworn on the 20/4/2017. The Applicants/Plaintiffs Notice of Motion was brought under certificate of urgency on 20/4/2017.

The matter came before me as the duty judge. Upon going through the Notice of Motion, I certified the matter as urgent and directed that a date be taken at the registry on a priority basis and that the Respondent be served.

5. By a letter dated 20/4/2017 addressed to the Deputy Registrar, the Plaintiffs/Applicants Advocate, Mr. Mwakisha sought that the matter be placed before the court on 21/4/2017 for directions. On the 21/4/2017, Mr. Mwakisha, Advocate for the Plaintiffs/Applicants appeared and urged that interim orders be granted as per prayer (2) of the application. Upon hearing Mr. Mwakisha, the court reluctantly granted the orders in the interim. The orders granted were:-

i) That the application be and is hereby certified as urgent.

ii) That pending the hearing of this application inter-parties an injunction be and is hereby granted restraining the Defendants/Respondents by themselves, agents, servants or otherwise howsoever from entering upon the property known as L.R. 28984 within Taita Taveta County save for the purpose of removing there from their equipment lying therein and that they be further barred from removing any iron ore or other excavated material.

iii) The application be served for hearing inter-partes on the 4th may 2017.

6. Upon the Defendants/Respondents being served, the 2nd Defendant/Respondent filed a replying affidavit. It is sworn by Ravji Karsan Bhinji Saghani, a director of the 2nd Defendant/Respondent sworn on the 4/5/2017 and filed in court on the 4/5/2017. There is also a replying affidavit sworn by Mahmood Kassam Mihanji, a director of the 1st Defendant, sworn on the 25/4/2017 and filed in court on the 28/4/2017.

7. In response to the Plaintiffs/Applicants application dated 20/4/2017, the 1st Defendant filed a Notice of Motion dated 28/4/2017. It is brought under Order 40 Rules 2 & 4, Order 45 Rules 1 & 2, Order 51. Rules 1, 3 & 15 of the Civil Procedure Rules, 2010 Section 1A, 3A, 63(c) & (e) of the Civil Procedure Act (Cap 21) and all other enabling and applicable provisions of the Law including the inherent power of this Honourable Court.

It seeks orders:-

a) That this application be certified as urgent and heard *ex parte* in the first instance.

b) That the court be pleased to set aside, discharge, vacate, stay and review the order issued by this Honourable Court on 21/4/2017 restraining the Defendants/Applicants from entering upon the property known as L.R. 28984 within Taita Taveta County save for the purpose of removing there from their equipment lying therein and that they be further barred from removing there from any iron ore or other excavated material.

c) That this application be heard in priority to the Plaintiff/s/Respondents' application dated 20/4/2017.

d) That the Plaintiffs/Respondents application and suit dated 20/4/2017 and filed on 21/4/2017 be struck out and dismissed with costs to the Defendants.

e) That pending the hearing and determination of this application the Plaintiff/Respondent by themselves their officers, servants, agents or otherwise howsoever be restrained from interfering with the Defendants/Applicants possession in that parcel of land known as Title Number L.R 28984.

f) That costs be borne by the Plaintiff/Respondent.

8. The grounds are on the face of the application and listed in paragraph 1 – 21. The application is supported by the affidavit of Mahmood Kassam Miyajni, a director of the 1st Defendant sworn on the 28/4/2017.

9. The 2nd Defendant also filed a Notice of Motion dated 4/5/2017. It is brought under Order 40 Rules 2, and 4, Order 45 Rules 1 & 2, Orders 51 Rules 1, 3 & 15 of the Civil Procedure Rules 2010 Section 1A, 1B, 3, 3A and 63(c) (e) of the Civil Procedure Act and all other enabling and applicable provisions of the law including inherent power of this Honourable Court.

10. It seeks orders;

a) That this application be certified as urgent and heard *ex parte* in the first instance.

b) That the court be pleased to set aside, discharge, vacate stay and review the order issued by this Honourable Court on 21/4/2017 restraining the Defendants from entering upon the property known as L.R. 28984 within Taita Taveta County save for purpose of removing there from their equipment lying therein and that they be further barred from removing there from any iron ore other excavated material.

c) That this application be heard in priority to the Plaintiffs application dated 20/4/2017.

d) That the Plaintiff application and suit dated 20/4/2017 and filed on 21/4/2017 be struck out and dismissed with costs to the Defendants.

AND IN THE ALTERNATIVE

e) That pending hearing and determination of this application the Plaintiff by itself its officers, servants, agents or otherwise howsoever be restrained from interfering with the Defendants possession in that parcel of land known as Land Parcel Number 28984.

f) That the Plaintiff do issue an undertaking as to damages and deposit security for costs.

g) That the costs be borne by the Plaintiff.

The grounds are on the face of the application as paragraph 1 – 21. The application is supported by affidavit of Ravji Karsan Bhimji Sanghani, a director of the 2nd Defendant sworn on the 4/5/2017.

11. On the 4/5/2017 the matter was mentioned before Honourable Lady Justice A. Omollo who directed that;

i) The Respondents applications together with the replying affidavits be treated as responses to the Plaintiffs/Applicants application

dated 20/4/2017.

- ii) That the said application by the Respondents be served forthwith and the Plaintiff is hereby given 10 days to file its responses.
- iii) That the interim orders issued by the Honourable Court on 21/4/2017 are extended to the time when the applications will be heard.
- iv) That the Plaintiff/Applicant to file and serve their skeleton submissions within 7 days of being served.
- v) That the hearing shall be on 24/5/2017.
- vi) That the 1st & 2nd Defendant's personnel be and are hereby allowed to remain/access the premises as the same is conceded by the Plaintiff for purposes of looking after their equipment.

THE PLAINTIFFS SUBMISSIONS.

12. It is the Plaintiff's case that it has been issued with a title deed in respect of L.R 28984. The same was issued on 24/8/2015. That before the issuance of the title deed the 1st Defendant was granted a 10 year lease, prompting the Plaintiff to file HCCC No. 340 of 2008, challenging the validity of the lease. The 10 year lease has since lapsed hence the legality of the 1st Defendants presence in the land has now dissipated.

The 2nd Defendants presence on the land courtesy of the joint venture agreement with the 1st Defendant is a violation of the conditions of the lease. The Plaintiff is guaranteed the right to property under Article 40 of the Constitution. The consent of the Plaintiff was not sought before the 1st Defendant was granted mining rights.

They have relied on the case of **Titus Musau Ndome – versus- Cabinet Secretary Ministry of Mining And 2 Ohters.**

Section 37 of the Mining Act requires that the consent of a private land owner to be sought before any mining is undertaken on the land. The allegation by the Defendants that the material was excavated while the Defendant had a valid licence is not true as the licence had lapsed.

The Plaintiff's title has not been challenged even in ELC 260 of 2014. That this suit is not an abuse of the court process as the reliefs being sought in ELC 260 of 2014 and HCCC No. 340 of 2008 are different from those being sought in the instant suit.

That the reliefs sought by the Plaintiff in ELC 260 of 2014 are long spent as title has been issued.

13. That there is no order protecting the Plaintiff's interest in ELC 260 of 2014 in so far as the possibility of any material on the land being moved goes. The application by the 4th Defendant, dated 23/10/2015 is not pending because there is a notice of withdrawal dated 20/4/2017. They have also relied on the case of;

I. **Johnson –versus- Gore Wood & Co. (2001) All ER**

II. **Bradford & Brigley Building Society –versus- Seddon (1991) IWL 1482.**

That the Plaintiff has a prima facie case that would succeed at the trial. The Plaintiff being the land owner is likely to suffer irreparable damage and or injury that may not adequately be compensated by damages. The balance of convenience favours the status quo being maintained until the dispute is determined. That the 2nd Defendant has no rights to be protected since a mining licence issued to a mining operator is not transferrable nor was the joint venture agreement permissive of any subletting or assignment. Therefore the 2nd Defendants claim that it would be inconvenienced by the grant of injunction does not arise. They pray that their application dated 20/4/2017 be allowed and the Defendants' applications be dismissed with costs.

THE FIRST DEFENDANTS SUBMISSIONS.

14. It is the 1st Defendant's case that it is the lessee and/or beneficial owner of L.R. No. 28984 specifically MR 190 registered in Folio No. 504/98. That on 28/3/2007 it was granted a 10 year lease by the County Council of Taita Taveta. That it was granted mining rights. That there exists ELC No. 260 of 2014 and HCCC 340 OF 2008 in which the same matters are in issue.

That the Plaintiff in their application dated 20/4/2017 concealed crucial and material facts in relation to various matters pending before this court in respect to the same suit property between the same parties.

15. That the Plaintiff failed to disclose that they had a similar application dated 23/10/2015 in ELC No. 260 of 2014 which application is still pending. Further that the Plaintiff failed to disclose that the material sought to be restrained from being carted away from the suit property was mined and excavated during the existence of a valid and duly recognized lease. That the court in ELC 260 OF 2014 ordered that that the status quo be maintained. They relied on the case of **The Owner of the Motion vessel "Lillian S. (Civil Appeal No 50/89, unreported,** where the court referred to the case of **R. V. Kensington Income Tax Commissioners ep princess Edmond De Polignac (1917) KB 486**

That an applicant who comes to court to obtain relief on an ex parte statement be should make a full and fair disclosure of all the material

facts.

They also relied on the case of **Uhuru Highway Development Limited –versus- Central Bank of Kenya And 2 Others (1995) eKLR**

The Plaintiff is guilty of material non-disclosure hence this court ought to discharge and/or vary the ex parte orders. They relied on the case of **Republic –versus- Chairman, District Alcoholic Drinks Registration Committee And 4 Others Civil Appeal No 4 of 2013 J/R**

Macharia Wangui –versus- Attorney General And Another HCCC NO. 50 of 2013.

16. The Plaintiff has not satisfied the conditions for grant of interlocutory injunctions as set out in the case of **Giella –versus- Cassman Brown And Company Limited** Also in **Mrao Limited – versus – First American Bank Limited And 2 others.** That the Plaintiff must demonstrate that his rights have been unlawfully and illegally infringed upon by the Defendant/Respondent. That the material sought to be restrained from being carted away from the suit property was mined and excavated during the existence of a valid and recognized lease.

17. That the Plaintiff has failed to demonstrate that he will suffer irreparable injury which cannot be compensated by damages. They have relied on the case of **Vivo Energy Kenya Limited –versus- Maloba Petrol Station Limited And 3 Others Civil Appeal No. 21 of 2014** which echoed the decision in **Nguruman Limited –versus- JAN Bonde Nielsen And 2 Others.**

That the Plaintiff has not shown any evidence of any injury or prejudice that it would suffer save for the speculative allegations stated in the affidavits. These are not sufficient to demonstrate irreparable injury.

That the balance of convenience tilts in favour of the Defendants/Respondents. The 1st Defendant urged the court to dismiss the Plaintiffs application and to set aside review or vary the orders issued on 21/4/2017.

18. Further that the principles of governing a temporary or such prohibitory orders in a dispute is strictly in a dispute is strictly to maintain the status quo pending hearing and determination of the main suit and not to grant any further rights to one party over the other prematurely. They have also relied on the cases which I have had occasion to read.

- a) **Edward Karanja Ragui –versus- Barclays Bank of Kenya Limited, Nairobi Milimani HCCC 92 of 2002.**
- b) **Microsoft Corporation –versus- Mitsuni Computer garage Limited And Another, Nairobi Milimani HCCC 810 of 2001.**
- c) **East African Foundry Works (K) Limited –versus- Kenya Commercial Bank Limited, Nairobi Milimani HCCC 1077 of 2002.**
- d) **Thiba Mining Hydro Company Limited –versus- Josphat Karu Ndwiga Kerugoya HCCC No. 596 of 2013.**

THE SECOND DEFENDANTS SUBMISSIONS.

19. There are more or less similar to the 1st Defendants submissions. It is their case that there exists two other suits in which the subject matter is L.R. No 28984. They have cited among others the case of;

1. **Standard Chartered Bank Limited –Versus- Jenipher Atieno Odok Kisumu HCCC No. 124 of 2001.**
2. **Fort Hotels Limited t/a Coast Carpark & Amusement Centre –versus- Tourism Finance Corporation And Another (2016) eKLR** which quoted with approval the case of **Fleur Investment Limited –versus- Permanent Secretary, Ministry of Roads and 4 Others (2012) eKLR.**

It further submitted that the Plaintiff has not satisfied the conditions for grant of temporary injunctions. That the balance of convenience tilts in favour of the 2nd Defendant since the iron ore was mined at its own cost is in danger of being wasted should the injunction orders be sustained.

20. I have considered the Plaintiffs application dated 20/4/2017, the affidavit in support and the annexures. I have considered the Defendant's applications dated 28/4/2017 and 4/5/2017 respectively, together with the affidavits in support and the annexures. I have considered the submissions on record. The issues for determination are;

- I) Whether or not this suit is sub judice.
- II) Whether the orders granted on 21/4/2017 by this Honourable court ought to be set aside, reviewed and/or discharged for non-disclosure of material facts.
- III) Whether the Plaintiffs application has satisfied the conditions for grant of temporary injunctions.
- IV) Who should bear the costs

21. It is not in doubt that there are two other suits pending before other courts of competent jurisdiction. One is HCCC No 340 of 2008,

Kishushe Ranching Cooperative Society Limited

-Versus-

1. Saghani Limited

2. Wanjala Mining Company Limited

3. County Council of Taita Taveta

The other is ELC No 260 of 2014,

Wanjala Mining Limited

-Versus-

1. National Land Commission

2. Ministry of Land, Housing & Urban Development

3. Chief Land Registrar

4. Kishushe Ranching Cooperative Society Limited

In the two suits as well as the instant suit the subject matter is L.R. Number 28984. Both suits are still pending. I have perused the pleadings in the two cases. The parties are essentially the same. The subject matter is the same Section 6 of the Civil Procedure Act provides as follows;

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or nay of them claim litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court”

22. The Plaintiff (who is the 1st Defendant in the present suit) in ELC No 260 of 2014 was granted the following orders on 24/10/2015;

1. “That this application is hereby certified as urgent and heard in the first instance.

2. That the Honourable court do issue an injunction against the defendants/Respondents and/or their members, servants, agents, workers, employees, proxies or any other persons whosoever dealing with alienating, excavating, leasing, sub-dividing, offering for sale disrupting valid business or in any other manner whatsoever and however dealing in that subject parcel of Land No L.R. No 28984 registered under Folio No. F/R NO 504/98 pending hearing and determination of this application and the subsequent suit.

3. That pending the hearing and determination of this application and the subsequent suit the 3rd Defendant/Respondent by himself, his officers, servants, agents or otherwise howsoever be restrained from issuing and/or registering a grant in favour of the 4th Defendant/Respondent without reflecting the Plaintiffs/Applicants beneficial interest therein and from howsoever dealing in that subject parcel of land L.R. No. 28984 registered under Folio NO. 504/98...

4.”

23. I have quoted this order to show that the issues in these two files are the same. I find that this suit is sub judice. I am guided by the case of *Fort Hotels Limited t/a Coast Carpark & Amusement Centre –versus- Tourism Finance corporation And Another (2016) eKLR* where the court citing with approval the case of *Fleur Investment Limited –versus- Permanent Secretary, Ministry of Roads And 4 Others (2012) eKLR*. In the case of *Standard Chartered Bank Limited –versus- Jenipher Atieno Odok Kisumu HCCC No 124 of 2001* the court observed (cited) and relied upon in the case of *John Kisese Nthenge –versus- Toeda Mwasaru And 3 others (2014) eKLR*.

“It is not within the rights of parties to engage in a multiplicity of suits as the multiplicity is meant to obstruct the due process of the law and when a party shows design to abuse the powers of the court such actions must be stopped to avoid unnecessary cost and waste of judicial time.”

24. I have gone through the supporting affidavit of Elistone Mbela. I find that he did disclose the existence of the other two cases. He however failed to disclose that there existed orders which were granted in favour of the 1st Defendant (Plaintiff in ELC 260 of 2014) which are still in force. They have not been discharged. I am guided by the holding in *Hadkiston –versus- Hadkiston (1952) All ER 567* “that an order made by a court competent jurisdiction must be obeyed until that order is discharged.”

25. The orders of Honourable Lady Justice A. Omollo of 23/11/2015 in ELC 260 of 2014 are still in force for the avoidance of doubt, they were;

- a) "That the Plaintiff is hereby granted 10 days to file a replying affidavit to the 4th Defendants application dated 23/10/2015 and the 4th Defendant/Applicant is given 10 days to put in a supplementary affidavit if need be.
- b) That thereafter parties to exchange their submissions within 28 days and the submissions be highlighted on 8/2/2016.
- c) That in the meantime both parties are barred from excavating for all minerals till the next hearing date and the Plaintiff's possession is not interrupted."

These are the orders in force in ELC 260 of 2014. The Plaintiff in this suit failed to disclose this fact. I find that this is a material fact which ought to have been disclosed.

26. I have looked at the 4th Defendants application dated 23/10/2017 in ELC 260 of 2014. I find that the reliefs sought are similar to these in the application dated 20/4/2017. The Plaintiff claims to have withdrawn that application. Indeed I have seen the Notice of withdrawal of the application dated 23/10/2015. The said Notice is dated 19/4/2017 and filed in court on 20/4/2017 the same day the present application was filed. The said notice of withdrawal has not been endorsed by the court suit is still pending as directions have not been taken regarding it.

27. In the case of *Uhuru Highway Development Limited –versus- Central Bank of Kenya and 2 Others (1995) eKLR*. Omollo A. held;

"A party who goes to a judge in the absence of the other side assumes a heavy burden and must put before the judge all the relevant materials including material which is not so favourable to him and is against his interests. The basis of this requirement obviously being that it is a universal rule of natural justice that court orders ought to be made only after hearing or giving all the parties an opportunity to be heard. Ex parte orders whether they be injunctions or of whatever nature for main exception to this rule and for a party to benefit from this exception there must be a good and compelling reasons for it. A party who has obtained an ex parte order must be able to support that order at the inter parties hearing on the very same grounds upon which he was able to obtain it in the first place."

28. I find that the Plaintiff fell short of a full and frank disclosure. I also rely in the case of *Kenya Universities And Colleges Central Placement Service –versus- Kenya Medical Training College And Another, C & J R Misc Application No. 291 of 2015*.

The consequence of non-disclosure is that, had this court been made aware of the existing orders in ELC 260 of 2014. I would not have granted the orders herein ex parte. The orders granted by this court on 21/4/2017 are in conflict with those of Honourable Lady Justice A. Omollo issued on 23/11/2015.

29. The Plaintiff cannot benefit from the orders which they obtained by failing to disclose material facts. The orders must be discharged. The 1st and 2nd Defendants application dated 28/4/2017 and 4/5/2017 succeed only to this extent.

I decline to strike out the Plaintiff's suit as this would be too drastic.

30. I have given due consideration to the Plaintiffs application dated 20/4/2017. The principles for grant of temporary injunctions were set out in the case of *Giella -versus- Cassman Brown And Company Limited (1973) EA 358*. I have considered the Plaintiffs case in the light of the foregoing circumstances. I find that they have failed to prove that they have a prima facie which has high chances of success. There is dispute as to the ownership of the excavated iron ore which is lying on the suit property. The 2nd Defendant has contended that the same was excavated at the time when there existed a valid lease and/mining licence.

I also find that the Plaintiff has failed to demonstrate that it will suffer irreparable injury and/or damage which cannot be compensated by damages. In any case what is in dispute is the already excavated iron ore which can be quantified. I find that the balance of convenience tilts in favour of the Defendants who stand to lose if the already excavated iron ore goes to waste.

31. All in all I find that Plaintiffs application failed to satisfy the conditions for grant of interlocutory injunctions.

32. Accordingly I make the following orders;

- a) That the Plaintiff's application dated 20/4/2017 is hereby dismissed.
- b) The 1st & 2nd Defendants applications dated 28/4/2017 and 4/5/2017 respectively are hereby allowed only to the extent that the ex parte orders granted by this Honourable court on 21/4/2017 are hereby set aside and/or discharged.
- c) Each party to bear its own costs.
- d) The parties are urged to consider moving the court with a view to consolidate this suit with ELC 260 of 2014 or in the alternative the application dated 12/7/2017 be fixed for hearing.

It is so ordered.

Dated, signed and delivered at Mombasa on the 18th day of October 2017.

L. KOMINGOI

JUDGE

18/10/2017

Mr. Mwakisha – I pray that the status quo is maintained for a limited period to enable us make an application to preserve the status quo.

L. KOMINGOI

JUDGE

18/10/2017

Court -The Plaintiff is granted seven (7) days stay pending the filing of a formal application.

L. KOMINGOI

JUDGE

18/10/2017