



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO 3 OF 2017

SKYMAN FREIGHTERS LIMITED..... PLAINTIFF/APPLICANT

VERSUS

SAMUEL MACHARIA GITAU

RICHARD NDERITU MWANGIDEFENDANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 4th January 2017. It is brought under Section 1A, 1B, 3, 63 (e) of the Civil Procedure Act, Order 51 Rule 1, order 40 Rules 1, 2, 3& 4 of the Civil Procedure Rules and all other enabling provisions of the law.

It seeks orders that;

a) Spent

b) Spent

c) This Honourable Court be pleased to issue a temporary injunction to restrain the Defendants either by themselves, their agents, servants or workmen or otherwise, howsoever from trespassing, encroaching, alienating, carrying on construction works, wasting damaging and/or parting with possession and/or in any other manner dealing or interfering with the plaintiff's property comprised in certificate of Title Number CR 63036 situated in Mombasa Municipality in the Mombasa County containing by measurements 0.0800 hectares and being sub-division Number 20823 (Original Number 14162/14165/Section I Mainland North on land survey plan Number 367530 pending the hearing and determination of this suit.

d) Direction for inspection taking of inventory and preservation of the subject matter be given and an appropriate restoration order be made to avoid wasting damage or loss of property.

e) Any other order this court may deem fit and necessary to grant.

f) Costs of this application be provided for.

2. The grounds relied upon are on the face of the application. The main one being the Plaintiff/Applicant is the legal and registered owner of the suit land which was purchased from Teleposta Pension Scheme Trustees for valuable consideration on 23/3/2012.

3. The application is supported by the affidavit of Nicholas Wanjala Wangamati a director of the plaintiff company sworn on the 4th January 2017.

4. The application is opposed. There is a replying affidavit sworn by Samuel Macharia Gitau the 1st defendant/respondent on the 10/1/2017.

5. On 21/2/2017, it was agreed between the parties that the application be disposed by way of written submissions. The matter was fixed for mention on 3/4/2017 to confirm filing of submissions. On 3/4/2017 only the plaintiff/Applicant's advocates had filed their submissions. The matter was then fixed for a ruling on 6/7/2017.

6. I have considered the Notice of Motion dated 4/1/2017, the supporting affidavit and the annexures. I have also considered the replying affidavit and the annexures.

I have also given due consideration to the written submissions by counsel for the plaintiff/Applicant and the relevant provisions of law.

The issues for determination are:

- i) Whether or not the Plaintiff/Applicant is the legal and registered owner of the suit land.
- ii) Whether or not the Defendants/Respondents have trespassed on the suit land.
- iii) Whether or not the Plaintiff/Applicant has satisfied the conditions for grant of temporary injunction.
- iv) Who should bear the costs.

7. It is now appropriate to consider the facts that have emerged and the legal principles applicable. The principles were laid down in the case of *Giella –versus- Cassman Brown & Co. 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 on a balance of convenience.

8. It is the Plaintiff/Applicant's case that it is the legal and registered owner of the Suitland that they purchased the same from Teleposta Pension Scheme Trustees on 23/3/2012.

They have annexed the certificate of Title Number 63036/1, certificate of official search, map and a copy of the sale agreement to the Notice of Motion dated 4/1/2017.

They have also annexed photographs showing some recently constructed semi-permanent houses on the Suitland.

I find that the plaintiff/Applicant has annexed documents to show that they are the legal and registered owners of the Suitland.

9. The Respondents not the other hand have not annexed any documents to show that they have a claim to the Suitland. Their claim that they have been on the land is neither here nor there. They claimed the Suitland was originally Plot Number 188/1/Mainland North Bombululu in which about two hindered (200) squatters resided in. the first Respondent however failed to tell the court what they have done actualize their claim. In SRMCC No. 66 of 2016. The Respondents herein are not parties.

There is nothing to show that the subject matter is the same.

10. Going by photographs annexed to the plaintiff's application, the structures appear to be recently put up on the suit land. This shows that the Respondents may have trespassed onto the said land.

They will have an opportunity doing the hearing to rebutt this.

11. I find that the Plaintiff/Applicant has demonstrated that it has a prima facie with a probability of success. I also find that it is likely to suffer irreparably if these orders are not granted. The reason being the Respondents have invaded the Suitland and have put up structures. There is need to preserve the Suitland pending the hearing of the suit.

12. I find merit in this application and I grant the orders sought namely;

i) That a temporary injunction do and is hereby issued to restrain the Defendants either by themselves, their agents, servants or workmen or otherwise howsoever from trespassing, encroaching, alienating, carrying on construction work, wasting, damaging and/or parting with possession and/or in any other manner dealing or interfering with the plaintiff's property comprised in certificate of Title Number CR 63036 situated in Mombasa Municipality in the Mombasa County containing by measurement 0.0800 hectares and being sub-division number 20823 (Original Number 14162/14165) Section Mainland North on land survey plan Number 367530 pending the hearing and determination of this suit.

ii) The costs of this application do abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered at Mombasa on the 12th day of October 2017.

L. KOMINGOI

JUDGE

12/10/2017

Mr. Wachenje – We pray that we be supplied with a certified copy of the ruling.

Court – To be supplied upon payment.

L. KOMINGOI

JUDGE

12/10/2017