



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KISUMU

ELC CASE NO.214 OF 2015

MAYFAIR HOLDING LIMITED.....APPLICANT

VERSUS

PHILEMON ORIGARESPONDENT

RULING

1. **Mayfair Holdings Limited**, the Applicant, filed the notice of motion dated 19th August 2015 for temporary injunction against the Respondent, **Philemon Origa** from blocking the Applicant's access or in any other way interfering with the applicant's access to land parcel **Kisumu Municipality/Block 8/90**. The Applicant further prays for the Respondent to be stopped from constructing on land parcel **Kisumu Municipality/Block 8/254**. The court granted interim orders ex parte in terms of prayer 2 on 19th August 2015.

2. Though the ruling had initially been set for 16th March 2016, the court was not able to prepare and deliver the ruling for failure to trace the Respondent's replying affidavit in the court record and duly notified the parties counsel, Mr. Onsongo and Omondi for Applicant and Respondent respectively. Mr Omondi promised to supply the court with a copy of their replying affidavit before the end of that day, the 16th March 2016. By the time the file was brought back to prepare the ruling on the following day, the 17th March 2016, the copy of the replying affidavit had not been availed, and none was availed by the time this ruling was prepared.

3. The counsel for the parties consented on the 24th September 2015 to file written submissions. The Plaintiff's counsel filed their submission dated 11th November 2015 on the same day, while counsel for the Defendant's filed theirs dated 17th November 2015 on the following day.

4. The issue for determination is first, whether or not the Applicant has established a prima facie case with a probability of success for issuance of temporary injunction at this interlocutory stage. Secondly which party meets the costs of the application.

5. The court has carefully considered the grounds on the face of the notice of motion, the supporting affidavit, the rival written submissions and come to the following determinations;

a) That from the pleadings filed by the Applicant and the documentary evidence attached to the supporting affidavit, the Applicant is the registered proprietor of all that piece of land known, as **Kisumu Municipality/Block 8/90**, while the Respondent is the owner of the neighbouring parcel known as **Kisumu Municipality/Block 8/254**.

b) That the Respondent disputes the Applicant's claim that there exist a service lane between their plots. That it was the Applicant's responsibility to establish the facts that shows that he has a reasonable case with a possibility of success. That to that effect, he annexed a survey map for **Kisumu Municipality/Block 8** to the list of documents dated 19th August, 2015. The court has perused the said map and noted that counsel did not mark the position of the two plots numbers 90 and 254. The court has been able to trace the two plots and it is apparent **plot 90** has its front touching **Lodwar Road**, while **plot 254** has its front touching **Nzoia Road**. That both plots share a common boundary at the back.

c) That there is nothing on the map availed by the Applicant to confirm that there exists an access lane or road at the point that the two plots shares a boundary, at the back.

d) That a registered proprietor of a property, like the Respondent herein, has rights and privileges under **Section 24 and 25 of the Land Registration Act No.3 of 2012** which this court is under duty to protect. The provision of **Section 26 (1) of the said Act** obligates this court to take such a registered proprietor as the absolute and indefeasible owner of the land "**subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate.**" The Applicant has not availed any evidence to show that the Respondent's registration as proprietor of **Kisumu Municipality/Block 8/254** is subject to any easement of a service lane between the two plots.

e) That the issue of whether or not the Applicant is entitled to an easement in form of service lane over the Respondent's plot can only be decided on merit after both parties have adduced their evidence, but not at this interlocutory stage.

f) That in view of the foregoing, the court is of the view that the Applicant has not established a prima facie case with a probability of success. That considering that the Respondent is entitled to rights and privileges of a registered proprietor under **Section 24 and 25 of the Land Registration Act**, that includes to carry out approved developments thereon, the balance of convenience tilts in his favour. That the Applicant has not shown that an award of damages would not suffice were he to be successful, finally. (see **Giella -V- Cassman Brown & Ltd Co.**[1973] E.A. 358 and **Mrao Ltd -V- First American Bank of Kenya Ltd & 2 others** (2003) eKLR.)

6. That flowing from the foregoing reasons, the court finds that the notice of motion dated 19th August 2015 is without merit and is dismissed with costs. The interim injunction orders of 19th August 2015 are accordingly vacated.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 16TH DAY OF MAY 2016

In presence of;

Applicant ABSENT

Respondent ABSENT

Counsel M/S Adwar for Plaintiff

Mr Mwasibwa for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/5/2016

16/5/2016

S.M M. Kibunja J

Oyugi court Assistant

Parties absent

M/s Adwar for Plaintiff

Mr Mwasibwa for Defendant

Court: Ruling delivered in open court in presence of M/S Adwar for Plaintiff and Mr Mwasibwa for Defendant.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

16/5/2016