



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ENVIRONMENT AND LAND COURT AT MOMBASA
ELC CASE NO. 41 OF 2015

NARENDRAKUMAR KARSAN SANGHANI.....PLAINTIFF

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY & 2 OTHERS.....DEFENDANTS

RULING

1.The applicants moved this Court under Order 40 and 51 of the Civil Procedure Rules and section 1A, 1B & 3A of the Civil Procedure Act. The application dated 11th March 2015 seeks the following orders ;

1) Spent

2) Spent

3) Pending hearing and determination of this suit, the Defendant by itself or through its servants, employees, officers and/or agents jointly and severally be restrained from entering or occupying L.R No. MN/V/1817 and/or from demolishing the boundary wall, gate or any other structure on the said property and/or from interfering in any manner whatsoever with the plaintiffs' quiet and peaceful use and occupation hereof.

4) That the costs of this application be provided for.

2.The application is supported by 7 grounds listed on its face inter alia that the applicants are the registered leasehold proprietors as joint tenants of land L. R MN/V/1817 in deed plan No 207770 ; that the defendant issued demolition notice on the basis that the Southern boundary of the Plaintiff's wall has encroached on to the Changamwe – Mikindani – Jomvu Junction road reserve. The applicants contend these actions by the defendant are illegal.

3.The motion is supported further by the affidavits sworn by Narendra Kumar Kassam Sanghai on 11th March 2015 and 16th July 2015. In the affidavit of 11th March, the applicants have annexed copies of grants and certificate of official search to show they own the land having acquired the same through purchase. They also annexed copies of valuation form for stamp Duty, stamp duty receipt and certificate of rates clearance.

4.Mr Narendra Kumar deposed that he received a call from a Mr Said Charo that he was given a letter by

the guards guarding the suit property and that the gates and the walls had been marked "X". He annexed a copy of this letter and photos of the wall with the mark "X" taken. He engaged a surveyor to find out if there was encroachment which survey report was negative. The applicants wrote through their advocates on record to the 1st defendant to withdraw the said notice but there was no response. The applicants fear that unless the defendant is restrained, his actions will adversely affect the rights and interests of the applicants.

5. In opposition, the 1st defendant filed a replying affidavit sworn by Engineer Jared Makori dated 29th June 2015. In this affidavit, Engineer Makori gave a history on when the planning process of the road was initiated as far back as 1967. That in this plan, it was set out that a stretch of 5.9 kilometers would be developed and annexed a map showing this as 'JMI'. He continued that an aerial map for the area was taken and land acquisition plans prepared in accordance with the Land Acquisition Act, 1968. Further to this plan, the portion that was assigned for acquisition on LR MN 82/2/V was set as 0.193 ha and a gazette notice was issued on 21.11.1969 to that effect as per annexure 'JM4'.

6. The 1st defendant deposed that the suit property is encroaching on the road reserve by about 0.1777 ha the same having been compulsorily acquired and reserved for public purpose. The 1st defendant averred that the applicants have not shown that consultations as mandatory under the law with other government departments were done while creating the suit premises. That the creation of the suit premises was not lawful and hence cannot confer any superior title to the applicants as against the defendants' public right. Engineer Makori deposed that it would be inequitable to make compensation for the same property for which it had compulsorily acquired in 1969.

7. In response to the replying affidavit, the applicants filed a supplementary affidavit in which Mr Narendra Kumar deposed that they had no knowledge of the matters deposed to by Engineer Makori. That the maps annexed do not make reference to title No 82/2/V. He deposed that they acquired the property through purchase hence their acquisition was lawful and innocent of the irregularities contained in paragraph 19 – 24 of the replying affidavit.

8. The parties filed written submissions and quoted case law extensively. The submissions were highlighted on 4th May 2016. The plaintiff began their submissions by re - iterating the facts as set out in the pleadings and then concluded by giving an explanation of what purpose an injunction is set to serve. The applicants supported their submissions with the case of **Shami Deshpal vs Habib Abu Mohamed & 5 Others (2015) eKLR**. The 1st defendant also opened his submissions by giving a summary of the facts as set out in the pleadings and raised the issue for determination to be whether the plaintiff is entitled to the orders of injunction. The 1st defendant submitted on the principles set out in the case of **Giella vs Cassman Brown** to which he answered the plaintiffs case failed to meet. I will make reference to relevant passages of the submissions in determination as I have read the same and need not reproduce their contents here.

9. From the pleadings, it is not disputed that the applicants hold title to the suit property. The 1st defendant submitted that its case is only in respect of the suit premises in so far as it encroaches on the road reserve. The suit premises measures 0.1652 of a hectare as per the certificate of grant annexed. The 1st defendant avers that this land was created by subdividing of L.R MN 82/2/V a fact which is also not disputed.

10. One of the issue in dispute is whether this plot was available to have been sold in 1996 to the applicants. The 1st defendant annexed two gazette notices dated 21st November 1969 and 28th November 1969 respectively in which the original parcel 82/2/V was amongst the plots listed to be acquired by the government under the Land Acquisition Act. The 1st defendant submits that the creation of the suit premises was undertaken in 1985 some 27 years after the government had acquired this portion.

11. It follows therefore from this pleading and the submission that the applicants were not part of the subdivision process. When they were purchasing the land, they were innocent as the 1st defendant did

not annex anything to show that they had restricted the title to warn anyone not to deal with this land. To this extent I am satisfied that the applicants have shown a prima facie case with a probability of succeeding.

12. The 1st defendant submitted on the doctrine of overriding interest; that the area where the suit premises is located was compulsorily acquired in 1969. He submits that there are certain unregistered interest which nonetheless binds the 1st registered proprietor. He quoted section 28 of Cap 300 (*repealed*) which provided for overriding interests. With utmost respect to counsel for the 1st defendant, land acquired under the Land Acquisition Act (*repealed*) cannot be interpreted to fall under the unregistered overriding interests anticipated under section 28 of the Registered Land Act Cap 300 (*repealed*). I say so because once land was acquired, it ceased to belong to the registered proprietor unlike the unregistered overriding interest which do not necessarily disentitle an owner e.g. in case of way leaves or creation of easements.

13. Since on the face of the pleadings filed there is no document shown that the land was finally acquired, and compensation paid out, it will be prudent for an opportunity to be presented to the parties to present evidence to demonstrate to Court for instance ; was the acquisition process completed ; why did the government not register the acquired portion to itself ; was compensation paid ; was necessary consents obtained during the subdivision which took place in 1985 which created the title to the suit premises ; Would the applicants be entitled to compensation and from who ?

14. The third issue is whether the injury if any can be compensated by an award of damages or it is irreparable. The 1st defendant referred to the case of **Nguruman Ltd vs Jan Bonde Nielsen & 2 Others where the Court of appeal defined irreparable injury to refer to a situation where there is no standard by which the amount can be measured with reasonable accuracy or the injury is of such a nature that monetary compensation of whatever amount will never be an adequate remedy.**

15. I agree with this decision wholly. However in this instance, the applicants have questioned the legality of the 1st defendant's action. The applicants once they became aware of the notice of intention to demolish their property carried out a survey to confirm whether there was encroachment or not. They wrote to the 1st defendant enclosing the survey report to show they had not encroached. The 1st defendant did not respond to this letter nor withdraw the notice. The issue of whether the intended actions of the 1st defendant was within the law is yet to be determined. What would be the scenario to allow the demolition to go on by refusing to grant the injunction then at the end of the case the Court finds the demolition was unlawful ? It means the Court would have authorised an illegality merely because the injury is compensatable by an award of damages. It is my view that where the legality of an action has been questioned, then compensation is not the only remedy to be considered.

16. I am alive to the principle of the wider and greater public good to be considered while granting injunctions. This interest must be weighed visa vi the rights of the individuals especially the rights protected under article 40 of the Constitution. The 1st defendant has rights under the Land Acquisition Act repealed and replaced with the Land Act to acquire private property for public use. However where that process is not shown to have been done, this Court has the responsibility to protect a private proprietor. Consequently I find the applicants have met two of the principles set for granting injunctions. For that reason, I do allow the motion in terms of prayer 3 and 4.

Ruling dated and delivered at Mombasa this 20th day of July 2016.

A. OMOLLO

JUDGE