

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ELC. NO. 288 OF 2014

MAWINGO CONSTRUCTIONS 2010 LIMITED PLAINTIFF

- V E R S U S -

MOMBASA WATER PRODUCTS LIMITED DEFENDANTS

RULING

1. This is an application seeking temporary orders of injunction in terms of prayer 4 and 5 of the motion dated 17th November, 2014. The motion is supported by the grounds on the face of it and the affidavit of Clive Erskine which I have read.
2. The application is opposed by the defendant by his replying affidavit. I have also had an opportunity to read it and need not reproduce its contents here.
3. The advocates made oral submissions to argue the motion. Mr. Kamami for the applicant submits that the defendant sold to the applicant several plots which were consolidated and given a number MN/5046. The applicant is already put in possession. The applicant's complaint is that the defendant granted an easement which runs across part of the plots sold to him after the agreement was drawn. It is his submission that by this, the defendant altered the agreement and he will suffer great prejudice. That the easement runs horizontally along the boundaries of the suit property.
4. Mr. Ratemo for the defendants admitted the sale transaction but submits that the properties were sold minus the road reserve. It is the defendant's case that the easement is comprised in plot registered as number 4420/1 and the applicant was informed of the existence of the access point. Further that clause 9 of the agreement provided for easement and right of way. The defendant submits that he has sold plots downstream to people who need to use the easement. It is his case that the applicant blocking the road has caused the people downstream to suffer. Mr. Ratemo submitted that the collapsed walls were put by Ocean Freight Ltd and they do not belong to the applicant. The defendant admitted constructing water drainage on the existing passage. He urged the court to dismiss the motion.
5. It is clear the defendant sold the suit plot to the applicant. The applicant states that the access road runs horizontally along his plot and the construction being undertaken is eating into his plot. The respondent on his part submits the access road is independent of the applicant's land as the construction is being undertaken on Plot no. 4420/1. The respondent's case is also that the applicant was made aware of the existence of this easement in Clause 9 of the sale agreement and by a letter dated 10th September 2014.
6. The applicant has not denied receipt of the letter dated 10th September 2014. In the sale agreement annexed as "CE1" in the applicant's affidavit, clause 9.1 reads the property is sold subject to

"(a) all subsisting easements, quasi easement and rights of way (if any) equities, quasi - equities and overriding interests."

This clause made the applicant aware of the matters affecting the property at the time of sale. I agree

with the defendant that he cannot turn around and say it is an alteration of the agreement by the defendant to build the water drainage on the existing passage. In any event, if the defendant is encroaching on the applicant's portion of the land during this construction then the issue becomes a boundary dispute and not an illegal grant of and or registration of an easement as pleaded on the grounds on the face of the motion. The applicant has not denied the walls demolished and shown in the photographs belongs to Ocean Freight as submitted by the defendant. He did not file further affidavit to contest the said averments contained in the replying affidavit.

7. In light of the foregoing circumstances I do find that the prayers sought in the motion as pleaded are not supported by facts. The application has not met any of the principles set in the renowned case of ***Giella vs Cassman Brown (1973) E.A.*** for granting injunctions. The applicant did not submit that damage if any to be suffered if the defendant continues with the construction of the water drainage cannot be compensated by an award of damages. Consequently I find the motion to be without merit and dismiss it with costs to the defendant.

Dated and delivered in open court at Mombasa this 26th day of February, 2015.

A. OMOLLO

JUDGE

26.2.2015