



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 935 OF 2012

SATO PROPERTIES LIMITED..... PLAINTIFF

VERSUS

THE COUNTY GOVERNMENT OF NAIROBI
(SUCCESSOR IN TITLE TO THE DEFUNCT)

CITY COUNCIL OF NAIROBI 1ST DEFENDANT

COMMISSIONER OF LANDS 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

ANTOW TRADING COMPANY LIMITED4TH DEFENDANT

R U L I N G

The 4th Defendant/applicant filed a Notice of Motion dated 29th April 2014 where the 4th Defendant/Applicant was indicated as “**The Successor in Title to Antow Trading Co. Ltd**”. The application sought an injunction against the plaintiff and the 1st Defendant to restrain them from in any manner dealing with the property known as **L.R. NO. 1870/1/217** (the suit property herein) pending the hearing and determination of the suit. The plaintiff objected to the name of the 4th Defendant indicated as “**The successor in Title to Antow Trading Company Ltd**”. The court granted the 4th Defendant leave to amend the Notice of Motion.

The 4th Defendant/Applicant filed an amended Notice of Motion dated 15th May 2014 seeking the same orders as were sought in the application dated 29th April 2014. The 4th Defendant yet again on 18th August 2014 filed a fresh application against the plaintiff and the 1st defendant which sought similar injunctive orders as in the amended Notice of Motion dated 15th May 2014. In the applications the 4th Defendant seeks the following substantive order:-

“That this Honourable court be pleased to grant an interim injunction restraining the plaintiff and the 1st Defendant either by itself/himself, its/his agents, assigns, representatives, employees or otherwise however from entering upon, fencing, disposing of, alienating,

encumbering, charging interfering with, transferring and/or erecting in or any manner dealing with or in all that property known as Land Reference Number 1870/1/217 pending the hearing and determination of this suit”.

The grounds set out in support of the Notice of Motion of 18th August 2014 are common to the grounds adduced in the Notice of Motion dated 15th May 2014 save for grounds (a) and (b). The grounds as set out on the body of the application are as follows:-

- a. That the 1st Respondent entered the premises and evicted the tenants on 17/8/2014 on a Sunday using a court order that was obtained without hearing the application in **CMCC NO. 9260 of 2007**.
- b. That an injustice is being perpetrated before the court.
- c. That they have a prima facie case with high chance of success and should be allowed to ventilate the same.
- d. That the applicant stands to suffer irreparable loss and damage, if the orders sought herein are not granted.
- e. That the applicant cannot be adequately compensated for their loss in damages.
- f. That the plaintiff/Respondent in cahoots with 1st Defendant/ Respondent has evicted the tenants and has now began constructing a perimeter wall around all that property known as Land Reference Number **1870/1/217** in respect of which the 4th defendant/interested party holds a certificate title.
- g. That the Plaintiff and the 1st Defendant's/Respondent actions amount to trespass over the applicant's property.
- h. That the balance of convenience tilts in favour of granting the orders sought above.
- i. That this application is made in good faith.
- j. That the wider interests of justice will be best served if the orders sought herein above are granted.

The said 4th Defendant's application is further supported on the grounds contained in the supporting affidavit and further affidavit sworn by **Jeneby Arap Too** on 18th August 2014 and on 22nd September 2014 respectively.

The plaintiff upon being served with the 4th Defendant's application dated 18th August 2014 filed grounds of opposition/objection dated 22nd August 2014 on 25th August 2014 which inter alia included the following grounds:-

1. Interim injunction was declined earlier and so far as this application (dated 18th August, 2014) is concerned the same principle applies.
2. The plaintiff was ordered to be given possession of the suit property by the Chief Magistrate's court at **Milimani in CMCC NO.9260 of 2007**, an appeal against such orders was lodged but withdrawn with the result that possession orders given in favour of the present plaintiff reverted in favour of the plaintiff.
3. It is a fait accompli that the plaintiff is in possession, the tenants (of the Nairobi City County then Nairobi City Council being service tenants) having given possession to the plaintiff.
4. -----
5. -----
6. There was no order stopping the plaintiff from obtaining possession.

The plaintiff further in opposition to the 4th Defendant's application filed a replying affidavit sworn by **Anil Bharmal Shah** on 11th September 2014 in which he reiterates the contents of the various affidavits previously filed by him in this suit sworn on 13th May 2014 and 28th August 2013 respectively.

The parties filed written submissions to ventilate their positions in regard to the 4th Defendant's application dated 18th August 2014. The 4th Defendant applicant filed its submissions dated 12th

September 2014 on 15th September 2014 while the plaintiff filed its submissions dated 22nd September 2014 on the 23rd September 2014. The parties in their filed submissions substantially reiterate the facts contained in the parties respective affidavits in support of and in opposition to the 4th Defendant's application. The facts relating to the ownership of Land Reference **1870/1/217** are highly contested and disputed as between the plaintiff and the 4th Defendant. Each of the parties accuse the other of fraudulent dealings as relates to the suit property and in particular the 4th Defendant asserts that it is the owner of the suit property having been the original allottee of the property and having satisfied all the allotment conditions to the City Council of Nairobi. The 4th Defendant further contends that the title held by the plaintiff in regard to the suit property is fraudulent and illegal and cannot confer any interest and rights of ownership to the plaintiff. The 4th Defendant avers that the company named **Baumann Engineering Ltd** who purportedly transferred the suit property to the plaintiff had no valid property which they could have transferred, they having forged documents to effectuate the transfer of the property.

For its part the plaintiff contends that the 4th Defendant was dissolved vide **Gazete Notice NO.8949** of 14th September 2007 and did not exist as a legal entity and therefore lacked the locus standi to litigate. The plaintiff asserts the directors of the 4th Defendant are infact fraudsters who have been subjected to investigations and that criminal proceedings have been instituted against them as per the copy of the charge sheet annexed in respect of **CM CR. Case NO. 1266 of 2014** marked "ABS2" where both **Mohamoud Chemwor Tarus** and **Jenneby Taita Too** are variously accused of forging agreements between the directors of **Antow Trading Company and Sato Properties Ltd** and a court order purportedly given by **Hon. Rtd Justice Khamoni** on 23rd May 2013 in **H.C. File NO. 935 of 2012**. The plaintiff further asserts that it was granted possession of the suit property vide **CMCC NO. 9260 of 2007** as per order issued by the court on 15th February 2008 and thus it lawfully took possession of the suit property as the owner of the suit property.

The Plaintiff contends that the 4th Defendant is staking claim to the suit property relying on fake documents which ought to disentitle the Applicant to the orders that they seek.

On the material placed before the court and having perused all the affidavits by the parties and the annexures thereto I am not satisfied the 4th Applicant has established and/or demonstrated a prima facie case with a probability of success to entitle the court to grant an interim injunction as sought. The plaintiff is presently the registered owner of the suit property, even though the 4th defendant contests that registration. On the tendered evidence the 4th Defendant has not demonstrated that it has locus to institute this suit and/or litigate. There is evidence that the 4th Defendant was dissolved vide Gazette Notice NO. 8949 of 14th September 2007 and therefore prima facie the 4th Defendant ceased to exist as a company effective from that date. The 4th Defendant has not demonstrated that the company was subsequently reinstated and the letters dated 18th February 2012 and 30th May 2013 from the Registrar of companies that the 4th Defendant relies upon to show the company exists have been disowned by the Registrar of Companies vide the letter dated 6th May 2014 annexed to the plaintiffs replying affidavit sworn on 13th May 2014. Thus in my view the 4th Defendant has not satisfied the first principle for the grant of an injunction as enunciated in the case of **GIELLA –VS- CASSMAN BROWN & CO. LTD (1973) EA 358** where the court set out the principles and/or conditions for grant of an injunction thus:-

- i. Applicant has to establish a prima facie case with a probability of success.
- ii. Applicant has to demonstrate that he stands to suffer irreparable damage that cannot be compensated by an award of damages if the injunction was not granted.
- iii. In case the court was in doubt in regard to either of the 1st two conditions the court could determine the application by considering the balance of convenience.

In the instant application there is evidence that the 4th Defendant was intent on selling the suit property which is a pointer that damages would be an adequate recompense in case the 4th Defendant is at the conclusion of the trial decreed the rightful and lawful owner of the suit property. The value

of the suit property could be easily ascertained by a duly certified valuer. The 4th Defendant in my view cannot suffer damages that cannot be compensated by an award of damages.

The 4th Defendant affirms the tenants who were on the suit property were removed by the plaintiff who is now in possession. The court order issued in the Magistrate’s court to the extent that the same had not been reviewed varied and/or set aside on appeal granted vacant possession of the suit property to the plaintiff. The parties to the suit in the Magistrate’s court had subjected themselves to the jurisdiction of the court and thus the court was competent to make the orders that it did and the same remained valid for as long as they were not varied and/or set aside. In the premises I would also hold the balance of convenience would be in favour of the plaintiff who is in possession.

The upshot is that I find and hold that the 4th Defendant’s applications dated 15th May 2014 and 18th August 2014 lack any merit and I accordingly order the same dismissed with costs to the plaintiff.

Ruling dated, signed and delivered this...16TH..day of...APRIL..2015.

J. M. MUTUNGI

JUDGE

In the Presence of:

..... For the Plaintiff

..... For the 1st Defendant

.....For the 2nd Defendant

..... For the 3rd Defendant

..... For the 4th Defendant