



Impact Chemicals Limited v County Assembly of Kisumu & 4 others; Kenya Commercial Bank Ltd (Interested Party) (Environment and Land Case Civil Suit E027 of 2022) [2024] KEELC 718 (KLR) (15 February 2024) (Ruling)

Neutral citation: [2024] KEELC 718 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND CASE CIVIL SUIT E027 OF 2022
SO OKONG'O, J
FEBRUARY 15, 2024**

BETWEEN

IMPACT CHEMICALS LIMITED PLAINTIFF

AND

COUNTY ASSEMBLY OF KISUMU 1ST DEFENDANT

NATIONAL LAND COMMISSION 2ND DEFENDANT

LAND REGISTRAR KISUMU 3RD DEFENDANT

THE DIRECTOR OF SURVEYS 4TH DEFENDANT

THE HON. ATTORNEY GENERAL 5TH DEFENDANT

AND

KENYA COMMERCIAL BANK LTD INTERESTED PARTY

RULING

1. The Plaintiff brought this suit against the 1st, 3rd and 5th Defendants, and the Interested Party on 5th October 2022. The Plaintiff amended the plaint on 25th January 2023 to join the 2nd and 4th Defendants to the suit. In its amended plaint, the Plaintiff averred that at all material times, it was the lawful and legitimate registered owner of all those parcels of land known as Kisumu Municipality/Block 13/107 and Kisumu Municipality/Block 13/109 (hereinafter referred to together as “the suit properties” and separately as “Plot No. 107” and “Plot No. 109” respectively). The Plaintiff averred that it purchased the suit properties from one, Victor Omondi Odenyo through an agreement of sale dated 1st September 2017. The Plaintiff averred that before purchasing the suit properties, he conducted due diligence that confirmed that the suit properties were lawfully and procedurally allocated and titles issued to the previous owners thereof.



2. The Plaintiff averred that after acquiring the suit properties and taking possession thereof, the Plaintiff charged the same to the Interested Party to secure a loan facility of Kshs. 30,000,000/-. The Plaintiff averred that although the suit properties were lawfully owned and registered in the name of the Plaintiff, the 1st Defendant had amalgamated the same with an adjacent parcel of land on which the 1st Defendant was constructing a building thereby depriving the Plaintiff of its rights of entry, use and development of the properties. The Plaintiff sought several reliefs against the Defendants among others; a declaration that the Plaintiff was the lawful registered owner of the suit properties, a permanent injunction restraining the 1st Defendant from further trespassing on the suit properties in any manner whatsoever and howsoever, an order of eviction of the 1st Defendant from the suit properties, and in the alternative, an order for the 1st Defendant to compensate the Plaintiff in the sum of Kshs.30,000,000/- being the current market value of the suit properties.

Together with the amended plaint, the Plaintiff filed an amended Notice of Motion dated 24th January 2023 seeking a temporary injunction restraining the 1st Defendant from entering upon, remaining on, removing from, wasting, subdividing, digging on, excavating, fencing, constructing any building or developing any structure whatsoever or otherwise dealing with the suit properties in any way whatsoever or in any way whatsoever interfering with the Plaintiff's quiet possession, use and enjoyment of the same pending the hearing and determination of the suit. The Plaintiff's application was brought on the grounds set out on the face thereof and on the supporting affidavit sworn by the Plaintiff's director, Adams Omondi Kisoka on 24th January 2023.

3. The Plaintiff contended that it was the registered owner of the suit properties and that the 1st Defendant had commenced construction of a perimeter wall around portions of the suit properties thereby amalgamating the said portions with the property of the 1st Defendant on which it was constructing the new Kisumu County Assembly. The Plaintiff averred that it was necessary to protect the suit properties and the Plaintiff's rights and interests thereon from interference by the 1st Defendant. The Plaintiff averred that it had established a prima facie case against the 1st Defendant and that even if the court was to consider the balance of convenience, the same would tilt in its favour. The Plaintiff averred that damages may not be an effective or adequate remedy in the circumstances of the case. The Plaintiff's director annexed to his affidavit in support of the application among others, copies of the certificates of leases for the suit properties in the name of the Plaintiff dated 15th December 2017.

The Plaintiff's application was opposed by the 1st Defendant through a replying and supplementary affidavit sworn by the 1st Defendant's Clerk, Owen Ojuok on 6th February 2023 and 23rd March 2023 respectively. The 1st Defendant averred that it requested the County Government of Kisumu to allocate land to it to put up Ultra-Modern Assembly offices in Kisumu. The 1st Defendant averred that on 20th January 2021, the County Government of Kisumu allocated to it a portion of its land known as Kisumu Block 13 for the said purpose. The 1st Defendant averred that the titles held by the Plaintiff in respect of the suit properties were issued irregularly and unlawfully. The 1st Defendant averred that there was no Part Development Plan(PDP) that gave rise to the suit properties. The 1st Defendant averred that the existing PDP for Kisumu Block 13 prepared by the Director of Physical Planning on 11th August 1987 and approved by the Commissioner of Lands on 1st September 1987 showed that the land claimed by the Plaintiff part of which had been allocated to the 1st Defendant to put up the Ultra-Modern Assembly offices was reserved for Water Treatment Works and that the land had neither been subdivided nor issued with a title. The 1st Defendant averred that there had never been a change of use of the said parcel of land from Water Treatment Works to something else. The 1st Defendant averred that the Plaintiff did not place before the court information on the history of the suit properties to support the certificates of lease that were issued in its favour.



4. The 1st Defendant averred that upon being allocated part of Kisumu Block 13 by the County Government of Kisumu, it took possession and engaged a contractor to put up the said Ultra-Modern Assembly offices at a cost of Kshs. 418,356,348.60. The 1st Defendant submitted that the Plaintiff had not established a prima facie case with a probability of success.

The submissions

5. The application was argued by way of written submissions. The Plaintiff filed its submissions dated 31st July 2023. The 1st Defendant filed its submissions dated 11th October 2023 while the Interested Party filed submissions dated 27th April 2023.

The Plaintiff submitted that its title to the suit properties was not in dispute. The Plaintiff submitted that as the owner of the suit properties, the Plaintiff was entitled to all the rights and interests appurtenant to such ownership. The Plaintiff cited section 26 of the Land Registration Act, 2012 in support of this submission. The Plaintiff submitted that since its titles to the suit properties had not been cancelled or nullified, the purported allocation of the suit properties to the 1st Defendant was unlawful. The Plaintiff submitted that the 1st Defendant's act of arbitrarily invading and occupying the suit properties without any notice to the Plaintiff was wrongful, oppressive and unreasonable, and violated the Plaintiff's right to property guaranteed under Article 40 of the Constitution. The Plaintiff submitted that it was bound to be deprived of the protection of the law guaranteed under Article 27(1) of the Constitution unless the orders sought were granted. The Plaintiff submitted that it had established a prima facie case against the Defendants with high chances of success and that it stood to suffer irreparable harm unless the orders sought were granted. The Plaintiff submitted that even if the matter were to be determined on a balance of convenience, the same would tilt in favour of granting the orders sought. The Plaintiff cited several cases in support of this submission which I have considered. The Plaintiff submitted that the application was not opposed by the 2nd, 3rd and 4th Defendants. The Plaintiff submitted that it would be just, fair and equitable that the orders sought were granted to preserve the suit properties.

6. In its submissions in reply, the 1st Defendant submitted that it had only fenced a portion of the parcel of land known as Kisumu/Block 13 which was allocated to it by the County Government of Kisumu. The 1st Defendant submitted that the County Government of Kisumu was not sued by the Plaintiff. The 1st Defendant submitted that the part of Kisumu/Block 13 occupied by the 1st Defendant which was being claimed by the Plaintiff was already excavated and massive construction work had taken place thereon. The 1st Defendant submitted that the suit properties were created from a parcel of land that was already alienated to Kisumu Municipality and a Part Development Plan prepared in respect thereof. The 1st Defendant submitted that the purported alienation of the suit properties to the Plaintiff was irregular. The 1st Defendant submitted that the Plaintiff had not demonstrated that it had a prima facie case with a probability of success against the Defendants and that it would suffer irreparable injury or damage unless the orders sought were granted. The 1st Defendant submitted that the Plaintiff did not have possession of the suit properties. The 1st Defendant submitted that it was the 1st Defendant which was in possession of the properties and was undertaking multimillion construction works thereon. The 1st Defendant submitted that the Plaintiff could not suffer irreparable harm since it had admitted that it could be compensated with an award of Kshs. 30,000,000/-. The 1st Defendant submitted that the balance of convenience tilted in its favour since it had committed public funds to the tune of Kshs. 418,356,346.60 on the suit properties. The 1st Defendant submitted that it was in a position to compensate the Plaintiff in the sum of Kshs. 30,000,000/- if the Plaintiff were to succeed at the trial



of the suit. The 1st Defendant urged the court not to grant the orders sought. The 1st Defendant cited two decided cases in support of its submissions.

On its part, the Interested Party supported the Plaintiff's submissions. The Interested Party submitted that upon confirming that the Plaintiff was the registered owner of the suit properties, it advanced a loan to the Plaintiff secured by the suit properties. The Interested Party submitted that the Plaintiff was deserving of the orders sought. The Interested Party submitted that the Plaintiff had satisfied the conditions for the grant of the temporary injunction sought. The Interested Party submitted that the Plaintiff had established that it had a prima facie case against the Defendants and that it would suffer irreparable injury unless the injunction sought was granted. *The Interested Party cited Nguruman Limited v. Jan Bonde Nielsen & 2 Others [2014]* eKLR and *Mrao Limited v. First American Bank of Kenya Limited & 2 Others [2003]* KLR 125 in support of its submissions. I will refer to the two cases later in the ruling.

Analysis and determination

7. I have considered the Plaintiff's application together with the affidavit filed in support thereof. I have also considered the 1st Defendant's affidavit and supplementary affidavit filed in reply to the application. Finally, I have considered the submissions by the Plaintiff, the 1st Defendant and the Interested Party and the various authorities on which they relied. The Plaintiff has sought in her application a temporary injunction against the 1st Defendant pending the hearing and determination of the suit. The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. As was stated in the case of *Giella v. Cassman Brown & Co. Ltd [1973]* EA 358, an applicant for an interlocutory injunction must show a prima facie case with a probability of success, and such injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience. In *Nguruman Limited v. Jan Bonde Nielsen & 2 Others (supra)*, the Court of Appeal adopted the definition of a prima facie case that was given in *Mrao Limited v. First American Bank of Kenya Limited & 2 Others (supra)* and went further to state as follows:

“The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion....All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation...The applicant need not establish title it is enough if he can show that he has a fair and bonafide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.”

8. The Plaintiff's case is a straightforward one. The Plaintiff has contended that it is the registered owner of the suit properties and that the 1st Defendant has entered the suit properties without its permission and occupied portions thereof on which it has commenced construction of a building. The Plaintiff has contended that the entry by the 1st Defendant into the suit properties and its continued occupation and use thereof is unlawful. The Plaintiff has placed before the court as evidence of its ownership of the suit properties the certificates of leases in its name. On its part, the 1st Defendant has not denied that the Plaintiff is the registered owner of the suit properties. The 1st Defendant's case is that the



Plaintiff acquired the suit properties illegally in that the suit properties were created from a parcel of land that was reserved for use by the defunct Municipal Council of Kisumu for Dunga Water Works. The 1st Defendant has produced before the court among others, a PDP dated 1st August 1987 showing that the parcel of land from which the suit properties were created was reserved for Water Treatment Works. The 1st Defendant has contended that the land having been alienated to the defunct Municipal Council of Kisumu for Water Treatment Works, the same was not available for alienation to the Plaintiff or the persons from whom the Plaintiff acquired the properties. The 1st Defendant averred that the land which was part of Kisumu/Block 13 was lawfully allocated to the 1st Defendant by the County Government of Kisumu which owned the same.

9. I am satisfied from the evidence before the court that the Plaintiff is the registered owner of the suit properties. However, from the evidence that has been placed before the court, the 1st Defendant has created doubt on the validity of the titles held by the Plaintiff in respect of the suit properties. If it is established at the trial that the suit properties were created from land that was reserved for use for Water Treatment Works through a PDP that was prepared and signed by the Director of Physical Planning, approved by the Commissioner of Lands, and registered in the register of Part Development Plans, the titles held by the Plaintiff would be annulled. In *Henry Muthee Kathurima v. Commissioner of Lands & Another [2015]* eKLR, the Court of Appeal stated that:

“We have considered the provisions of Section 26 of the *Land Registration Act* in light of the provisions of Article 40(6) of *the Constitution* and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of *the Constitution*. Guided by Article 40 (6) of *the Constitution*, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that the title to the property was unlawfully acquired.”

10. In Nairobi High Court Civil Suit No. 1024 of 2005(O.S), *Milankumar Shah & 2 others v. The City Council of Nairobi & another*, the court stated as follows:

“We hold that the registration of title to land is absolute and indefeasible to the extent firstly that the creation of such title was in accord with the applicable law and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was not procured through fraud and misrepresentation to which the person or body which claims and relies on that principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest”.

11. In *Adan Abdirahani Hassan & 2 others v. Registrar of Titles & 2 others [2013]* eKLR, the court stated as follows:

19. Section 75 of the repealed Constitution recognised the doctrine of public trust which applies to land set aside for public purpose. Such parcels of land are held by the Government in trust for the public and any purported allocation to individuals or legal persons cannot be said to fall under the purview of the protected property pursuant to the provisions of Section 75 of the repealed Constitution. It is true that under section 23 of the Registration of Titles Act cap 281, a title is sacrosanct and indefeasible and can only be challenged on the grounds of fraud and misrepresentation. However, any alienation of land contrary to the provisions of section 75 of the repealed Constitution or the provisions of the Government Land Act or any other Act of Parliament would be null and void ab initio.

20. Article 40 of the current Constitution, just like section 75 of the repealed Constitution protects the right to own property. This Article should however be read together with the



provisions of Article 40(6) which excludes the protection of property which has been found to have been unlawfully acquired. This requirement recognises the fact that *the Constitution* protects certain values such as human rights, social justice and integrity amongst others. These national values require that before one can be protected by *the Constitution*, he must show that he has followed the due process in acquiring that which he wants to be protected.

24. There has been a long chain of authorities by the High Court which have stated that the Registrar of Titles or the Registrar of Lands, as the case may be, has no authority to cancel a title. My take is that the Commissioner of Lands or his subordinates, while alienating Government land, can only do so over unalienated Government land as defined in *the Constitution* and under the repealed Government of Lands Act. The Commissioner of Lands or his subordinates cannot purport to alienate land which has already been set aside for public purpose.
25. Any alienation of land reserved for public purpose and issuance of a title for the same, whether under the Registration of Titles Act, cap 281 or the Registered Land Act, cap 300 is null and void ab initio. Such a title does not exist in the first place because the land belonged to the Public and was not available for alienation. The cancellation of such a “title,” which is not a title as known in law because it should not have been issued in the first place, would be an administrative exercise by the Commissioner of Lands or the Registrar of Titles to rectify the mistake or misrepresentation that was made by the same office.
26. This is the position that was taken by Justices J.G. Nyamu and R. Wendo in Miscellaneous Civil Application No. 1732 of 2004; James Joram Nyaga & Another -Vs- The Hon. Attorney General and two others where they held as follows:-

The Commissioner of Lands cannot have purported to pass any valid title under the Government Lands Act or the Registration of Titles Act when acting contrary to the express constitutional provisions. The question of fraud under section 23 of the Registration of Titles Act does not therefore arise and there would be no need to prove it in this case...The applicants have challenged the process by which the land was repossessed from them. From our findings above, the Applicants had no title to the land and the result is that the action of the Respondent was not a compulsory acquisition of that land. The land belonged to the public and the custodians were the Respondents. The notices issued by the Respondent were proper and sufficient time was given for verification for those who ought to have been in doubt of their titles...Due process was followed in the repossession of the suit land.”

12. Due to the foregoing, I am not satisfied that the Plaintiff has established a prima case with a probability of success. I am also not persuaded that the Plaintiff stands to suffer irreparable injury unless the orders sought are granted. In its amended plaint, the Plaintiff has sought as an alternative to the prayer for possession of the suit properties, compensation in the sum of Kshs. 30,000,000/-. This means that the Plaintiff can be compensated for its possible loss if the orders sought are not granted and it succeeds at the trial. There is no evidence before the court that the 1st Defendant would be unable to pay the Plaintiff the said sum of Kshs. 30,000,000/- which the Plaintiff has given as the value of the suit properties.
13. Given the foregoing findings, the Plaintiff’s application is not for granting. I do not need to consider the balance of convenience that I was urged to consider by the parties. I wish to say that even if I were to consider the balance of convenience, the same would tilt in favour of disallowing the application. The Plaintiff who claims to have acquired the suit properties in 2017 has never taken possession of



the same. The Plaintiff's title is disputed. The 1st Defendant who claims to have been allocated the suit property by the lawful owner thereof is in possession and has committed public funds to the tune of Kshs. 418,356,348.60 for the construction on the property of what has been referred to as the "Ultra-Modern County Assembly Chamber, Offices and Associated works". The construction works have commenced. I am of the view that considering the position of the 1st Defendant and the Plaintiff, the 1st Defendant stands to suffer great loss and inconvenience if the injunction is granted and it turns out at the trial that the injunction should not have been granted than the loss and inconvenience that the Plaintiff would suffer if the injunction is refused and it turns out at the trial that the same should have been granted. In the circumstances, the balance of convenience is in favour of the 1st Defendant.

Conclusion

14. In conclusion, I find no merit in the amended Notice of Motion application dated 24th January 2023. The application is dismissed with costs to be in the cause.

DELIVERED AND DATED AT KISUMU ON THIS 15TH DAY OF FEBRUARY 2024

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Plaintiff

Mr. Ojuok h/b for Mr. Modi for the 1st Defendant

N/A for the 2nd Defendant

N/A for the 3rd, 4th and 5th Defendants

Mr. Ouru for the Interested Party

Ms. J.Omondi-Court Assistant

