



**Taj Mall Limited v Vishva Properties Limited & 3 others (Environment & Land Case E003 of 2023) [2024] KEELC 1063 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1063 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E003 OF 2023  
J OMANGE, J  
FEBRUARY 15, 2024**

**BETWEEN**

**TAJ MALL LIMITED ..... PLAINTIFF**

**AND**

**VISHVA PROPERTIES LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**MINISTRY OF LANDS, PUBLIC WORKS HOUSING AND URBAN DEVELOPMENT ..... 2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEY ..... 3<sup>RD</sup> DEFENDANT**

**THE REGISTRAR OF TITLES ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. This matter comes up for Ruling on two applications. The first application is a notice of motion dated 7<sup>th</sup> July 2023 by the Plaintiff while the second application by the 1<sup>st</sup> Defendant is a Notice of Motion dated 2<sup>nd</sup> October 2023.
2. The first application seeks the following orders:
  - i. That pending hearing and determination of this suit a temporary injunction be issued restraining the 1<sup>st</sup> Defendant / respondent whether by themselves , servants, agents and or anyone acting at their behest or otherwise howsoever from laying any claim whatsoever further encroaching, trespassing, interfering with, damaging, alienating , detaining , carrying out construction and/or dealing in any manner whatsoever with Land reference number 28535 (original number 20267) having a double land registration number 32502 herein refereed as the property.



- ii. That the Kenya police and specifically the deputy county commissioner, Embakasi sub county to be served with this order and ensure and/guarantee compliance with the same particularly regarding the preservation of the property awaiting outcome of this application and the suit.
  - iii. Costs of the Application.
3. The application is brought on the grounds set out therein and on the supporting affidavit of Rameshchandra Govind Gorasia in which he deposes that the Plaintiff is the registered owner of the suit property having acquired the same through a transfer on 27<sup>th</sup> October 2008 effected by the original owners. He avers that after the transfer they received all the necessary clearances and approvals from the relevant parties including the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants herein.
4. That at some point in the year 2020 they tried to gain access to the property and were faced by assailants who indicated they were the owners to the suit property which actions prompted them to conduct their own investigations leading to the discovery that a third party Highway Holdings limited was also listed as the owner to land reference no 20267 that was allocated a new title land reference no 32502 that was transferred to the 1<sup>st</sup> Defendant in the year 2022.
5. That the 1<sup>st</sup> Defendant has since encroached on the said parcel and commenced construction of go downs which if allowed to continue will occasion irreparable loss hence the present application.
6. The 1<sup>st</sup> Defendant vide a replying affidavit sworn by Harish Vekaria dated 20<sup>th</sup> July 2023 deposed that the Plaintiff is guilty of material non-disclosure hence not deserving of the orders sought after. That the Plaintiff through its director had been charged and convicted of forgery in Nairobi CCRC 1043 of 2016 in which he had attempted to defraud the legally registered owners of their parcel of land.
7. It was further deposed that the 1<sup>st</sup> Defendant conducted due diligence before purchasing the suit property in the year 2021 and thereafter constructed a perimeter wall. The 1<sup>st</sup> Defendant deposed that no explanation had been given by the Plaintiff why they did not seek legal redress from court after they took possession and put a perimeter wall. They insisted that the Plaintiff had not followed due process.
8. The Plaintiff in their supplementary affidavit dated 28<sup>th</sup> September 2023 urged the court to strike out from the record the averments pertaining to the criminal conviction of the Plaintiff's director as the two were separate entities and the Plaintiff's company had not been convicted anywhere. The affidavit also questioned the capacity of Highway Holdings to transfer valid title to the 1<sup>st</sup> Defendant as they had another title in the name of a different Third Party.
9. The second application by the 1<sup>st</sup> Defendant seeks the following orders:-
  - i. That the supplementary affidavit filed by the Plaintiff and in particular paragraphs 12, 13, 14, 15 and 16 be expunged from record.
  - ii. That the orders made *ex-parte* on 2nd October 2023 be set aside and/or reviewed and the 1<sup>st</sup> Defendant be given an opportunity to ventilate its position before any orders can be issued.
  - iii. That alternatively the orders of status quo be elaborated so that parties have clarity on delimitations.
10. The court directed the parties to canvass both applications by way of written submissions. Regarding the 1<sup>st</sup> application the Plaintiff submitted that by virtue of being in possession of a title LR No 28535 originally (20267) they had met all requirements that necessitated grant of injunctive orders having established a *prima facie* case.



11. Counsel referred the Court to the Court of Appeal decision in *Benja Properties limited* (supra) in which it was held that in a case where there are duplicate titles the first in time shall prevail unless fraud is proved. It was also submitted that the losses could not be compensated by an award of damages as the 1<sup>st</sup> Defendant was in the process of selling the go downs to unsuspecting third parties.
12. Lastly, that the balance of convenience was in favour of grant of injunction as the involvement of third parties would greatly complicate the issue and cause hardship not only to the Plaintiff but also to the parties who would have purchased the properties.
13. The 1<sup>st</sup> Defendant on the other hand, submitted that the conditions for issuance of a temporary injunction had not been met by the Plaintiff and the claim of holding title did not amount to a *prima facie* case. They argued that the evidence of conviction was relevant as it was in relation to an adjacent piece of land. Counsel argued that the Plaintiff would not be prejudiced if the orders sought are not granted. On the other hand, they argued that they would be prejudiced if an injunction were issued.
14. The Plaintiff in respect of the 2<sup>nd</sup> application submitted that they had right to access to information pursuant to article 35 of the *constitution* 2010 which right they had exercised by asking for the information through correspondence to the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> Defendants and furthermore stated that the case being at an interlocutory stage the 1<sup>st</sup> Defendant could not raise objections to the evidence. Regarding a status quo order they submitted that in the event the court maintains the orders and does not grant the injunctive orders then the orders should expressly state that all activities on the property should stop.
15. The 1<sup>st</sup> Defendant in support of his application seeking to set aside *ex parte* orders relied on order 12 rule 7 of the *Civil Procedure Rules* and the case of *Philip ongoma capt v Catherine Nyero Owota* Civil appeal No 14 of 2001 to buttress the point that they had a right to seek for setting aside of the *ex parte* status quo orders which was justified by sufficient cause being that they experienced technical hitches to log in court and by the time they were logging in the matter had been dealt with.
16. On the second issue of expunging paragraphs 12,13,14 and 15 of the supplementary affidavit, it was submitted that the documents being relied on being of privileged nature, the manner of obtaining the same not having been clearly stated by the Plaintiff, they were inadmissible and relied on section 134 and 137 of the *Evidence Act* that guarded against use of illegally obtained evidence and also relied on the authority in the case of *Jackeline Chepkemoi Kimeto v Shafi Grewal Kaka & 3 others* (2019) eKLR.
17. The issue for determination in the 1<sup>st</sup> application is whether the Plaintiff has met the conditions for grant injunctive orders. The law on interlocutory injunctions is set out under Order 40 Rule 1 (a) and (b) of the *Civil Procedure Rules* thus: “Where in any suit it is proved by affidavit or otherwise –
  - a. That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
  - b. That the Defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the Plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the Defendant in the suit;

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”



18. The principles for grant of injunction are well settled in the case of *Giella v Cassman Brown & Company Limited* [1973] E.A. 358., where the court stated :

“First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

In the case of *Mrao Ltd v First American Bank of Kenya Ltd* (2003) eKLR the Court of Appeal had this to say on a *prima facie* case:“

... in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

19. The Plaintiff in its pleadings has availed a copy of title to Land ref no 28535(original number 20267) and search documents as proof that it has a legal right over the suit property as against the 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendants on their part have produced title to the suit property being LR 32502(original 20267). The two parties have both gone to great lengths to discredit each other’s titles. The facts by both parties are seriously contested. This court cannot and will not make definitive findings of fact either for or against each party. These are the issues the court will delve into at the main hearing bearing in mind that the court will be considering not only the fact that a party has a title but also the root of the title.
20. It is essential that the court refrains from making findings of fact at this interlocutory stage. Lord Diplock in *American Cyanamid Co. V Ethicon Limited* (1975) 1 ALL ER 504; (1975) A.C. 396 HL at 510.
- “It is no part of the Court’s function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.”
21. Having found that there are claims of two titles and that the court will require to hear both parties to make a final determination it is essential that the court take steps to preserve the subject matter so that other innocent third parties are not brought onto the property nor is the property disposed of by either party.
22. The issues raised in the 2<sup>nd</sup> application on admissibility of evidence are issues that can be addressed during the main hearing. In the meantime, it is essential that the status quo be maintained so that the property is not changed from its current form and neither is ownership transferred to other innocent parties.
23. The application is allowed in the following terms;
- a. The status quo is to be maintained pending the hearing and determination of the suit. The status pertaining is that the 1<sup>st</sup> Defendant who is currently in possession should retain possession but should cease from carrying out any construction on the suit property or in any way changing its current state.



- b. No transfer should be carried out on the suit property by any of the parties pending the hearing and determination of the suit.
- c. Costs to abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024.**

**JUDY OMANGE**

**JUDGE**

In the presence of: -

Mr. Kabaiko for the 1<sup>st</sup> Defendant

Mr. Shah for the Plaintiff

Steve - Court AssistantM

