



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL NO. 365 OF 2010

HARISH RAMJI.....1ST PLAINTIFF
BHARATRAMJI..... 2ND PLAINTIFF
ASHVIN RAMJI 3RD PLAINTIFF

VERSUS

MOMBASA CEMENT LIMITED..... DEFENDANT

RULING

The Defendant by a Notice of Motion dated 17th June 2013 expressed to be made under section 1A, 1B and 63 of the Civil Procedure Act and Article 159 of the Constitution seeks the following substantive orders:-

1. That the plaintiffs herein be restrained whether by themselves, their agents, servants, employees and/or however else from constructing (or continuing to construct) upon the property charging, selling or alienating the property known as **L.R.NO.11895/50** which is the subject of this suit pending the hearing and determination of this suit.
2. That the status quo in so far as the aforesaid property is concerned be maintained such that the state, character, use and/or ownership is not changed pending the hearing and determination of this suit.

The application is premised on the grounds set out on the face of the application and on the affidavit sworn in support by **Hasmukh Patel** a director of the Defendant. The Defendant sets out the following grounds in support of the application.

- (a) The dispute herein relates to a dispute as to the ownership of the property which is subject of the suit.
- (b) The plaintiffs appear to want to entrench their position as regards the suit property by constructing thereon,
- (c) The Defendant's claim herein will be rendered nugatory and/or nugatory should the stated character of the suit property be altered, and
- (d) It is only fair and just in the circumstances that the status quo be maintained so as not to prejudice any of the parties.

The affidavit by **Hasmukh Patel** dated 17th June 2013 gives the background of the matter and the deponent explains that the dispute relates to two parcels of land **L.R.NOS. 11895/24** and **11895/25** which were previously owned by the National Social Security fund (NSSF) and which the plaintiffs and the Defendant both now claim ownership of. The plaintiff filed the instant suit vide a plaint dated 27th July 2010 and they seek a permanent injunction restraining the Defendant from trespassing, parking its vehicles, erecting a fence or in any way interfering with the plaintiffs right of proprietor of the parcel of land known as **L.R.NO.11895/50**. Contemporaneously with the plaint the plaintiffs filed a chamber summons application dated 27th July 2010 under a certificate of urgency seeking an order of temporary injunction restraining the Defendant from trespassing, parking its vehicles, fencing or in any way interfering with the plaintiffs right of ownership and quiet possession of the property known as **L.R.NO.11895/50** pending the interpartes hearing of the application **Hon. Justice Muchelule** certified the application urgent on 29th July 2010 and granted an ex parte interim order of injunction pending the hearing of the application interpartes. The plaintiffs application has not been heard yet but the interim order has been extended from time to time.

The Defendant through **Hasmukh Patel** swore a replying affidavit dated 10th February 2011 in opposition to the plaintiffs application staking claim to the parcel of land claimed by the plaintiff. The Defendant in particular averred that it was a purchaser of the suit property and was in possession with the consent of NSSF who were the sellers and that the consent order entered into on 16th June 2010 in **HCCC NO. 22 of 2007** where the NSSF and the plaintiffs were parties was fraudulently entered into. The Defendant averred that all the parties in **HCCC NO. 22 of 2007** were aware of the Defendant's interest in the suit property herein yet went ahead to record the consent and to use the recorded consent to process a title over the disputed portion of land to the prejudice of the Defendant. The Defendant avers that the title registered in favour of the plaintiffs was fraudulently procured and therefore a nullity.

The Defendant filed a statement of defence and counterclaim to the plaintiffs claim and has filed an application dated 16th November 2012 seeking that the National Social Security Fund (NSSF) be joined herein as the 2nd Defendant or necessary party. This application is pending hearing.

In the statement of defence and counterclaim the Defendant states that the suit property **L.R. NO. 11895/50 (original Number 11895/24/12)** was wrongfully and/or fraudulently and/or illegally registered in the names of the plaintiffs (**as nominees of Golden Terrace Limited**).

The Defendant under the counterclaim contends that the transfer of the suit property ought to have been effected to the Defendant by the NSSF and not to the plaintiffs and avers that the transfer in favour of the plaintiffs was a nullity and ought to be set aside ex-debitio justitae. The Defendant seeks a declaration that the transfer to the plaintiffs was made deceitfully and fraudulently and in contravention of the decree in **HCCC NO.22 of 2007** and a further declaration that pursuant to the said decree the Defendant was the person entitled to a transfer of the suit property. The Defendant further seeks the cancellation of the registration of the plaintiffs as proprietor of the suit property.

It is apparent from the foregoing review of the pleadings that the ownership of the suit property is contested notwithstanding that the plaintiffs are registered as owners. The Defendant avers that upon the plaintiffs being granted the ex parte order of injunction the plaintiffs have used the restraining order to actually take over possession by breaking the Defendant's gate and installing their own security guard at the premises. The Defendant avers that during the month of June 2013 when this application was filed the plaintiffs had commenced construction of a boundary wall which the Defendant sees as an attempt to entrench their position to the prejudice of the Defendant and urges the court to restrain further construction works on the suit property pending the hearing and determination of the suit to avoid the Defendant's claim being rendered nugatory.

The Defendant further avers that it had been let into possession of the suit property by NSSF after having fully paid for its purchase and was only awaiting the formal transfer to be effected to it. The Defendant urges that the status quo ante prior to the grant of the interim order of injunction be maintained pending the hearing and determination of the suit.

The plaintiffs in response to the Defendant's application filed a replying affidavit in opposition thereto sworn by **Harish Ramji** on 1st July 2013. The plaintiffs assert that they are the registered proprietors of the suit property as nominees and assignees of **Golden Terrace Limited** following a consent judgment and decree in **HCCC NO. 22 of 2007**. As per the decree Golden Terrace Limited agreed to have the property registered as **L.R.NO. 11895/24** purchased from NSSF shared proportionately between themselves and **Golden Terrace Limited** and **Harp Investico Limited** gave NSSF authority to transfer to the plaintiffs **L.R.NO.11895/50** as their Nominees and assignees and the property was accordingly transferred to the plaintiffs. The plaintiffs depone that as the registered proprietor they are entitled to develop the property in exercise of their constitutionally guaranteed right and aver that the injunctive orders sought by the Defendant are unmerited and would be prejudicial to the plaintiffs proprietary rights in the suit property. The plaintiffs further state **Hon. Justice Muchelule** on 29th July 2010 granted an interim temporary injunction against the Defendant pending the hearing of the plaintiffs chamber summons application dated 27th July 2010 and contend the Defendant cannot have a basis for bringing the instant application.

The parties filed written submissions as directed by the court. The Defendant filed their submissions on 11th October 2013 and the plaintiffs filed their submissions in reply thereto on 28th January 2014. In the filed submissions the plaintiffs assert that the Defendant cannot satisfy the test established in the case of **GIELLA – VS- CASSMAN BROWN & CO. LTD (1973) EA 358** where the Judges laid the conditions/principles for grant of temporary injunction as follows:-

“an applicant must show a prima facie case with a probability of success, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, when the court is in doubt it will decide the application on the balance of convenience”.

The plaintiffs argue the Defendant has not established any basis for the grant of an interlocutory injunction as the Defendant has not proved that it has a proprietary interest in the suit property and submits that the Defendant is but a trespasser in the suit property where the plaintiffs are the registered proprietors. The plaintiffs submit that the Defendant has not tendered any evidence to show that there has been an infringement of a right it is entitled to by the plaintiffs to entitle the court to intervene and issue a restraining order against the plaintiffs as sought by the Defendant. In support of this submission the plaintiffs referred the court to the case of **Mrao Limited –vs- First American Bank Limited (2003) KLR 125** where **Bosire JA** while considering what constitutes a prima facie case in Civil cases observed thus:-

“So what is prima facie case? I would say that in civil case it is a cases in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”.

Bosire JA in the same case while still commenting on what amounts to a prima facie case stated as follows:-

“.....it is not sufficient to raise issues. The evidence must show an infringement of a right and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case”.

The Defendant through their filed submissions contend that they had fully paid the purchase price in respect of the suit property to National Social Security Fund (NSSF) who were the original owners and were in actual possession of the suit property at the time the transfer was effected to the plaintiff which the Defendant claims was fraudulently done. The affidavit sworn by **Hasmukh Patel** on 10th February 2011 in response to the plaintiff's application annexes documents which even though disputed by the plaintiffs tend to show that the Defendant was engaged in a sale/purchase transaction with the NSSF of the property the subject of this suit. If indeed the Defendant was one of the purchasers of a portion of **L.R. NO. 11895/24** which apparently NSSF was selling to various parties then the consent order/decre

issued in **HCCC NO.22 of 2007** on 16th June 2010 would have encompassed the Defendant. The relevant orders were as follows:

- 1. That the property shall be shared proportionally by all the purchasers.**
- 2. That the purchasers shall be liable to pay in full for the entire acreage of lands captioned in the title document of the property known as Land Reference Number 11895/24.**
- 3. That each purchaser shall pay for his/her portion of the land at the agreed rate of purchase price in the sale Agreement.**

It is clear that the consent order/judgment talks about purchasers without naming them meaning there were several purchasers. The Defendant asserts that they were one of the purchasers. Annexures to the Defendant's affidavit marked "**HP6**"-**HP8**" point to an ongoing sale transaction involving NSSF and the Defendant. The Defendant made a payment of **Kshs.6,050,700/-** vide a Banker's cheque dated 2/9/2009 to NSSF through the Law firm of **M/S Wetangula Adan, Makokha & company advocates** then acting for NSSF in the sale transaction. What was the payment for if not for the suit property?. The Defendant submits that the plaintiffs utilized the consent order/judgment to fraudulently transfer the suit land to themselves to the prejudice of the Defendant.

The Defendant has through the counterclaim pleaded fraud as against the plaintiffs and has further applied for the NSSF to be enjoined as a party to the suit though the application for joinder is yet to be determined. This is consistent with the Defendant's claim that it was duped or short changed by the plaintiffs and the NSSF by them using the consent order in HCCC NO. 22 of 2007 to process the title over the suit property in favour of the plaintiffs.

I have perused the pleadings and the affidavits by the parties and the parties submissions and I am satisfied the Defendant has placed material before the court that puts to question the title held by the plaintiffs to the suit property being annulled. I am in the premises of the view that the Defendant has satisfied the test of a prima facie case as defined by **Bosire JA** in the case of **Mrao Limited –VS- First American Bank Ltd (Supra)** where he observed a prima facie case in civil cases is a case in which on the material presented before the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. In the instant case I am of the view that the Defendant has in fact demonstrated having participated in the purchase of the suit property, was put in possession by the NSSF and that in the circumstances the registration of the plaintiffs as proprietors of the suit property is a matter that would require to be explained at the trial.

I am cognisant of the fact that the plaintiffs have pleaded sanctity of title in respect of the suit property to wade off the claim by the Defendant and cites the previous section 23 (1) of Registration of Titles Act Cap 281 Laws of Kenya (now repealed) to assert that their title is absolute and indefeasible. After the repeal of the Registration of Titles Act, section 23 of the Act was replaced by section 26 of the Land Registration Act NO.3 of 2012 which provides as follows:

26.(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party or,**
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

Thus while sanctity of title is acknowledged under the law such sanctity will be defeated or lost where it

is shown the title was fraudulently acquired to the knowledge of the registered proprietor or where it is shown the title was acquired illegally or unprocedurally or through a corrupt scheme.

In the instant case the Defendant alleges fraud and asserts the plaintiffs were party to the fraud in procuring or acquiring the title. If fraud is proved by the Defendant as alleged the court can cancel the title under the provisions of section 80(1) of the Land Registration Act which provides thus:-

80.(1) subject to subsection (2) the court may order the rectification of the registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.

Thus a registered proprietor's title is absolute and indefeasible only if it cannot be challenged under any of the provisions of section 26(1) (a) and (b) of the Land Registration Act. The plaintiffs title to the suit property has been challenged and I have held that the challenge cannot be described as frivolous and in the circumstances in my view, it is necessary that the suit property is preserved so that the party's that is decreed to be entitled to it at the conclusion of the trial shall get the property in the condition that it is presently in. As ownership is at the centre of this dispute I would not consider it necessary to consider the other conditions for the grant of an interlocutory injunction and particularly because I have come to the conclusion that the order that commends itself in the circumstances of this matter is one requiring the parties to observe and maintain the present status quo. Having determined the application for injunction by the Defendant I do not consider that any purpose will be served to list for hearing the plaintiffs chamber summons dated 27th July 2010 where the plaintiffs also seek a temporary injunction against the Defendant pending the hearing and determination of the suit. This ruling will therefore be taken to dispose both the plaintiffs and the Defendant's applications for injunction herein. Hopefully the parties will realize the necessity of expediting the preparation of the suit for compliance with order 11 of the Civil Procedure Rules to facilitate the hearing and final determination of the main suit on merits so that the rights of the parties can be determined once and for all.

The upshot is that the court orders and directs that the parties as relates to the suit property do observe and maintain the present status quo where no party shall effect any developments, charge, transfer or dispose of the suit property until the suit is heard and determined.

Each party shall meet their own costs of both the application by the plaintiffs dated 27th July 2010 and the Defendant's application dated 19th June 2013.

Orders accordingly.

Ruling dated, signed and delivered this.....**23rd**.....day of...**October**.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiffs

..... For the Defendants