



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 721 OF 2013

PUSH ENTERPRISES LIMITEDPLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY..... DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff filed an application by way of a Notice of Motion dated 12th June 2013 seeking the following orders:

1. The Defendant whether by himself, agent, servants, or contractors, or otherwise however be restrained from trespassing upon the Plaintiff's property on L.R No. 25799/1 along Mombasa and from taking possession of, interfering with or offering for sale, security, constructing, selling, transferring, alienating and/or otherwise dealing with the said property pending the interpartes hearing of this suit.
2. Pending the hearing and determination of this suit the Defendants whether by themselves, agent, servants and persons claiming from and through them or otherwise howsoever be directed by an Order to vacate the suit premises on L.R No. 25799/1 along Mombasa Road (hereinafter referred to as "the suit property") with immediate Road with immediate effect pending the disposal of this suit.
3. The officer commanding Embakasi Police Station be directed to assist the Court bailiff in the enforcement of these Orders.

The grounds for the application are stated in the said Notice of Motion and in a supporting affidavit and further affidavit sworn on 12th June 2013 and 28th January 2014 respectively by Christopher Mugonye Wamae, a director of the Plaintiff. The Plaintiff states in this regard that it is the registered owner of all the piece of land known as LR. No. 25799/1 along Mombasa Road, and took vacant possession of the property upon payment of requisite fees and a Title Deed issued for 99 years. Further, that it has been in occupation until the Defendant trespassed on the suit property, and erected a notice board thereon claiming to be the rightful owner.

The Plaintiff gave an account of how it was given title to the suit property, and the said deponent stated in this regard that Plaintiff's property originated from L.R No. 25799 which was an individual title before its subdivision by the Government, and after an application was made to and approved by the Commissioner of Lands by a licensed surveyor to sub-divide L.R No. 25799. Further, that LR. No. 25799 was sub-divided into three parcels of land namely L.R. No. 25799/1, 25799/2, and 25799/3.

The deponent averred that the Plaintiff was subsequently issued with an allotment letter by the Commissioner of Lands in respect of LR. No. 25779/1 which it duly accepted, and after complying with the conditions on the allotment letter, it was duly issued with a Grant for land parcel L.R No. 25799/1 by the Registrar of titles. The deponent annexed copies of correspondence on the survey and sub-division, the survey maps, survey computation, survey forms, and of the said allotment letter and title.

The deponent further stated that the property known as LR No. 21919 (Grant No. IR 70118) which the Defendant claims that the suit property is on does not exist, and is not in any way related to the suit property. Further, that the parcel of land known as L.R No. 21919 was surrendered to the Government and that the Commissioner of Lands thereafter approved the sub-division of the land. The Plaintiff reiterated that the Defendant has never been the registered proprietor of L.R No. 25799/1 since the Plaintiff was the first registered proprietor of the said property.

The Defendant's Response

The Defendant's response to the Plaintiff's application was by way of a Notice of Preliminary Objection dated 16th July 2013, two Replying Affidavits both sworn on 14th August 2013 and a Further Affidavit sworn on 11th July 2014. The first replying affidavit and further affidavit were sworn by Victor Arika, the Defendant's acting Corporation Secretary/Chief Legal Officer, and the second replying affidavit was sworn by Lawrence Mosongo Amima, a Draughtsman of the Defendant.

The Defendant objected to the Plaintiff's suit on two grounds:

1. That the Plaintiff has failed to comply with Section 34 of Kenya Airports Authority Act and as such the suit is an abuse of the process.
2. That this Honourable Court is not seized (*sic*) of jurisdiction to hear and determine this suit in any event.

The aforesaid deponents in addition stated that the Defendant is the lawful and registered proprietor of that land parcel known as I.R. No. 21919 (Grant No. I.R 70118) situated in the City of Nairobi and measuring 4674.60 hectares, and acquired title to the said land on 26th July 1996. The deponents denied that the land parcel number 25799/1 which the Plaintiff is claiming is separate from the Defendant's land, and that the same is enclosed within and forms part of the title known as LR 21919. They further stated that at no time had the parcel of land known as I.R No. 21919 been surrendered by the Defendant to the Government, nor has the Commissioner of Lands ever approved the subdivision thereof.

Further, that parcel LR No. 21919 was created through a survey that was done in 26 March 1996 and authenticated by the Director of Surveys on the 21st May 1996, while the survey that created parcel L.R No. 25799/1 was carried out and authenticated by the Director of Survey in May 2002, 6 years after the Defendant's land had been surveyed. The deponents further claimed that the land known as I.R No. 21919 (Grant No. I.R 70118) encompasses the Jomo Kenyatta International Airport and all surrounding land including the approach funnel of the proposed second runway, and is public land vested in the Defendant.

It was further averred by the deponents that since the said land is public land vested in the Defendant, any person and/or entity seeking to obtain part of the said land must comply with the law and procedure for the acquisition of public land. In addition, that that by provisions of section 12 (2) (g) of the Kenya Airport Authority Act, the authority of the Defendant's board of directors must be given when land vested in the Defendant is to be sold, let or otherwise disposed of.

Lastly, the deponents denied that the Defendant had evicted the Plaintiff from the subject property, or that it is a trespasser upon I.R No. 25799/1. They stated that the Defendant is in occupation of the said property by dint of being the lawful and registered proprietor of the subject land. They annexed a copy of the survey map and title deed for LR No. 21919.

The Issues and Determination

This Court issued directions that the parties do file and exchange submissions on the Plaintiff's Notice of Motion and Defendant's preliminary objection. The Advocates for the Plaintiff filed two sets of submissions on 31st January 2014 and 20 March 2014, while the Advocate for the Respondent filed their original submissions on 14th July 2014 and supplementary submissions on 5th August 2014.

I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The preliminary issue to be determined is whether the Plaintiff's suit and application herein are competently before this Court. The Defendant submitted in this regard that the Plaintiff had not complied with section 34(a) of the Kenya Airport Authority Act, that requires the Defendant to be served with statutory notice prior to the institution of legal proceedings at least 30 days before such institution. The Defendant relied on the decision In **J. Wambugu & Others vs Kenya Railways Corporation, (2005) e KLR** where the suit was found to be a nullity and dismissed in the absence of the statutory notice being served on the Defendant.

The Plaintiff submitted on this issue that it commenced its suit through a Plaint dated 12th June 2013 filed on 20th June 2013, and wrote a demand letter to the Defendant dated 15th March 2013, and further letters dated 20th March 2013, 21st March 2013 and 26th March 2013 of its intention to sue. Further, that the Defendant did acknowledge the Plaintiff's letters and responded in a letter dated 25th March 2013. The Plaintiff relied on the decision in **World Duty Free Company Ltd vs Kenya Airports Authority, HCCC N0 372 of 2012** to argue that in the circumstances notice was properly served on the Defendant in compliance with section 34 of the Kenya Airport Authority Act.

Section 34(a) of the Kenya Airport Authority Act provides as follows:

“Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent;”

I have perused the letter by the Plaintiff's Advocate dated 26th March 2013 addressed to the Defendant which was attached to the replying affidavit sworn on 12th June 2013 by Christopher Mugonye Wamae in support of the Plaintiff's application. The letter bears a stamp that it was received by the Defendant on 26th March 2013. In addition, the letter states as follows:

“Kenya Airports Authority,

Airport North Authority

P. O. Box 19001-00501,

NAIROBI.

Dear Sir,

RE; L. R. NO. 25799/1 ALONG MOMBASA ROAD

We refer to the above matter where we have been instructed and retained by Push Enterprises Limited whose firm and mandatory instructions are to address you as hereunder.

It has come to the attention of our client that without notice and/or authority you have erected a

public notice board on the above property claiming to be the registered owner.

Ours is to bring to your attention that you remove the notice from the parcel of land within 2 hours upon receipt of this epistle, without which we shall take drastic measures to protect our client's interest.

Take further notice that delay on your part to remove the notice board shall compel our client to seek legal redress which consequences you are well aware of.

Upon expiry of the aforesaid period and if our demand is not met, we have instructions to institute a suit against yourselves.

Take further notice that if you do not instruct your agents to vacate the property and remove the notice board erected on our client's property, we shall institute proceedings against you without further reference to you as to costs and other incidentals arising therefrom.

Meanwhile be informed that to avert a suit against you, your prompt response on the above shall save costs, bearing in mind that you are a trespasser on the property known as L.R No. 2579/1 along Mombasa Road.

Please be advised accordingly.

Thank you,

Yours faithfully,

OSUNDWA SAKWA

ADVOCATES

C.C Push Enterprises Limited

P. O. Box 13843,

NAIROBI. “

Section 34(a) of the Kenya Airport Authority Act does not proved any form in which the statutory notice to the Defendant should be given, and what is required is that such notice contains the particulars of the claim and the intention to sue. The above letter in my view has met this requirements and further, was received on 26th March 2013, which was more than 30 days before the institution of this suit by the Plaintiff on 20th June 2013. The Defendant's preliminary objection therefore fails, and this Court finds the Plaintiff complied with section 34 of the Kenya Airport Authority Act and its suit and application are competently before this Court.

The outstanding substantive issues that remains to be determined are firstly, whether the threshold for the grant of the temporary injunction sought has been met by the Plaintiff on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**. The second issue is whether the Plaintiff has in addition shown any special circumstances to entitle him to the mandatory injunctions sought, as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215 as follows:

“a prima facie case in a civil application includes but is not confined to a “genuine and arguable case.” It is a case 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.”

The Plaintiff in his submissions relied on sections 24 (a) and 26 (1) of the Land Registration Act of 2012 to argue that it has shown a *prima facie* case by proving that it is the legal and registered owner of the suit property, and acquired the title to the said property within the legal strictures of the law. Further, that the title relied on by the Defendant for LR 21919 was surrendered to the Government. The Plaintiff further submitted that he is entitled to exclusive possession of the suit property as an incidence of ownership and the Defendant is a trespasser in law.

Lastly, the Plaintiff submitted that damages are not an adequate remedy where there is a clear breach of the law. Further, that no harm will be occasioned to the Defendant if the injunctions sought are granted, while the Plaintiff will suffer harm if they are not granted, and the balance of convenience therefore tilts in its favour. The Plaintiff cited various judicial authorities in support of his arguments.

The Defendant on the other hand argued that the Plaintiff had not shown a *prima facie* case as he had not demonstrated that the division of the Defendant’s land was done lawfully, and that the Defendant being a statutory corporation is vested with sufficient means to satisfy an award of damages in favour of the Plaintiff. Lastly, that the claims made by the Plaintiff against the Defendant are weighty, and require the examination of the Commissioner of Lands and Chief Land Surveyor to allow the Court to come to a reasoned determination.

I have perused the Plaint filed herein dated 12th June 2013 and note that the Plaintiff is seeking various injunctions against the Defendant, a declaration that it is owner of the suit property, and damages for trespass. The Plaintiff has brought evidence of its title to the suit property, issued to it on 18th June 2012 and registered on 6th February 2013. The Defendant have relied on a title for LR 21919 of which they claim the suit property is part. However, a perusal of the said title shows that it was surrendered to the Government of Kenya on 7th November 2003 in exchange of a new grant IR 90243. The Defendants did not exhibit the copy of the new grant to ascertain in the suit property falls therein.

Therefore the evidence before the Court at this stage is that the Plaintiff has title to the suit property, while the Defendant has not provided any evidence of their title or entitlement to the suit property. It is thus my view that not only has the Plaintiff shown a *prima facie* case in the circumstances, but that as the registered owner it is also entitled to possession of the suit property. The outstanding issues raised by the Defendant as to propriety of the processes of acquisition of the suit property by the Plaintiff, and as to whether the suit property is public land will be canvassed at the full hearing of this suit after which the appropriate final orders will be given by this Court.

I will accordingly allow the Plaintiff’s application and hereby order as follows:

1. The Defendant whether by itself, its agents, servants, contractors, or otherwise be and are hereby restrained from trespassing upon the property known as L.R No. 25799/1 along Mombasa Road, and from taking possession of, interfering with, offering for sale or security, constructing on, selling, transferring, alienating and/or dealing with the said property in any other manner pending the hearing and determination of this suit or until further orders.
2. The Defendant whether by itself, its agents, servants, contractors, or persons claiming from and through it shall forthwith vacate the property known as L.R No. 25799/1 along Mombasa Road pending the hearing and determination of this suit or until further orders, and upon service by the Plaintiff on the Defendant of the orders herein.
3. The Officer Commanding Embakasi Police Station shall assist the Court bailiff in the enforcement

- of the Orders given herein and shall ensure compliance with the said orders.
4. The costs of the Plaintiff's Notice of Motion dated 12th June 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___15th___ day of ___October___, 2014.

P. NYAMWEYA

JUDGE