



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND DIVISION
ELC. CASE NO. 1191 OF 2013

RAY PHARMACEUTICALS LIMITED.....1ST PLAINTIFF
METROPOL ENTERPRISES LIMITED.....2ND PLAINTIFF
VITAFOAM PRODUCTS LIMITED.....3RD PLAINTIFF
NCP PAPER MILLS LIMITED.....4TH PLAINTIFF
ANJU MOHANLAL SHAH.....5TH PLAINTIFF
JINIT MOHANLAL SHAH.....6TH PLAINTIFF
MOHANLAL DHARAMSHI SHAH.....7th Plaintiff

Versus

COUNTY GOVERNMENT OF KIAMBU..... DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 2nd October 2013 in which the Plaintiffs/Applicants seek for an order of temporary injunction to be issued restraining the Defendant from demolishing, disposing, tampering with, trespassing or in any way interfering with the Plaintiffs' properties namely L.R. No. 4953/2209, L.R. No. 4953/2159, L.R. No. 4953/4064, L.R. No. 4953/2021, L.R. No. 4953/2206, L.R. No. 4953/2020 and L.R. No. 4953/1954, Thika (hereinafter referred to as the "suit properties") pending the hearing and determination of this Application and suit. The Plaintiffs/Applicants also seek for costs of this Application be costs in the cause.

The Application is based on the grounds appearing on the face of it together with the Supporting Affidavit of Peter Otieno, the Property Manager of the 5th, 6th and 7th Plaintiffs sworn on 2nd October 2013 in which he averred that the Plaintiffs are the registered proprietors of the suit properties as follows:

1. The 1st Plaintiff, Ray Pharmaceuticals Limited, is the registered proprietor of L.R. No. 4953/2209, Thika.
2. The 2nd Plaintiff, Metropol Enterprises Limited, is the registered proprietor of L.R. No.

- 4953/2159, Thika.
3. The 3rd Plaintiff, Vitafoam Products Limited, is the registered proprietor of L.R. No. 4953/4064, Thika.
 4. The 3rd and 4th Plaintiffs, Vitafoam Products Limited and NCP Paper Mills Limited, are the registered proprietors of L.R. No. 4953/2021, Thika as tenants in common.
 5. The 5th Plaintiff, Anju Mohanlal Shah, is the registered proprietor of L.R. No. 4953/2206, Thika.
 6. The 6th Plaintiff, Jinit Mohanlal Shah, is the registered proprietor of L.R. No. 4953/2020, Thika.
 7. The 7th Plaintiff, Mohanlal Dharamshi Shah, is the registered proprietor of L.R. No. 4953/1954, Thika.

He annexed copies of the title deeds for all the above mentioned properties. He further averred that pursuant to their ownership rights, the Plaintiffs sought and obtained approvals from the then Municipal Council of Thika for the construction of boundary walls in order to demarcate the suit properties and to protect the same from trespassers and other forms of encroachment. He confirmed that the boundary walls were constructed at considerable expense. He further averred that on 24th September 2013, the Defendant's officers entered the suit properties and proceeded to demolish the boundary walls constructed thereon, ignoring his pleas for them to stop. He further averred that those officers returned on 26th September 2013 and finished the demolition. He further stated that no notice of the demolition was ever served upon the Plaintiffs. He further confirmed that the matter was reported to the police at the Makongeni Police Station, Thika who said that they were unable to intervene without a court order. He asserted further that the destruction of the walls has caused the Plaintiffs to suffer massive losses estimated at Kshs. 107 million and amounted to a gross violation of the Plaintiffs' fundamental right to property as guaranteed under Article 40 of the Constitution.

The Application is contested. The Defendant filed the Replying Affidavit of John Mwivithi Mutie, the Interim Sub-County Administrator of the Defendant, sworn on 19th November 2013 in which he averred that the Plaintiffs have not exhibited official searches to confirm that they are the registered owners of the suit properties. He further disputed the ownership claims of the Plaintiffs on the ground that the suit properties are public land which was unlawfully allotted to and registered in the names of the Plaintiffs. He further stated that the suit properties were acquired through fraud, misrepresentation and error. He proceeded to highlight the various procedures that were not complied in the issuance of the title deeds exhibited by the Plaintiffs. He further added that the Plaintiffs did not exhibit any evidence of the claimed construction costs amounting to over Kshs. 107 million. He further asserted that the Plaintiffs were notified to remove the offending walls in a notice published in the Daily Nation on 5th December 2012 but failed to act upon the said notice. He further stated that the Plaintiffs can be compensated in damages and that a restraining injunction is not an appropriate remedy as the offending walls have already been demolished.

Both the Plaintiffs and Defendant filed their written submissions which have been read and taken into account in this ruling.

The issue arising from this Application which I am called upon to determine is whether or not to grant the Plaintiffs the order of temporary injunction which they seek. In deciding whether to grant the temporary injunction sought after by the Plaintiffs/Applicants, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of

MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125, a prima facie case was described 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.”

Have the Plaintiffs/Applicants demonstrated that they have a genuine and arguable case? In support of their assertion that they are the registered proprietors of the suit properties, the Plaintiffs have produced copies of their title deeds to this court. The Defendant has challenged the validity of those title deeds on the grounds that they were acquired through fraud and misrepresentation.

Section 26(1) of the Land Registration Act provides as follows:

“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer ... 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 , ... 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.”**

This provision requires the court to take the produced title deeds as prima facie evidence of ownership unless they are challenged, inter alia, on the ground of fraud or misrepresentation to which the person is proved to be a party. While the Defendant has alleged that there was fraud or misrepresentation in the issuance of the title deeds, the Defendant has not been able to demonstrate to this court that the Plaintiffs were party to such fraud or misrepresentation at this interlocutory stage. In **Eunice Grace Njambi Kamau & Another versus Attorney General & 5 Others (2013) eKLR**, the Court held as follows:

“... the determination whether a title is illegal or unlawful has to take into account the circumstances and the process through which the title was obtained and/or acquired and provided that the title is regularly issued by the duly authorized officers entitled to do so by the government, it is my opinion that such title can only be impugned under Article 40(6) of the Constitution by it being established that the title was unlawfully obtained or acquired by the person shown to be registered as the owner. The doctrine of sanctity of title is anchored on the premises that a registered owner of land who holds a certificate of title that is duly registered is prima facie the owner of that property and the title he holds is indefeasible unless the title is shown to have been unlawfully acquired and/or procured. My understanding is that the title of a registered owner to be impugned on account of fraud, such owner much have had knowledge that the title was fraudulently obtained or procured and /or the owner was party to the fraud.”

Accordingly, this court is bound to take the title deeds produced to be prima facie evidence that the Plaintiffs do indeed own the suit properties. In these circumstances, I find that indeed the Plaintiffs have established a prima facie case with high chances of success at the main trial of this suit.

Does an award of damages suffice to the Plaintiffs/Applicants? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 3RD

DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE