



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 59 OF 2014

THE REGISTERED TRUSTEES OF THE KENYA RAILWAYS

STAFF RETIREMENT BENEFITS SCHEME.....PLAINTIFF

VERSUS

HIGHER EDUCATION LOANS MANAGEMENT BOARD.....DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff filed an application by way of a Notice of Motion dated 24th January 2014 seeking the following outstanding substantive orders:

1. The Defendant whether by itself, agent, servants, or assigns be restrained from interfering, dealing in any way, constructing, erecting structures and/or in any other way interfering with the property known as LR No. 209/12178 and the house therein pending the hearing and determination of this suit.
2. The Defendant be ordered to tear down the perimeter fence that it has caused to be erected on the property known as LR No. 209/12178 (hereinafter referred to as "the suit property").
3. The Defendant, its agents/servants/assigns be evicted and/or ejected from the suit property during the pendency of the suit to preserve the suit property.

The application is premised on grounds that the Plaintiff is the bona-fide owner of the property known as LR No. 209/12178 (the suit property), and has enjoyed quiet possession until 13/1/2014 when the Defendant commenced levelling and clearing off a portion of the suit property and has forcefully erected a perimeter wall thereon. The Plaintiff avers that the Defendant's action of levelling and clearing using earth movers may demolish the house thereon. The Plaintiff contends that unless the court intervenes, there is an eminent danger that the Defendant will continue to trespass and interfere with the Plaintiff's premises in which event it shall suffer irreparable loss and damage.

The application is supported by an affidavit sworn by James Israel Olubayi, the Director of Corporate and Pension Trust Services Limited as well as the Corporate Trustee of the Plaintiff. The deponent states that vide Legal Notice No. 169 of September 2006, Kenya Railways Corporation (referred to as the sponsor) transferred the suit property situate off Upper Hill Road to the Plaintiff, and that the Plaintiff is in the process of obtaining title thereto. He deponed that the suit property comprises of 5 blocks of storied flats, a maisonette and a servants quarter which is currently rented out to the Plaintiff's employees in a bid to generate revenue.

It was further deponed by the Plaintiff's director that on taking possession of the property, they learnt that

the Defendant has encroached, erected a perimeter wall and deployed security personnel thereon, the effect of which is to deny the Plaintiff access to its servant's quarter. It is his disposition that the dispute between the parties has been a subject of an ongoing engagement between the Plaintiff, the Defendant, the sponsor and the Ministry of Lands with the intention of finding an amicable solution. However, that on 13/1/2014, the Defendant brought earth movers and other specialized equipment to the property and commenced clearing, excavating and leveling a portion of the property. The deponent urged the court to grant the prayers since that the property does belong to the Plaintiff.

The Defendant's Response

The Defendant's response is in a Replying Affidavit sworn on 5/3/2014 by Charles Mutuma Ringera, the Chief Executive Officer of the Defendant. He deponed that the Defendant is the registered owner of property known as L.R No. 209/13515 situate in Upper Hill, which is totally different from the Plaintiff's parcel of land, and that the injunction sought is against a parcel of land different from that of the Defendant but with the aim of surreptitiously applying it against the Defendant's parcel. Further that the gazette notice vesting the suit property in the Plaintiff refers to an unspecified part of the suit property, thus creating confusion as to the extent of the Plaintiff's interest thereto.

The deponent stated that the Defendant purchased its property from Paul Koinange trading as Hardy Playland on 16/6/2000 for a consideration of Kshs. 42 million. Subsequently, that the property was duly transferred on 20/7/2000 when after the Defendant took possession and constructed a perimeter wall between the years 2002 – 2003. It is further deponed that the Defendant has been paying council rates and rents, and complying with its obligations as an owner of its property. The deponent contends that the Plaintiff's application is of extreme bad faith as it has been filed just as the Defendant has brought in contractors on site to commence construction of an office block for its own use as well as rental purposes.

It is further deponed that the suit herein is time barred for reasons that: the Defendant has been in possession of the disputed portion of land as at the date when the interest of the Plaintiff allegedly accrued in 2006; the Defendant owned and occupied its property since the year 2000; the Defendant and its predecessor in title cumulatively owned and fully possessed the suit property for 9 years before the Plaintiff's interest alleged accrual and have continued to be in such possession for a period exceeding 12 years. The deponent urged the court to disallow the application with costs for lack of merit, but in the meantime, that the Plaintiff be ordered to furnish an undertaking as to damages considering its known monetary woes.

The Submissions

The application was canvassed by way of written submissions. Akide & Company Advocates for the Plaintiff filed submissions dated 19/8/2014. Counsel submitted that the Plaintiff is a beneficiary of the suit property measuring 8.77 acres contained Original Survey Folio known as F/R No. 247/76. Further, that the folio confirmed that the Defendant's property is situated within the boundaries of the Plaintiff's property. It is submitted that the Plaintiff that it is the rightful owner of the suit property and has never surrendered or never conveyed any portion thereof to create L.R. No. 209/13515.

Counsel submits that the title documents in the Defendant's possession in respect of ownership of L.R. No. 209/13515 was obtained irregularly and un-procedurally on the basis that the Defendant ought to have conducted an official and historical search at the Survey of Kenya which would have revealed that the Kenya Railways Corporation was the owner of the suit property; it ought to have dawned on the Defendant that something was awry as the main house is in the Plaintiff's portion whereas its servant's quarter is hived off; the suit property was neither surrendered to the Government nor sold to the Defendant, or listed in the Ndungu Land Report as an officially surrendered property; and thus the Defendant could not have obtained a good title from the previous owner as the portion had been hived off irregularly and illegally.

Counsel also submitted that the Government can only convey property belonging to Kenya Railways Corporation in accordance with Section 14(4) & (5) of the Kenya Railways Corporation Act, which makes

it mandatory that the Corporation should execute a deed of surrender or conveyance in favour of the Government to enable the latter lawfully allot the property to the Defendant. Consequently, that due process of sub-division and/or transfer of the portion were not followed.

In respect to the technical aspects pleaded by the Defendant, counsel submitted the Plaintiff's quest for justice ought not to be stifled by the procedural technicalities raised by the Defendant. Further, that the suit is meritorious on grounds that it is not time barred since the Plaintiff was incorporated on 4/5/2006 and the property was transferred to it on 7/9/2006. Consequently, that the Plaintiff has maintained its rights to the property only for 8 years and as such well within the required timeline to lodge the suit.

Counsel submitted that the Plaintiff has shown a justifiable right to the ownership of the suit property and has therefore met the threshold of establishing a *prima facie* case and ought to be granted protection of the court. Counsel also submitted that the Plaintiff stands to suffer irreparable damage because the Defendant has not only encroached onto the Plaintiff's property, but has also denied the Plaintiff access to its servant's quarter. Further that the Plaintiff is apprehensive that the said servant's quarters will be demolished by the Defendant in view of its plans to commence development to the Plaintiff's detriment.

Simba & Simba Advocates for the Defendant filed submissions dated 24/9/2014 wherein counsel submitted that the Plaintiff has failed to demonstrate a *prima facie* case with a probability of success on the basis that, first, the Defendant and its predecessor in title possessed the Defendant's property since 1997 and therefore for a cumulative period of 17 years. Consequently, that the cause of action, if any, accrued against the Plaintiff's alleged predecessor in title so that any suit became time barred twelve years after 1997, that is, in 2009. Secondly, counsel submitted that the Defendant had established how it obtained its property for value, after carrying out due diligence and without notice of the Plaintiff's interest or its predecessor in title.

Counsel referred to section 23 of the Registered Titles Act (now repealed) and section 106 of the Land Registration Act, and submitted that the Defendant's title to the property is absolute and indefeasible and that the only challenge the Plaintiff can raise is by proving fraud or misrepresentation to which the Defendant is a party. It was submitted that there was no proof that the Defendant participated in any fraud or misrepresentation in acquiring the property. As regards irreparable loss and damage, counsel submitted that the Plaintiff had not demonstrated that the house on the disputed portion was constructed or belonged to Kenya Railways Corporation, and even if it did, there was nothing to show that damages would not be sufficient remedy. Counsel submitted that the value of the house can be quantified and considering the purchase price paid to acquire the property, the Defendant is more than able to compensate the Plaintiff for any damage.

It was further submitted that the balance of convenience is in favour of declining the injunction sought since it would occasion the Defendant great injustice, as it will continue to rent premises at the expense of the tax payer. Further that the Plaintiff did not stand to be prejudiced considering the uncertainty over its interest in the Defendant's property.

Counsel submitted that the application had been made after inordinate delay, long after the Defendant had taken possession and constructed the perimeter wall. It was also submitted that the Plaintiff had not offered an undertaking as to damages whereas it sought to stop construction of a multi-million office complex, as well as demolish of the wall fence. In respect to the mandatory injunction sought, counsel submitted that the Plaintiff had not demonstrated any special circumstances to warrant such order at the interlocutory stage.

The Issues and Determination

I have read and carefully considered the pleadings, annexed evidence and submissions made by the parties herein. The issues 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 it 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 dispute between the parties is about the ownership and possession of a portion of land which the Plaintiff claims is part of its property LR No. 209/12178, whereas the Defendant claims the disputed portion of land is its property known as LR No. 209/13515. Both parties have demonstrated to this court how they acquired what they claim to be their property. The Plaintiff produced the legal notice through which the suit property was transferred to it by Kenya Railways Corporation. It is the Plaintiff's claim that the disputed portion, which the Defendant claims ownership of, was illegally excised from its property.

The Defendant on its part detailed the conveyance transaction of how it acquired the disputed portion, and maintained that it conducted due diligence before purchasing the property. The Defendant also produced a copy of their title to the disputed portion. The Defendant also claims that it has acquired the disputed portion of land by way of adverse possession, and it was submitted at great length that the Defendant and its predecessor in title had been in possession of the portion in dispute cumulatively for a period over 12 years and therefore if there were any claim as against the Defendant, then the same was time barred sometime in 1997.

The Defendant's averment were refuted by the Plaintiff wherein counsel submitted that the Defendant came into existence in 2006, and the property in dispute was transferred to it in the same year, thus the Plaintiff was well within time to institute the suit. These particular issues will have however have to be further canvassed and a determination made on the same after full hearing of this suit.

Arising from the foregoing, and as the facts herein are highly contested, I am of the view that this is a case that can only be decided on the basis of a balance of convenience as regards the prayers for temporary injunction. This is because both parties have produced evidence of the basis of their legal entitlements to the disputed portion of land, and further, the extent of the suit property that was vested in the Plaintiff by Kenya Railways Corporation, and whether it includes the disputed portion of land can only be established after an independent survey has been done and a report thereof made to the court. The balance of convenience therefore is in favour of the preservation of the suit properties, and I am guided in this respect by the Court of Appeal decision in the case of **Ougo & Another v Otieno (1987) KLR** where the Court held:

The general principle is that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute has been decided in trial.

As regards the prayers for destruction of the perimeter fence and eviction of the Defendant, these prayers are mandatory in nature. The rule on the grant of mandatory orders of injunction is that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then, only in clear cases where the court thinks that the matter ought to be decided at once, See **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 EA 109.** As the issue of the ownership of the disputed portion of land is still outstanding, this is not a clear case that the court can

determine at once. There are also allegations of fraud levelled against the Defendant, which can only be substantiated through evidence given at full hearing. In that regard, I decline to grant the said prayers.

I accordingly order as follows pursuant to the provisions of sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, and Order 40 Rule 6 of the Civil Procedure Rules:

1. That pending the hearing and determination of the suit filed herein or until further orders, the *status quo* to be maintained shall be as follows:
 - a. The Plaintiff and Defendant by themselves or through their representatives, agents or servants shall not sell, transfer, or in any other manner alienate or dispose of the parcels of land known as L.R. LR No. 209/12178 and/or L.R No. 209/13515, and shall not excavate, demolish, construct and/or erect any structures and/or undertake any further developments thereon.
 - b. The Plaintiff either by itself or through his representatives, agents or servants shall not in any manner interfere with the Defendant's occupation and possession of the disputed portion of land known as or referred to as L.R No. 209/13515.

2. The costs of the Plaintiff's Notice of Motion dated 24th January 2014 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____12th____ day of ____November____, 2014.

P. NYAMWEYA

JUDGE