REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC CASE NO. 110 OF 2020

BANIS AFRICA VENTURES LIMITED.....PLAINTIFF/APPLICANT

VERSUS

NATIONAL LAND COMMISSION.....DEFENDANT/RESPONDENT

RULING

This ruling is in respect of an application by way of a notice of motion by the plaintiff/applicant dated the 31st November 2020 seeking for the following orders:

a) Spent:

b) That pending the hearing and determination of this application *inter partes* this Honourable court be pleased to issue an order restraining the respondent by themselves, their officers, servants, agent or anyone acting on the respondent's behalf from asking possession or entering, encroaching, trespassing, working on, constructing, using, acquiring or in any manner interfering with part or whole parcel of land known as **Plot No.s Kapseret/Block 10/Lamaywet/740,741,742,743,744,745,746,747,748,749 and 751** (suit property) belonging to the applicant without clearing the balance of the awards for the plots and the developments on the said plots all totaling to a sum of Kshs.44,150,344.

c) That pending the hearing and determination of this suit, this Honourable court be pleased to issue an order restraining the respondent by themselves, their officers, servants, agent or anyone acting on the respondent's behalf from asking possession or entering, encroaching, trespassing, working on, constructing, using, acquiring or in any manner interfering with part or whole parcel of land known as Plot **No.s Kapseret/Block 10/Lamaywet/740,741,742,743,744,745,746,747,748,749 and 751** (suit property) belonging to the applicant without clearing the balance of the awards for the plots and the developments on the said plots all totaling to a sum of Kshs.44,150,344.

d) That pending the hearing of the suit inter-parties, the court be pleased to issue an order compelling the respondent to release the balance of the awards for the plots and the developments on the said plots totaling to a sum of Kshs. 44,150,344.

e) Costs of the application.

The defendant respondent was served with the application but did not file any response therefore this application is unopposed. The court had earlier granted interim orders of injunction pending the delivery of this ruling.

APPLICANT'S CASE

It is the applicant's case that it is the registered proprietor of the suit property known as **Plot No.s Kapseret/ Block10/**

Lamaywet/740,741,742,743,744,745,746,747,748,749,750 and 751 and that in January 2018 it entered into agreements with the respondent where the respondent was to acquire the suit property for the purpose of constructing the Eldoret Town Bypass Road.

The applicant also avers that it subsequently entered into another separate agreement with the respondent for compensation for all the developments the applicant had made in the suit property, signed acknowledgement statements' and award forms dated the 24th January 2018, which forms indicated the amount to be paid for each plot.

It was the applicant's further averment that the respondent paid lesser sums in breach of their agreement and did not pay any sum for one of the plots that is Plot **No. Kapseret / Block10 / Lamaywet/750** hence the total sum owed to it is Kshs. 44,150,354/.

Finally, the applicant states that the respondent has proceeded to its parcels of land among those that owners are supposed to vacate whereby the Area chief served the applicant with a 30-day vacation notice dated the 16th October 2020 for one of his plots namely **Kapseret /Block10/ Lamaywet/740.** The applicant is therefore apprehensive that unless the court urgently intervenes and grants it the orders sought, the respondent will take possession of the said plots for construction of the bypass without making full payments as per their agreements.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicant has met the threshold for grant of injunctions. **Order 40 Rule 2** of the ***Civil Procedure Rules 2010*** which provides as follows:

2. Injunction to restrain breach of contract or other injury [Order 40, rule 2.]

(1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

The court is also guided by the conditions to be met by an applicant as was held in the case of **Giella vs Cassman Brown & Company Limited (1973) E A 358,** where the court expressed itself as follows:-

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.

The first hurdle for an applicant is to establish that he/she has a prima facie case before an order of injunction can be issued. Does the applicant have a good case to entitle it to complain against the defendant/respondents activities in the long run" From the pleadings and the documents availed to the court, it is evident that there was an agreement between the applicant and the respondent.

In the case of **Naftali Ruthi Kinyua v Patrick Thuita Gachure & another [2015] eKLR** the Court of Appeal stated that:

*"With reference to the establishment of a prima facie case, **Lord Diplock** in the case of **American Cyanamid vs Ethicon Limited** **[1975] AC 396** stated thus,*

"If there is no prima facie case on the point essential to entitle the plaintiff to complain of the defendant's proposed activities that is the end of any claim to interlocutory relief."

Further in the case of **Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others [2015] eKLR,** the court further

expounded and stated that:

*"In **HABIB BANK AG ZURICH V. EUGENE MARION YAKUB,CA NO. 43 OF 1982** this Court considered the role of the court when determining whether or not a prima facie case has been made out. The Court expressed itself thus:*

"Probability of success means the court is only to gauge the strength of the Plaintiff's case and not to adjudge the main suit at the stage since proof is only required at the hearing stage."

*The same caution was repeated in **NATIONAL BANK OF KENYA V. DUNCAN OWOUR SHAKALI & ANOTHER, CA NO. 9 of 1997** when Omolo JA stated:*

"The question of finally deciding whether or not there is a contract between the parties and if there is what terms ought to be implied in the contract is not to be determined on affidavits. All a Judge has to decide at the stage of an interlocutory injunction is whether there is a prima facie case with a probability of success. A prima facie case with a probability of success does not, in my view, mean a case, which must eventually succeed."

*Yet again in **AGIP (K) LTD V. VORA [2000] 2 EA 285**, at page 291, while reversing a grant of an order of injunction by the High Court, this Court stated:*

*"With reference to ground 19 of the appeal, it is as well to remember that the Commissioner had before him an application, which by law required him to consider whether on all the facts in support or in opposition, a prima facie case with a probability of success had been made out to justify the grant of an injunction. In our view, the Commissioner was not entitled to delve into substantive issues and make finally concluded views of the dispute. He was not at that interlocutory stage of the matter, to condemn one of the parties before hearing oral evidence that party being condemned had in opposition to the claims in the suit." **(Emphasis added).***

The applicant must make full candid disclosure of all material facts in order to benefit from the equitable relief of an injunction as was held in the case of **Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another[{1990} K.L.R 557]** where Bosire J held that

"to succeed in an application for injunction, an applicant must not only make a full and frank disclosure of all relevant facts to the just determination of the application but must also show he has a right legal or equitable, which requires protection by injunction."

The applicant has given an elaborate background to the case and annexed agreements to show what they had agreed upon with the respondent which is not controverted by the respondent. I find that the applicant has established a prima facie case.

The applicant must also establish that he will suffer irreparable loss if an order of injunction is not issued. In **Halsbury's Laws of England[Halsbury's Laws of England, Third Edition, Volume 21, paragraph 739, page 352.**] it is stated that :-

"It is the very first principle of injunction law that prima facie the court will not grant an injunction to restrain an actionable wrong for which damages are the proper remedy. Where the court interferes by way of an injunction to prevent an injury in respect of which there is a legal remedy, it does so upon two distinct grounds first, that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages an injunction may be granted, if the act in respect of which relief is sought is likely to destroy the subject matter in question"

*In order to show irreparable harm, the moving party must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. But what exactly is "irreparable harm"" **Robert Sharpe**, in **"Injunctions and Specific Performance,"[Robert Sharpe, Injunctions and Specific Performance, looseleaf, (Aura, On: Cananda Law Book, 1992), P 2-27]** states that "irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."*

From the applicant's pleadings and annexures, it is evident that the applicant is the registered owner of the suit parcels of land and they entered into agreements with the respondent for compensation of specific amounts which have not been paid as per the agreement. The applicant was to surrender substantial parcels of land and if the respondent is not stopped by way of a temporary injunction then the applicant is likely to suffer irreparable harm.

It is also on record that the respondent has already issued a notice of taking possession pursuant to Sections 120 & 121 of the Land Act 2012 in relation to suit parcel **No.749** dated the 16th of October 2020 giving the applicant 30 day vacation notice, upon which expiry, the respondent has authorized the Kenya National Highways Authority to commence construction work on the parcel of land. The applicant averred that the respondent has taken possession of the suit property and started marking posts in order to commence the intended construction of the bypass After the completion of the construction the applicant will not have an opportunity to ventilate its grievance. I find that the applicant will suffer irreparable harm.

In the case of **Said Almed vs. Mannasseh Benga & Another [2019] eKLR** the court held that:

"Where it is clear that the defendant's act complained of is or may very well be unlawful, the issue of whether or not damages can be an adequate remedy for the plaintiff does not fall for consideration. A party should not be allowed to maintain an advantageous position he has gained by flouting the law simply because he is able to pay for it. Support for this view is to be found in the Court of Appeal decision in the case of ***Aikman vs Muchoki (1984) KLR 353.'*** *See the case of* ***Joseph Mbugua Gichanga vs Co-operative of Kenya Ltd (2005)eKLR****.*

Ordinarily it would be said that the applicant would be compensated by way of damages, but in this case the said damages which had been agreed upon have not been paid. This amounts to the respondent being in an advantageous position breaching the terms of the agreement and bulldozing its way into the applicant's land to construct a road without full compensation.

Further it is trite law that where there is breach of the law, an applicant cannot be compelled to accept damages as compensation. In the case of **Joseph Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR** it was held as follows by Warsame, J(as he was then)

"...that damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an order of injunction."

I have considered the application, the submissions and relevant authorities and find that the applicant has met the threshold for grant of temporary injunction. The same is hereby allowed as prayed. Parties to comply with order 11 within 30 days.

DATED and DELIVERED at ELDORET this 11th DAY OF FEBRUARY, 2021

M. A. ODENY

JUDGE