



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. E276 OF 2021**

**ISAAC GATHUNGU WANJOHI..... PLAINTIFF/APPLICANT**

**=VERSUS=**

**SAIF HOLDINGS LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF NAIROBI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**A. INTRODUCTION**

1. This ruling is in respect to the Motion application dated 28<sup>th</sup> July 2021. The application seeks the following orders:

**i. *Spent.***

**ii. *That an interim conservatory order by way of injunction do issues restraining the first defendant/respondent, its agents, servants and/or employees or any other person whatsoever from continuing with the construction /development on the property known as L.R No. 15107 along Mombasa road, pending the hearing and determination of this application.***

**iii. *That an interim conservatory order by way of injunction do issue against the 2<sup>nd</sup> defendant/Respondent barring whether by itself, its officers, or agents from issuing a certificate of occupation or any other approvals to the 1<sup>st</sup> defendant /Respondent pending the hearing and determination of this application.***

**iv. *That a temporary conservatory order by way of injunction do issue restraining the 1<sup>st</sup> defendant/Respondent, his agents, servants and /or employees or any other person whatsoever from continuing with the construction /development on the property known as L.R.No 15107 along Mombasa road ,pending the hearing and determination of the suit herein.***

**v. *That a temporary conservatory order by way of injunction do issue against the 2<sup>nd</sup> defendant/Respondent barring it whether by itself, its officers or agents from issuing a certificate of occupation or any other approvals, licences and/or approvals to the 1<sup>st</sup> defendant/Respondent pending the hearing and determination of suit herein.***

**vi. *That the costs of this application be provided for.***

2. The application is based on the grounds on its face and supported by the affidavit sworn by **Isaac Wanjohi Gathungu** the

Applicant herein sworn on the 28<sup>th</sup> July 2021.

3. When the matter came up for hearing on 19<sup>th</sup> October 2021, parties agreed to have the application disposed of by way of written submissions. The Respondent did not file the written submissions while the Applicant filed his submissions on 18<sup>th</sup> October 2021.

## **B. PARTIES RESPECTIVE SUBMISSIONS**

### **Applicant's submissions**

4. It was the Applicant's case that he is the legal and rightful owner of L.R.No.15107 situate along Mombasa road. Which property was transferred to him by Wagika General Construction on 7<sup>th</sup> June 1995.

5. The Applicant submitted that the title over the said property was issued on 27<sup>th</sup> June 1995 upon which he subsequently took possession over the same.

6. That Applicant also submitted that the 1<sup>st</sup> Respondent is in the process of constructing a warehouse on the said property which project has been approved by the 2<sup>nd</sup> Respondent. It's the Applicant's contention that the construction of the said warehouse will alter the nature of the property to his detriment.

7. The Applicant further submitted that the court ought to intervene and injunct the 1<sup>st</sup> Respondent from proceeding with the construction on his land.

8. It was further submitted that the Applicant had met all the principles of injunction and he urged the court to allow his application in terms of prayers 4,5,6.

### **Respondent's submissions**

9. The 1<sup>st</sup> Respondent did not file any response despite being served and notified on the court's proceedings. The 2<sup>nd</sup> Respondent filed grounds of opposition dated 24<sup>th</sup> August 2021 sating that the application does not disclose any reasonable course of action as against them, since no infringement of the Applicant's right had been occasioned. They urged the court to dismiss the application with costs to them.

## **C. ISSUES AND DETERMINATION**

10. I have considered the Application, the responses filed thereto and submissions filed by the Applicant. I have also considered the decisions that were relied on. The single issue which in my opinion arise for determination is whether the Applicant has met the threshold for the grant of temporary orders of injunction sought.

11. In an application for interlocutory injunction, the onus is on the Applicant to satisfy the court that it should grant the injunction sought. In so doing, the Applicant must satisfy the requirements laid down in the celebrated case of *Giella vs Cassman Brown Co. Ltd (1973) EA 358* which are that a prima facie case with a probability of success must be established and that the applicant would suffer irreparable loss that cannot be compensated by an award of damages and where in doubt, the court will decide whether or not to grant the injunction on a balance of convenience.

12. 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."*

13. It was the Applicant's case that he is the legal and rightful owner of L.R.No.15107 and that the 1<sup>st</sup> Respondent was illegally constructing a warehouse in the suit property.

14. In support of his case, the Applicant also annexed in his supporting affidavit sworn on 28<sup>th</sup> July 2021 the certificate of title and letter from registrar of lands confirming ownership of the suit property to his name.

15. It was also the Applicant's case that the 1<sup>st</sup> Respondent had illegally claimed ownership of the said property subsequently which he averred that he had made a complaint to the Director of Criminal Investigations owing to the same and investigations were still pending.

16. In the instant case, the 1<sup>st</sup> Respondent did not file any response in respect to the application. The contentions made by the applicant in his affidavit were not controverted or denied by the 1<sup>st</sup> Respondent.

17. The Applicant's right to property as enshrined under Article 40 of the Constitution ought to be protected at this stage. The balance of convenience lies in favour of allowing the application as against the 1<sup>st</sup> Respondent.

18. While the Applicant deposed that an approval had been granted by the 2<sup>nd</sup> Respondent for construction of the warehouse, no evidence was tendered before the court showing that such approval had indeed been granted. Further there was no response to the Applicant's letter dated 7<sup>th</sup> December 2020 or any confirmation by the 2<sup>nd</sup> Respondent that indeed such approval was in existence. In view of the foregoing, the Court finds that the Applicant has not established a prima facie case as against the 2<sup>nd</sup> Respondent.

19. Since a prima facie case has not been established against the 2<sup>nd</sup> Respondent, it is not necessary to consider whether, the Applicant will suffer irreparable harm as a consequence of the 2<sup>nd</sup> Respondent action unless the orders sought are granted against them.

20. With regard to the 1st Respondent, I am satisfied that the Applicant will suffer irreparable harm unless the injunction sought is granted.

21. Due to the foregoing, I will allow the Applicants' application dated 28th July 2021 in terms of prayer 4 as against the 1<sup>st</sup> Respondent only. The costs of the application shall be in the cause.

22. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF NOVEMBER 2021.**

**E. K. WABWOTO**

**JUDGE**

In the Virtual Presence of: -

Mr. Wamai for the Plaintiff/Applicant.

N/A for the 1<sup>st</sup> Defendant/Respondent.

N/A for the 2<sup>nd</sup> Defendant/Respondent.

Court Assistant: Caroline Nafuna

**E. K. WABWOTO**

**JUDGE**



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