



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. E 064 OF 2021

VULPINE INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

POSTONE LIMITED.....1ST DEFENDANT

GEORGE MUNENE.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 16th June, 2021 brought pursuant to Order 40 Rule 1, 2, 3 & 4 of the Civil Procedure Rules; Sections 1A, 1B & 3A of the Civil Procedure Act and Articles 40 & 159 (2) of the Constitution. The Plaintiff seeks the following orders:

a) Spent.

b) That pending the hearing and determination of this application, this Honourable Court be pleased issue an order of injunction restraining the 1st and 2nd Defendants whether by themselves or through their agents, workers, servants or employees from trespassing, entering into, taking possession, excavating, mining, destroying or in any other manner interfering with the quiet and peaceful possession of the Plaintiff's property known as Land Reference Number 15050/16.

c) That pending the hearing and determination of this application and main suit herein, an order of eviction from the suit property known as Land Reference Number 15050/16 be issued against the Defendants, their agents, servants, workers and/or employees.

d) That the Officer Commanding Police Station (OCS) Athi River Police Station be ordered to effect the Court Order to ensure peaceful compliance of any orders that may be issued by the Court.

e) That pending the hearing and determination of this suit, this Honourable Court be pleased issue an order of injunction restraining the 1st and 2nd Defendants whether by themselves or through their agents, workers, servants or employees from trespassing, entering into, taking possession, excavating, mining, destroying or in any other manner interfering with the quiet and peaceful possession of the Plaintiff's property known as Land Reference Number 15050/16.

f) That the costs of this application be provided for.

The application is premised on the grounds on the face of it and the supporting affidavit of BHUPINDER SINGH DOGRA, a director of the Plaintiff company where he deposes that the Plaintiff is the registered proprietor of land parcel number 15050/16 (Grant IR No. 55465) hereinafter referred to as the 'suit property', and holds a Certificate of Title to that effect. He claims that

on 15th June, 2021, he was informed by one Mutua, an agent of the Plaintiff that there was excavation and mining of stones on the suit property which was being done without the Plaintiff's consent. Further, Mutua informed him that the said mining was authorized by the 2nd Defendant and was being undertaken by the 1st Defendant. He avers that the Defendants have trespassed on the suit property. He contends that the suit property has been rendered derelict and has therefore lost use as a result of the actions by the Defendants. Further, the Defendants' actions have denied the Plaintiff the use of its property thereby occasioning it loss and damage. He reiterates that there is need for the court to issue an eviction order against the Defendants, agents, servants, workers or employees, from the suit property and the said order to be effected by the OCS Athi River to ensure peaceful compliance.

The application was opposed by the 2nd Defendant who filed a replying affidavit sworn by GEORGE MUNENE where he confirms being a member of Village D Self Help Group in excess of 15 years and that they are settled on land parcel number LR 12610/5 where he has been carrying out some economic activities including quarrying and other mining related activities. He claims he has been carrying out mining activities on the land belonging to Kando Enterprises Limited and not the Plaintiff's land. He avers that owing to the long, peaceful and uninterrupted stay on the suit property, his association together with others filed a suit claiming adverse possession, being Machakos ELC No. 11 of 2021 OS, which is pending determination. He denies being in occupation of the Plaintiff's alleged land and insists they are in occupation of a different portion of land. Further, that they ceased operation on the land which they occupy, from the moment they were served with the court order.

The Plaintiff through BHUPINDER SINGH DOGRA filed a supplementary affidavit correcting paragraph 3 of its supporting affidavit and confirming that it acquired the suit property on 27th July, 1992 and not 27th July, 2021 as earlier stated. He stated that the directors of the 1st Defendant are George Munene and Caroline Beatrice Wangui.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 16th June, 2021 including the respective affidavits and rivaling submissions, the following are the issues for determination:

- **Whether the Plaintiff is entitled to orders of temporary injunction pending the determination of this suit.**
- **Whether the Court should issue eviction orders against the Defendants from the suit land pending determination of this suit.**

The Plaintiff in its submissions reiterated its averments and contended that it has established a prima facie case with high chances of success as it is the owner of the suit property and held a certificate of title dated the 27th July, 1992 to that effect. It further submitted that it would suffer irreparable loss that cannot be compensated by an award of damage and the balance of convenience tilts in its favour. It stated that the Defendants should be evicted from the suit property pending determination of the suit. To support its averments, it relied on the following decisions: **Moses C Muhia Njoroge & 2 others v Jane W. Lesaloi & 5 others [2014] eKLR; Mrao Ltd Vs First American Bank Of Kenya & 2 Others (2003) KLR 125; Florence Njeri Mwangi V Ngatha Miringu (2018) eKLR; Agnes Adhiambo Ojwang V Wycliffe Odhiambo Ojjo, Kisumu HCCC 205 of 2000; Josphat Kuria Gathoni V James Maina Njoroge & 3 others (2019) eKLR and Kenya Breweries Limited & Another V Washington O. Okeyo (2002) eKLR.**

The Defendants in their submissions insist an injunction cannot issue as the Plaintiff has not adduced evidence to confirm they are indeed on the suit property. They further submitted that the Plaintiff has not established a prima facie case to warrant the orders sought and made reference to this Court's Ruling dated the 24th November, 2021. They stated that the Court had already made its finding on the need for viva voce evidence in order to ascertain the location of the Applicant's land and no new evidence has been presented to the contrary. They urged the Court to find that it has become functus officio and down its tools. To support their arguments, they have relied on the following decisions: **Giella Vs Cassman Brown & Co. Ltd (1973) EA PG 338; Brookside Studios & Another V A. A. Kawir Transporters Ltd & 4 Others CA No. 346 of 2013 and Stanley Kanyi Kigotho V Mary Njoki Civil Appeal No. 304 of 2005.**

As to whether the Plaintiff is entitled to orders of temporary injunction pending the determination of this suit, I wish to rely on the principles on injunction established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition

of a prima facie case as stated in the case of **Mrao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125**. The Plaintiff claims to be the owner of the suit property since 1992 and holds a certificate of title to that effect. The Plaintiff contends that the Defendants have trespassed on the suit property and undertaken mining activities thereon, to its detriment, a fact which is denied by the Defendants. The Defendants insist they are not on the suit property but undertake mining activities in a different parcel of land. Further, that they have even filed a suit against the owners of the property wherein they are undertaking the said activities, claiming to have acquired the land through adverse possession.

From the annexures in the respective affidavits, it is evident that the Defendants are actually undertaking activities in a different parcel of land owned by Kando Enterprises Limited and they have actually annexed certificate of official search as well as different photographs showing the activities undertaken thereon. I further note that the Defendants have even sued the said owner of the property vide Machakos ELC OS 11 of 2021 for adverse possession, as evident in the pleadings annexed in the replying affidavit. Insofar as the Plaintiff has produced its Certificate of Title including photographs depicting the mining activities on the land, it is my considered view that this cannot be conclusive proof that it is actually the Defendants undertaking such activities. Further from the pleadings in the impugned suit filed by the Defendants claiming adverse possession, it is clearly evident that their claim is on a totally different parcel of land. In the circumstances while associating myself with the decisions cited above, at this juncture I find that the Plaintiff has not established a prima facie case as against the Defendants, to warrant the orders of injunction sought. Further, in relying on the Case of **Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where it was held that in instances where a party fails to establish the first limb on injunctions, the court need not proceed to decide on the other two limbs and I will hence decline to do so.

On the eviction orders sought, I note I had already dealt with this issue in my Ruling delivered on the 24th day of November, 2021. For the avoidance of doubt I have reproduced an excerpt from the said Ruling hereunder:

'In the current scenario, the Plaintiff seeks a mandatory injunction to evict the Defendants from the suit land. From the evidence presented by the Plaintiff, there is no conclusive proof that the Defendants are interfering with the suit land. Further, the photographs presented only show a quarry and machines. It is my considered view that it would be pertinent for viva voce evidence to be adduced to enable the Court arrive at a proper determination of the dispute at hand. Further, there are no special circumstances to warrant the orders sought. From the facts as presented by the Plaintiff, this is not a clear case to meet the threshold set in granting a mandatory injunction and while relying on the above cited judicial authority, I decline to grant the same.'

In the circumstances, I will decline to deal with this issue.

It is against the foregoing that I find the Notice of Motion application dated the 16th June, 2021 unmerited and will proceed to dismiss it.

Costs will be in the cause

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 26TH DAY OF APRIL, 2022

CHRISTINE OCHIENG

JUDGE



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