



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

ELCA NO. 2 OF 2020

THE COMMITTEE MEMBERS -NGOE BUYING CENTRE.....1<sup>ST</sup> APPELLANT

KIRU TEA FACTORY LIMITED .....2<sup>ND</sup> APPELLANT

VS

EPHANTUS NGETHE GICHUKI.....RESPONDENT

(An appeal from the Ruling of Hon E Muriuki Nyagah, Principal Magistrate

in Muranga CM ELC No 31 of 2019 delivered on the 4/2/2020)

**RULING**

1. The Appellants proffered an appeal on the 18/2/1020 on the following grounds; That the Respondent does not own LOC14/KIRU/1815, the suit land hence no locus standi; the suit land is a road reserve and therefore the Respondent cannot advert a case on behalf of the Government; the learned magistrate misdirected himself to the principles of granting an injunction and in that way failed to hold that the Respondent did not prove a prima facie case, that the injury to be suffered could not be adequately be compensated with costs and that the balance tilted to not granting the injunction.

2. The appeal is opposed by the Respondent.

3. Parties filed written submissions which I have read and considered.

4. The principles on which Courts will grant an injunction are well known. This Court restated those principles in **Giella v. Cassman Brown and Co. Ltd (1973) EA 358**, together with the mode of their application as follows:

“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, and thirdly, if the Court is in doubt, it will decide an application on a balance of convenience”.

5. In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to;

- a. establish a prima facie case,
- b. demonstrate irreparable injury if a temporary injunction is not granted, and
- c. show that the balance of convenience is in his favour”.

6. Prima facie case was defined by the court of appeal in the case of **Mrao Vs First American Bank (K) Limited** as where an Applicant establishes that his legal right has been infringed by a defendant thereby calling for a rebuttal by the latter.

7. On locus, the Appellants submitted that the Respondent is not the owner of the suit land. That it is owned by Jamleck Wachira Gichuki having acquired the same in 1966. That the respondent is not the legal representative of the late Gichuki. The respondent on the other hand has argued that the estate of the late Gichuki is being administered under the Public Trustee and that in a family meeting held on the ... 1.2 acres of the suit land was distributed to the respondent. There is no evidence laid before the court to show that the estate is under the legal administration of the Public Trustee. There is no evidence that the 1.2 acres allegedly distributed to the respondent falls on the are where the

Appellants tea collection centre stands.

8. The parties have relied on the letters from the Ministry of Roads but for various reasons. The Appellant submits that it was permitted to construct the tea collection centre in 2001 vide a letter dated the 27/3/2001. In this letter the Provincial works Engineer allowed the 1<sup>st</sup> Respondent to utilize the road reserve provided that in future should they require the space the 1<sup>st</sup> Appellant would remove it at its own costs. Vide another letter dated the 3/7/2003 the said Ministry of Roads public works and Housing , MURANGA office informed the Permanent Secretary at the headquarters as follows; the 1<sup>st</sup> Appellant was given the permission to utilize the space in 2001; the tea structure including the latrine is 2 meters from the respondents fence which has also encroached on the road reserve; the respondent has not erected any structures or houses or other structures within 30 meters from the tea collection centre; the section has not traffic and therefore cannot be a blackspot as the road as low traffic flow; the respondents assertion that the fence was destroyed is false and the trees cut were on the road reserve but which never interfered with the said fence.

9. It is on record that the said Ministry demanded that the tea collection centre be remove vide its letter of 2003 and warned that failure to do the same would be demolished by the Government.

10. The Respondent has claimed that he is the beneficial owner of 1.2 acres of land out of the suit land. There is no prima facie evidence as to the location of the said land and whether it is the same space being utilized by the 1<sup>st</sup> Appellant.

11. From the foregoing paragraphs it is clear that the issue of whether or not the tea collection center is on the road reserve or the Respondents land is in question. The controversy can best be left to the trial court to determine. Equally the issue of legal representation of the estate of the registered owner of the suit land is referred to the trial court for determination.

12. The court answers the 1<sup>st</sup> limb in the negative, that is to say the 1<sup>st</sup> Appellant has not established a prima facie case with a probability of success.

13. The respondent argued that it will suffer irreparable loss if the tea collection centre is not removed. Given the doubt raised as to the actual position of the tea collection centre vis a vis the suit land and the road reserve coupled with the observation that any injury that the Respondent may suffer if the injunction is not granted is compensable with damages, the court answers this in the negative.

14. It is the view of the court that until the fact of the ownership of the land being utilized by the tea collection centre is established, it is only fair that the status quo be maintained. The balance of convenience tilts in the court granting status quo which means the tea collection centre shall remain on the land pending the hearing and determination of the suit.

15. The appeal is allowed and the orders of 4/2/2020 be set aside and substituted with orders of status quo.

16. Each party to meet their costs of the appeal.

17. Orders accordingly

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 14<sup>TH</sup> DAY OF JANUARY 2021**

**J G KEMEI**

**JUDGE**

Delivered via email presence of:

1<sup>st</sup> & 2<sup>nd</sup> Appellant: Macharia HB Ms Mwai

Respondent Ms Bundi HB Kibunja

Kuiyaki: Court Assistant