



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND COURT CASE NO. 360 OF 2014**

**ALEX MEYA NYAANGA**

**SUING as administrator of**

**NYARANGA NYAKERIGA (Deceased)..... PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF NYAMIRA ..... DEFENDANT**

**RULING**

1. The plaintiff filed the instant suit as the administrator of Nyaanga Nyakeriga (deceased) by a plaint dated 24<sup>th</sup> September 2014 alleging that the defendant's officers had deliberately and forcefully entered and occupied a portion of land parcel number **North Mugirango/Boisanga/3769** registered in the deceased name on diverse dates in June and August 2014 and has commenced constructing a permanent building thereon. The plaintiff seeks a permanent injunction against the defendant.
2. The plaintiff on 12<sup>th</sup> November 2014 filed a Notice of Motion application seeking an interlocutory order of injunction against the defendant/respondent to restrain any trespass and/or any interference with the suit property pending the hearing and determination of the suit. The plaintiff based his application on the grounds that he had a prima facie case with overwhelming prospects of success against the defendant. The plaintiff alleged that the defendant had unlawfully entered onto land parcel **North Mugirango/Boisanga/3769** registered in the name of his deceased father and started using and wasting the same, which acts of the defendant needed to be restrained. The plaintiff avers the entry by the defendant on the suit land was forceful and is in violation of the plaintiff's proprietary rights over the suit property. The plaintiff asserts the defendant has no proprietary rights over the suit property and therefore has no basis to enter onto the land and carry on any activities therein.
3. The defendant entered appearance and filed a statement of defence dated 13<sup>th</sup> October 2014 and denies all the plaintiffs averments in the plaint. The plaintiff further filed grounds of opposition to the plaintiff's application dated 3<sup>rd</sup> February 2015 and contends that the plaintiff has not demonstrated a prima facie case against the defendant to warrant the grant of a mandatory injunction at this interlocutory stage of the proceedings. The defendant further avers that the plaintiff's application does not disclose any ground upon which an injunction may be granted and that at any rate the balance of convenience would be against the grant of an injunction. The defendant additionally argues that the plaintiff has not complied with the provisions of **Government Proceedings Act**, Cap 40 Laws of Kenya in bringing the suit which renders the suit fatally defective.
4. The plaintiff and the defendant filed written submissions to canvass the application. I have

reviewed the plaintiff's application and the affidavit sworn in support together with the grounds of opposition filed by the defendant and the submissions by the parties. I am not persuaded the plaintiff has demonstrated a prima facie case that would warrant the court to grant an interlocutory injunction against the defendant

5. Having regard to the plaintiff's affidavit sworn in support of the application, it is not clear what the basis of the application is. Paragraphs 3, 4, 5 and 6 of the plaintiff's affidavit raises the issue of compensation for compulsory acquisition which raises the question, whether the defendant may have compulsorily acquired any land for any public purposes. From the plaintiff's application it is not clear to what use the defendant has put the land that the plaintiff alleges it has encroached upon. The plaintiff has stated that the defendant was constructing a water tank but the plaintiff has with respect not shown if such water tank was being constructed by the defendant in the plaintiff's parcel of land. A surveyor's report would perhaps have been required to show that the construction was taking place in the plaintiff's parcel of land. I find it difficult to believe that the defendant would out of nowhere mobilize resources and just enter onto the plaintiff's land and commence construction of a water tank therein. No evidence has been tendered to show that there has been interference with the plaintiff's parcel of land. If the issue was to turn out to be one of compulsory acquisition (and there is no evidence to this effect) then damages would undoubtedly be adequate remedy as there are clear provisions of the law for determining what compensation ought to be paid in case of compulsory acquisition.
6. In the case of **Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others [2003] eKLR** a prima facie case was defined thus:-

**“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.”**

On the material presented by the plaintiff, no prima facie case has been demonstrated that the defendant may be called to rebut and it is my finding and holding that the plaintiff has not established a prima facie case. The plaintiff therefore cannot satisfy the threshold for grant of temporary injunction as established in the case of **Giella –vs- Cassman Brown & Company Ltd [1973] E.A 358**.

7. Being satisfied no prima facie case has been established by the plaintiff, I need not consider the other conditions for grant of temporary injunction whether or not damages would be an adequate remedy and/or in whose favour the balance of convenience tilts. The conditions are sequential such that if the first condition whether or not there is a prima facie case with a probability of success fails, then of necessity the application must equally fail.
8. Accordingly, therefore I find the plaintiff's application to be devoid of any merit and I order the same dismissed with costs to the defendant.

**Ruling dated, signed and delivered at Kisii this 29<sup>th</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

..... for the plaintiff

..... for the defendant

**J. M. MUTUNGI**

**JUDGE**