



**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND COURT CASE NO. 254 OF 2014**

**HOSEA NYANDIKA MOSAGWE .....1<sup>ST</sup> PLAINTIFF**

**MILTON NDEGE ONYANCHA ..... 2<sup>ND</sup> PLAINTIFF**

**MARTIN KAPSERI ONSASE .....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

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

**RULING**

1. The plaintiffs filed the present suit vide a plaint dated 1<sup>st</sup> July 2014 and simultaneously with the plaint filed a Notice of Motion dated 27<sup>th</sup> June 2014 expressed to be brought under Order 40 Rule 4 and Order 51 Rule 1 of the **Civil Procedure Rules** and Section 3A of the **Civil Procedure Act** Cap 21 Laws of Kenya. The plaintiffs by the application seek the following orders:-
  - i. **Injunction restraining the defendant and or their servants from forcefully demolishing or by any other way the property known as West Mugirango/Siamani/1912 pending the hearing and determination of this matter.**
  - ii. **An order declaring the acts of the defendant herein unjustified, unreasonable, illegal and unconstitutional.**
  - iii. **Costs of the suit be provided for.**

The plaintiffs have set out grounds in support of the application on the face of the application and in the affidavit sworn in support of the application by the 1<sup>st</sup> plaintiff.

2. The plaintiffs stated they are the registered proprietors of land parcels **West Mugirango/Siamani/1561 and 1912** (hereinafter referred to as “the suit property”). They allege that the defendant has unlawfully and without any colour of right targeted the plaintiffs’ buildings on the suit properties for demolition for construction of a road. The plaintiffs aver that the physical plan for Nyamira County government does not show that there is a road that passes through the suit premises and hence the defendant has no justification to open a road through the plaintiffs’ said properties. The plaintiffs aver that the Nyamira County Government approved their building plans on the suit properties as per annexure marked “003” and further the survey map and the copies of mutations annexed as “004” do not show a road exists through the suit properties. The defendant nonetheless has identified the plaintiffs’ buildings on the suit properties for demolition as the photographs of the buildings which the defendant has marked with an “X” attest. The photographs are exhibited as annexure “002” in the supporting affidavit. The plaintiffs aver that they will suffer substantial and irreparable damage if their structures are

- demolished by the defendant as threatened and thus the instant application for injunction
3. The defendant in response to the plaintiffs' suit and application filed both a notice of preliminary objection and grounds of opposition dated 16<sup>th</sup> July 2014. The preliminary objection listed the following grounds:-

1. **The suit is fatally defective.**
2. **The suit is a non-starter.**
3. **The suit is an abuse of the court process.**

The defendant did not file any replying affidavit in opposition to the plaintiffs' application but took the following grounds of opposition:

1. The application is not meritorious.
2. The reliefs sought are not tenable in law as sought.
3. No sufficient material/evidence has been produced before court to warrant orders sought.

4. Hon. Justice Okong'o on 29<sup>th</sup> July 2015 directed that the plaintiffs' application dated 27<sup>th</sup> June 2014 be argued by way of written submissions. The plaintiffs filed their submissions on 27<sup>th</sup> August 2015 and the defendant filed their submissions on 15<sup>th</sup> February 2016. I have considered the pleadings, the plaintiffs Notice of Motion together with the supporting affidavit and the annexures thereto, the grounds in opposition by the defendant and the submissions filed by the parties. The issue for determination at this stage of the proceedings is whether the plaintiffs have satisfied the conditions for grant of a temporary injunction as established in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E A 358**. The court in the case established the following conditions that an applicant for a temporary injunction ought to satisfy:-

1. **That the applicant has a prima facie case with a probability of success.**
2. **That the applicant stands to suffer irreparable damage that cannot be compensated in damages unless the injunction is granted.**
3. **That in case of doubt the court may determine the matter by considering the balance of convenience.**

5. In the case of **Mrao Ltd –vs- First American Bank of Kenya and 2 Others [2003] KLR 125** the Court of Appeal considered what constitutes a prima facie case and held:-

**“A prima facie case in a civil application includes but is not confined to a “genuine and arguable”. 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.”**

Applying the principles established in the **Giella –vs- Cassman Brown Case** (Supra) and considering the test of what would constitute a prima facie case as stated in the case of **Mrao Ltd –vs- First American Bank of Kenya & 2 Others** (Supra), I am satisfied the plaintiffs have demonstrated a prima facie case so as to require the defendant to offer an explanation in rebuttal of the plaintiffs assertions. It is not disputed the plaintiffs are the registered owners of the suit properties. A copy of the title for land parcel **West Mugirango/Siamani/1561** has been exhibited and it is in the plaintiffs' names. It is also not disputed that the plaintiffs have permanent structures/buildings on the suit properties which the defendant have identified for demolition. The building plans for the building on land parcel **West Mugirango/ Siamani/1561** were approved by the Town Council of Nyamira on 13<sup>th</sup> November, 2012. The survey plan annexed to the supporting affidavit for **West Mugirango/Siamani Registration Section** duly endorsed by the District Surveyor, Kisii shows land parcels 1561 and 1912 are adjacent to each other and no road runs through them. Each of the plots is served by a separate service road.

6. The defendant through their submissions has averred that the plaintiffs have encroached onto the road reserve. Where is the evidence? The defendant did not depone any affidavit in response to the plaintiffs' affidavit and neither has the defendant substantiated the grounds of opposition filed. Why for instance does the defendant state the application is not meritorious? There is no illustration that it lacks merit. The plaintiffs' averments have not in my view been rebutted and they cannot be rebutted through submissions by counsel in as far the same relate to facts. The court has no evidence that the plaintiffs have encroached onto the road reserve as contended by the defendant in its submissions. Having regard to the documents tendered by the plaintiffs, their assertions can only be refuted through an affidavit in response and none was tendered by the defendant. In the premises, I am persuaded the plaintiffs have demonstrated a prima facie case to entitle them to the grant of a temporary injunction. The plaintiffs would be put to considerable expense if their buildings are demolished by the defendant. Having painstakingly put up the buildings which the evidence shows had been approved by the defendant, I hold the view they could suffer irreparable damage if their buildings are demolished.
7. The prayer seeking a declaration that the acts of the defendant are unjustified, unreasonable, illegal and unconstitutional is in the nature of a final order which would be unavailable at this stage of the proceedings. I decline to grant such an order and the same is rejected.
8. The net result is that I grant an order of injunction in terms of prayer (2) of the Notice of Motion dated 27<sup>th</sup> June 2014 and I award the costs of the application to the plaintiffs.

**Ruling dated, signed and delivered at Kisii this 22<sup>nd</sup> day of April, 2016.**

**J. M MUTUNGI**

**JUDGE**

**In the presence of:**

1<sup>st</sup> plaintiff present in person

N/A for the defendant

**J. M. MUTUNGI**

**JUDGE**