



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
E.L.C. NO 2 OF 2015

MARIAM GACHOKA NJERU.....PLAINTIFF

VERSUS

JOSIAH KARIUKI NGRI.....1st DEFENDANT

CHARLES NJERU NGARI.....2nd DEFENDANT

RULING

INTRODUCTION

Mrs Mariam Gachoka Njeru, the 94 year old grandmother is seeking a temporary injunction to restrain the defendants/respondents who are her grandsons from destroying her mango plants pending the hearing and determination of this suit.

According to the affidavit of service filed in court on 27th January, 2014 only the first defendant/respondent was served with the hearing notice. The second defendant/respondent was not served. Notwithstanding service upon the first defendant/respondent with the hearing notice, he did not attend the hearing of this application, which I had certified urgent on 25th January, 2015. The hearing of the application proceeded in the absence of the 1st defendant/respondent.

The Case for the Plaintiff/Applicant

The applicant filed this application under certificate of urgency seeking a temporary injunction and this is clear from prayer (c) of her notice of motion dated 31st December, 2014. In support of her application, she has attached the supporting affidavit dated 9th January, 2015. According to her, the defendants/respondents are her grandsons who she says are very influential. After finding out that she had left them out of her will in respect of the suit land, they became angry and defiant and then proceeded to cause annoyance and harm to her.

It is her further evidence that on various dates between the months of June, July and August 2014, the two defendants/respondents and their employees or agents invaded the mango plantation of the applicant. While there, they harvested her mango, parked them in lorries and made more than 20 trips ferrying them to unknown places. They also proceeded to cut down the mango trees and ferry them away and sold them as firewood. In addition to the foregoing they also damaged some other crops on the suit

land.

Despite the intervention by members of the public and her children the defendants proceeded to harvest the mangoes and cut the mango plants as I already stated. A report to the local administration police did not bear any fruits, because she says they used their influence and bought their way out.

Finally, she says that this conduct of the defendants/respondents has persisted and this is what forced her to file this application in order to stop the irreparable damage to her crops and which is the source of livelihood.

The Applicable Law

The law that governs the issuance of a temporary orders is contained in Order 40 of the 2010 Civil Procedure Rules. The provisions of that Order have been interpreted and judiciary approved in the case of *Giella v Cassman Brown & Co Ltd (1973) EA 358*. According to that case an applicant for a temporary order has to meet the following criteria:

“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above two requirements, then it will decide the application on the balance of convenience.”

Issues for determination:

In the light of the affidavit evidence and the law, the following are the issues for determination:

1. Whether or not the plaintiff/applicant has met the threshold for the grant of a temporary order.
2. Who should pay for the costs of this suit.

Evaluation of the Evidence and the Law

The affidavit evidence which I have summarized in the foregoing paragraphs clearly shows that the plaintiff/applicant is the registered owner of the suit land. She has detailed how the two defendants/respondents have harvested her mango trees which they have sold elsewhere in 20 lorries. They went further and cut down the mango trees which they sold elsewhere as firewood. This evidence is unopposed. I find it to be credible evidence.

In the circumstances, the plaintiff/respondent has made out a case for the grant of a temporary injunction. Unless it is issued she is likely to suffer irreparable damage that may not easily be compensated by way of damages. A temporary injunction will not issue against the second defendant because he was not served with the notice of hearing.

Verdict and Disposal Order

In the light of the evidence above, I order as follows:

1. The plaintiff/applicant is hereby granted a temporary injunction in terms of prayer (c) of her notice of motion against the 1st defendant/respondent only.
2. A similar order will not be issued against the 2nd defendant/respondent, because he was not served with the hearing notice.
3. Costs of this application will be costs in cause.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this...28th .. day of ...
January..2015**

In the presence of Mr Mogusu Advocate holding brief for Mr Muraguri Advocate.

Court clerk Mr Mutero

Right of appeal under Order 43 Civil Procedure Rules of 2010 explained to the parties.

J.M. BWONWONGA

JUDGE