



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT EMBU
E.L.C. NO 254 OF 2014
PETER MURIUKI MUTOKAA & 35 OTHERS.....PLAINTIFFS
VERSUS
KANG'OROTI KITHAE (in trust for JEREVASIO
NGARI KANG'OROTI AND 89 OTHERS).....DEFENDANTS
RULING

Introduction

The thirty six plaintiffs/applicants have through their counsel filed a notice of motion dated 11th January 2015 seeking the following orders from this court:

1. An order directing that all eighty nine defendants/respondents be served through substituted service by publication of an advertisement either through the Daily Nation or the East African Standard (*sic*) newspapers.
2. A preservative temporary injunction restraining the ninety defendants/respondents either by themselves, their agents or employees from subdividing or in any way interfering with the suit land pending the hearing and final determination of this application.
3. An order to provide for the costs of t his application.

This is an ex-parte application brought under certificate of urgency.

The plaintiffs'/applicants' case:

The applicants have annexed a supporting affidavit in support of their application which is brought under **Order 5 rule 17, Order 49 rule 7(1) (iii), Order 40 Rules 1, 2 and 3 of the 2010 Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya** and all other enabling provisions of the law.

In support of the application, the applicants have stated that it is not practically feasible and cost effective to serve all the defendants personally. The reason advanced for this is that most of the defendants are unknown to the plaintiffs and are scattered all over Embu County.

The second ground in support of the application is that the defendants are now busy trying to subdivide and dispose off the suit land to unsuspecting third parties which will seriously compromise this suit. According to the applicants, they have satisfied the requirements for the grant of a temporary injunction, which they submit that it is only fair and just that it be granted.

The supporting affidavit sworn to by the first plaintiff, Mr Peter Muriuki Mutokaa on behalf of the other plaintiffs/applicants has reiterated the grounds upon which the application is filed.

The Applicable Law

The law that governs this application is found in Order 40 of the 2010 Civil Procedure Rules. The provisions of this order have been judicially approved in the case of ***Giella v Cassman Brown & Co Ltd (1973) EA 358***. According to that case, an application for a temporary injunction has to satisfy the following conditions:

“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 2 requirements, then it will decide the application on the balance of convenience.”

Furthermore, the law that applies is found in ***Order 5 of the 2010 Civil Procedure Rules***. The provisions of this order are in relation to issuance and service of summons upon the concerned parties.

In this regard, it is important to point out that the difficulty of service of summons upon the defendants/respondents has been explained in terms of the affidavit evidence that it is not possible because most of them are unknown to the plaintiffs and they are scattered all over the County of Embu. In the circumstances, the normal process of serving summons under Order 5 may not be practicable.

Issues for Determination:

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

1. Whether or not the applicants have satisfied the requirements for the grant of a temporary injunction.
2. Whether or not the applicants have satisfied the requirements for the grant of an order for substituted service.
3. Who should pay for the costs of this application.

Evaluation of the Affidavit Evidence, Findings and the Law:

In the light of the affidavit evidence and the applicable law, I find that the applicants have satisfied the requirements for the grant of an order to effect service by way of substituted service in either the Daily Nation or the East African Standard newspapers.

Furthermore, they have also satisfied the requirements for the grant of a temporary injunction in accordance with the principles set out in the case of ***Giella v Cassman Brown & Co Ltd, supra***.

Verdict and Disposal Order:

In the light of the foregoing, I hereby make the following orders:

1. An order that service upon the respondents be done by way of substituted service in either the

Daily Nation or the Standard newspapers during working days.

2. The summons to be affixed at the Embu High Court Civil Registry notice board.

3. An *ex parte* temporary injunction is granted to the applicants pending the inter partes hearing within fourteen (14) days.

4. The summons be affixed at offices of the Chief and Assistant Chief of the area where suit land is situate.

5. Costs of the application will be costs in cause.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this.. **26th** day of **FEBRUARY,..2015**.

In the presence of the Mr. Njagi for the plaintiffs/applicants and in the absence of the defendants/respondents.

Court clerk Mr Muriithi

J.M. BWONWONGA

JUDGE