



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 761 of 2012**

**JONSON KYAI NDOO.....PLAINTIFF**

**VERSUS**

**GOOD NEWS CHURCH OF AFRICA.....1<sup>ST</sup> DEFENDANT**

**BERNARD WAMBUA KILONZO.....2<sup>ND</sup> DEFENDANT**

**MUEMA KILONZO.....3<sup>RD</sup> DEFENDANT**

**MUTISO KIUNDI.....4<sup>TH</sup> DEFENDANT**

**RULING**

The Applicant herein who appeared in person, brought this application dated 29/8/2012 under order 40 Rule 1 (a), 1 & 4 (1) of the civil procedure Rules and Section 1(a) 1(b) and 3A of the Civil Procedure Act.

The Applicant herein sought for a temporally injunction pending the hearing and determination of this application to restrain the Defendants, by agents, or servants whether by themselves or otherwise howsoever from entering, constructing and even worshipping or in any other way interfering with all that plot un-surveyed industrial plot – Emali township measuring 2.5 acres.

That OCS Emali Police Station do foresee the service and compliance of the orders issued by the court and costs of the suit be provided for. The application was supported by the annexed affidavit of **Jackson Kyai Ndo**.

The application was first filed at Machakos High Court on 29/8/2012 and interim orders were issued on 29/8/2012 during the High Court Vacation by Justice Makhandia for only 14 days.

On 12/9/2012, when the matter was heard by Justice Makhandia, the Judge declined to extend the interim orders as stated the law did not allow him to extend exparte order of injunction after 14 days.

However the Applicant who acts in person filed an application on 12/9/2012 for *extension of the court order issued on 28/8/2012*. The application was set down for hearing on 18/10/2012 by Justice

Makhandia in Machakos High Court. The Judge directed that since the matter is a land dispute and pursuant to the Practice Directives issued by the **Chief Justice** dated 20/9/2012, the matter was to be transferred to the nearest Environment and Land Court for hearing and determination.

Again on 23/10/2012 Justice Dulu directed that the nearest Land and Environment Court was in Nairobi and he therefore directed the matter to be forwarded to this court.

Vide letter dated 29/10/2012, the Machakos High Court file No. 325/2012 was transferred to High Court in Nairobi and given ELC No. 761/2012. The file was placed before the Duty Judge Ougo, J who directed that application be served to the other parties and interpartes hearing was set for 6/11/2012.

On 6/11/2012 the matter was placed for hearing before Justice Mwilu who directed the application be heard interpartes on 19/11/2012.

On 19/11/2012, this matter was set for hearing before me. The Defendants were absent. However the Plaintiff/Applicant had filed an affidavit of service dated 12/11/2012 on which one *Francis Wambua* a licenced court process server had deponed that he served the application on 10/11/2012 to the 3<sup>rd</sup> Defendant personally and to the wife of 2<sup>nd</sup> Defendant who were pointed to him by one Sammy who was known to the Defendants. After perusal of the affidavit of service dated 12/11/2012, the court was satisfied that the Defendants were properly served and they failed to appear in court. The matter proceeded exparte.

As I had stated at the onset, the Applicant herein appears in person. As I consider the application I will be guided by *Article 159 (2) (a) & d of the Constitution* which provide as follow: -

In exercising judicial authority, the court and tribunals shall be guided by the following principles.

- a) Justice shall be done to all irrespective of status.
- b) Justice shall be administered without undue regard to procedural technicalities.

The Applicant herein has filed an application for temporary injunction as provided by order 40 Rule 1 (a) which states that

***“Where in any suit it is proved that any property in dispute in a suit is in danger of being wasted, damaged or alienated by any party to the suit, and wrongful sold in execution of a decree... the court may by order grant a temporary injunction to restrain such act .....or make such order for the purpose of staying and preventing the wasting, damaging alienating, sale, removal and disposition of the property.”***

The Applicant herein must prove that the suit in dispute is in danger of being ***wasted, damaged or alienated.***

The principles that the court should consider in an application for grant of interlocutory injunction were well set out in the case of ***Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358*** and later re-emphasized in the case of ***East Africa Development Bank vs Hyundai Motors Kenya Ltd in Civil Appeal No. 194/2004.***

The three principles are: -

- a) The Applicant should satisfy the court that he has a *prima facie* case with probability of success.
- b) That Applicant stands to suffer irreparable injury which would not adequately be compensated by an award of damages.
- c) If court in doubt to decide on a balance of convenience the Applicant herein had a duty to satisfy the

above principles.

The question now the court will ask is whether the Application herein has satisfied the said principles?

In his supporting Affidavit dated 29/8/2012, the Applicant averred that he is the owner of the un-surveyed industrial plot situated in Emali Township. That the same was allocated to him on 26/4/1994 vide annexure **JNKI**.

That upon allocation of the same, he accepted the same and paid the requisite charges as per annexure JNK2.

He further averred that the Ministry of Land through annexure JWK3 wrote to Makueni County Council confirming that Applicant is the registered owner of the plot in question and the said council prepared the title documents. Vide JKN4 letter dated 3/10/2011, the Town Clerk of Makueni County Council was informed of the complaint by Permanent Secretary Ministry of Local Government and he was requested to speed up the said registration. It was also evident through annexure JKN5 that one Bernard W. Kilonzo had acknowledged that plaintiff had documents to prove ownership of the plot in question.

The Applicant alleged that on 22/8/2012, the Respondent started to construct a permanent structure on the said land. The Defendants did not appear in court to deny and or confirm that allegation though they were served with the hearing notice as per Return of Service dated 12/11/2012 filed in court on 19/11/2012.

If indeed the Defendants are constructing on the said parcel of land, their action amounts to changing the **status quo** and thus the suit is in danger of being wasted or damaged as stated in order 40 rule 1 (a).

The Applicant has attached several annexures to his application of special interest is the letter of allotment JNKI and receipts for payment of the requisite charges, JKN2.

The applicant has demonstrated that he has **an interest** in the suit property and thus he has satisfied the court that he has a *prima-facie case* with probability of success.

Applicant has averred that the Defendants have commenced construction of a permanent structure on the suit land that will change the *status quo* as the land will no longer be vacant. If the Plaintiff/Applicants succeed in future, the land would have been *wasted* and Applicant will *suffer irreparable damages* which would not be adequately compensated by an award of damages.

The Applicant has therefore satisfied the two principles set out in the case of **Giella Vs. Cassman Brown Co. Ltd (1973) EA 358**.

Though this application was not opposed and given that the application herein has been followed by many other applications by the Applicant in the same suit, the court will decide this application without undue regard to technicalities but just on the **interest of justice** as provided by **Article 159 (2) d** of the constitution 2010.

Having considered the application dated 29/8/2012, the annexed affidavit and the relevant law, the court finds that this application has merit and it should be allowed. I have however noted that in prayer No. 2 the Plaintiff/Applicant had sought for temporary injunction pending the hearing of the application.

As I stated earlier, the applicant is a lay person and appeared in person. I will allow the application on the following terms: -

1. Temporary injunction be issued restraining the Defendants, their agents or servants whether by themselves or otherwise whosoever from entering, constructing, and even worshipping or in any other way interfering with all that plot un-surveyed industrial plot – Emali Township measuring 2.5 acres pending the hearing and determination of this suit.

2. The OCS Email Police Station to foresee the service and compliance of these orders issued by the court.
3. Defendant to meet the cost of the Application.
4. The Plaintiff also to set down the matter for hearing and determination expeditiously to determine the issue of ownership of the suit in dispute.

Dated, signed and delivered this 15<sup>th</sup> day of January, 2013.

**L.N. GACHERU**

**JUDGE**

In the Presence of:

.....for the Applicant

.....for the Defendants

.....Court Clerk