



**REPUBLIC OF KENYA**

**High Court at Bungoma**

**Civil Case 4A of 2012**

**BENDONAT INVESTMENT LTD ..... PLAINTIFF**

**VERSUS.**

**MUNICIPAL COUNCIL OF KIMILILI ..... DEFENDANT**

**RULING**

In an application dated 5<sup>th</sup> may 2012, the applicant sought orders of

(a). That while pending the hearing inter partes, the defendant through its agents and servants restrained through a temporary injunction from entering, trespassing, occupying or damaging in or any other way whatsoever interfering with the plaintiff/applicant use of the land comprised in title no. Kimilili/Kimilili/4571.

(b). that upon inter partes hearing, this court be pleased to grant and or extend the temporary injunction sought for above, until such time that the pending suit would be heard and determined.

(c). costs be in the cause.

The application is supported by grounds on the face of it and on the affidavit of Benson Wafula Khwatenge, the director of the applicant.

Subsequent to and while this application was pending, the applicant filed another application dated 4<sup>th</sup> June 2013 in it, the applicant sought several orders inter alia

(i). Application be certified urgent.

(ii). that while pending hearing and determination of the instant application and the application dated 5.5.2012, the officer in charge of the Kimilili police station do oversee the compliance of the order made on 7.5.12 and further extended on 16.5.12 upto 1.10.12 and when the application shall be heard and determined.

(iii). The defendant, Municipal council of Kimilili be punished for being in contempt of a court order.

(iv). That Mr. Henry Momanyi, the clerk to the defendant, Mr. Benson Wangila, town engineer and Mr. Benson Wafafwa, the enforcement officer be committed to civil jail for a period not more than 6 months for breaching the court order issued on 7.5.2012.

(v). the defendant and its agents be compelled to purge the contempt by re-establishing the uprooted

fence to the satisfaction of the plaintiff and at the defendants expense .

(vi). Costs be provided for.

The same is also based on grounds on the face of it and on the affidavit of Ben Wafula, the applicants director.

Both applications are opposed and the town clerk swore an affidavit dated 9<sup>th</sup> July 2012 in response to both applications.

Benson Wangila and Benson Wefwafwa has also filed a replying affidavit to the contempt proceedings.

I will deal with the applications in order of their presentation to court. I wish to point out that I made out one ruling for two reasons. First, the defendant/respondent has filed a replying affidavit and written submissions in response to both applications. It would be difficult to isolate the issues they have raised. Secondly, the matters in issue are inter related and no prejudice will be suffered by either of the parties.

In respect to the application for injunction (dated 5.5.2012), the applicant must satisfy the principles not settled for granting of injunctions as set out in the case of Giella vs. Cassman brown & Co. Ltd. [1973] E.A. 358.

I/e (a). The applicant must show a prima facie case with a probability of success.

(b). the applicant must show that unless the injunction is granted he/she will suffer irreparable loss/injury.

(c). when the court is in doubt, it will decide the application on a balance of convenience.

And additional principle currently

(d). the issue public interest.

On the issue of prima facie case, the applicant has annexed a title deed and sole

agreement showing he has a case with chances. The respondent has annexed a sale agreement showing they bought this land on 4<sup>th</sup> April 1990. There is a dispute as to ownership. This court finds the applicant has met condition on prima facie case but it cannot be decided only on this principle.

The second principle is loss that cannot be compensated by award of damages. The applicant has alleged and the respondent has confirmed that they pulled down a fence put on his plot. The applicant paid approval of plants fee of Kshs. 19,700/= rates arrears of Kshs. 15,000/= and fencing costs of Kshs. 77,000/= as pleaded in the plaint. It also allege fencing cost that was done on 14<sup>th</sup> May 2012. All these sums are payable by way of compensation. Other than stating that building materials prices are escalating by the day, he has not specified any loss which cannot be compensated by way of damages.

The 2<sup>nd</sup> last aspect, is when the court is in doubt, it will decide on the balance of convenience. The applicant has stated in his pleadings that he wishes to develop the suit land. He has submitted building plans to the respondent for approval. He annexed a receipt to that effect. The respondent allege the applicant obtained this land fraudulently. They claim the land belongs to them and is used for public purposes i.e modern market bus park and open space is being used as an open market and a few kiosks. None of the parties have brought/explained to this court the true position on the ground. No photos were annexed to verify the existence of the kiosks. The validity or otherwise of the title cannot be determined at the application stage. In the absence of proof that the open space is being used as an open market/modern bus park, the balance of convenience tilts in favour of the applicant who currently holds title.

The last aspect of the public interest is taken care of above. Had the defendant/respondent annexed receipts, photographs or approval plans of the developments carried out in this plot, the court would have disregarded the applicants title and declined the injunction. Instead they only mentioned the public use only paragraph 11 and very casually. Therefore there is nothing much the court can do at this stage other than to allow the application and confirm the orders of injunction issued on 7<sup>th</sup> May 2012 pending the hearing and determination of this suit.

I now turn to the contempt of court proceedings. The standard of proof required in contempt proceedings is higher than on a balance of probabilities and lower than for criminal proceedings (beyond reasonable doubt)

The applicant served orders of temporary injunction issued on 7<sup>th</sup> May 2012 upon the defendant's officer on 8<sup>th</sup> May 2012. The defendant has confirmed service. The initial fence was removed on 10<sup>th</sup> April 2012. This fact is admitted by both parties. What is disputed is the second destruction of the fence which according to the applicant was done on 14<sup>th</sup> May 2012. He has annexed an affidavit sworn by Robert Watima who was the fund contracted to put up this 2<sup>nd</sup> fence. At paragraph 7 of that annexure, they finished fencing on 12<sup>th</sup> May 2012 and while watering the posts on 14.5.2012, the defendants engineer and enforcement officer alongside many people pulled down the fence.

The engineer and enforcement officers have sworn affidavits to contest this. The town engineer states that he is not aware of the events of 12<sup>th</sup> May 2012. He avers that he is not the defendants engineer. The same sentiments are expressed by the enforcement officer. In his affidavit, he states that he is parks supervisor with the defendant and not enforcement officer as alleged by the applicant. He admits the fence removal of 10<sup>th</sup> April 2012 but not the one of 14<sup>th</sup> May 2012.

I have read each of the affidavits filed by the parties and documents annexed thereto. I wish to point out a few things it has observed;

- i) The applicant did not annex any receipts for purchases made towards the fencing above on 12.5.2012.
- ii) The applicant or his fundi (Robert Watima) has not annexed any contract signed between them or petty cash vouchers signed to show there were payments made for the work undertaken on 12.5.12.
- iii) The said Robert Watima did not disclose in his affidavit how he knew the names, and ranks of the officers he quoted and how he knew they were staff/employees of the defendant.
- iv) The applicants director does not also lay basis of how he identified the respective officers on 12.5.2012.
- v) The court takes judicial notice of the fact that if the posts were being watered on Monday then the barbed wire/mess had not been mounted as the trend is usually to mount them when the posts are dry. There were no wires as put in paragraph 10 of Robert Watima's affidavit annexed as exhibit in the motion.

From the above observations, it points to doubt cast on the applicants case for citing the respondents for contempt of court. the standard required is high than balance of probabilities. This was the finding in court of appeal Civ. Appl. No. 39 of 1990. Refrigerator & Kitchen Utensils ltd. vs. Gulabchad Popatiel Shah & others. For the reasons given/observed above, I find that the applicant has not satisfied this court in proving the defendants are or their agents are disobeyed the order served on 8.5.2012.

The application dated (4.6.2012) is thus dismissed with costs to the respondent.

**RULING DATED, SIGNED, READ AND DELIVERED** in open court this 18<sup>th</sup> day of MARCH 2013.

**A. OMOLLO**

**JUDGE.**