



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI LAW COURTS)

ENVIRONMENTAL & LAND CASE 363 OF 2013

KENYA RAILWAYS CORPORATION.....PLAINTIFF

VERSUS

1. WILLIAM OGUTU OKOTH.....1ST DEFENDANT

2. JOYCE LWANDE ONEKO.....2ND DEFENDANT

3. HUMAN NEEDS PROJECT.....3RD DEFENDANT

RULING

Coming before me for determination is a Notice of Motion application dated 14/3/13 brought under Order 40 Rules 1 and 2, Order 5 Rule 17 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 of the Civil Procedure Act and all other enabling provisions of the Law. It seeks the following order:-

a) Spent

b) A temporary injunction be issued restraining the Defendants by themselves, agents, servants, employees or otherwise howsoever from encroaching into, occupying, erecting buildings or other structures, alienating or in any way dealing with or interfering with the section of the Kenya-Uganda Railway line and the railway reserve thereto running along the Nairobi Kibera Estate's Olympic Primary and facing the Kibera Gatwekera village between the Calvary Church and the Kibera ODM Office and/or any part of the Kenya-Uganda Railway line and the railway reserve thereto, pending the hearing of this application.

c) This Honourable Court be pleased to direct the Commandant Kenya Railways Police to enforce the orders issued herein.

d) The Summons and all the court papers herein be served by way of substituted service by affixing the same on the temporary wall the Defendants are in the process of erecting on the railway line reserve.

e) An injunction be issued restraining the Defendants by themselves, agents, servants, employees or otherwise howsoever from encroaching into, occupying, erecting buildings or other structures, alienating or in any way dealing with or interfering with the section of the Kenya-Uganda Railway Line and the railway reserve thereto running along the Nairobi's Kibera Estate's Olympic Primary and facing the Kibera Gatwekera village between the Calvary Church and the Kibera ODM Office and/or any part of the Kenya-Uganda Railway line and the railway reserve thereto, pending the hearing and determination of

this suit.

f) An injunction be issued compelling the Defendant to remove any structures put up or developments carried out without the Plaintiff Corporation's express authority in any part of the section of Kenya-Uganda Railway line and the railway reserve thereto running along the Nairobi's Kibera Estate's Olympic Primary and facing the Gatwekera village between the Calvary Church and the Kibera ODM office and/or any part of the Kenya- Uganda Railway line and the railway reserve thereto, pending the hearing and determination of this Suit.

g) Costs of this application.

The application is premised upon the grounds found on the face of the application and the Supporting Affidavit of STANLEY GITARI sworn on 14/3/13 in which he deponed that Kenya Railways Corporation is the sole Government State Corporation in charge of railway transport in Kenya. He further deponed that the Plaintiff Corporation owns and operates various railway lines in Kenya including the Kenya – Uganda Railway line which runs through Nairobi CBD and parts of Kibera Estate in Nairobi.

He further averred that the Defendants had irregularly and unlawfully encroached onto a section of the said Kenya-Uganda Railway Line running along the Nairobi's Kibera Estate's Olympic Primary and facing the Kibera Gatwekera village between Calvary Church and the Kibera ODM office and are about to commence illegal construction thereon on the railway reserve which illegal construction if allowed will greatly jeopardize the Kenya-Uganda railway transport. He further deponed that the said illegal construction is a health risk and may lead to untold damage and loss of life in case a train derails as the railway reserve is mainly a buffer for safety against accidents, fire and also future railway expansion and to safeguard against damage and loss of human lives. He further deponed that railway encroachment has been of great concern leading the Plaintiff Corporation to obtain funds from the World Bank to resettle all slum dwellers occupying the railway reserve to protect the lives of slum dwellers due to the grave risk associated with the illegal occupation of the railway reserve. He swore further that the Plaintiff Corporation has on numerous occasions asked the Defendants not to encroach into the rail reserve and stop their illegal activities but the Defendants refuse to do so which actions are detrimental to the exercise by the Plaintiff Corporation of its Statutory mandate and ensuring the safety and welfare of general members of the public who use rail transport. He further deponed that the Defendant's illegal encroachment is illegal, irregular and unlawful and is designed to impede the Plaintiff Corporation contrary to the provisions of the Constitution, the Kenya Railways Corporation Act, the Government Lands Act and the Survey Act.

The application is unopposed. The Respondents did not file any Replying Affidavit despite being served with the application. I have considered the arguments made by Counsel for the Plaintiff Corporation.

In deciding whether to grant the temporary injunction, I wish to refer to and rely on the precedent set in the case of ***Giella v. Cassman Brown [1973] EA 358*** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of ***Mrao v First American Bank of Kenya and Two Others [2003] KLR 125***, a prima facie case was described as:-

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

Has the Plaintiff/Applicant established a *prima facie* case with a probability of success? The Plaintiff Corporation is a body Corporate capable of acquiring movable and immovable property. Part of its powers is to establish and operate rail transport services which include the Kenya-Uganda Railway, including the railway reserve measuring 30 metres from the centre line of the railway line. The Plaintiff Corporation also established that the Defendants have in actual fact encroached into the railway reserve whereupon they have built a temporary structure. Having established this, this court finds that the Plaintiff Corporation has established a genuine and arguable case and have accordingly established a *prima facie* case with a probability of success.

Has the Plaintiff Corporation shown that it will suffer irreparable injury which would not be adequately compensated by an award of damages? This court finds that this question is answered in the affirmative. The railway reserve cannot be replaced by an award for damages. Further, this court being not in doubt does not need to establish in whose favour the balance of convenience tilts.

In view of the foregoing, this court allows prayer Nos. (c), (e) and (g) of the Application. The court declines to allow prayer No. (f) for the reason that the sought order is permanent in nature which is not appropriate to grant at this stage of the proceedings before the suit proceeds for full trial and final determination .

It is so ordered.

SIGNED AND DELIVERED AT NAIROBI ON THE 17TH DAY OF MAY 2013.

**MARY M. GITUMBI
JUDGE**