



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
ELC NO. 84 OF 2012

JOSEPH MURIUNGI SAMSONAPPLICANT

VERSUS

BERNARD NGENTU.....RESPONDENT

R U L I N G

The application herein was brought to Court by way of a Certificate of Urgency. It is dated 27th November, 2013. When this application was heard ex- parte on 29.11.12, the Court noted that the plaintiff admitted at paragraph 5 of his plaint that the defendant occupied part of the suit land.

As a result of the plaintiff's admission that the defendant occupied part of the suit land, the Court noted that it would not grant prayer 2 as such action would have the effect of evicting the defendant before the application and the suit herein were heard and determined. The court ruled:

1. Matter is certified urgent and heard ex-parte in the first instance.
2. Orders as in prayers 2 and 3 denied.
3. Matter to be transferred to the Chief Magistrate's Court, Maua, which court has pecuniary and geographical jurisdiction to handle this suit.
4. The Deputy Registrar of this court to facilitate the transfer of the case to Maua.
5. Mention before Chief Magistrate on 4th December, 2012.

When this application and the suit were supposed to be mentioned before the

Chief Magistrate, Mr. Kariuki advocate for the Plaintiff, informed the court that the chief Magistrate had informed him that she had no jurisdiction to have the suit transferred to Maua. When this Court issued its order that the suit be transferred to Maua, the Court felt that a lower Court of competent jurisdiction could hear and determine the case.

Nevertheless, Mr. Kariuki impressed upon the Court the Urgency of his application. He also sought leave to amend the application. The court also agreed that the application could be heard by the Environment and Land Court. The original application was duly amended and what is before this Court is the amended application dated 4th December, 2012 seeking orders:

1. **THAT** this Application is certified **URGENT** and the same be heard ex- parte in the first instance.

2. **THAT** an order of injunction be issued to restrain the defendant, his servants, agents, and employees from trespassing on the plaintiff's land Parcel No. NJIA/CIA MWENDWA/3725 and from plucking his miraa trees pending the hearing and final disposal of this application.

3. **THAT** the Chief NJIA CIA MWENDWA Location be authorized to effect the said order of injunction.

4. **THAT** a Penal Clause be inserted on the order to ensure compliance

It is noted that had prayer 2 been granted in the manner it was crafted, there would have been no necessity of having the application heard. Nevertheless, on 5.12.2013 prayer 2 was granted not as prayed but “pending the Inter Partes hearing of this application.”

On 19.12.2012 the Court had the interim order of injunction extended. The applicant also obtained prayer 3 to enable the Chief of the area where the suit land is enforce the Interim Order. He also obtained prayer 4 to have a penal clause inserted in the Interim Order.

Before the application dated 27th November, 2012 as amended by the Notice of Motion dated 4th December, 2012, could be heard, the advocate of the plaintiff/applicant came to Court with another application seeking to commit the defendant to detention for contempt of Court. The application was dated 21st January, 2013. He sought to argue his application but the court advised him to put his house in order first by serving the defendant's advocate and also by serving him personally.

It would seem as if this was done because on 1.2.2013 when the matter was mentioned in Court, Mr. Nyenyire, advocate, holding brief for Mr. Mugambi, for the defendant was in Court. He argued that as the amended Notice of Motion was not supported by a supporting affidavit, it was not properly in court. His argument notwithstanding, he urged the court to allow him to reply to the application dated 21st January, 2013. He also prayed that the 2 applications herein be heard simultaneously and on the same date.

Mr. Charles Kariuki who was holding brief for Mr. Kariuki for the plaintiff informed the Court that the plaintiff wanted both applications to be heard by way of written submissions. The advocate present in Court for the defendant agreed that both applications could be heard simultaneously and by way of written submissions.

The parties filed and exchanged their submissions and on 30.4.2013 the Court fixed 18.6.2013 as the date of the ruling.

Regarding the application dated 27.11.2012 as amended by an application dated 4th December, 2012, the plaintiff/applicant was casual. He did not demonstrate to the Court at all as to why he deserved the orders he sought, including the order of an Interlocutory Injunction following the principles laid down in the Case of **GIELLA VS CASSMAN BROWN**. On this matter I agree with the defendant. Having so found, I will not consider the other authorities and arguments advanced by the defendant/respondent as this will be a superfluous exercise. I will also take the same approach regarding the argument that an injunctive relief cannot be granted where there is no relief in the nature of a permanent injunction prayed for in the plaint.

Regarding the application dated 21.1.2013, I find that the plaintiff's prosecution of his case was veritably weak and casual. An application that seeks to deny a citizen his freedom must be considered a serious matter. Among other requirements, he should be personally served. There is no evidence that he was personally served in this case, even after this Court had so directed.

There are other issues of fact which I do not wish to delve into. As the Court of Appeal held in **MBUTHIA VS JIMBA CREDIT CORPORATION AND ANOTHER [1988] KLR:**

“The correct approach in dealing with an application for an interlocutory injunction is not to decide the issue of facts but

rather to weigh up the relative strengthen of each side's propositions”

I am of the view that this approach should be embraced in all matters germane to interlocutory orders.

In the circumstances, it is ordered:

- 1. That the applicant's application dated 27th Nonmember, 2012 is dismissed with costs to the respondent/defendant.**
- 2. That the application dated 21.1.2013 is dismissed with no order as to costs.**

Delivered and signed in open court at Meru this 18th day of June, 2013 in the presence of:

Mwonjaru Cc

B. G. Kariuki for Plaintiff/Applicant - Absent

Mugambi Mbaabu for Defendant for/Respondent - Absent

P. M. NJOROGE

JUDGE