



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ELC. CASE NO. 469 OF 2013

JOHN AYAWO ONEKO1ST PLAINTIFF
MORRISON NDUNGU2ND PLAINTIFF
JOHN WANJOHI MUNDUIA.....3RD PLAINTIFF
DUNCAN KAMAU KINYUA.....4TH PLAINTIFF
NICHOLAS KINYAUA.....5TH PLAINTIFF
THOMAS OMBARA.....6TH PLAINTIFF

VERSUS

TITUS MATYA KIONDO 1ST DEFENDANT
DOMINIC KAGO NDUAU.....2ND DEFENDANT
DAYKIO PLANTATION LIMITED.....3RD DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 17/4/13 in which seeks the following orders:-

1. Spent.
2. That a temporary injunction do issue against the Defendants his agents and/or servants from evicting and interfering with the Plaintiff's use and occupation of plot No. 8442 (hereinafter referred to as the "Suit Property") pending the hearing and determination of this application.
3. That a temporary injunction do issue against the Defendants from evicting and/or otherwise interfering with the Plaintiff's use and occupation of the Suit Property pending the hearing and determination of this suit.
4. That costs of this application be costs in the cause.

The application is premised upon the grounds appearing on the face of the application and the Supporting

Affidavit of John Oyawo Oneko sworn on 17/4/13 in which he stated that he and other Plaintiffs have been in actual occupation of the Suit Property where they have been extracting building materials for sale for 20 years now and that they have valid licenses to carry out the aforesaid activities. He stated further that the Plaintiff together with their families rely on the aforementioned activities as a source of livelihood. He also indicated that for the stated 20 years, they have carried out the said activities without any interference from the Defendants or any other third party.

He also stated that on or about 14/4/13, the Defendants and/or their agents attempted to evict them from the Suit Property. He also stated that when he and the other Plaintiffs sought to know the nature of the Defendant's claim on the Suit Property, the Defendants did not produce any documents to support their claim. He stated further that unless the orders sought were granted, he together with the other Plaintiffs and their families would suffer irreparable loss and damage, as they solely depend on the proceeds from the sale of the stones extracted from the Suit Property.

The application is unopposed. Despite being served with this application, the Defendants did not file any response or attend court at the hearing of the application.

The issue for determination is whether the Applicants have met the principles to warrant grant of an interlocutory 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.”

Have the applicants established 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”.

Turning to the evidence adduced in this application by way of affidavit, the Applicants have claimed that they possess proprietary rights over the Suit Property which entitle them to remain thereon and to continue extracting stones therefrom for sale to the exclusion of any other person including the Defendants. However, the Applicants have not shown to this court how they came to own the Suit Property. They have not produced any documentary evidence to prove their ownership claims over the Suit Property. They have only stated that they have been in occupation of the Suit Property for 20 years. To this extent therefore, this court finds that the Applicants have not proved their ownership claims over the Suit Property at this stage. Accordingly, I find that the Applicants have failed to show that they have a *prima facie* case with a probability of success.

Having found that one of the conditions for the grant of an interlocutory injunction have not been satisfied, this court sees no need to interrogate whether the remaining two conditions have been met.

In the light of the foregoing, I hereby dismiss this application. Costs shall be in the cause.

SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JULY 2013.

MARY M. GITUMBI

JUDGE