



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NUMBER 604 OF 2011

BILLY FURAHA KAMANGO.....PLAINTIFF

VERSUS

1. MOSES ODHACH.....1ST DEFENDANT

2. THE CHIEF BUILDING INSPECTOR MUNICIPAL COUNCIL OF MOMBASA....2ND DEFENDANT

3. THE MUNICIPAL COUNCIL OF MOMBASA.....3RD DEFENDANT

RULING

1. The application herein was brought under urgency by way of Notice of Motion dated 16th November, 2011 by the Plaintiff. It seeks injunctive relief under Order 40, on the grounds that the 1st Defendant had begun constructing a house on the reserved access to the Plaintiff’s house in Bombolulu Estate. The construction was allegedly encroaching onto the wayleaves to the Plaintiff’s property on which he had built a house over five (5) years ago. The prayer for an urgent hearing was granted but no *ex parte* orders were given. Instead, the Plaintiff was directed to serve his application on the Respondent’s for these *inter partes* hearing. In the meantime, parties unsuccessfully sought to resolve their dispute out of court.

2. The remaining prayer now sought is for an injunction against the 1st Defendant, his servants or agents restraining him from:

“initiating, commissioning and/or continuing with construction on the wayleaves to the Suit Property...and/or dealing in any manner whatsoever and howsoever with the wayleaves to the suit property until the hearing and determination of the suit.”

No orders are sought against the 2nd and 3rd Defendants. The claim against them is that had formally approved the Plaintiff’s construction including the access roads and wayleaves, thereby implicitly guaranteeing the Plaintiff those accesses and rights.

3. The Applicant’s application was supported by an Affidavit sworn by Samuel Kamango Furaha, the Plaintiff’s father. He also filed the verifying affidavit to the Plaintiff on the strength of a Power of Attorney donated by the Plaintiff. Annexed to the supporting Affidavit were a limited power of attorney, a building plan of the Plaintiff’s Apartment block showing the 2nd Defendant’s approval stamps dated 15th

December, 2005, receipts of rent paid to the Plaintiff by his tenants, and photographs showing the construction works for the 1st Defendant's house. These are the same documents produced on the List of Documents annexed to the Plaintiff.

4. The 1st Defendant filed a Replying Affidavit with annexures showing that in 2004, he purchased an '80x50' foot plot within Plot Number 4581/1/MN next to the Plaintiff's plot and that he is paying the owner of Plot Number 458/1/MN a monthly ground rent of Kshs.400/=. He deposes that: after purchasing his plot, he built a house on one part of the plot leaving the other part free; that when the Plaintiff acquired his plot, he found the 1st Defendant already in occupation of his house; that during construction of the Plaintiff's block the 1st Defendant, on request of the Plaintiff, allowed him - the Plaintiff - permission to place building materials and to park vehicles of the Plaintiff's tenants on his plot; that in November, 2011 he began building on the vacant part of his own plot after receiving requisite approvals, and he has spent substantial amounts of money in that regard.

5. The 2nd and 3rd Defendant's also filed grounds of opposition. They argued that no wrong or breach had been demonstrated to have been perpetrated by them, that the application is misconceived, frivolous and bad in law; and that no reasons have been set forth to warrant the court's exercise of its discretion in the Plaintiff's favour.

6. At the hearing, the Applicant essentially recited the grounds and averments in the application and supporting affidavit, pointing out that the 2nd and 3rd Defendant's approval of the Plaintiff's plans upheld their position that the wayleaves were guaranteed. Counsel argued that the part now left as a wayleave is a narrow dangerous path which even emergency services cannot access.

7. On their part, the Respondents argued that the Plaintiff had not satisfied the requirements for grant of an injunction as set out in **Giella vs Cassman Brown and Company Limited 1973 EA Page 358.** Counsel for 1st Respondent pointed out that the 1st Defendant has properly obtained approval to building plans from the 3rd and 4th Defendant which were exhibited in his replying affidavit; and that the Plaintiff had not shown he could not be adequately compensated with damages. Finally, counsel impugned the Supporting Affidavit sworn on behalf of the Plaintiff by the Plaintiff's father, on the ground that the Power of Attorney alleged authorising it was neither witnessed nor registered as required under Section 4 of the Registration of Documents Act. Counsel urged that, on that basis alone, the application was a non-starter for defect, and the suit itself fatally defective. Counsel urged that both the application and suit be struck out.

8 I have carefully considered the parties submissions and documents filed in support of the application and responses thereto. Order 40 Rule 1 under which the application is brought provides as follows:

"1. where in any suit it is proved by affidavit or otherwise –

(a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or

(b)

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

9. In this case, the Applicant is claiming that his property will suffer damage or loss due to encroachment by the 1st Defendant on wayleaves servicing his plot. For Order 40 to avail to the Plaintiff, therefore, he must show that he has a good interest in the suit property which he alleges will suffer damage; that, in this case, there are wayleaves servicing that property; and that such wayleaves have been

encroached upon by the 1st Defendant causing damage to the Plaintiff.

10. What has the Plaintiff demonstrated? From the building plan attached to his affidavit, he has shown that he has put up a residential block on Plot Sub-division 35 Section 1 MN at Bombolulu.

It is not in dispute that his residential block is next to the 1st Defendant's plot which, apparently, is also subdivision or parcel on Plot Number 458/1/MN.

11. The location plans shown on both the Plaintiff's and 1st Defendant's approved plans indicate Plot Number 458/1/MN but neither do they show the subdivisions which each party owns, nor the boundaries, accesses or wayleaves related thereto. In law, a wayleave exists on the basis that there is a *dominant tenement* and a *servient tenement*. These were not identified and shown. Nor, very importantly, were the location plans drawn in a scale large enough to show either access roads or road reserves *vis a vis* the parties' plots, so that these allegations cannot be demonstrated at this stage without further evidence.

Thus, in relation to the **Giella** requirements, I am not satisfied that, from the available information, the Plaintiff has a *prima facie* case with a reasonable chance of success. Further, given the uncontroverted averments of the 1st Defendant that he granted the Plaintiff certain accommodation to use the undeveloped part of his, the 1st Defendant's, property for storing materials and parking vehicles, it seems disputed whether what in fact was an arrangement allowing use, *ingress* and *egress*, amounted in law and in fact to a wayleave. I am not doubtful of that.

12. In addition, the Plaintiff did not make any attempt whatsoever, to show that if he is not granted the injunction sought, no amount of damages could adequately compensate him. This, as stated, is the second limb of the **Giella** principles, to be considered where the first is successful. In this case, though, it is unnecessary to delve into this second limb.

13. I should also point out that as regards the 2nd and 3rd Defendants, no orders were sought by the Plaintiff. The effect of this is that their participation in the application was not necessary, and their costs are therefore not recoverable herein, as there was nothing to defend.

14. The upshot of the foregoing is that, the Plaintiff's application is hereby dismissed, with costs to the 1st Defendant/Respondent.

Orders accordingly.

Dated and delivered this...29th Day of March, 2012

R.M. MWONGO
JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)