



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISII

CIVIL SUIT NO. 305 OF 2010

JAFFAR RAMADHAN.....PLAINTIFF

-VERSUS-

MUNICIPAL COUNCIL OF KISII.....1ST
DEFENDANT

MIYORO PETERSON.....2ND DEFENDANT

RULING

On 27th October, 2010, **Jaffar Ramadhan**, hereinafter “*the plaintiff*” filed the instant suit against the **Municipal Council of Kisii** and **Miyoro Peterson**, hereinafter the “*the 1st and 2nd defendants*” respectively. In the suit, the plaintiff prays for a permanent injunction against the 2nd defendant , General damages for trespass and costs of the suit.

Apparently the suit is informed by the fact that the 1st defendant allocated to the 2nd defendant a purported plot No. 28 at Nyanchwa site and service scheme being a subdivision from plot No. 29 hereinafter “*the suit premises*”. However the plaintiff owns a house in the suit premises having earlier been allocated the same by 1st defendant as well. The 1st defendant went ahead and approved building plans for the 2nd defendant which plan has led to interference with the plaintiff’s house. It was not possible therefore for the commissioner of lands to have allotted the suit premises to two different numbers and if he did so, then one is void. In the meantime the 2nd defendant had wrongfully proceeded to occupy and or trespass upon his suit premises without colour of right and had started construction of a permanent structure thereon, hence the suit.

Contemprenously with the filing of the suit, the plaintiff took out under certificate of urgency a chamber summons application for interim injunction, first, pending the hearing of the application interpartes and subsequent thereto pending the hearing and determination of the suit.

When the application came before me ex-parte on 28th October, 2010, I certified it urgent and granted interim injunction pending the hearing and final determination of the application interpartes. In the premises prayers 1 & 2 of the application are now spent. This ruling therefore is limited only to the 3rd and 4th prayers in the application which seek temporary injunction restraining the defendants from re-entering, trespassing, putting up structures, cutting down trees, interfering with or in any other manner whatsoever dealing with the suit premises pending the hearing and determination of the suit and of course costs of the application.

In support of the application, the plaintiff swore that he had been the sole registered proprietor of the suit premises since 1977. However sometimes on 12th August, 2010 or thereabouts, the defendants without any lawful excuse, colour of right or consent of the plaintiff trespassed onto the same and deliberately put up structures, defaced the plaintiff's building, cut down trees and food crops. The defendants' continued illegal occupation and utilization of the suit premises had denied the plaintiff his only source of shelter and is bound to affect and or alter the character and or appearance of the suit premises which will occasion him irreparable loss and damage. By virtue of being the registered owner of the suit premises he had absolute and exclusive right to possess, occupy and utilize the same. In view of the foregoing the plaintiff felt that he had established a prima facie case with overwhelming chances of success against the defendants. Further the balance of convenience heavily tilted in his favour.

In response to the suit and the application, the 2nd defendant filed a defence as well as a replying affidavit. The defence was along the lines that plot No. 28 Nyanchwa Site and Service Scheme was not a subdivision of plot no. 29; that his building plans were approved lawfully by the 1st defendant, denied that the suit premises belonged to the plaintiff or that the commissioner of lands gave the suit premises, two different numbers. Instead he averred that plot No. 28 belonged to him and was distinct from plot No. 29. He therefore denied wrongful occupation, trespass or interference with the plaintiff's suit premises.

In his replying affidavit, the 2nd defendant reiterated the foregoing. Suffice to add that his plot shared a common boundary with the suit premises. However the two were separate and distinct plots. That with the approval of the relevant Government authorities, he started constructing a house on his plot. In the process however, he realized that part of the plaintiff's house extended beyond the common boundary and into his plot. He approached the plaintiff over the issue and they agreed that he would cut part of the plaintiff's roof that extended into his plot and repair the cut part of the roof to enable him construct some pillars. Later on however the plaintiff reneged on the agreement and caused the arrest of the 2nd defendant's workers. Following his intervention the plaintiff withdrew the complaint and the workers were released by the police. He maintained that all his construction and activities were restricted to his plot No. 28 and had not in any way interfered with the suit premises.

On its part, the 1st defendant filed grounds of opposition to the application. It took the view that the application was frivolous vexatious and misconceived. It was also bad in law and an abuse of the court process. Therefore the application did not lie as against the 1st defendant.

When the application came up for interpartes hearing before me on 17th October, 2010, **Mr. Ochoki, Bosire and Mrs Asati** learned counsels for the plaintiff, 1st and 2nd defendants respectively agreed to canvass the same by way of written submissions. Parties subsequently filed and exchanged the same which I have carefully read and considered alongside cited authorities.

The principles for granting an interlocutory injunction such as sought in the instant application are that:-

- a) *The applicant must show a prima facie case with a probability of success.*
- b) *An interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages.*
- c) *If the court is in doubt, it will decide the application on balance of convenience.*

However a prima facie case in a civil case include 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 explanation or rebuttal thereof from the latter. Finally in granting the injunction, court exercises discretion. An injunction too is an equitable remedy. So that whoever seeks it must come to court of equity with clean hands and must show utmost good faith. See **Mrao Ltd .v. First American Bank of Kenya Ltd (2003) KLR,125.**

Applying all the above considerations to the circumstances of this case, and on the material placed before me, I am satisfied that the plaintiff has been able to establish a prima facie case with a probability of success. It is common ground that both the plaintiff and 2nd defendant have been allotted plot numbers 28 and 29 at Nyanchwa Site and Service Scheme respectively by the 1st defendant. Apparently, the suit premises were allocated to the plaintiff in 1977. However the allotment of plot No. 28 to the 2nd defendant appears to have been much later. It appears to me that the dispute is not about proprietorship of the two plots but the boundary. It is common ground that the 2nd defendant's development of his plot has interfered with and or caused damage to the plaintiff's suit premises. This is clear from the agreement entered into between the parties dated 9th October, 2010 and annexed on the 2nd defendant's replying affidavit. If anything that agreement attests to the 2nd defendant's liability. It is clear from the first four clauses of the agreement that, the 2nd defendant acknowledged blame for what had transpired. He undertook to repair the roof of the plaintiff's building which had been damaged, he was to re design his house in such way that it did not interfere with the plaintiff's house whose wall were not to be demolished, that the pillars that led to the defacing of the plaintiff's house were to be relocated and new iron sheets and fischer board replaced. Finally, it was agreed that the 2nd defendant was to instruct his engineers to improvise the construction so that the roof is not affected, blocked windows to remain intact and allowed space to open freely so as to allow proper ventilation to the plaintiff's house. Finally, if the repairs were not done, the construction was to cease immediately. It is instructive that this was a gentlemen's agreement . However, it appears that the 2nd defendant reneged on the same, hence the suit. From the foregoing, it is quite apparent that the 2nd defendant had indeed damaged the plaintiff's suit premises in the process of putting up his house. The 2nd defendant's construction seems to have extended into the suit premises blocking the plaintiff's view from his house and has made it well nigh impossible for him to open his windows or for free circulation of air into his suit premises. This as correctly submitted by counsel for the plaintiff has caused the applicant irreparable damage which cannot be compensated for by an award of damages. The fact that there is no proper circulation of air into the applicant's house is a health hazard. On the basis of the pleadings before me and the annexures, I have no doubt in my mind therefore that the plaintiff has established a prima facie case with probability of success. As I have stated elsewhere in this ruling a prima facie is not a case which must succeed at the plenary hearing. A prima facie case is the type of case that shows a semblance of a right being infringed and which calls for interrogation. The plaintiff has so far demonstrated that fact.

The 2nd defendant has averred that his activities are restricted within his plot No. 28. However in the light of the report of the surveyor annexed on his further affidavit and the agreement already referred to, his contention cannot be entirely correct.

There is interference with the suit premises arising from the 2nd defendant's activities on his plot. I think that the balance of convenience tilts in favour of the plaintiff. Had the terms of the agreement been carried out, there would have been need for this suit.

In the final analysis, I am satisfied that the plaintiff has established a prima facie case, the damage which will be suffered by the plaintiff in the event that the injunction is denied is not compensatable by an award of damages since the 2nd defendant acts will entail destruction of part of the plaintiff's house, erection of a wall that will block the plaintiff's windows and access to fresh and clean air. Finally, on the aforesaid facts, the balance of convenience heavily tilts in favour of the plaintiff

I therefore allow the application in terms of prayer 3 of the application dated 27th October, 2010. The plaintiff shall have the costs of this application as well.

Ruling dated, signed and delivered at Kisii this 31st March, 2011.

ASIKE-MAKHANDIA

JUDGE