



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 190 OF 2009

ARISTARICHO MOTANYA.....1ST
PLAINTIFF

HARON ONDITI ONCHIRI.....2ND
PLAINTIFF

MARGARET NYANGANYI PHILIP.....3RD
PLAINTIFF

RONALD CHEMITEI.....4TH
PLAINTIFF

ISAAC MORIASI KAOSA.....5TH
PLAINTIFF

HANNAH MUMBI.....6TH
PLAINTIFF

TIMOTHY S. LUGALIA.....7TH
PLAINTIFF

VERSUS

JOSEPH KARIUKI WAITHANJI.....1ST
DEFENDANT

MUNICIPAL COUNCIL OF ELDORET.....2ND
DEFENDANT

RULING

This is an application mainly for an interlocutory injunction pending the hearing and determination of this suit. The application is expressed to be brought under Order XXXIX Rules 1 and 2 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act. The application is brought by the plaintiffs against the defendants. The plaintiffs claim to have purchased various portions of former **LR No. 8500** (hereinafter “**the suit properties**”). They claim that the 1st defendant has erected a new fence on the suit properties thus obstructing their way and should be stopped from further interfering with the suit properties. They also seek an order directing the 1st respondent to restore the boundary features which existed as at 14th September, 2009.

The 1st defendant has opposed the application contending that the dispute is over the creation of public road and the plaintiffs have each refused to cede three metres width being their contribution towards the creation of the said road. He therefore denies the trespass alleged in the application.

The 2nd defendant on the other hand supports the plaintiffs' application on the ground that the 1st defendant has in fact encroached into a road reserve and interferes with the suit properties. In its view it has been wrongly sued.

I have considered the application the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. The conditions for grant of interlocutory injunctions are well settled. In the precedent setting case of **Giella -Vs- Cassman Brown & Company Limited [1973] E. A. 358**, the Court of Appeal stated as follows, regarding temporary injunctions:-

First, an applicant must show a *prima facie* case with a probability of success; Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated in damages and thirdly, if the court is in doubt, it will decide an application on the balance of convenience. It is also elementary that the court is not required at this stage to adjudicate with finality on the facts and the law urged by the parties.

Applying those principles to the matter at hand, I observe that the ownership of the suit properties is really not in dispute. The plaintiff's have deponed that the 1st defendant has severally trespassed on their properties. They are supported by the 2nd defendant that he had indeed, besides interfering with the suit properties, also encroached onto a road reserve. In support of that averment it has exhibited a survey plan of the area.

From the material on record and the submissions of counsel, the plaintiffs have demonstrated a prima facie case with a probability of success at the trial, given the position taken by the 2nd defendant which would normally have custody of the records of the development plans of the area within its jurisdiction.

As the dispute is over land, I am of the view that damages would not adequately compensate the plaintiffs. With regard to the third condition, I have come to the conclusion that the balance of convenience tilts in favour of granting the injunction. I say so, because, a final resolution of the dispute between the parties is not possible without carrying out a survey of the area in dispute and an interim injunction will serve to preserve the area in dispute.

In the result, I allow the application in terms of prayer 3 thereof. The mandatory injunction sought in paragraph 4 is final in nature and is not appropriate at this stage. The parties are at liberty to use the services of a surveyor to determine the becons allegedly removed.

The temporary injunction granted is so granted on the condition that the plaintiffs file separate undertakings as to damages within the next five (5) days from the date hereof.

Costs shall be in the cause.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF NOVEMBER, 2011.

**F. AZANGALALA
JUDGE**

Read in the presence of:-

Mr. Otieno for the Plaintiffs and

Mr. Barasa for the 1st Defendant.

**F. AZANGALALA
JUDGE**

23RD NOVEMBER, 2011