



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC NO. 45 OF 2010

NATIONAL OIL CORPORATION OF KENYA....PLAINTIFF/APPLICANT

VERSUS

STEVEN KAMUNGE DEFENDANT/RESPONDENT

RULING

The Plaintiff is the registered proprietor of all those parcels of land known as title numbers NAIROBI/BLOCK 97/59, 60, 61, 62, 63 and 64 (hereinafter referred to as "the suit properties"). It brought this suit because it alleged that sometimes in January 2010 the Defendant had trespassed on them, erected structures and was in the process of farming them off. It prayed for a permanent injunction, damages for trespass, *mesne* profits, costs and interest.

?The Defendant filed a defence denying it had entered the suit premises, that it had built structures thereon or sought to fence them off.

With the suit was filed an application under **Order 39 rules 1 and 2** of the **Civil Procedure Rules**, **Order 5 rule 17** of the **Civil**

Procedure Rules and sections 1A, 1B and 3A of the Civil Procedure Act for an interlocutory injunction to restrain the Defendant by himself, his agents, representatives, employees or other persons claiming under him from entering on, trespassing, farming, disposing of, alienating, developing, charging, interfering with, transforming, and/or in any other manner dealing with or in the suit properties. The supporting affidavit was sworn by Gladys Kolett who is the Plaintiff's legal officer who stated that about February 2010 the Plaintiff became aware that some people had illegally entered into the suit premises and had commenced construction. It conducted investigations and found it was the Defendant who was the intruder, and yet he had no right or claim to the suit properties. The deponent further stated that the Plaintiff had not been able to ascertain the Defendant's physical address for personal service. This is why service was by way of advertisement in the newspaper. An interim injunction was obtained to await the present *inter parte* application.

In the replying affidavit the defendant reiterated that he had not entered the suit premises, or committed the alleged acts thereon. He took issue with both the verifying and supporting affidavits in so far as the deponent had not disclosed the source of her information.

M/s Mate for the Plaintiff and Mr. A.G.N. Kamau for the Defendant agreed that the application was to be decided on basis of the principles governing the grant of interlocutory injunction as settled by the decision in **Giella –V- Cassman Brown & Co. Ltd (1973) EA 358**. The Applicant must show a *prima facie* case with a probability of success; he has to demonstrate that he might otherwise suffer irreparable injury or loss; and, if the court is in doubt, it will decide the application on the balance of convenience.

The Plaintiff is the owner of the suit properties. The Defendant is not claiming them. The Plaintiff states the Defendant has trespassed on the suit premises, erected structures thereon and is pulling them off. The Defendant has denied all these. From the affidavit sworn by the legal officer of the Plaintiff, it is clear that it was discovered there were structures being developed on the suit properties. The Plaintiff then conducted investigations which allegedly revealed the offender was the Defendant. The affidavit clearly shows it was not the deponent who personally conducted the investigations, and does not say who in the organization conducted the investigations. The affidavit shows the Defendant was before this not known to the organization. It does not say the Defendant's employee or agent was found on the properties. It does not say the Defendant was personally found to be on the premises. It is not known who conducted the investigations to be able to find it was the Defendant. Against that clouded allegation, the Defendant was categorical that he had not entered the suit premises or undertaken any work thereon. Regarding the allegation by the legal officer that the Defendant has trespassed on the suit premises, I find that the Plaintiff has not established a *prima facie* case with a probability of success. It was incumbent upon the Plaintiff to show a *prima facie* basis that it was the owner of the suit properties and that the Defendant had trespassed upon them.

The result is that the Application is dismissed with costs.

DATED AND DELIVERED AT

NAIROBI

THIS 12TH DAY OF OCTOBER 2010

1. O. MUCHELULE

JUDGE