



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA  
AT NAIROBI

MILIMANI LAW COURTS  
Civil Suit 1367 of 2005

JUMA IBRAHIM .....PLAINTIFF/RESPONDENT

VERSUS

KENYA RAILWAYS CORPORATION LTD.....DEFENDANT/APPLICANT

RULING

1. The application before court is the Chamber Summons dated 1/09/2009 brought under Order XXXIX Rule 1(a), Rule 4 and Rule 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya. The Applicant in the application is the Defendant. The Applicant prays for ORDERS:-

1. *THAT a temporary injunction do issue restraining the Respondent, his servants and/or agents from constructing on, wasting, damaging and/or otherwise interfering with the suit property herein namely LR. No. 209/13772 (Grant No. I.R. 80226) pending the hearing and determination of the application herein.*

2. *THAT a temporary injunction do issue restraining the Respondent, his servants and/or agents from constructing on, wasting, damaging and/or otherwise interfering with the suit property herein namely L.R. NO. 209/13772 (Grant No. I.R. 80226) pending the hearing and final determination of the suit herein.*

3. *THAT IN THE ALTERNATIVE the Honourable Court be pleased to discharge, vary or set aside the temporary order of injunction issued on the 19<sup>th</sup> October, 2006.*

4. *THAT costs of this suit be in the cause.*

2. The application is premised on the grounds that:-

(a) *The ownership of the suit property namely LR No. 209/13772 (Grant No. IR 80226) is in dispute between the parties herein.*

(b) *The Respondent herein has commenced construction works at the said suit property*

(c) *The Applicant has a prima facie case with a good probability of success.*

(d) *Unless the injunction is issued the Applicant stands to suffer irreparable damage if the Respondent is not restrained from continuing with the construction on the suit property.*

3. There is also an affidavit in support of the application. The same is sworn by A.K. Maina, the Corporation Secretary of the Applicant Company on 31/08/2009. The deponent says that on 11/06/1984, the suit property was allotted to the Defendant/Applicant through the Commissioner of Lands and that at no given time thereafter has the Defendant/Applicant ever sold or otherwise transferred any part of the suit property to the Plaintiff/Respondent or any other purported previous holder. The deponent also says that any such purported sale of the suit property was done illegally and fraudulently. At paragraphs 5 and 6 of the Supporting Affidavit, the deponent avers that the suit property being LR No. 209/13772 is part of the larger LR No. 209/9534 owned by the Defendant/Applicant herein and that the suit property to which the Plaintiff herein claims title was illegally fraudulently and unlawfully excised from LR 209/9534 being the land owned by the Defendant/Applicant, and that the same was illegally, fraudulently and unlawfully transferred and registered in the name of the Plaintiff. The deponent asks this court to grant an order halting the construction being undertaken by the Plaintiff on the disputed suit property until this suit is heard and determined. The Defendant/Applicant avers that the ongoing construction is not only illegal, but it is also in bad faith and is a blatant disregard of the Defendant's/Applicant's rights to the suit property especially as the disputed property is the access road to the Defendant's parcel of land.

4. Annexed to the Supporting Affidavit is the Letter of Allotment dated 11/10/1984 in respect of LR No. 209/9534 – Nairobi South B, to the Defendant/Applicant. Also annexed to the Supporting Affidavit are copies of photographs (AK 3) showing the nature and extent of the construction being undertaken by the Plaintiff herein.

5. The application is opposed through the Replying Affidavit sworn by **Juma Ibrahim** on 9/10/2009. He avers that he still remains the registered proprietor of the suit property which property he says is protected under Section 23 of the Registration of Titles Act, RTA, Cap 281. The Plaintiff/Respondent also says that there is already an order of injunction against the Defendant, which order the deponent says was issued at ex parte stage by Osiemo J on 11/11/2005 and confirmed by Njagi J on the 19/11/2005. The said order reads as follows:-

*“That an interim injunction be and is hereby granted restraining the Defendant/Respondent, its employees, servants and/or agents or otherwise from trespassing on LR No. 209/13772 (I.R. No.80226) Plainsview Estate, South B, Nairobi and to further restrain them from continuing to damage and waste the Plaintiffs/Applicant's property on LR No.209/13772 (IR No.80226) until the hearing and determination of this application interpartes.*

6. The Plaintiff/Respondent says that the Defendant/Applicant has been guilty of wanton destruction of the suit property since the 29/11/2005, when the Defendant/Applicant allegedly descended upon the suit property and demolished the perimeter wall and that as a result of that demolition, the Defendant's/Applicant's employee by the name James Muriithi was arraigned before the RM's Court at Makadara on a charge of malicious damage in Criminal Case Number 816 of 2006. The Plaintiff avers that the Defendant/Applicant has come to court with unclean hands and suggests that it would be a travesty of justice to grant the Defendant/Applicant the orders sought. The Plaintiff denies that the suit property was excised from the Defendant's larger parcel of land known as LR No. 209/9534. Finally, the Plaintiff avers that the Defendant's prayer for injunction cannot be granted on vacuo and that in any event, the Defendant/Applicant has not satisfied the conditions set out in the **Giella –vs- Cassman Brown & Co. Ltd. case** for the granting of injunctions.

7. The parties' advocates appeared for oral submissions on 22/09/2009. Mr. Charaggu Waigwa of Oraro & Co. Advocates appeared for the Defendant/Applicant while Mr. Githinji Victor & Co. Advocates appeared for the Plaintiff/Respondent. Mr. Charaggu submitted that the Defendant/Applicant has shown that he is the registered owner of the suit property and therefore has a prima facie case with a probability of success. He also reiterated the averments contained in the grounds on the face of the application and the supporting affidavit of A.K. Maina. Mr. Charaggu contended that the suit property which he says was excised out of the

Defendants LR No. 209/9534 is being wasted and that no amount of damages would adequately compensate the Defendant/ Applicant for the loss being occasioned by the Plaintiff's/Acts of wanton destruction.

8. Mr. Githinji on the other hand contended that the circumstances of this case are such that the Defendant/Applicant has not discharged the onus of demonstrating that it has a prima facie case with a probability of success, nor that it is likely to suffer such loss as would not be compensated by payment of damages. Mr. Githinji also contended that the balance of convenience tilts in favour of the Plaintiff/Respondent who has several strong points going for him:-

- (i) *the Plaintiff already has an injunction against the Defendant*
- (ii) *the Plaintiff/respondent is not in contempt of any order of injunction*
- (iii) *the Defendant does not have a suit of its own (or counterclaim) in which it has sought an order of injunction as one of the reliefs*

9. In response, Mr. Charaggu submitted that the Defendant/ Applicant will suffer irreparable damage unless the order sought is granted and further that under Order XXXIX Rule 1(a) the Defendant herein is properly before this court on the instant application.

*Order XXXIX Rule 1 of the Civil Procedure Rules provides*

*“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;*

*(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, renewal or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.”*

10. In support of his contentions, Mr. Githinji cited the well known case of **Giella –vs- Cassman Brown & Co. Ltd.** (above) and **Milimani HCCC No. 1780 of 2000 – Southern Credit Banking Corp Ltd. –vs- Charles Wachira Ngundo**. The **Giella case** sets out the prerequisites to be considered by the court before granting an order of injunction, namely that –

*(a) an Applicant must show that he has a prima facie case with a probability of success*

*(b) an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury*

*(c) when the court is in doubt, it will decide the application on the balance of convenience*

11. In the **Southern Credit Banking Ltd. case**, similar arguments to the ones put forward by counsel for the Applicant in this case were made, namely “that as the Respondent had not pleaded any counterclaim on the Originating Summons and there was no prayer of a permanent injunction in the Originating Summons itself, the Respondent’s prayers [for an injunction] could not be granted as they were not part of the case to be canvassed at the trial.”

12. I have now considered the rival submissions in this matter. My view of the Defendant’s application is that it cannot succeed. First from the Certificate of Title marked as annexure “JI

1", the Plaintiff/Respondent is shown as the registered owner of the suit property, and on the face of that evidence alone, it is unlikely that the Defendant/Applicant's case against the Plaintiff/ Respondent is will succeed. By virtue of the provisions of Section 23(1) of the RTA, the Plaintiff's case seems to be more likely to succeed than the Defendant's. On that basis, the Defendant's prayer for an injunction cannot succeed.

13. The Defendant/Applicant has also asked in the alternative that the temporary order of injunction issued on 19/10/2006 be discharged, varied or set aside. The temporary order of injunction dated 19/10/2006 was granted pending the hearing and determination of the suit. It seems the Plaintiff has been slow in moving the court for a date for the hearing of this suit. I would have allowed the Defendant's alternative prayer were it not for the fact that each party is registered as proprietor of separate and distinct premises. The only point I must make here is that the Plaintiff must endeavour to have this suit heard and determined without any further delay so that the ownership rights in the suit property can be determined for the benefit of all parties.

14. In the result, the Defendant's application dated 1/09/2009 is found wanting in merit. The same is hereby dismissed. Each party shall bear its own costs.

It is so ordered.

Dated and delivered on the 13<sup>th</sup> day of November, 2009.

**R.N. SITATI**

**JUDGE**

Delivered in the presence of:-

Mrs. Waiganjo for Githinji (present) for the Plaintiff/Respondent

Mr. Charaggue (present) for the Defendant/Applicant

Weche – court clerk