



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(Coram: Ojwang, J.)

CIVIL CASE NO. 2908 OF 1987

G. CRITICOS & COMPANY LIMITED.....PLAINTIFF

-VERSUS-

JOHN NJENGA KINUTHIA.....1ST DEFENDANT

NICHOLAS NJENGA KINUTHIA.....2ND DEFENDANT

STEPHEN MARUBU MWANGI.....3RD DEFENDANT

RULING

During the pendency of a long-running suit, the defendants who had on 27th August, 1987 filed a statement of defence and a counterclaim, sought interlocutory relief by way of a Chamber Summons dated and filed on 27th May, 2008. The application relates to the suit land, and specifically seeks orders –

(i) *“that a temporary injunction do issue restraining the plaintiff/respondent and its servants [and] agents or anyone authorised by them from quarrying or mining and removing any plants, soil, murrum, building stones, quarry chips and other materials whatsoever from the premises, or [in] any way wasting, damaging, trespassing upon, altering the status quo, or otherwise injuriously affecting the environment, until the final determination of this partly-heard suit”;*

(ii) *“that the costs of this application be provided for.”*

In the general grounds supporting the application it is stated that – (a) the main suit was last mentioned on 16th April, 2008, when by consent further hearing dates were set down for 16th and 17th July, 2008; (b) on 23rd May, 2008 the plaintiff, by its servants or agents, entered upon the suit premises and caused to be drilled therein at least four test-holes, to a depth of more than one metre each, and these are believed to be for establishing the viability of a building-stone quarry; (c) the plaintiff intends to quarry or mine building-stones, murrum, and soil, and the process threatens to waste, damage and alienate part of the suit premises; (d) the threatened actions of the plaintiff are unauthorized, and likely to have injurious impacts on the environment; (e) the threatened actions are an affront upon the jurisdiction of the Court, and are contemptuous of the process of the Court; (f) the plaintiff’s actions, as they are committed during the pendency of the suit, amount to an attempt to steal a march on the defendants; (g) it is meet and just that the plaintiff be restrained immediately by injunctive orders of the Court.

The evidentiary basis of the application is set out in the affidavit of the 2nd defendant, sworn on 27th May,

2008. The deponent, one of the three administrators of the estate of the original defendant, **James Kinuthia Kinyanjui**, states that on 23rd May, 2008, certain persons who claimed to have been sent by one **Basil Criticos**, entered upon the suit premises, and drilled several holes therein. The said persons, upon being asked the reason for their entry upon the suit land, answered that “they were drilling the holes to test if the site was viable for mining and quarrying of building-stones and other materials.” The deponent visited the suit land on 25th May, 2008, and saw at least four holes drilled into the ground, each being at least one metre deep. He depones that part of the suit premises where the holes have been drilled, has been in the defendants’ possession. The deponent believes that the plaintiff intends to mine, or quarry for building-stones, murram and soil; he believes that the plaintiff has not sought or obtained an environmental-impact assessment licence for the intended activities on the suit land. The deponent further believes that the plaintiff, in attempting to enter and work the suit premises during the pendency of suit, is trying to alter the *status quo* in disregard of the due process of the Court. The deponent believes that the plaintiff is trying to steal a march on the defendant, and that such an attempt should be brought to a halt.

Basil Criticos, a director of the plaintiff company, swore a replying affidavit on 12th June, 2008, deponing *inter alia*, that the plaintiff “is in exclusive possession of the suit land contrary to the defendants’ allegation that they possess part of it.” The deponent stated that the plaintiff “has never parted with the suit premises and/or portions of it to the defendants as alleged.” He deponed, controversially on a question of law rather than fact: “the plaintiff company being in exclusive possession of the suit land has every right to improve, develop and earn a living from it and cannot be enjoined.”

The deponent made averments on a historical incident of 1991, when the defendant “entered a portion of the suit land and started quarrying for stones in complete regard of the present suit”; and in 1996, “orders were duly granted by the Court”; and from the fact that injunctive orders were thus issued against the defendant’s activities, the deponent gives the impression that the plaintiff, for its part, holds a better right to exploit the suit land – another controversial statement which lies several removes from the plane of fact. The averment is still more extreme when it contends that “the plaintiff has unlimited access to the entire suit land ...and has been protecting it from acts of waste committed by the defendant’s agents and therefore the defendant cannot be heard at this late stage to purport to champion environmental issues.” The deponent then goes on to deny the factual statement in the supporting affidavit; he says: “there is no evidence to support the alleged quarrying and/or mining of stone.”

On 7th July, 2008, learned counsel **Mr. Githuka** for the defendants/applicants, and **Mr. Chebii** for the plaintiff/respondent appeared before me, to canvass their respective positions in relation to the application.

Presenting the applicant’s case, **Mr. Githuka** noted that whereas the suit began in 1987, and was now drawing to a close, the plaintiff’s unilateral activities on the suit premises had the character of being pre-emptive of any eventual outcome, and this was potentially injurious to the defendants, as they could end up receiving property that is already gravely undermined by the plaintiff’s recent activities. Counsel urged that the fate of the suit land was now a question lying within the jurisdiction of the Court, and there was no reason for the plaintiff to move into the same at this stage.

Mr. Githuka illuminated an obvious defect in the replying affidavit of **Basil Criticos**: the claim that his company (plaintiff) was always in possession of the suit land, and so was doing nothing out of the ordinary by exploiting the same. **Mr. Githuka** invoked Order 39 of the Civil Procedure Rules, as a basis for seeking this Court’s injunctive orders, for the preservation of the suit property until the main cause had been fully determined.

Learned counsel relied on the principle set out in the Court of Appeal decision in **Giella v. Cassman Brown & Co. Ltd.** [1973] E.A. 358, and urged that the defendants had a good defence in the main suit, accompanied by a counterclaim – and so the defendants’ position represented a *prima facie* case with a probability of success – a fact to be considered in regard to their prayer for injunctive relief. This dictated that the *status quo* be maintained, until the main cause was disposed of. *Status quo* in that regard, by the authority of the Court of Appeal decision in **Yego v. Tuiya & Another** [1986] KLR 726, meant *status quo ante*, i.e. the prevailing state of affairs before the objectionable scenario was put in place (see p.728; and

also, *Shariff Abdi Hassan v. Nadhif Jama Adan*, Civil Appeal No. 121 of 2005).

Mr. Githuka urged that the plaintiff be not allowed to sustain the situation on the suit land at the stage where they had taken it even as they ignored the jurisdiction of this Court. He submitted that damage had already been caused during the pendency of the suit, and in relation to such damage, the plaintiff should be required to give an undertaking of payment.

Learned counsel also submitted that the costs of the instant application had been necessitated by the plaintiff/respondent who, consequently, should be mulcted in costs.

Learned counsel **Mr. Chebii**, relied on the said replying affidavit by **Basil Criticos**. He maintained that there existed no evidence “that the plaintiff has done anything on the suit land to warrant the application.”

There was, however, a discrepancy between counsel’s position and his client’s. Whereas **Basil Criticos** deponed that he had complete possessory rights over the suit land, counsel said: “The plaintiff controls part of the suit land...that is in the evidence.” Counsel contended that the defendants’ application was “unmeritorious”, and should be dismissed with costs.

To the submissions for the respondent, learned counsel **Mr. Githuka** thus responded:

“**[Basil Criticos]** says the plaintiff is in exclusive possession of the suit land. He says the plaintiff has every right to work the land. He does not deny the plaintiff is mining the suit land, or has the intent to mine.”

I have carefully considered the content of the defendant’s application; of the supporting affidavit; of the replying affidavit; and of the submissions of counsel. The detailed aspects of the scenario described in the application proceedings, will certainly emerge from evidence in the main cause, and from a careful analysis thereof. But there are, at this stage, interim scenarios of fact which are adequate, in the determination of an interlocutory application such as the one in hand. The prima facie fact-situation may be described as follows:

- 1. The suit land is the subject of a protracted suit which may come to a conclusion in the near future.**
- 2. The said suit is founded upon a plaint and a defence, in which the plaintiff and the defendants respectively, had laid certain serious claims.**
- 3. It cannot be doubted that the defendant does have a serious defence, to which is annexed a counterclaim, against the plaintiff.**
- 4. Just as the plaintiff asserts possessory claims in some part of the suit land, so does the defendant, in respect of another part.**
- 5. A *lis* has been placed before this Court, which, therefore, currently, is the sole organ with jurisdiction to resolve questions of rights and wrongs, in respect of the suit land.**
- 6. If either partly were to seek to make a change to the *status quo* on the suit land, without the orders of the High Court, such unilateral action would be unauthorised and unlawful, and would be contemptuous of the authority of the Court.**
- 7. On the facts, the defendant has presented a credible factual account, whereas the plaintiff has been merely dismissive, and has not addressed the well-founded fears raised by the defendant.**
- 8. There is no reason to doubt the defendants’ representation that the part of the suit land where the offending holes have been drilled, has been in the possession of the defendants.**

9. There is no factual dimension to the deposition in the replying affidavit, that the entire suit land “is in [the] exclusive possession” of the plaintiff.

10. It is clear that the plaintiff’s deponent in the replying affidavit, who should have addressed only points of fact raised by the applicants, devoted much of his deposition to controversial arguments touching on unresolved questions of law.

The foregoing scenario of facts would show that the defendant has a *prima facie* case for filing the instant application. The respondent clearly fails to recognise that the Court’s order for maintenance of the *status quo*, which was made against the defendant in 1996, must apply to *both* parties. Mischief on the part of the plaintiff is evident, insofar as it seeks to pre-empt the continued hearing and determination of the main cause. Such a mischief perilously borders on a contempt of the jurisdiction of this Court. Such action as the respondent may have already effected on the suit land, being the reason for the instant application, is *unlawful* and must, where possible, be *undone*; and this entails the propriety of orders requiring undertakings to pay damages for such wrongs as may already have been committed in defiance of the Court’s jurisdiction.

The authorities called in aid by the applicants, *Giella v. Cassman Brown & Co. Ltd.* [1973] E.A. 358; *Shariff Abdi Hassan N. Nadhif Jama Adan*, Civil Appeal No. 121 of 2005, and *Yego v. Tuiya & Another* [1986] KLR 726, carry the pertinent principles of injunctive relief, which ought to be held to govern the relationship between the parties, in relation to the suit land.

This Court, therefore, *allows* the defendants’ application by Chamber Summons dated 27th May, 2008 and specifically orders as follows:

1. The suit premises is subject to the pending litigation, under the jurisdiction of the High Court, and no party may engage in any activity that undermines the said jurisdiction.

2. Consequently, the plaintiff must restore the status quo ante, and abide by the terms of these orders.

3. In the event the plaintiff has unilaterally caused damage to the suit premises that is not restorable in the short-to-medium term, the plaintiff shall undertake to pay commensurate damages to the defendant if the main cause should turn in favour of the defendant. The amount thus payable in damages shall be agreed upon between the parties, within 40 days of the date hereof, failing which the defendant shall apply to the Court for a determination of the amount, and so long as the main cause shall remain pending.

4. A temporary injunction is hereby ordered, restraining the plaintiff/respondent and its servants and agents, or any person authorised by the plaintiff/respondent, from quarrying or mining on the suit premises, or removing any plants, soil, murrum, building stones, quarry-chips or any other materials whatsoever from the suit premises, or wasting, trespassing upon, or altering the status quo of the suit premises, or otherwise injuriously affecting the environment of the same, until final determination of the suit.

5. The plaintiff/respondent shall pay the costs of the instant application in any event.

SIGNED and DATED at Nairobi this 11th day of July, 2008.

J.B. OJWANG

JUDGE

DELIVERED at Nairobi this 16th day of July, 2008.

M. WARSAME

JUDGE

Coram: Warsame, J.

Court Clerk: Huka

For the Defendant/Applicant: Mr. Githuka

For the Plaintiff/Respondent: Mr. Chebii