



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 136 of 2006

AL HAD MOHAMED MOHAMED HATIMY PLAINTIFF

- Versus -

KALIDAS KANJI (A) LIMITED DEFENDANT

Coram: Before Hon. Justice L. Njagi

Court clerk – Kinyua

Mr. Mwakisha for Plaintiff/Applicant

Mr. Jiwaji for Respondent

R U L I N G

The applicant seeks orders that this court do restrain the defendant by itself, agents, servants, or otherwise howsoever from trespassing upon, collecting rentals on or in any other way howsoever interfering with the plaintiff's rights of ownership over subdivision No. 8826 (Original 143/2 Sec.I MN) until this suit is heard and determined, and that there be an order for costs. The application is made by a chamber summons dated 23rd June, 2006, and taken out under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules, and sections 3A and 63(e) of the Civil Procedure Act. It is supported by the annexed affidavit of MOHYDEAN MOHAMED MOHAMED HATIMY sworn on 23rd June, 2006 and is premised on the grounds that:-

- 1. The defendant has wantonly and without lawful cause continually entered upon and/or trespassed onto the plaintiff's property in total disregard of the plaintiff's rights of ownership**
- 2. The defendant's conduct continues to expose the plaintiff to colossal losses and to incite his tenants against him.**
- 3. This court has a duty to stem such illegal acts, if only so as to uphold the law and so vindicate the plaintiff's right.**

The application is opposed vide a replying affidavit sworn by ANILKANT MANEKIAL KALIDAS

KANJI on 26th July, 2006. At the hearing thereof, the applicant was represented by Mr. Mwakisha while the respondent was represented by Mr. Jiwaji.

After hearing and considering the rival submissions of both counsel, I note that the primary subject matter of this suit is some property which has engendered a train of court actions between the parties hereto as well as some interested third parties. At the time of the hearing of this application, there were not less than two matters which were still pending between the parties herein and others. Then comes the present action. Litigation must come to an end, and it is imperative that the current differences brought about by the suit property should be sorted out once and for all. If this is not done timeously, we may soon come to a time when both the interested parties as well as the courts may choke under the volume of litigation arising therefrom.

Having said that, I am constrained to revisit the leading authority on the principles applicable to the grant of injunctions in East Africa, i.e. the case of **GIELLA v. CASMAN BROWN AND COMPANY LTD.** [1973] E.A. 358. In that case, it was held the three principles to be applied are that firstly, the applicant must show a prima facie case with a probability of success; secondly, an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer an irreparable injury which could not adequately be compensated in damages; and thirdly, that if the court is in doubt as to the existence or otherwise of a prima facie case, it should decide the application on a balance of convenience. I am also alive to the fact that at this interlocutory stage, it is not the business of the court to make any definitive findings of fact and law, and particularly on contentious propositions of law.

By a ruling of Wambilyangah J. delivered on 23rd May, 1995 in Mombasa HCCC No. 71(O.S.) of 1988, the court found it expedient to make the following orders:-

“1. THAT Plots numbers subdivisions 1 to 96 in that piece

or parcel of land known as Plot 143/Section 1/Mainland

North be and are hereby given and allocated to the

Defendant KALIDAS KANJI & COMPANY LIMITED.

2. THAT Plots numbers subdivisions 97 to 184 of all that

piece or parcel of land known as Plot No. 143/Section

1/Mainland North be and are hereby given and allocated

to the Plaintiffs SHEIKH ABDULRAHMAN

MOHAMED HATIMY and HAJI MOHAMED SHEIK

MUHIDIN.”

The plaintiff's case is that he is now the successor in title to subdivision No. 8826 of the suit property, by virtue of a Transfer registered on 7th November, 2000. It is from this subdivision that subdivisions 97 to 184 were given and allocated by the court order of 23rd May, 1995, hereinabove referred to. The applicant has attached three copies of receipts in respect of rentals for sub plot No. 178. The receipts are dated 13th October, 2003; 10th March, 2004; and 11th January, 2005. They show that the rentals for those months were collected by the defendant and another. This is clearly contrary to the court order by which sub plot No. 178 was among those allocated to Sheikh Abdulrahman Mohamed Hatimy and Haji Mohamed Sheik Muhidin. There is no evidence before the court that the said order is the subject of an appeal.

For the above reasons, I find that the plaintiff has established a prima facie case with a probability of success, which satisfies the first condition laid down in GIELA'S case. As for the second condition, it is notable that an interlocutory injunction will not normally be granted unless it is shown that the applicant would otherwise suffer irreparable injury which cannot adequately be compensated in damages. The use of the word "normally" leaves it open to the court to grant an interlocutory injunction in a suitable, exceptional situation even though the injury suffered by the applicant can adequately be compensated in damages. The present case is an instance of such an appropriate, exceptional situation. Since the substance of the complaint is that the respondent is improperly collecting rent from the applicant's tenants, and the amount collected or collectable is ascertainable, the applicant's loss is not irreparable as it can adequately be computed and compensated in damages. However, to allow the respondent to continue collecting rents from plots allocated by the court to the applicant is an affront to the court order by which the plots were allocated. In such a situation, it would be appropriate to grant an injunction in order to preserve the sanctity of court orders. Each case must, therefore, be considered and decided having regard to all its peculiar facts and surrounding circumstances.

In the circumstances of this case, and for the reasons outlined above, I find that the applicant is entitled to the order sought if only to give effect to a valid court order which has not been appealed against, and neither varied, set aside, nor stayed. I accordingly grant prayer 2 of the chamber summons application dated 23rd June, 2006, as prayed. The respondent will also meet the costs of this application.

It is so ordered.

Dated and delivered at Mombasa this 2nd day of February, 2007.

L. NJAGI

JUDGE