



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL CASE 7 OF 2007**

**MUSA KIPKIRUI A. SANG.....PLAINTIFF**

**VERSUS**

**KERICHO WATER AND SANITATION CO.....DEFENDANT**

**RULING**

The plaintiff, Musa Kipkurui A. Sang filed an application under the provisions of Order XXXIX Rule 2 of the Civil Procedure Rules seeking orders of temporary injunction to restrain the defendant, Kericho Water & Sanitation Company, either by itself, its employees, servants and/or agents from trespassing onto, excavating, laying pipes or otherwise carrying out construction activities on the plaintiff's parcel of land known as Kericho Municipality/block 4/311 (*hereinafter referred to as the suit land*) pending the hearing and determination of the suit. The grounds in support of the application are on the face of the application. The summary of the said grounds are that the plaintiff states that the defendant had trespassed into the suit land without any colour of right or without seeking his permission or authority. The plaintiff contended that no wayleave had been granted to the defendant to lay the sewer line on the plaintiff's parcel of land. The plaintiff therefore urged this court to grant him the order of injunction to restrain the defendant from continuing with its illegal activities on his said parcel of land. The plaintiff further prayed for an order of this court to order the defendant to fill up the trench that it has illegally excavated on the suit land. The application is supported by the annexed affidavit of the plaintiff.

The application is opposed. The defendant, through its managing director, John K. Cheruiyot filed a replying affidavit in opposition to the application. In the said replying affidavit, he deponed that the plaintiff had sued the defendant wrongly. He deponed that it was not the defendant which had excavated the suit land but rather it was the Lake Victoria South Water Services Board which had contracted a contractor to undertake the said laying of the sewer line. He deponed that the duties of the defendant only extended to the provision of water services within the municipality of Nakuru and not the development of the infrastructure. He annexed a copy of a document which set out the roles and duties of the Lake Victoria South Water Services Board. He deponed that the application by the plaintiff should be dismissed.

At the hearing of the application, I had the submissions made by Mr. Maondo on behalf of the plaintiff and by Mr. Mutai on behalf of the defendant. I have also carefully read the pleadings filed by the parties in support of their respective positions in this application. The issue for determination by this court is whether the plaintiff has established a case that would enable this court to grant him the order of interlocutory injunction sought. The principles to be considered by this court in deciding whether or not to grant an application for an injunction are well settled. In the landmark case of **Giella Vs. Cassman Brown [1973] EA 358**, the Court of Appeal held that an interlocutory injunction would not normally be granted unless an applicant establishes that he has a prima facie case which has a high likelihood of success. The applicant must also establish that he would suffer irreparable harm which would unlikely be compensated by an award of damages. And finally, in the event that the court would be in doubt, it would decide the application on a balance of convenience.

Certain facts are not in dispute in this application. It is not disputed that the plaintiff is the registered owner of the suit land. He has annexed a copy of the Certificate of Lease in respect of the said parcel of land as annexture No. "MKS 1". The plaintiff has also established that a trench had been dug across his said parcel of land without his authority or permission. The defendant has not established that it has compulsorily acquired the said parcel of land to enable it lay a sewer line on it. The defendant has further

not established that it possesses a right of way i.e a wayleave that would enable it to lay a sewer line on the said parcel of land. The plaintiff has exhibited photographs showing the trench that has been dug across his said parcel of land. The defendant's defence to the plaintiff's complaint is that it is not the one which gave instructions to the contractor to lay the said sewer line. The defendant's managing director deponed that the entire infrastructure within its area of jurisdiction are owned by the Lake Victoria South Water Services Board. The defendant however did not annexe a copy of an agreement between itself and the said Lake Victoria South Water Services Board. This court is therefore unable to reach a finding that the said works on the plaintiff's parcel of land was not undertaken by the defendant. It is the defendant's case that once the construction of the infrastructure has been completed, the same would be handed over to it for its management.

Having carefully considered the said arguments made, it is clear that the defendant is attempting to escape liability for the damage done on the plaintiff's parcel of land by claiming that the said works were ordered by another body other than itself. The plaintiff complained to the defendant before the said construction of the sewer line commenced but the defendant chose not to inform the plaintiff that it was not responsible for the said works. In any event, it evident from the facts of this case as disclosed by affidavit evidence that the defendant is an agent of the Lake Victoria South Water Services Board. As the agent of the said board, it was the duty of the defendant to inform its principal (*if such a relationship indeed exists*) where to lay the sewer line. The defendant failed to do this.

In the circumstances of this application, I do hold that the plaintiff has established a prima facie case that the defendant did trespass on its parcel of land. The said sewer line is being laid for the benefit of the defendant. The plaintiff's application for interlocutory injunction is therefore allowed. The defendant either by itself, its servants or agents is hereby restrained by means of an interlocutory injunction from entering, trespassing into, excavating or laying pipes or otherwise carrying out any construction activities on the plaintiff's parcel of land known as Kericho Municipality/Block 4/311 pending the hearing and determination of this suit. The plaintiff has further established that the defendant had no right to lay the said sewer line on its parcel of land. This court will grant prayer (d) of the application. The defendant is hereby ordered to refill the said trench dug on the plaintiff's parcel of land within 30 days of the delivery of this ruling or in default thereof the plaintiff shall be at liberty to fill up the said trench at the expense of the defendant. The plaintiff shall have the costs of the application.

**DATED at Kericho this 22<sup>nd</sup> day of March, 2007**

**L. KIMARU**

**JUDGE**