



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT 15 OF 2005

ALI MAHMOUD JUMA PLAINTIFF

- Versus -

ZUBEDA ATHMAN RICHI DEFENDANT

Coram: Before Hon. Justice L. Njagi

Court clerk - Ibrahim

Mr. Mwakireti for Plaintiff/Applicant

Mr. Lijoode h/b for Gikandi for

Defendant/Respondent

RULING

This application is made by way of a Chamber Summons dated 26th January, 2005, and taken out under Order XXXIX rules 1, 2, 3 and 9 of the Civil Procedure Rules, sections 3A and 63 of the Civil Procedure Act, and all enabling provisions of the law. The applicant prays that an injunction be issued restraining the defendant whether by herself or by her servants, agents and or employees from trespassing upon and from erecting and or constructing any structure or building on land reference or land parcels numbers 1513/28 and 1513/26 Takaungu, Kilifi District, or any portion thereof. He also asks that costs of the application be provided for.

The application is premised on the grounds that –

1. The defendant and her agents have without claim of right or authority from the plaintiff entered upon and trespassed upon the plaintiff's land parcels number 1513/28 and 1513/26 situate at Takaungu and commenced erecting and or putting up or constructing structures thereon.
2. The defendant's entry and unlawful use and trespass upon the aforesaid parcels of land has deprived the plaintiff of his quiet uninterrupted use and enjoyment of the same.
3. The defendant has evinced an intention to dispossess the aforesaid parcels of land from the plaintiff

by the unlawful entry and trespass thereon.

4. Unless the defendant is prohibited and stopped by way of an injunction from trespassing upon and erecting or constructing structures or buildings upon the plaintiff's aforesaid parcels of land, the defendant shall continue to do so illegally.

The application is supported by the annexed affidavit sworn by the applicant on 27th January, 2005, and opposed by the respondent through her replying affidavit sworn on 16th February, 2005.

At the hearing of the application, Mr. Mwakireti appeared for the applicant and Mr. Gikandi appeared for the respondent. After considering the pleadings and the submissions of both counsel, it seems to me that in order to determine this matter, the best route to take is via GIELLA v. CASSMAN BROWN & CO. LTD. [1973] E.A. 358, in a bid to ascertaining whether the conditions for granting interlocutory injunctions have been satisfied in this matter. In that case, SPRY, V.P. of the then Court of Appeal for East Africa, said at page 360 –

“The conditions for the grant of an interlocutory injunction are now ... well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Regarding the first condition, Mr. Gikandi for the respondent raised an issue concerning the validity of the plaint in this matter. He argued that the plaint in this case does not contain an averment that there is no other suit pending, and that there have been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter. In his submission, this omission was a contravention of order VII rule 1(e) of the Civil Procedure Rules which was mandatory. Consequently, there was no valid plaint, and in the absence of a plaint, there cannot be a prima facie case.

It is true that the plaint in this case does not comply with the dictates of order VII rule 1(e) to the extent that it does not contain the particulars specified therein. If it was the defendant/respondent's case that, indeed, there is another suit pending, or that there have been previous proceedings, in any court between the plaintiff and the defendant, then counsel's concerns would be justified. In the absence of any such other suit pending, or of any previous proceedings between the parties over the same subject matter, I don't think that the defendant is prejudiced by the omission in any way, or that the omission goes to invalidate the plaint. In such circumstances, the best course to take would be to allow the plaintiff to amend the plaint rather than strike out the plaint. It may be instructive to note that whereas order VII rule 1(3) empowers the court to strike out a plaint which does not comply with subrule (2) of order VII rule (1), no similar power is vested in the court in the event of failure to comply with rule 1(1). In the event, I don't think that the omission to include the particulars set out in order VII rule 1(1) (e) renders the plaint invalid.

Coming back to GIELLA v. CASSMAN BROWN & CO. LTD. (supra), the first issue is whether the plaintiff has shown a prima facie case with a probability of success. The plaintiff's case is that he is the registered and beneficial owner of land titles number 1513/28 and 1513/26 situate at Takaungu, and that he has been in use and occupation of the said parcels of land since 1978 or thereabouts and continues to do so to date. To substantiate his claim, he has attached to his application exhibit “AMJ1”. This is a certificate of ownership issued on 13th February, 1976. By that certificate, the Recorder of Titles thereby certified that Bibi wa Mwinyi was the proprietor of an estate in fee in that piece of land situate in the Kilifi District at Takaungu ... and marked L.R. No. 1513/28. It further shows that an instrument of transfer to Ali Mahmoud Juma had been registered against the title on 15th November, 1979. This shows, prima facie, that the plaintiff is the registered proprietor of the suit plot No. 1513/28. For the defendant to swear that the plaintiff is not the registered proprietor of title number 1513/28 is to deny the obvious.

With regard to L.R. No. 1513/26, the plaintiff has also exhibited a copy of a certificate of ownership.

By that certificate, which is also dated 13th February, 1976, the Recorder of Titles certifies that the Administrator of the Estate of Mwana Binti Omar, deceased, is the proprietor of an estate in fee in that piece of land situate in the Kilifi District at Takaungu ... and numbered L.R. No. 1513/26. Although there is nothing on record to show his interest in that property, the plaintiff claims to be the beneficial owner thereof. Mr. Mwakireti, his advocate, shed a little light on the matter when he submitted that the plaintiff is the Administrator of the estate of Mwana Binti Omar.

In her replying affidavit, the defendant/respondent states that it is not true that the plaintiff is the registered and beneficial owner of title numbers 1513/28 and 1513/26 which are the subject matter of the suit. However, unlike the plaintiff who has produced copies of certificates of ownership, she has not produced anything akin to a title. The only documents she has produced are affidavits from deponents who are not parties to this suit; a diagram which depicts her family tree; and a copy of an approved plan dated 25th October, 1965, which she says was for the house on L.R. 1513/28. Whereas that may be so, it is noted that the plan itself does not show that it was for the house on L.R. No. 1513/28, and even if it was, that was in 1965, long before the plot was transferred to the plaintiff in November, 1979. Furthermore, the defendant seems to be given to exaggeration. In paragraph 13 of her affidavit sworn on 16th February, 2005, she says –

“THAT my uncle, Malim Zaja, died last year at the age of 100 years and he had lived on the house on L.R. No. 1513/28 all his life. Annexed hereto and marked ‘ZRS 6’ is a copy of my uncle’s national Identity Card.”

Firstly, if the deponent’s uncle was 100 years old, and he had lived in the house on L.R. No. 1513/28 all his life, it means that he found the house there at his birth, and left it there upon his death. In effect, the house is more than 100 years old. If the photograph of the house which collapsed is anything to go by, that house could not have stood for more than 100 years. Secondly, the uncle died the year before the affidavit was sworn. It was sworn on 16th February, 2005. Therefore, the deponent’s uncle died in 2004. Since she avers that he died at the age of 100 years, this would place his date of birth at 1904. Yet, a copy of his national identity card which is exhibited as “ZRS 6” shows that he was born at Kaloleni in 1918. If he was 100 years old, he could only have been born in 1904; if he was born in 1918, he could only have been 86 years old at his death, but not 100 years. What is the truth?

Learned counsel for the defendant submitted that his client’s contention that they have lived on the premises for more than 40 years had not been contradicted, and that this meant that the plaintiff had never resided on the premises. The plaintiff has pleaded in paragraph 4 of the plaint that he has been in use and occupation of the suit premises since 1978 or thereabout and continues to do so. That contradicts the defendant’s assertion. Furthermore, the defendant’s defence and replying affidavit are at variance. Paragraph 6 of the affidavit states –

“THAT our clan had built homes on parcels of land and the homes have been on that land over 40 years.”

This paragraph does not make us any wiser as to which parcels of land the clan had built homes on. Even assuming that the parcels referred to are the suit plots, in paragraph 5 of the defence the defendant states that she has been in continuous occupation of the suit premises for over 4 years and not 40 years! Which is which? Arising out of these contradictions by the defendant, I am satisfied that the plaintiff has satisfied the first condition for the grant of an interlocutory injunction as laid down in GIELLA’S CASE.

Counsel for the defendant submitted that the plaintiff had not said that damages could not be adequate compensation either in the plaint or in the application, and therefore the second condition in Giella’s Case had not been satisfied. This is not quite correct inasmuch as the plaintiff has averred in paragraph 11 of his supporting affidavit that he has suffered and continues to suffer unquantifiable damage by reason of the defendant’s entry and trespass upon the plaintiff’s parcels of land, which damages cannot atone. It is instructive that the second condition laid down in Giella’s Case is that an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

By the use of the word “normally”, this condition implicitly allows for the granting of an interlocutory injunction even where, in appropriate cases, the injury could adequately be compensated by an award of damages.

In the instant case, since the plaintiff is in possession of the instruments of title, which are prima facie evidence of ownership, it would be disastrous to deny him protection on the ground that the other side can compensate him by an award of damages. Such a move would open up the vistas of forcible invasion of the poor people’s property by those who are able to compensate them by an award of damages. This would be calamitous. In the circumstances of this case, the second condition in Giella’s Case is also satisfied.

If I was in any doubt, I would still find that the balance of convenience tilts in favour of the plaintiff on the basis that he has prima facie evidence of ownership.

For the foregoing reasons, I find that the plaintiff has established that he is entitled to an interlocutory injunction. I accordingly make the following orders –

1. An injunction be and is hereby issued restraining the defendant whether by herself or by her servants, agents and or employees from erecting and constructing any structure or building on land reference or land parcels numbers 1513/28 and 1513/26 Takaungu, Kilifi District, or any portion thereof pending the hearing and determination of this case.
2. The plaintiff will file an undertaking as to damages within 10 days from today.
3. Costs in the cause.

Dated and delivered in Mombasa this 31st day of July, 2007.

L. NJAGI

JUDGE