



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MALINDI**

Civil Suit 59 of 2006

GIO-FO INVESTMENT LIMITEDPLAINTIFF

V E R S U S

MARTINI CHARO MASHA MWANDUKA

KITSAO MASHA

KARISA MASHA

GEORGE MASHA

KAHINDI MASHADEFENDANTS

R U L I N G

This ruling relates to two application which arose as follows and were argued together in order to save judicial time.

The plaintiff brought an application by way of chamber summons dated 6th July 2006 and filed on the same day seeking mainly one substantive order – to restrain the defendants from entering or interfering with the plaintiff’s suit property Chembe/Kibabamshe/405 pending the determination of the suit.

There was also a prayer for police assistance in ensuring compliance as the defendants had become violent and destructive. The orders were granted on temporary basis. While that application was pending *inter partes* hearing, the defendants on their part brought an application on 29th August 2006 seeking to restrain the plaintiff from interfering with the said Chembe Kibabamshe/405 pending the determination of the suit.

It was convenient to hear the two applications together. The plaintiff’s application of 6th July 2006 is premised on the grounds that it is the registered proprietor of Chembe Kibabamshe/405 where it has commenced the construction of a tourist hotel.

That the defendant have, without any colour of right trespassed on the said property and committed wastage. That infact the defendants have caused material damage to the suit property and taken away construction material and have also occasioned physical harm to the directors of the plaintiff and/or its workers.

A replying affidavit was sworn by the 1st defendant on behalf of the rest of the defendants. In that reply

the defendants aver that they are the rightful owners of the suit property by reason that it is ancestral land where they have lived from time immemorial. That the suit property was allocated to their father during demarcation and they have been waiting for a title deed. They have denied threatening the plaintiff's directors and employees.

Finally they have expressed doubt as to the authenticity of the plaintiff's title as the Government had imposed an embargo on land transaction in the area where the suit property is located during the period it is alleged it was transferred.

Those constitute the rival arguments by the parties. In terms of the authority of **Giella v Cassman Brown & Co. Ltd** (1973) EA 358, the court will consider whether the applicant has established a *prima facie* case with a probability of success before interlocutory injunction can issue.

It will also bear in mind that an injunction will not normally issue if it is shown that an award of damages will be sufficient compensation. However, if the court is in doubt as to the existence of a *prima facie* case it will decide the case on a balance of convenience.

In considering whether the plaintiff has established a *prima facie* case with a probability of success the court must exercise caution to avoid making definite finding of either fact or law as doing so would encroach into the province of the trial court. The court at this interlocutory stage is only investigating if the applicant has, by his pleadings, made out a *prima facie* case as defined by the Court of Appeal in the case of **Mrao Ltd v First American Bank Ltd & 2 Others**, (2003) KLR 125 at page 137.

The plaintiff and the defendants in the instant application have laid claim to the ownership of the suit property.

The plaintiff's claim is based on a title deed issued under the Registered Land Act on 30th May 2006.

That registration by dint of Section 27 of the Registered Land Act vested the absolute ownership of the suit land in the plaintiff. The defendants, on the other hand have not shown any registerable interest in the suit property.

Nothing has been annexed to their replying affidavit to suggest that their father had been allocated the land or even when such allocation took place.

For the above reasons I am persuaded that the plaintiff has demonstrated that it has a *prima facie* case with a probability of success at the trial. The plaintiff has deposed that it is in the process of putting up a tourist class hotel at a cost of KShs.80m. If the interference by the defendants are not checked the plaintiff stands to suffer great loss which cannot be adequately compensated in damages. It has been pleaded that the defendants are not capable of compensating the plaintiff should an injunction not issue and the defendants proceed with their wastage and destruction. The averment that they are impecunious has not been controverted.

I conclude on this point that damages will not be adequate compensation. Even though I am not in doubt as to the existence of a *prima facie* case I am of the view that the balance of convenience lies with the plaintiff having shown on a *prima facie* basis that it is the registered proprietor of the suit property.

Turning to the defendant's application dated 16th August 2006 and filed on 29th August 2006, it was argued for the plaintiff that the application is incompetent as it seeks interlocutory injunction without a suit or a counter-claim in which a permanent injunction has been sought.

The application is based on the grounds that the court having issued a restraining order against the defendant not to interfere with or enter into the suit property, the plaintiff similarly ought to be restrained as the ownership of the suit property is still in dispute.

First and foremost the principles in the **Giella** case (supra) will apply. But having found that the plaintiff

has a *prima facie* case with regard to ownership that by implication ousts the defendant's claim of ownership. Should it turn out at the trial that the defendants are entitled to the suit property it is the plaintiff who will lose having put up a tourist hotel on the land. I do not see the defendants' loss which cannot be compensated in damages.

Regarding the competence of the application it is merely academic in view of my above finding. However, Order 39 rule 1 of the Civil Procedure Rules is instructive. It is framed in such a way that it is not necessary to have a suit for permanent injunction in order to seek a temporary injunction. It states;

“ 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; or

(b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in execution of any decree that may be passed against the defendant in the suit,

the court may by an order grant a temporary injunction to restrain such act, or make such order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders” (emphasis supplied)

Under this rule the purpose is to preserve the disputed property. See Mansukhlal Patel v Brian Hume Naylor & 2 Others (C.A No.10 of 200).

Contrast that provision with Rule 2 of Order 39 of the Civil Procedure Rules, under which it is an express requirement that the suit in which a temporary injunction is sought must be one for restraining the defendant from committing a breach of contract or other injury of any kind.

Although the defendants' application is expressed to be brought under rules 1, 2 and 3, it clearly falls under rule 1.

That being so, I find that the application is not incompetent.

The sum total of all these is that pending the hearing of the suit herein the defendants shall be restrained by order of temporary injunction in terms of prayer (b) of the chamber summons dated 6th July 2006. The defendants shall pay costs of this application.

It is further ordered that the defendant's application dated 16th March 2006 is hereby dismissed with costs.

Dated and delivered at Malindi this 13th day of November 2006

W. OUKO

J U D G E