REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Suit 454 of 2005

KEMACO INDUSTRIES LIMITED ……...1ST PLAINTIFF

JOHNSON KIMATHI KIENGO………….. 2ND PLAINTIFF

VERSUS

ABDIRAHIMAN MUHAMED ABDI ……..... DEFENDANT

RULING

On 20.04.05 the plaintiffs filed a chamber summons application under certificate of urgency and his counsel, Mr. M. Kinyanjui appeared before and obtained ex-parte from the Duty Judge (Ransley, J) the temporary restraining order sought vide prayer 2 in the chamber summons which was in the following terms:

> **"A temporary injunction be granted restraining the defendant, whether by himself, his agents and/or servants, from damaging, wasting, encroaching or trespassing onto, constructing thereon, alienating or disposing of or in any other way whatsoever interfering with the plaintiff's parcel of land known as Nairobi L.R. No.209/12690 (Grant No.I.R. 91977) situate in Nairobi, pending hearing and final determination of this application."**

Eventually the application came for inter-partes hearing before me on 23.05.05 whereat the plaintiffs/applicants were represented by learned counsel, Mr. M. Kinyanjui while the defendant/respondent was represented by learned counsel, Mr. S.N. Wachira.

The main prayer for consideration on 23.05.05 was prayer 3 of the chamber summons application seeking a temporary restraining order in similar terms to those in prayer 2, save that the order this time was to last pending hearing and final determination of this suit. The plaintiffs/applicants also prayed that the costs of the application be borne by the defendant/respondent.

The application was supported by the affidavits of Kimani Mathu and Johnson Kimathi Kiengo both sworn on 20.04.05. Kimani Mathu described himself as a director of the 1st plaintiff company while Johnson Kimathi Kiengo said he is the 2nd plaintiff. The essence of both affidavits is that the plaintiffs are the registered owners of the suit land. Paragraph 4 of each affidavit states:

> **"That on 12th April, 2005, the defendant without any colour or right, trespassed into our said parcel of land and demolished the perimeter fence and other structures thereon belonging to us and installed by ourselves, dumped building materials on/around the property and has started to erect illegal structures thereon."**

Annexed to Kimani Mathu's affidavit are photocopies of Grant No. I.R.91977 issued to one Francis

Gitonga of Nairobi for 99 years from 01.02.96 and a photocopy of Deed Plan No.243620, inter alia, showing the suit land, i.e. L.R. No.209/12690. The grant issued under the Registration of Titles Act (Cap.281) bears an entry to the effect that the land was transferred to Kemaco. Industries Ltd (1st plaintiff) and Johnson Kimathi Kiengo (2nd plaintiff) as tenants-incommon in equal shares on 30.12.04.

At the *inter-partes* hearing of the application on 23.05.05, plaintiffs'/applicants' counsel pointed out that his clients had deponed that the defendant had trespassed onto their property, i.e. the suit land, while the defendant had denied doing so vide his affidavit sworn on 09.05.05. Counsel proposed that if the court was in doubt as to what was happening on the ground, the court could make a site visit under prayer 5 of the chamber summons which seeks any other or further relief. He referred to Giella -vs- Cassman Brown & Co. Ltd [1973] E.A. 358 to make the point that the basic principles to guide issuance of injunctions are a *prima facie* case and balance of convenience and that since the defendant lays no claim to the suit land, the said principles have been met and that the temporary injunction sought should be granted pending the hearing and final determination of this suit. He termed as irrelevant the contents of paragraph 7 of the defendant's/respondent's affidavit of 09.05.05 alluding to what the deponent described as discrepancies and anomalies between the Deed Plan annexed to Kimani Mathu's affidavit of 20.04.05 and a Deed Plan produced by the said Kimani Mathu in HCCC No.453 of 2005. Plaintiffs'/applicants' counsel contended that the two Deed Plans (Survey Plans) had to be different as they refer to different properties. Plaintiffs'/applicants' counsel noted that the defendant did not avail the Deed Plan/Survey Plan relating to HCCC No.453 of 2005 alluded to in his affidavit of 09.05.05.

On the other hand defendant's/respondent's counsel described this as a very simple case, leaning in favour of the defendant/respondent. In counsel's view, the defendant's/respondent's case is essentially that he had never trespassed onto the suit land as alleged in paragraph 4 of the affidavits of Kimani Mathu and Johnson Kimathi Kiengo of 20.04.05 and that the plaintiffs/applicants have not laid before this court adequate material to establish the trespass they complain of. Counsel pointed out that nowhere in the plaintiffs'/applicants' pleadings do they state that the defendant is their neighbour at the suit land and noted that the defendant has vide paragraph 8 of his affidavit of 09.05.05 stated that he has been wrongfully and mistakenly sued as he has never been to the site of the suit land.

Regarding the proposed site visit, defendant's/respondent's counsel submitted that if the plaintiffs/applicants want such a visit to take place, they should make a substantive application.

As regards Giella's case (supra), defendant's/respondent's counsel submitted that it is in the defendant's/respondent's favour as the plaintiffs/applicants have not in his view established a *prima facie* case. Defendant's/respondent's counsel urged that the temporary injunction sought should not issue as the plaintiffs/applicants have not shown they would suffer irreparable loss or injury not compensatable with damages, noting that no value has been attached to the perimeter fence said to have been demolished by the defendant/respondent. In defendant's/respondent's counsel's view, if there is doubt in the court's mind as to what is on the ground, the court should decide the application in favour of the defendant/respondent on balance of convenience and that the balance of convenience is in favour of the defendant/respondent. Counsel urged that the application be dismissed with thrown – away costs to the defendant/respondent.

In reply, plaintiffs'/applicants' counsel referred to paragraphs 5 and 6 of the plaint averring that the defendant trespassed onto the suit land, demolished the perimeter fence and other structures and dumped building materials thereon or around the suit land and started erecting illegal structures on the land which in counsel's view clearly establishes loss to the plaintiffs/applicants. On the issue of the proposed site visit, counsel submitted that there is no requirement that he must make a formal or substantive application and that the court had discretion to make the visit on the basis of the oral application he had made. Plaintiffs'/applicants' counsel described the defence as a mere denial and submitted that the fact that the defendant/respondent had not disputed the plaintiffs'/applicants' ownership of the suit land establishes a prima facie case for the balance of convenience to tip the scales in the plaintiffs'/applicants' favour. Counsel reiterated his earlier submissions and prayer for the restraining order sought.

I have given due consideration to the rival submissions of the parties.

The central issue emerging from the pleadings is whether the trespass complained of has been committed and, if so, whether the defendant/respondent and/or his agents has or have committed the subject acts of trespass. The defendant/respondent denies the trespass pleaded by the plaintiffs/applicants and avers that he has been wrongfully and mistakenly sued by the plaintiffs/applicants as he has never been to the subject site. He lays no claim to the suit land and there is no claim that he is a neighbour there. As I understand it, the defendant/respondent also denies sending any agent to commit trespass on the suit land. This is a very strange case indeed.

On the affidavit evidence availed to court at this interlocutory stage, it seems unlikely that the plaintiffs/applicants would complain about non-existent acts of trespass or interference with the suit land. There is, however, doubt in my mind whether the defendant/respondent is the person responsible for the acts of trespass complained of. It may well be that the defendant/respondent has been mistaken for somebody else. In view of the existing doubt about the identity of the alleged trespasser, I hold that no *prima facie* case has at this interlocutory stage been established against the defendant/respondent and I accordingly refuse to grant the restraining order sought vide prayer 3 in the chamber summons application of 20.04.05. Costs shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 25th day of July, 2005.

B.P. KUBO

JUDGE