



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION –MILIMANI**

**CIVIL CASE 646 OF 2003**

**THOMAS NYANGERI MOGAKA ..... PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD ..... 1ST DEFENDANT**

**JOSEPH MUNGAI GIKONYO**

**t/a GARAM INVESTMENTS ..... 2ND DEFENDANT**

**MT. ELGON ORCHARDS LIMITED ..... 3RD DEFENDANT**

**RULING**

On 14th October 2003 the Plaintiff instituted suit against the three (3) Defendants for inter alia a mandatory injunction directed at the 3rd Defendant to remove itself and all its servants and/or agents together with their materials and equipment if any from L.R. NO.7993 Trans Nzoia District and allow the Plaintiff free access thereto.

On 20th November, 2003 the Plaintiff moved the Court for a similar order among others by way of Chamber Summons. The Chamber Summons finally came up for hearing before Hon. Waweru J. on 16th and 19th November, 2004. The Learned Judge delivered his ruling on 18th February, 2005 declining to grant a temporary mandatory injunction. He delivered himself as follows:-

***“There is a dispute as to whether the Plaintiff was in possession or not at the time of sale. There is also a dispute as to whether the 3rd Defendant has taken possession of the entire parcel of land or just a portion of it and in its manner of taking possession ..... I hold that there are no special circumstances as would warrant the issuance of a temporary mandatory injunction as sought.”***

Three months down the line the 3rd Defendant moved the Court under a certificate of urgency for orders inter alia that:-

***(a) The Plaintiff be restrained by way of an injunction from further pulling down, demolishing or breaking the barrier erected by the 3rd Defendant or otherwise committing any acts of trespass on L.R. No.7993 pending the hearing and determination of this application or in any way interfering with the quiet enjoyment of the suit land by the 3rd Defendants until the hearing and determination of this application inter partes.***

***(b) The Plaintiff be restrained by way of an injunction from entering, trying to gain entry into trespassing onto or in any way interfering with the 3rd Defendant's possession of L.R. No.2993 pending the hearing and determination of this application inter partes.***

***(c) The Plaintiff be restrained by way of an injunction from further pulling down demolishing or breaking the barrier erected by the 3rd Defendant or otherwise committing any acts of trespass on L.R. No.7993 pending the hearing and determination of this suit or in other way interfering with the quiet enjoyment of the suit land by the 3rd Defendant until the hearing and determination of this suit.***

***(d) The Plaintiff be restrained by way of an injunction from entering, trying to gain entry into, trespassing onto or in any way interfering with 3rd Defendant's possession of the property L.R. No.7993 pending the hearing and determination of the suit.***

The application was supported by the affidavit of one Rupert McClellan the General Manager Administration of the 3rd Defendant. The Application was opposed. There was a replying affidavit by the Plaintiff. The application was canvassed before me on 6th June 2005 by Mr. Kiragu Learned Counsel for the 3rd Defendant, Mr. Ojiambo Learned Counsel for the 1st and 2nd Defendants and Mr. Nyandieka Learned Counsel for the Plaintiff. From the submissions of the Learned Counsels, the following appear to be the issues for determination in this application. First whether or not the position on the ground has changed since the order of Hon. Waweru J.; secondly whether or not the Plaintiff is attempting to take possession of the suit land without obtaining a Court order; thirdly whether or not this application is res Judicata; and Fourthly whether or not the 3rd Defendant can invoke the jurisdiction of this Court under Order 39 Rules 1(a), 3(1) and 4 of the Civil Procedure Rules without having filed a counterclaim.

As to whether or not the 3rd Defendant was entitled to move the court under Order 39 Rules 1(a), 3(1) and 4 of the Civil Procedure Rules and yet it has no claim of its own, I hold that the 3rd Defendant need not have counter claimed in order to invoke the jurisdiction of the court under Order 39 Rule 1(a). The rule reads:

***“1. Where in any suit it is proved by affidavit or otherwise 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 decree.....the Court may by order grant a temporary injunction....”***

A plain reading of this rule shows that a relief under the rule is available to any party to the suit. The Plaintiff's objection in this regard is therefore without merit and is rejected.

Regarding the plea of Res Judicata, I hold that on the basis of the allegations made by the 3rd Defendant, the Application is not res judicata. The 3rd Defendant has moved the Court on the basis of purported fresh actions of the Plaintiff. The new allegations were not canvassed and indeed could not have been canvassed before Hon. Waweru J. when he heard the Plaintiff's application dated 20th November, 2003. I will deal with the 1st and 2nd issues together. When Hon. Waweru J. heard the parties on the Plaintiff's application of 20th November, 2003 he got the impression that the 3rd Defendant may not yet be in occupation of the entire piece of land and that the plaintiff may be in possession of a portion thereof. In the circumstances he declined to grant a temporary mandatory injunction as had been prayed for in paragraph 4 of the application.

The 3rd Defendant now seeks by its present application orders of injunction inter alia restraining the Plaintiff from committing any acts of trespass on L.R. No.7993 or trying to gain entry into or in any way interfering with the 3rd Defendant's possession of L.R. No.7993. With respect the 3rd Defendant does not seem to appreciate what Waweru J. observed regarding possession of the suit property. If it had appreciated the Learned Judge's observations, it would have known that the issue of exclusive possession of the suit property by either party was not clear-cut. In my view that position remains the same. The

fresh complaints regarding a road of access or right of way or the actions of public officers can be resolved without moving the court for a prohibitory orders of injunction against the Plaintiff.

In the result and for the reasons stated above, I am not satisfied that the 3rd Defendant has established the first condition set by the precedent setting case of **Giella – v- Cassman Brown & Co. Ltd (1973) E.A. 358**. No prima facie case with a probability of success at the trial has been shown. This finding is sufficient to dispose of this application. It is not necessary to consider the second condition for the grant of an interlocutory injunction. The 3rd Defendant's application dated 23rd May 2005 is dismissed with costs to the Plaintiff.

To resolve this matter once and for all, I order that the parties hereto commence pre trial proceedings within thirty (30) days from the date hereof after which a hearing date should be given on priority basis.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2005.

**F. AZANGALALA**

**JUDGE**

Read in the presence of :-