REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ELC CASE 10 OF 2020

ABDIKADIR ISSACK ALI..1ST PLAINTIFF

KHALIF ARAB HASSAN...2ND PLAINTIFF

AHMED HUSSEIN GARAD...3RD PLAINTIFF

VERSUS

AHMED HASSAN OMANE...1ST DEFENDANT

IBRAHIM ALI SHEIKH...2ND DEFENDANT

ALI HASSAN OMANE..3RD DEFENDANT

RULING

Summary of facts

The Plaintiffs herein filed a plaint and accompanying notice of motion and certificate of urgency on 07th October 2020 in Garissa ELC Case No. 10 of 2020 praying for orders of a permanent injunction barring the Defendants by themselves, their agents, servants, employees or assignees from trespassing, subdividing or otherwise being present on their properties, being Plot nos. GSA/1923; GSA/1924; and GSA/1927 respectively. The Plaintiffs averred that the Defendants had commenced beaconing, subdividing and selling the suit properties without the authority of the Plaintiffs who were the legal and beneficial owners. In support of their ownership of the properties, the Plaintiffs presented the minutes of the Garissa Municipal Council meeting held on 18th February 2000 where a unanimous resolution was passed to transfer the properties to the Plaintiffs. Copies of letters from the Municipal Council of Garissa dated 5th April 2001 were also adduced in support of the Plaintiff's ownership of the suit properties. The proceedings of a criminal case No.79 of 2018 in which the 1st and 2nd Defendant had been accused of trespassing upon the suit properties and assaulting the plaintiffs was also presented. In the matter, the Defendants were convicted on their plea of guilt and discharged under Section 35 of the Penal Code.

On 8th October 2020, the Plaintiffs' application was certified urgent and a temporary injunction restraining the Defendants by themselves, their agents, servants, employees or assignees from disposing or alienating the suit properties was given, pending the hearing of the application *inter-partes* on 27th October 2020.

On 11th December 2020, the Defendants filed a joint replying affidavit, claiming legal and beneficial ownership of Plot Nos. GSA/2253; GSA/2520 and GSA/2552, located in the Bulla Medina area of Garissa. In support of the ownership, the Defendants presented letters from Garissa Municipal Council verifying the ownership of the properties. The Defendants averred that the said plots constitute their family land and that they have been in occupation since 1996 without disturbance. They contest that while the criminal case referenced by the Plaintiffs did infact take place, the 1st and 2nd Defendants only pleaded guilty to assaulting the Plaintiffs and that the case could not be used as evidence of the Plaintiff's ownership of the land. The Defendants contend that the properties owned by the Plaintiffs are situated in Bulla ADC area, while their properties are situate in Bulla Medina area, a distance of approximately 2km apart.

On the 14th of December 2020, parties agreed to canvass the notice of motion application dated 7th October 2020 by way of written submission and affidavits. The interim orders were extended pending the determination of the application.

Plaintiff's Submissions

The Plaintiffs filed their joint written submissions on 26th January 2021 and reiterated the contents of the notice of motion and the plaint as to the ownership of the properties trespassed upon by the Defendants and the need for an injunction restraining the Defendants from disposing

or alienating the properties. They averred that the three-part test for the award of a temporary injunction as required in the case of **Giella v Casman Brown** had been satisfied and that the plots of land referred to by the Defendants and supported by the maps filed; AHO 2 (a) (b) (c)were meant to confuse the Court.

Defendant's Submissions

The Defendants had filed their submissions on 14th December 2020, essentially adopting the contents of their replying affidavit. The Defendants averred that the temporary injunction issued on 8th October 2020 ought to be lifted because the Plaintiffs have failed to satisfy the requirements set out in the **Giella v Casman Brown** case. The Defendants maintain that the Plaintiffs are referring to a completely different area.

Issues for determination

a) Whether an injunction ought to have been issued and whether the order issued ought to be lifted.

b) Order as to costs

Legal analysis and opinion

The issue in contention in the present case is not the ownership of the parcels of land, but their location. The Plaintiffs aver that their properties, to wit, Plot nos. GSA/1923; GSA/1924; and GSA/1927 are situated in the Bulla ADC area while the Defendants aver that their parcels of land, namely, Plot Nos. GSA/2253; GSA/2520 and GSA/2552 are situated within the Bulla Medina area.

Having so noted, it must be appreciated that the court at this juncture is not called upon to determine the issue of ownership, or location of the parcels of land, but whether or not the temporary injunction issued on 08th October 2020 ought to be lifted.

The parties to the case have correctly traced the legal standard governing the issuance of temporary injunctions to the seminal decision of **Giella v Cassman Brown [1973] EA 358.** The wording of Spry VP in that case is reproduced hereunder:

> **"The conditions for the grant of an interlocutory injunction are now, I think, 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."**

The Civil Procedure Rules 2010, legislate this position.

"[Order 40. Rule 1] Cases in which temporary injunction may be granted.

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 the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other 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."***

The three-part test set out in the Giella case has been held to be all inclusive, meaning that where there is a contrary finding for less than the three factors, the injunctive relief ought not to be given. See the case of **Kenya Commercial Finance Co. Ltd v Afraha Education Society [2001] 1 EA 86**, where the court pronounced itself as follows:

> **"If the applicant establishes a *prima facie* case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a *prima facie* case does not permit *"leap-frogging"* by the applicant to injunction directly without crossing the other hurdles in between."**

As cited by both parties, the first limb of the test, that of *whether or not the applicant has demonstrated a prima facie case with a probability of success*, was further enunciated in the case of **Mrao Ltd vs. First American Bank of Kenya and 2 Others {2003} eKLR** as follows:

> **"a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter."**

In the present case, although the Plaintiffs and the Defendants lay claim on distinctly different parcels of land and have provided ownership documents in support of their claims, the portions are mysteriously located in the same place. The question of how the different parcels of land are somehow situate at the very same location raises a prima facie case, calling for, at the very least, an explanation from the Defendants. In that way, the first prong of the three-pronged case has been identified to exist.

Onto the second prong. The Plaintiff, is next required to prove that the injury to be suffered, absent the injunction, would be irreparable, incapable of adequate compensation by an award of damages. The Plaintiffs aver that the Defendants are in the process of beaconing, sub dividing and selling the land on the contested location. In the absence of an injunction, and if the Plaintiffs were to wait for the hearing and determination of the case, it is conceivable that the property, or a substantial part of it will have been alienated and transferred to other owners. At that point, damages will not be an adequate remedy, because the Plaintiffs will then have to get the purchasers for value out of the land in order for the land to revert to the Plaintiffs. In the premises, denying the Plaintiffs the injunction would be exposing them to injustice both in the short and long term.

The last prong suggests that when the court is in doubt, it should decide the application on a balance of probabilities. In **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR; Civil Appeal No. 77 of 2012 (Nairobi)** the court unpacked this requirement as follows:

> **"…The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."**

The inconvenience to be suffered by the Plaintiff if the injunction is to be withheld has already been canvassed. The inconvenience to be suffered by the presence of the injunction is their inability to alienate or otherwise dispose of the suit property until when the substantive case has been heard and determined. In my opinion, the inconvenience likely to be suffered by the Plaintiffs in the absence of the injunction drops the scale, in that it is weightier than the inconvenience to be borne by the Defendants. This opinion would be in keeping with the decision in **Amir Suleiman v Amboseli Resort Limited [2004] eKLR** where the court found that the lower rather than the higher risk of injustice should guide the court called upon to make a determination as to an injunctive relief.

In the circumstances, I find and hold that the Plaintiffs have satisfied the threshold of proof required for the grant of the temporary injunction. The injunction given ought to remain pending *interpartes* hearing and disposal of the suit.

As to costs, I order that each party ought to bear its own costs.

READ, DELIVERED AND SIGNED IN THE OPEN COURT THIS 26TH DAY OF FEBRUARY, 2021.

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E. C Cherono (Mr.)

ELC JUDGE