



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**  
**CIVIL SUIT NO. 84 OF 2001**

**ISAAC NJUKI NYAGA.....PLAINTIFF**

**-VSFESTUS**

**NJUE NYAGA**

**JEMIMAH WANGECHI.....DEFENDANT**

**RULING**

The Plaintiff/Applicant has come to this court under Order XXXIX rule 1 & 2 seeking an order of temporary injunction to restrain the Defendant from planting coffee stems and other acts of waste in respect of land parcel **No.NGARIAMA/NGIRIAMBUE/1540 & 1539**. This land is the subject of a suit filed by the Plaintiff on 10th September 2001, wherein the Plaintiff is seeking inter-alia an order of eviction of the Defendant from the land and general damages for loss of user. The Defendants have filed a defence and counter-claim to the Plaintiff's suit in which the Defendants have denied the Plaintiffs claim, and counterclaimed that they are entitled to the land under the statute of limitation since they have been in possession of the land since 1961. The Defendants further maintained that the original parcel of land i.e NGARIAMA/NGIRIAMBUE/233 was registered in the name of the Plaintiff for and on behalf of Nyagah Njunu who is the late husband of 2nd Defendant.

It is obvious from the pleadings that the Defendants are in occupation of the suit land and that is why the Plaintiff/Applicant is seeking an order for eviction and loss of user. The pleadings herein were closed in October 2001. Since then the matter has come for hearing twice but has not taken off. The Plaintiff has now come up with this application for what he calls a "temporary injunction". However looking at the order prayed for it does not appear to be a temporary order as its merely seeking to have the Defendant "restrained from planting coffee stems and other acts of waste in respect of **NGARIAMA/NGIRIAMBUE/1540 & 1539**". The court has not been informed what acts of waste that are being committed apart from planting of various things. It is evident that the issue of the alleged trespass is an issue that will have to be determined at the full trial.

Even assuming that the Plaintiffs application was couched in the proper manner (which it is not). The court would have to be convinced that the conditions under which an interlocutory injunction ought to be granted have been complied with i.e. *"First an Applicant must show a prima facie case with a probability of success. Secondly an interlocutory injunction would not normally be granted unless the Applicant might otherwise suffer irreparable injury which would not adequately be compensated by award of damages. Thirdly if the court is in doubt it will decide an application on the balance of convenience"*.

**E.A. industries v/s Trufoods (1972) EA 420 followed in Giella vs Cassman Brown & Co Ltd (1973) EA 358.**

In this case the Applicant has not convinced me that he has a better case than the Respondent nor has he shown that his loss if any in respect of the alleged acts of waste is not likely to be compensated by an award for damages. Finally on the balance of convenience the Defendants are in occupation of the land, and the court would be reluctant to interfere with the status quo before hearing the evidence. The balance would therefore tilt in favour of the Defendants in regard to the injunction sought.

I find that it would not be fair nor just to grant the injunction sought. I would accordingly dismiss the

Applicant's application dated 12th March with costs to the Respondent. I further order that the parties should take an early hearing date to facilitate the hearing and final determination of the main suit.

Orders accordingly.

**Ruling Signed and delivered in open Court this 2nd day of July 2003.**

**H.M. OKWENGU**

**JUDGE**