



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT IN KITALE

LAND CASE NO. 5 OF 2021

GEORGE SIMIYU WANGILA.....PLAINTIFF

VERSUS

ELDORET EXPRESS COMPANY LIMITED.....PLAINTIFF

TAWAI LIMITED.....2ND DEFENDANT

RULING

The Application

By a notice of motion dated 27/1/2021 and filed on the same date the plaintiff seeks the orders I set out as hereunder:

(1) ...spent

(2) That pending (*inter-parte*) hearing of the application temporary injunction be issued against the defendants herein from further pulling down of houses or any other damage in any manner on parcel No. LR.5707/R-IR.NO.18551.

(3) That pending hearing and determination of the main suit, temporary injunction be issued against the defendant herein from further pulling down of houses on land parcel No. LR.5707/R-IR.NO.18551.

(d) Costs are in the cause.

2. The notice of motion cites no provisions of the law under which it is purportedly brought. However it suffices to state that it seeks an order of temporary injunction against an unspecified defendant.

3. The application is supported by the affidavit of the plaintiff sworn on 27/1/2021. The application is premised on the following grounds: that the plaintiff is one of Directors of Tawai Limited, the registered proprietor of the land parcel **LR.5707/R (I.R. NO.18551)**; that the 1st defendant has invaded the suit land and started pulling down houses erected thereon and it needs be restrained by this court from further action; that the 1st defendant has hired goons in company of the police to terrorize the families on the suit land; that the eviction order has not been served at all and that the majority of the said families have been displaced.

4. There is no response to the instant application though affidavit of service of George Mumali dated 1/2/2021 states that the application was served upon one **Mr. Martin Nyongesa** said to be a director/shareholder of the 2nd respondent on behalf of the 2nd respondent and also on the 1st defendant by way of email.

Determination

5. The issue that arises in the instant application is whether the orders of injunction sought should be issued.

6. The application is supported by a very brief sworn affidavit of the applicant. In it he alleges that on **6th January 2012** he was surprised to see the defendant (without specifying which of the two defendants) enter the suit land with machinery and in the company of policemen and workmen. He alleges that there was no notice of that entry. The plaintiff tried to stop the entry in vain. There are clearly some gaps in the affidavit evidence that the plaintiff gives in his supporting affidavit. However it seems to be his sole concern that more than 300 people will be dispersed from the suit land. Then he speaks of failure of the respondent (without specifying which of the two respondents) to serve any "*lawful information*" or "*eviction order from the court,*" and states that unless "*the respondent*" is stopped by this court from further illegal action the entire suit will be rendered nugatory.

7. I must refer to the conditions for a grant of a temporary injunction set out in the celebrated case of **Giella Vs Cassman Brown 1973 EA 358** which are as follows:

a) The applicant must establish that he has a prima facie case;

b) The applicant must demonstrate that there is risk of loss or injury that can not be compensated for by way of damages; and

c) In the event that none of the two conditions herein above are satisfied, the court shall rule on a balance of convenience.

8. In addressing **issue No. 1** listed above, it is clear that going by the provisional certificate of title attached to the application the plaintiff is not the owner of the suit land referred to as **LR 5707/R(IR.NO.18551)**. The said title document proclaims that the proprietor is the 2nd defendant. Furthermore the copy of the grant exhibited leaves one in doubt as to whether **IR 18551** and **LR 5707/R** refer to one and the same parcel of land. The applicant appears to state in his application that they refer to the same parcel of land. Perchance the applicant had proved that they refer to the same parcel of land in this suit, the proper person to bring the instant suit against any person who interferes with the land would be the 2nd defendant but unfortunately it has been named as a defendant in these proceedings. These are not claimed to be derivative proceedings. It is clear that the 2nd defendant was served but it has not filed any documents in the matter and this court can not assume that it has any interest in the suit land. Secondly the applicant has not demonstrated any link with the 2nd respondent whom he claims to be the owner of the land either as a shareholder or a director. Therefore in this court's view no *prima facie* case has been demonstrated by the applicant in his application.

9. The second condition that has to be satisfied is for the applicant to demonstrate that he would suffer loss that can not be compensated for by way of damages. A perusal at the supporting affidavit does not demonstrate that the applicant has any house on the suit land that is likely to be demolished or any other property that would be affected by any action of the defendants. He speaks in general terms about some "300" people yet he has not demonstrated their authorization to bring the suit on their behalf. In this court's view he has not linked the alleged demolitions to his own interest in the land and he cannot claim on behalf of the "300" and therefore the second condition in **Giella vs Cassman Brown (supra)** has not been satisfied.

10. Ordinarily, having observed as above in an injunction application, it is proper to consider where the balance of convenience lies in deciding the application. However the dearth of material that the applicant has put on the record dissuades this court from even commencing to tread the path of balance of convenience. In this court's view where an applicant not only fails to establish his interest in the suit land by way of production of even a copy of title in his name but also fails demonstrated possession, a serious error may be committed by allowing the application for injunction on grounds of balance of convenience. It is not safe to grant such an application.

11. Consequently I find that the application dated **27th January 2021** has no merit and the same is dismissed with costs to both respondents. The plaintiff shall serve the defendants with summons and plaint as well as statements and documents as required by the rules and the defendants shall respond as required. This suit shall be mentioned on **17/3/2021** to confirm compliance. By that date an affidavit of service shall be filed by the plaintiff in the record in any event.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 3rd day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.