



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND CASE NO. E004 OF 2021**

**JOSEPH KIPKORIR BIWOTT.....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....DEFENDANT**

**RULING**

**[NOTICE OF MOTION DATED 12<sup>TH</sup> FEBRUARY, 2021]**

1. The Plaintiff filed the Notice of Motion dated the 12<sup>th</sup> February, 2021 seeking for the following orders, *inter alia*:

i. THAT pending the hearing and determination of this application *inter partes* this court be pleased to issue a temporary injunction against the Defendant, its agents, servants and/or any other person acting on the Defendant's instruction restraining them from disturbing the Plaintiffs occupation of land parcel No. **ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/3564**, barring access to the suit property and/or in any other manner interfering with the Plaintiff's occupation of the said land.

ii. **THAT** pending the hearing and determination of this application *inter partes* there be an order of temporary injunction restraining the Defendant its agents, servants and or any other person acting on their instructions from trespassing or proceeding with further demolition of the Plaintiff's property on land parcel No. **ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/3564**.

iii. **THAT** pending the hearing and determination of the suit herein this court be pleased to issue a temporary injunction against the Defendant, its agents, servants and/or any other person acting on the Defendant's instruction restraining them from disturbing the Plaintiff's occupation of land parcel No. **ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/3564**, barring access to the suit property and/or in any other manner interfering with the Plaintiff's occupation of the said land.

iv. **THAT** pending the hearing and determination of the suit herein there be an order of temporary injunction restraining the Defendant its agents, servants and or any other person acting on their instructions from trespassing or proceeding with further demolition of the Plaintiff's property on land parcel No. **ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/3564**.

2. The application is based on the twenty-one [21] grounds on its face and is supported by the affidavits of **Joseph Kipkorir Biwott** sworn on the 12<sup>th</sup> February, 2021 and 10<sup>th</sup> April, 2021. The plaintiffs case is that he is the registered proprietor of land parcel **Eldoret Municipality/Block 20 (Kapyemit)/3564**, the suit land, since 9<sup>th</sup> May, 2016. That on the 29<sup>th</sup> October, 2021(**sic**), the Defendant illegally defaced the developments on the suit land by marking them for demolition for allegedly encroaching onto the defendant's land. That he instructed his advocates who did a letter to the defendants demanding that they stop interfering with his property. That on 30<sup>th</sup> January, 2021, he found all the 30 units of his residential houses had been demolished by the defendant, who has not exhibited title to the land. That the defendants did not raise any objection when he was carrying out the development on the suit land, and the photographs attached to the replying affidavit are not taken on the property. That the notices exhibited by the defendant do not specifically mention his property to be part of their land, and the prayers sought should be granted.

3. That in opposition to the aforementioned application, the defendant filed the replying affidavit sworn by **Kenneth Kariuki, the engineer in-charge of the defendant's operations in Western and North-Rift Kenya**, on 25<sup>th</sup> March, 2021. It is their case that the suit land was either fully or partially within the "**visibility diamond**" of the Rail/Road Crossing, that stretches for 300 feet on each of the four directions along the diagonals of the crossing. That the law requires there be no construction or growing of crops beyond 9 inches within the Visibility Diamond so as not to hinder visibility. That if the plaintiff had acquired title to the land and erected the developments thereon, then he did so without the approval of the defendant. That the defendant had on the 10<sup>th</sup> June, 2016 learnt of encroachment onto their land at the level crossing at Maili Nne – Eldoret, off Uganda Road Highway, and reported to the police. That when the plaintiff commenced construction, the defendant marked the development with "**X**" while at foundation level. That the defendant further warned the plaintiff during a meeting held with him and his advocate on the 27<sup>th</sup> June, 2016. That the directive to demolish the development was issued by the County Commissioner, Eldoret and was carried out by the multi - agency team comprised of the National Government administrative officers,

Presidential Delivery Unit, National Police Service among others, after notices were published on the 20<sup>th</sup> March 2018, 27<sup>th</sup> September 2019 and 30<sup>th</sup> September 2019. That the fact that the plaintiff has in his pleadings confirmed that the demolition was completed, and has gone ahead to quantify the loss which he claims as damages, is a pointer that the prayers sought have been overtaken by events, as they cannot be given in vain.

4. That on the 22<sup>nd</sup> April, 2021 the Court directed that parties to file written submissions on the application. In support of the application, the learned counsel for the Plaintiff filed their written submissions dated the 27<sup>th</sup> April, 2021 while that for the Defendant filed theirs dated the 29<sup>th</sup> April, 2021. The following are the issues for the courts determinations;

- (a) *Whether the plaintiff has established a prima facie case with probability of success;*
- (b) *Whether the plaintiff stands to suffer irreparable loss if injunction order is not granted;*
- (c) *In whose favour does the balance of convenience tilt to? and*
- (d) *Who pays the costs?*

5. I have considered the grounds on the application, the affidavit evidence by both parties, the written submissions filed on behalf of the parties herein, the superior courts decisions cited thereon and come to the following conclusions;

(a) That in considering whether to grant an interlocutory injunction, courts are guided by the principles set out by the Court of Appeal in the celebrated case of **GIELLA v. CASSMAN BROWN & CO. LTD [1973] E A 358 at 360**, where *Spry J.* held as follows:

*“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.”*

That in the case of **SUSAN WANGARI MBURU & 5 OTHERS V ELDORET WATER AND SANITATION COMPANY LIMITED & ANOTHER [2020] eKLR**, *Odeny J.* stated that;

*“Apart from the three principles set out in the Giella case, the court should also look at the circumstances of each case as was held in the case of **JAN BOLDEN NIELSEN v HERMAN PHILLIPUS STEYA ALSO KNOWN AS HERMANNUS PHILLIPUS STEYN & 2 OTHERS (2012) eKLR**, where *Mabeya J.* remarked as follows:*

*‘I believe that in dealing with an application for an interlocutory injunction, the court is not necessarily bound to the three principles set out in the Giella Vs Cassman Brown case. The court may look at the circumstances of the case generally and the overriding objective of the law. In **Suleiman vs Amboseli Resort Ltd (2004) e KLR 589 Ojwang Ag. J** (as he then was) at page 607 delivered himself, thus:*

*“... Counsel for the defendant urged that the shape of the law governing the grant of injunctive relief was long ago, in **Giella –vs- Cassman Brown**, in 1973 cast in stone and no new element may be added to that position. I am not, with respect, in agreement with counsel in that point, for the law has always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of **Films Rover Internationale** made this point regarding the grant of injunctive relief (1986) 3 All ER 772 at page 780 – 781:*

*“ A fundamental principle of ....that the court should take whichever course appears to carry the lower risk of injustice if it should turnout to have been ‘wrong’...”*

*Traditionally, on the basis of the well accepted principles set out by the court of Appeal in **Giella Vs Cassman Brown**, the court has had to consider the following questions before granting injunctive relief.*

*i. Is there a prima facie case....*

*ii. Does the applicant stand to suffer irreparable harm...*

*iii. On which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice.....*

*When dealing an application for injunction you must consider which option has a lower risk of injustice for a party. Would it be in the interest of justice to grant an order of injunction or decline to do so. Looking at the surrounding circumstances of the case would it be in the interest of justice to stop a sewer line being used by the greater or larger public to stem breakout of disease? The answer would be that the public interest would take a*

*center stage as opposed to the individuals in the name of the applicants herein....”*

That in is the law that I will apply to the facts in this matter.

(b) That in his Supporting Affidavit, the Plaintiff has annexed a copy of the certificate of title of land parcel No. **ELDORET MUNICIPALITY BLOCK 20 (KAPYEMIT)/3564**. Although the Defendant did not adduce any evidence of ownership of the suit land, it has annexed to its replying affidavit a memo of a meeting held on 27<sup>th</sup> June, 2016 that they allege the Plaintiff attended in the company of his Advocate, one **Mr. Melly**. The said memo contains information to the effect that, Eldoret Block 20 Kapyemit 3564 is within the Diamond Reserve, and that the Plaintiff has continued the developments despite being warned to halt it, and to submit the development drawings to Kenya Railways for approval. That in view of the apparent contention by the defendant in their response to the plaintiff’s application that the suit land is within an area where the demolished developments were legally not allowed, which amounts to a challenge on the plaintiff’s title, I find this is one of the matters that parties need to be allowed to present their evidence in the main suit without any interlocutory order in the nature sought being considered.

(c) That I further note that the Plaintiff alleges that the Defendant has already demolished the residential units and business premises located on land parcel number **Eldoret Municipality/Block 20 (Kapyemit)/3564**. The Plaintiff annexed to his supporting affidavit sworn on 12<sup>th</sup> February, 2021 a bundle of photographs marked as **JKB4**, as evidence of the demolition. The Defendant has in paragraphs **13** and **14** of the replying affidavit alluded to the said demolitions on land parcel number **ELDORET MUNICIPALITY/BLOCK 20 (KAPYEMIT)/3564** adding that it was undertaken by the multi-agency operation team mandated to demolish illegal structures on railway land countrywide. That under the prevailing circumstances, an injunction in the form sought by the plaintiff under prayers **4** and **5** cannot be issued as I find that they have indeed been overtaken by events. That in the case of **HABIBA ALI MURSAL & 4 OTHERS V MARIAM NOOR ABDI [2018] eKLR**, the Court held as follows:

*“On the issue as to whether an injunction should be issued, there is nothing to restrain as the respondent has already demolished the walls of the building. According to the photographs annexed to the application for contempt which I shall shortly herein after deal with, the walls of the building have already been demolished and all windows removed. The entire building has been fenced and sealed using iron sheets. The applicants are not in the premises. The purpose of an injunction is to restrain that which is threatened to occur or is in the process of being undertaken in breach of one’s right. It is never meant to prevent what has already occurred. It will therefore be futile to grant injunctive orders. I will therefore decline to grant any orders in the notice of motion dated 11<sup>th</sup> October, 2018 save for an order that the respondent shall meet the costs of this application. It is so ordered.”*

That in the case of **MOSES M WAIRIMU & 24 OTHERS V KENYA POWER & LIGHTING CO LTD & ANOTHER [2020] eKLR**, the Court held as follows:

*“On whether they will suffer injury which will not be compensated, there is no doubt that the structures which they were seeking to protect have already been demolished. If the Applicants will succeed to show that their buildings were unlawfully brought down, they will always be compensated in monetary terms. An injunction cannot therefore be granted and in any case an injunction cannot issue to prevent what has already happened.”*

(d) That I do not deem it necessary to reinvent the wheel on this well-trodden path. I therefore find that the Plaintiff application for injunction has been overtaken by events. The Plaintiff has at prayers **(d)** and **(e)** of their plaint dated 12<sup>th</sup> January, 2021 captured the values of the damage occasioned by the demolition, and the anticipated loss of income which they now seek among other prayers. That I take that to be an admission that the loss that the plaintiff may have suffered is not irreparable, as it has already been ascertained and quantified. That the plaintiff’s application therefore lacks merit and I order that the same is dismissed with no orders as to costs.

(e) That however, and noting that the Plaintiff and the defendant appear to have filed their pleadings with documents and statements, I am of the considered view that this is a matter that can be fast tracked for the benefit of both parties and the public interest that is apparent.

(f) That exercising my discretion under **Section 27 Of the Civil Procedure Act chapter 21 of Laws of Kenya**, I find that this is a suitable instance for the costs of the application should be in the cause.

6. That in view of the foregoing, the plaintiff notice of motion dated the 12<sup>th</sup> February, 2021 is without merit and is dismissed with costs in the cause.

It is so ordered.

**Delivered virtually and dated at Eldoret this 26<sup>th</sup> day of May, 2021.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff:            Absent.

Defendant: Absent.

Counsel: M/s Odwa for the Plaintiff.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.