



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELCA CASE NO. 9 OF 2019

COUNTY GOVERNMENT OF KAKAMEGA.....PLAINTIFF/APPLICANT

VERSUS

THOMAS MUNIKA MUKUNGA

OIC KHAYEGA AP CAMP.....DEFENDANTS/RESPONDENTS

RULING

This application is dated 17th April 2019 and is brought under sections 3A, 63 e and 65 of the Civil Procedure Act and order 42, 43 and 51 seeking the following orders;

1. That this application be certified urgent.
2. That service of the application be dispensed with at the first instance.
3. That this honourable court may be pleased to issue an order of stay of execution of the part of the ruling delivered by the Honourable E. Malesi (SRM) on the 5th day of March, 2019 directing the applicant to deposit security of the sum of Ksh. 4,500,000/= to cover issues of compensation and all consequential orders therefrom pending the hearing and determination of this application.
4. That this honourable court may be pleased to issue an order of stay of execution of part of the ruling delivered by the honourable E. Malesi (Senior Resident Magistrate) on the 5th day of March, 2019 directing the applicant to deposit security of the sum of Ksh. 4,500,000/= to cover issues of compensation and all consequential orders therefrom pending the hearing and determination of the applicant's appeal.
5. That the costs of this application be provided for.

It is premised on the following grounds that on the 5th day of March, 2019 the Honourable E. Malesi (SRM) delivered a ruling in which he denied the 1st respondent injunctive orders but ordered the applicant herein to deposit the sum of Ksh. 4,500,000/= with the court as security to cover the issue of compensation depending on which way the case shall be determined. That the impugned order issued by the learned magistrate on the 5th day of March, 2019 was not sought in the 1st respondent's application dated the 30th day of November, 2018. That in arriving at the said sum of Ksh. 4,500,000/= the learned magistrate relied upon a professional valuation report that was filed by the 1st respondent after his application dated the 30th day of November, 2018 had already been argued in court. That the action of the learned magistrate to refer to the said professional valuation report not part of the court's record at the hearing of the application fundamentally violated the applicant's constitutional right to fair hearing and due process guaranteed under the Constitution of Kenya, 2010. That further there existed no basis for the learned magistrate to order the applicant to deposit the sum of Ksh. 4,500,000/= as security to cover issue of compensation depending on how the case shall be determined since the suit is yet to be heard and the interests and/or rights of the parties in the suit have not been determined by the court. That the learned magistrate failed to appreciate the budgetary mechanism and processes established under the Public Finance Management Act No. 18 of 2012. That the applicant has since lodged an appeal against that part of the said ruling. That the substratum of the appeal before this court is the directions by the Learned Magistrate on the deposit of the sum of Ksh. 4,500,000/= as security for compensation and consequently the applicant will suffer substantial loss if the orders sought in the application are not granted as the appeal will likely rendered moot and/or nugatory since payment of the said amount will in effect determine the appeal without it being heard on merit. That this application has been made in good faith and without any unreasonable delay and the applicant is willing to abide by such conditions as may be deemed necessary for grant of the orders sought. That the applicant stands to suffer prejudice if the orders sought in the application are not granted. That it is in the interest of justice and fairness that the application herein be allowed.

This court has carefully considered the submissions herein. The respondents were served but failed to attend court or file any submissions. The principals governing the grant of interlocutory injunction are clear. As stated in the case of *Giella vs. Cassman Brown* (1973) EA 358.

“The conditions of granting an 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 compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Furthermore, as elaborated in the case of *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* (2003) Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

Further he goes on to state that *“..... a prime facie case is more than an arguable case, it is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

This application is brought on the grounds that, on the 5th day of March, 2019 the Honourable E. Malesi (SRM) delivered a ruling in which he denied the 1st respondent injunctive orders but ordered the applicant herein to deposit the sum of Ksh. 4,500,000/= with the court as security to cover the issue of compensation depending on which way the case shall be determined. From the documents in the file the applicant has not shown a prima facie case with a probability of success. Secondly the applicant has not shown that they will suffer irreparable injury, which would not adequately compensated by an award of damages. I find that this application is not merited and I dismiss the same. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 2ND JULY 2019.

N.A. MATHEKA

JUDGE