



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT MIGORI**

**ELC CASE NO. 798 OF 2017**

**(Formerly Kisii ELCC No. 520 of 2015)**

**ROCH OBURU ODHIAMBO.....PLAINTIFF**

**VERSUS**

**MIGORI COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**MIGORI COUNTY LAND MANAGEMENT BOARD.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of an application by way of Notice of motion dated 27<sup>th</sup> November 2015 and filed on 30<sup>th</sup> November 2015 pursuant to sections 1A,1B,3 3A 63 (e) of the Civil Procedure Act Cap 21 Laws of Kenya and Order 4 of the Civil Procedure Rules, 2010. The application has been pending for a long time but for reasons given by the plaintiff's counsel on 13/12/2018, the same was reactivated accordingly.

2. In the application, the plaintiff (applicant) has sought against the 1<sup>st</sup> and 2<sup>nd</sup> defendants/respondents the following orders:-

**a) Spent**

**b) That this Honourable court do issue a temporary injunction restraining the respondents/defendants, their workers, agents or any other person from repossessing, re allocating or alienating or in any other way or manner disposing of the suit property known a LR. No. 8534/93 registered in the name of ROCH OBURU ODHIAMBO, the applicant/plaintiff pending the hearing and determination of this suit.**

**c) Costs of this suit be provided for.**

3. The application is premised on the applicant's supporting affidavit sworn on 27<sup>th</sup> November 2015 and annexed documents marked as "ROO EXT1, 2A to D, 3A and B" which include a photocopy of the lease, photocopies of invoices and receipts and photocopies of Daily Nation Newspapers extracts. The application is further premised on six (6) grounds on it's face, inter alia, that:-

**i. That applicant/plaintiff is the sole lessee of the suit property known as LR No. 8584/93 situate in Migori town measuring approximately 0.0351 hectares for lease of 99 years running from 1/9/1985 to 31/8/2084.**

**ii. That the applicant/plaintiff has filed a suit which prima facie has high chance of success.**

**iii. That if this application is not granted, the applicant stands to suffer irreparable loss and the main suit will be rendered nugatory.**

4. The 1<sup>st</sup> and 2<sup>nd</sup> defendant (respondents) opposed the application by way of a replying affidavit sworn on 20<sup>th</sup> January 2016 by Mr. Thomas Kwanga Mboya, the then County Attorney of the 2<sup>nd</sup> respondent who averred, among others, that the application has not met the legal threshold set in law for grant of the orders sought therein. That the applicant has not complied with the terms laid down in the allotment of the suit property specifically special condition 2 thereof and that the suit has absolutely no chances of success whatsoever as against the respondents for want of cause of action.

5. The application was canvassed by way of written submissions; see **Order 51 rule 16 of the Civil Procedure Rules, 2010.**

6. Learned counsel, Mr. Kerario Marwa of Kerario Marwa and Company Advocates for the applicant filed submissions dated 6<sup>th</sup> May 2016. Counsel relied on the case of **Giella –vs- Cassman Brown Company Ltd (1973) EA 358** as well as **sections 2,14 (1) (3) and 18 of the Land Act,2016 (2012)** and argued that the applicant has met the requisite threshold and urged the court to grant the orders sought in the application.

7. M/s. Odhiambo Oronga and Company Advocates for the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed submissions dated 18<sup>th</sup> July, 2016. Reliance was made on **Giella case (supra)**. Counsel urged the court not to injunct the Government, 1<sup>st</sup> respondent.

8. I have carefully studied the application, the replying affidavit and submissions including authorities cited therein. Has the applicant met the threshold in **Giella case (supra)** for the grant of the interim injunction sought in the application?

9. The applicant contended that he has met the requisite threshold and relied on documents marked as “ROO EXT1 to 3B.” That the replying affidavit is generally a denial of his claim in the application. That allocation and reallocation of public land vests with the National Land Commission (NLC) and not the respondents.

10. The respondent asserted that there is no dispute that the NLC is vested with powers to allocated and or repossess public land. That the suit was instituted against a wrong party and the application has not met the requisite threshold for the grant of the orders sought herein. That an injunction can not issue against the Government namely the 1<sup>st</sup> defendant.

11. This court is aware of the decision in **Giella case (supra)** that for an interim injunction to issue, the applicant must meet the requirements namely :-

*a) Establish his case only at a prima facie level.*

*b) Demonstrate irreparable injury if a temporary injunction is not granted and;*

*c) Allay any doubts as to (b) herein above by showing that the balance of convenience tilts in his favour.*

12. The definition of “Prima facie case” in Civil cases is well settled; see **Mrao Ltd –vs- First American Bank of Kenya Ltd and 2 others (2003) KLR 125**.

13. In the case **Nguruman Ltd –vs- Jan Bonde Nielson and 2 others (2014) eKLR**, the Court of Appeal stressed that it must always be borne in mind that the very foundation of the jurisdiction to issue orders of injunction vests in three (3) conditions:-

*a) The probability of irreparable injury.*

*b) The inadequacy of pecuniary compensation and;*

*c) The prevention of the multiplicity of suits.*

14. The order of injunction sought in the application is equitable in nature and within the discretion of this court and it depends on circumstances of the case. The court may grant a temporary injunction with such terms as provided for under **Order 40 rule 2 of the Civil Procedure Rules, 2010** which are meant to curb abuse of temporary orders as noted in **DPP –vs- Justus Mwendwa Kathenge and others (2016) eKLR**.

15. The applicant has demonstrated prima facie that he is the lawful allottee of the suit property by way of documents marked as “ ROO EXT 1 to 2D.” This court has the mandate to grant interim preservation orders including interim injunctions under **section 13 (7) (a) of the Environment and Land Court Act, 2015 (2012)**. However, I am of the considered view that the appropriate and merited order in the circumstances is an order for the maintenance of status quo in respect of the suit property rather than a temporary injunction in the terms sought in the application in interest of justice; see **Musa Angira Angira –vs- ICDC (2015) eKLR**.

16. Consequently and for those reasons, I direct and order that :-

*a) The parties shall maintain the prevailing status quo in lieu of a temporary injunction sought in the application in respect of the suit property, plot number 8534/93 measuring 0.0351 hectares, in Migori Town pending the hearing and determination of the instant suit. In particular, the defendants/respondents shall not alienate or transfer, repossess, reallocate or in any manner dispose of or interfere with the suit property pending the hearing and determination of this suit.*

*b) Costs of the application be in the cause.*

**DELIVERED, DATED and SIGNED at MIGORI this 3<sup>rd</sup> day of JULY 2019.**

**G.M.A. ONGONDO**

**JUDGE**

**In the presence of: -**

Mr. D.Adawo holding brief for Mr. Kerario Marwa learned counsel for the applicant/plaintiff.

No appearance for the defendants/respondents.

Tom Maurice – Court Assistant.