



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 13 OF 2020**

**HENRY NYASENTE MANASE.....PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF NYAMIRA.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. By a Notice of Motion dated 14<sup>th</sup> May 2020 the Plaintiff filed an application seeking a temporary injunction restraining the Defendants/Respondents acting through their agents, servants or anyone acting under their authority from entering upon, trespassing onto, taking possession, damaging or committing any acts or further acts of interference or wastage the property known as L.R No. 8726/20 and 8726/21.

2. The application was supported by the grounds stated on the face of the application and the Applicant's Affidavit sworn on the 14<sup>th</sup> May 2020 in which he deponed inter alia that he was the registered owner of the land parcels known as L.R No. 8726/20 and 8726/21. He deponed that on 22<sup>nd</sup> April 2020, the Defendants acting jointly and severally and without any colour of right, trespassed and demolished the Applicant's structures standing on the suit properties without any prior notice of eviction. The Applicant was apprehensive that the Respondents would cause further damage to the suit properties unless restrained by way of injunction.

3. The application was resisted by the 1<sup>st</sup> Respondent through the Replying affidavit of Josephat Motanya Gori, the County Chief Officer, Lands, Housing, Physical Planning and Urban Development, sworn on the 15<sup>th</sup> July 2020. In the said affidavit he denied that the County Government of Nyamira had ever carried out any demolition on the suit properties.

4. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have considered.

**ISSUES FOR DETERMINATION**

5. The singular issue for determination is whether the Plaintiff/Applicant is entitled to an order of injunction.

**ANALYSIS AND DETERMINATION**

6. In order to qualify for an order of injunction an Applicant must meet the conditions set out in the case of **Giella v Cassman Brown & Company Limited 1973 E.A.358** which are as follows:

*“First, the Applicant **must show that he has 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 damages. Thirdly, if the court is in doubt, it will decide the application on a **balance of convenience.**”*

7. The first hurdle that the Applicant must surmount it to demonstrate that he has a prima facie case with a probability of success.

In the case of **Mrao V First American Bank of Kenya Limited (2003) eKLR Bosire JA** (as he then was) stated as follows:

*“A prima facie case is one which on the material presented to the court a 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”*

8. In the instant case the Plaintiff has stated that he is the registered owner of the suit properties. To buttress his case, he has annexed copies of the certificates of title and a copy of the Part Development Plan in respect of the suit properties to his supporting affidavit. It is his contention that the Defendants have taken the position that he does not have any proprietary interest in the suit properties as they claim that the suit properties lie on a road reserve.

9. On the other hand, the 1<sup>st</sup> Respondent through their Chief Officer, Lands, Housing, Physical Planning and Urban Development denies that the Plaintiff/Applicant has any proprietary interest in the suit property.

10. Although the Plaintiff has a title in respect of the suit properties, I am unable at this stage to state whether or not the suit properties are on a road reserve as this will require the parties to adduce evidence in that respect. In any event, by the time the Plaintiff/Applicant moved the court for an order of injunction, the demolition of his structures had already taken place. There is no indication that the Defendants/Respondents intend to carry on any further demolition or destruction of the suit property in any other manner whatsoever. Furthermore, the Plaintiff/Applicant has not demonstrated that whatever damage and loss he has suffered cannot be compensated by way of damages. The value of the land and buildings that were destroyed is ascertainable and in the event that he succeeds in proving his case, he would be entitled claim special damages.

11. In the circumstances, I am of the considered view that the plaintiff has not satisfied the conditions laid down in *Giella v Cassman Brown*. The upshot is that the application lacks merit and it is hereby dismissed with costs to the defendant.

**DATED, SIGNED AND DELIVERED AT KISII THIS 5TH DAY OF MAY 2021.**

**J.M ONYANGO**

**JUDGE**