



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 192 OF 2016**

**EVA HELLEN MICERE MUGERA..... PLAINTIFF/APPLICANT**

**VERSUS**

**CHARITY WAIRIMU MWANGI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**COUNTY GOVERNMENT OF KIRINYAGA....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Applicant approached this Honourable Court vide a Notice of Motion dated and filed on 3<sup>rd</sup> July, 2018 whereby the applicant is seeking the following orders: -

***(a) Spent.***

***(b) Spent.***

***(c) The 1<sup>st</sup> defendant/respondent herein her agents, servants and family be restrained by the Honourable Court from interfering or in any other way with the said Plot No. Sagana E61 and anything on the said plot of Land until the matter is heard and determined.***

***(d) Costs be provided for.***

2. The application is premised on the following grounds: -

a. That the 1<sup>st</sup> defendant/respondent had brought in materials and commenced developments on the plot while this matter is pending before court.

b. That there is a counterclaim pending before court filed by the respondent.

c. That the plaintiff has been paying all the rates pertaining to the said plot of land.

d. That it would only be fair and just that this Honourable Court do issue a temporary injunction restraining the 1<sup>st</sup> defendant/respondent, her servants, agents and anybody else working under her from entering interfering and constructing on the Plot of Land pending determination of this suit.

e. That the plaintiff will continue to suffer while the 1<sup>st</sup> defendant/respondent benefits.

f. That the Plaintiff will suffer loss and damages if the 1<sup>st</sup> Defendant/Respondent is not restrained from constructing and/or utilizing the said Plot of Land.

3. The said application is supported by the affidavit of the Plaintiff sworn on 3<sup>rd</sup> July, 2018.

**APPLICANT'S CASE**

4. The Applicants case is that she has been the owner of the suit land since 28<sup>th</sup> January, 1992 when it was allocated to her by the 2<sup>nd</sup> Defendant and has been paying rates as well as all dues.

5. She stated that she had brought materials in preparation to build but the 1<sup>st</sup> defendant used some of the materials for her own construction. Further that she had constructed a foundation on the plot and the 1<sup>st</sup> defendant came and constructed a building on it.

6. She also stated that the actions of the 1<sup>st</sup> defendant were hindering her from developing the said land and thus she would suffer irreparable loss and damages if the orders she sought were not granted.

7. She further stated that since the 1<sup>st</sup> Defendant had filed a counter claim, it was fair and just for this Honourable Court to issue a temporary injunction to restrain her from entering, interfering and constructing on the suit land pending the hearing and determination of this suit.

### **1<sup>ST</sup> RESPONDENT'S CASE**

8. In response to the said application, on 25<sup>th</sup> September, 2019 the 1<sup>st</sup> Respondent filed the following grounds of opposition: -

- a. The application is incompetent and bad in law.
- b. The application is incurably defective and does not lie.
- c. The application is frivolous, vexatious and otherwise an abuse of the court process.
- d. The application does not meet the threshold in the law relating to injunctions.
- e. The application should be dismissed with costs.

### **SUBMISSIONS**

9. On 8<sup>th</sup> March, 2021, the parties herein through their advocates on record agreed to have the instant application disposed of by way of written submissions. The applicants filed their submissions on 29<sup>th</sup> April 2021. However, none of the respondents filed their submissions even after being given an opportunity to do so.

10. The applicant submitted that she had annexed the necessary documents to prove that she was the rightful owner of the plot and that the 1<sup>st</sup> respondent is a joy rider in the property.

11. She submitted that she had satisfied the ingredients of *Order 40 Rule 1 & 2 of the Civil Procedure Rules* as she had proved that the 1<sup>st</sup> Respondent had started constructing on the plot in dispute and that this was an act of wastage.

12. She also submitted that she had proved that damages had been occasioned and that her evidence had not been challenged by the respondents.

13. She submitted that she had adduced material before this Honourable Court which offers substantive issues for determination as there exists legal rights that have been violated by the defendant so as to call for an explanation or rebuttal from the defendants.

14. Further she submitted that as the legally and rightfully registered proprietor of the suit land, she had the legitimate expectation to enjoy it to her benefit. She urged in absence of the orders sought the same stood to be extinguished leading her to suffer substantial loss that cannot be adequately compensated by an award of damages.

15. She also submitted that if the orders sought are not granted and the suit is ultimately decided in her favour, then the inconvenience caused would be greater than that which would be caused to the defendants if the injunction is granted and the suit is ultimately dismissed. Thus, the balance of convenience ought to be inferred in her favour.

16. She relied on the cases of *Giella V Cassman Brown & Company Limited (1973) EA 358*, *Paul Gitonga Wanjau Vs Gathuthi Tea Factory Company Ltd & 2 others (2016) e K.L.R and Modzayo Mrima & Jadi Advocates Vs Peter Safari Shehe (2019) e K.L.R*. Ultimately she prayed that this Honourable Court grants the orders sought.

### **ANALYSIS**

17. The applicant has filed the instant application pursuant to **Order 40 Rule 2(1)** which provides as follows:

1. *Where in any suit it is proved by affidavit or otherwise — (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting,*

damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right. (2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

18. The conditions to be satisfied in order to grant the orders sought by the Applicant are laid out in the classicus case of **Giella Vs Cassman Brown (1973) E.A 358** whereby the court held as follows;

*“An applicant has to demonstrate firstly, that he has a prima facie case with probability of success. Secondly, an applicant has to show that he will suffer irreparable loss or damage if the interlocutory injunction is not granted, that is that an award of damages will not adequately compensate the damage. Thirdly, if the court is in doubt on the above 2 requirements, then it will decide the application on the balance of convenience.”*

19. The issues for determinations are therefore: -

a. **Whether the applicant has satisfied the threshold set out in the case of Giella vs. Cassman Brown (1973) E.A 358.**

b. **Who should pay the costs if at all.**

**WHETHER THE APPLICANT HAS SATISFIED THE THRESHOLD SET OUT IN THE CASE OF GIELLA VS CASSMAN BROWN (1973) E.A 358**

20. Firstly the applicant is mandated to demonstrate that she has a prima facie case with the probability of success.

21. A prima facie case was defined in the case of **Mrao Vs First American Bank of Kenya Ltd & Others 2003 K.L.R 125** where the Honourable Court held that:-

*“A prima facie case in a civil application includes but is not confined to a ‘genuine and arguable case’. It is a case 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”.*

22. The applicant’s claim in her plaint is that the 1<sup>st</sup> defendant has trespassed upon her plot No. Sagana/E61 and thus rendered her unable to continue developing it. She prays for an order of permanent injunction restraining the 1<sup>st</sup> defendant from tampering with the said plot.

23. I have looked at the documents annexed to the applicants Supporting Affidavit and I am convinced that the applicant has demonstrated that she was allocated the said plot by the 2<sup>nd</sup> Defendant and has been paying the rates for the same. Nothing was tendered by the defendants to disprove this and thus at this preliminary stage I am of the opinion that the facts deponed by the applicant are prima facie evidence that she indeed is the lawful owner of the said plot.

24. The 1<sup>st</sup> defendant did not also rebut by way of affidavit that she had not trespassed the said plot. I therefore find that the applicant has demonstrated that her rights to enjoy the said plot have been threatened thereby establishing a prima facie case with probability of success.

25. Secondly the applicant is required to show that she will suffer irreparable loss or damage if the interlocutory injunction is not granted.

26. In the case of **Marple Brooks Projects Company Limited & another Vs I & M Bank Limited [2019] e KLR**, the Honourable Court held that:

*“The next issue to address is whether the injury visited upon the Applicant should the conservatory orders not be granted could be compensated by way of damages. The principle generally is that where damages would suffice and the Respondent would be in a position to pay them, the court ought not to grant conservatory orders at an interlocutory stage. However, the position taken by Ringera J.A in the case of Kanorero River Farm Ltd and 3 Others v National Bank of Kenya Ltd 2002 2 KLR 207 was that “No party should be allowed to ride roughshod on the statutory rights of another simply because it could pay damages.”*

27. The applicant stated that she had constructed a foundation on the plot however the 1<sup>st</sup> Defendant came and put a building in it. Due to this she stated that she would suffer irreparable loss and damages since she was continuing with the process of developing the land for profit and that the said actions of the 1<sup>st</sup> defendant had hindered her.

28. The Defendants did not rebut this and I am thus of the view that irreparable loss will be occasioned if an injunction is not granted.

29. The final issue is on the balance of convenience. From the foregoing I find that the balance of convenience favours the applicant.

**CONCLUSION**

30. In the circumstances, I find and hold that the Notice of Motion dated 3<sup>rd</sup> July, 2018 has merits and the same is hereby allowed as prayed. Costs to be borne by the respondents.

**RULING DATED, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 17TH DAY OF SEPTEMBER, 2021.**

.....

**E.C. CHERONO**

**ELC JUDGE**

*In the presence of:-*

1. *Mr. Muraguri holding brief for Mr. Ngigi for the 1<sup>st</sup> Defendant*
2. *Mr. Mugo holding brief for Maina Kagio for the 2<sup>nd</sup> Defendant*
3. *Kabuta – Court clerk.*