



**REPUBLIC OF KENYA**

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

**ELC NO. 51 OF 2019**

**HAYER BISHAN SINGH & SONS LTD .....1<sup>ST</sup> PLAINTIF**

**SARNAGAR SINGH SAGER.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

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

**CITY OF KISUMU .....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiffs filed an application **dated 3<sup>rd</sup> December 2019** seeking an order of temporary injunction restraining the Defendants, their agents, representatives, servants and/or employees from trespassing on, wasting, constructing on, alienating, fencing to otherwise interfering and/or in any way dealing with the Plaintiffs' parcels of land known as KISUMU/MUNICIPALITY BLOCK 6/392 and KISUMU/MUNICIPALITY BLOCK 6/393, pending the hearing and determination of this suit.

The application is anchored on the supporting affidavit of Sarnagar Singh Hayer, the 2<sup>nd</sup> Plaintiff and a director of the 1<sup>st</sup> Plaintiff herein, in which It is deponed that the 2<sup>nd</sup> Plaintiff and his brother are the registered owners of KISUMU/MUNICIPALITY BLOCK 6/392 while the 1<sup>st</sup> Plaintiff is the registered owner of KISUMU/MUNICIPALITY BLOCK 6/393. That the 2<sup>nd</sup> Plaintiff and his brother applied for KISUMU/MUNICIPALITY BLOCK 6/392 to be allocated to them and the same was duly approved and all legal processes followed to have the same registered on their names. That the 1<sup>st</sup> Plaintiff bought KISUMU/MUNICIPALITY BLOCK 6/393 for valuable consideration and had the same transferred to its name. Copies of application letters, correspondences, transfer forms and certificates of leases in their names were attached.

That the Plaintiffs and the 2<sup>nd</sup> Plaintiff's brother embarked on development of the parcels and acquired loans from various institutions for the developments which is now valued at Ksh. 400,000,000/=. A copy of a valuation report for the parcels was attached. That the two properties are now charged to the tune of Ksh. 385,000,000/= to various financial institutions. Copies of searches reflecting the encumbrances were attached.

That the Respondents and its employees, agents, representatives of assigns embarked on demolishing, damaging and/or vandalizing the buildings, goods and other items or properties on the parcels and have started fencing the property with the building and some property still inside. Copies of photographs showing the fencing was attached.

That the Plaintiffs have suffered loss and damage amounting to Ksh. 89, 824,458/= as a result. A copy of the schedule of items and goods on the properties that were lost, destroyed and vandalized was attached.

That the actions of the Respondents shall put the Plaintiffs into financial ruin unless the Respondents' actions are stopped forthwith as the financial institutions may recall the loans advance to the 1<sup>st</sup> Plaintiff. That the Respondents action if allowed will violate the Plaintiff's constitutional right to a fair hearing, to own property and to earn living.

**Defendants' Response**

The Defendants responded through a replying affidavit of Doris Ombara, the Defendants' City Manager, dated 13<sup>th</sup> December 2019. The City Manager deponed that the Plaintiffs had admitted that the suit parcel used to belong to Kenya Railways and thereon were built junior staff houses, as per the letter dated 20th January 1988 attached to the Plaintiffs' supporting affidavit.

That the parcels had been repossessed by the Kenya Railways Corporation and Kenya Ports Authority in their efforts to re-establish the Kisumu Port, in which the Defendants had no role. That, in fact, the Plaintiffs had sued the Kenya Railways Corporation vide ELC Petition

No 18 of 2019 (OS) and obtained restraining orders on 4<sup>th</sup> November 2019, pending ruling on 14<sup>th</sup> February 2020.

That the injunctive orders sought enjoined are equitable remedies enjoining the party to make full and frank disclosure of material facts at the first instance. That for the causes of action to run parallel would expose the court to a risk of arriving at conflicting decisions on the same subject matter. That the court ought to balance the public interest against the private interest noting the Plaintiffs admission that the land used to be Kenya Railways Corporation land.

That the Defendants had been wrongly sued and as such the entire suit was fatally defective and the orders sought could not issue. That the Defendant Respondents being a county government could not be enjoined.

That the schedule of items vandalized attached was suspect as, from the photographs of the dilapidated and abandoned buildings also attached, it was not possible for valuable items to be kept there and the schedule did not bear any date and no ownership documents availed to vouch for the claim.

In a further affidavit dated 4<sup>th</sup> March 2020, the City Manager deponed that the suit parcels were part or portion of the original parcel KISUMU/MUNICIPALITY BLOCK 6/95 which belonged to and still belongs to Kenya Railways Corporation having been alienated to it on 8<sup>th</sup> February 1979. The certificate of lease of the original parcel was attached.

That the alleged alienation of the suit parcels being part of the already alienated original parcel was illegal and void since the commissioner of lands does not have the power to alienate an already alienated land.

### **Defendants' Submissions**

Counsel for the Defendants reiterated that the suit parcels, being part of land already alienated to Kenyan Railways Corporation, could not be alienated to the Plaintiffs by the Commissioner of Lands, citing Section 3 of the Government Lands Act and **Ethics & Anti-Corruption Commission v Njuguna Macharia [2015] eKLR**, and **Kenyan Anti-Corruption Commission v James Raymond Njenga & Another [2010] eKLR** among other cases for the proposition that that alienated land cannot be deemed unalienated.

Counsel submitted that the Respondents are not the ones who have engaged in the demolitions of the properties on the suit parcels as alleged, and that the Respondents do not claim any legal or equitable interest in the suit parcels. That the actions complained of were carried out by the Kenya Railways Corporation and the Kenya Ports Authority, therefore the Respondents have been wrongfully sued.

Counsel asserted that the Plaintiffs were guilty of material non-disclosure of the existence of a similar suit involving the same subject matter that is ELC No. 18 of 2019 (OS) Sarnager Singh Hayer and Hayer Bishan Singh & Sons Limited v Kenya Railway Corporation, seeking similar remedies as against the Respondents herein.

Counsel submitted that for injunctive orders to issue, the applicants should have satisfied the threshold as stipulated in **Giella v Cassman Brown & Co Ltd [1973] EA 358** – establishing a *prima facie* case, demonstrating irreparable loss which may not be compensated by an award of damages, and where the two requirements are not satisfied the court decides on the balance of convenience. That having shown that the suit parcels could not have been legally alienated and that the Respondents were not proper parties to the suit, the applicants failed to establish a *prima facie* case. That the Plaintiffs deponed in their supporting affidavit that they had suffered a quantifiable loss of Ksh. 89, 824, 458/=.

Counsel submitted that considering the public interest and the private interests of the Applicants, the public interest must prevail in this case, citing **Susan Waihera Kariuki & 4 others v Town Clerk Nairobi City Council & 3 others [2013] eKLR**.

### **Notice of Motion Dated 11th December 2019**

The Plaintiffs obtained temporary conservatory orders pending the determination of their application dated 3<sup>rd</sup> December 2019. The Plaintiffs later filed another application dated 11<sup>th</sup> December 2019 seeking orders to cite the City Manager of the 2<sup>nd</sup> Defendant, the Director of Enforcement of the 2<sup>nd</sup> Defendant and the County Secretary of the 1<sup>st</sup> Defendant to be in contempt of the orders of the court. The Plaintiffs also sought orders of committal or fining of the same officials until they obey the court's orders of 4<sup>th</sup> December 2019. The Plaintiffs asserted that despite being served with the orders the Defendants continue to occupy the suit parcels and carry out activities thereon, including carrying out hardcore, stones and other properties.

The Defendants, on the other hand, denied trespassing and carrying out any activities on the suit parcel and denied disobeying the court order. They instead pointed to the Kenya Railways Corporation and the Kenya Ports Authority as the persons dealing with the suit parcel. The Defendants stated that the Plaintiffs had in fact sued the Kenya Railways Corporation vide ELC Petition No. 18 of 2019 and further obtained contempt orders against the Managing Director of the Kenya Railways Corporation among other personalities.

### **Issues for Determination**

#### ***1. Principles governing temporary injunctions***

The principles for determining whether to grant an interlocutory injunction are laid out in **Giella v Cassman Brown [1973] EA 358** at 360: the applicant must show a *prima facie* case with a probability of success; that such an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury; and finally where the court is in doubt, it will decide the application on a balance of convenience.

The Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR elaborated on the meaning of a *prima facie* case as follows:

**“So what is a prima facie case? I would say that in civil cases it is a case in 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... a prima 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 success of the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”**

The Court of Appeal in Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR held that:

**“If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit “leap-frogging” by the applicant to injunction directly without crossing the other hurdles in between.”**

It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted.”

## 2. Proving contempt of court orders

Mativo J. in Samuel M. N. Mweru & Others v National Land Commission & 2 others [2020] eKLR held that:

**“It is an established principle of law that in order to succeed in civil contempt proceedings, the applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.”**

## 3. Whether the orders sought are merited

The core of the two applications is the Plaintiffs’ pleadings to the effect that the Defendants, their agents, representatives, servants and/or employees trespassed onto the suit parcels and demolished, vandalized or otherwise damaged various properties therein. That despite, a court order the Defendants have continue carrying out the alleged activities on the suit parcels.

The claim that the Defendants are the persons who allegedly trespassed onto the suit parcels and carried out the alleged activities has been cast into serious doubt by the undisputed existence of a separate suit ELC Petition No. 18 of 2019, between the Plaintiffs herein and the Kenya Railways Corporation, over the same suit parcels. In that case, the Plaintiffs deponed that Kenya Railways Corporation trespassed onto the same suit parcels and carried out demolition, damage and vandalization of properties leading to losses amounting to Kshs. 89,824,458/= which, curiously, is the exact figure of losses specifically pleaded in this application.

The affidavit evidence tendered by the Plaintiffs merely indicates activities being carried out on the suit parcels but offers no assistance in ascertaining the identities of the persons carrying out those activities. Therefore, the Plaintiffs have failed to establish a *prima facie* case at this stage. Similarly, as the identities of the alleged trespassers are in doubt, the application to cite the Defendants’ officials for contempt has no legs to stand on. Both applications ought to be, and are hereby dismissed with costs.

**DATED AT KISUMU THIS 12<sup>TH</sup> DAY OF MAY 2020**

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15<sup>TH</sup> March 2019 and with the consent of the parties.

**A.O. OMBWAYO**

**ENVIRONMENT & LAND**

**JUDGE**