



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1590 OF 2014

ERASTUS NYAGA MAINA..... PLAINTIFF

VERSUS

PETER WAKABA t/a GARAGE, BAR & RESTAURANT.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 23rd December 2014 in which the Plaintiff/Applicant seeks for a temporary injunction restraining the Defendant/Respondent from continuing to plow the hedge, flower bed and the road reserve adjacent and/or constructing car wash bays or in any other manner interfering with the use, movement and enjoyment of possession by the Plaintiff/Applicant's 35 tenant families residing on the parcel of land known as Ngong Township/Block 1/332 and Ngong Township/Block 1/342 (hereinafter referred to as the "suit properties") pending the hearing and determination of this Application and suit. The Plaintiff/Applicant also seeks for the costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the Plaintiff/Applicant, Erastus Nyaga Maina, sworn on 24th December 2014 in which he averred that he is the registered proprietor of the suit properties which he has extensively developed with permanent dwelling houses with 35 tenants with their families living therein including his own family. He annexed copies of his two Certificates of Lease. He averred further that the Defendant operates a bar and restaurant known as Garage Bar and Restaurant and a car wash right across the street from the suit properties. He further averred that without any notice or justification whatsoever, the Defendant has brought a tractor, leveled the road reserve area next to the suit properties, dug up the flower bed and pathway next to his fence and started constructing car wash sheds. He confirmed having reported the matter to the OCS Ngong Police Station who visited the site in his presence and in the presence of the Defendant/Respondent. He stated that the Defendant undertook to produce his licence from the County Government of Kajiado authorizing him to build the car wash in that place but failed to produce it. He further averred that if the Defendant/Respondent is allowed to proceed with building the car wash, his security and that of the 35 tenants and their families shall be seriously compromised and further that the water emanating from the said car wash shall pose a health hazard to them. In the circumstances, he requested the court to stop the Defendant/Respondent's said activities.

The Application is contested. The Defendant/Respondent filed his Replying Affidavit sworn on 6th January 2015 in which he averred that he approached the County Government of Kajiado in November

2014 seeking permission to put up a car wash business opposite his other business called Garage Bar and Restaurant. He averred further that officers from the County Government of Kajiado visited the proposed site and gave him the go ahead. He further averred that the proposed car shade is 50 metres from the Plaintiff/Applicant's gate to the suit properties and 10 metres to the feeder road to his homestead thus the car wash will not affect any person getting into his premises. He also confirmed that the OCS Ngong visited the site and gave him a go ahead to continue constructing the car wash. He added that the proposed car wash is similar to other car wash businesses established by other persons along the same road. He further denied having uprooted the Plaintiff's fence. He added that he is creating employment for more than 10 persons and that he would get a licence once the construction is complete.

In response thereto, the Plaintiff/Applicant filed his Further Affidavit sworn on 19th January 2015 in which he averred that the Defendant/Respondent had disobeyed the interim injunction issued by this court on 24th December 2014 by proceeding with construction of the car wash. He further averred that the Defendant/Respondent has brought in and poured more building materials along his fence with the express intention of extending the car wash sheds along the whole side of his fence and flower bed. He annexed photos to support this assertion. He further averred that the Defendant/Respondent has completely blocked off the pedestrian walkway along his perimeter fence and uprooted his flower bed. He added that the purported licence the Defendant/Respondent was relying on is not a licence but a mere letter by the Public Health Officer from Ngong Health Office which does not amount to a licence. He stated further that storm water from the car wash would obviously flow into his compound and create a marsh resulting in the immediate degradation of the environment leading to his tenants vacating the suit property.

The issue I am required to determine is whether to grant the Plaintiff/Applicant the orders of temporary injunction which he seeks. In deciding whether to grant the temporary injunction sought after by the Plaintiff/Applicant, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

“The conditions for the grant of an interlocutory 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 be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

“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.”

The issue of ownership of the suit properties is not in dispute, it is conceded by the parties herein that the suit properties belong to the Plaintiff/Applicant. The dispute revolves over the area lying outside the suit properties next to the Ngong Road, which presumably comprises of a road reserve. It is this area that the Defendant/Respondent has commenced to construct a car wash shade and parking. All road reserves belong to the Government of Kenya and it is this Government that can authorize the use of the same. The Defendant/Respondent has stated that he has the permission of the County Government of Kajiado to put up his car wash business in the disputed area. He alleged that officers from the County Government of Kajiado as well as the OCS, Ngong approved of his activities. He also annexed a copy of a letter dated 19th December 2014 from the Senior Public Health Officer Ngong which contained Public Health Requirements for a Car Wash. The Defendant/Respondent also stated that he would seek for a licence to operate the car wash business as soon as he completes the construction of the car wash. On his part, the

Plaintiff/Applicant disclosed his concerns that if the intended car wash business is allowed, the effects thereof would be felt by him directly considering the location of the suit properties to the intended business. He cited security concerns, health concerns, blockage of access to the suit properties and loss of tenants thereby directly affecting his use and enjoyment of his suit properties. I consider the concerns raised by the Plaintiff/Applicant to be genuine and valid. As the registered proprietor of the suit properties, he stands to be directly affected by the intended car wash business that the Defendant/Respondent is in the process of putting up. I consider that the Defendant/Respondent has not produced any evidence of approval or licence from the County Government of Kajiado to carry on his intended business at that site. In the circumstances, I do agree with the Plaintiff/Applicant that he has a prima facie case with high chances of success at the main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff's rights.

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 17TH DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE