



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CASE NO.65 OF 2012**

**SREEDEVIAMA SREEKUMARI**

**T/A SAKAWA SCHOOL.....PLAINTIFF**

**VERSUS**

**ELIZABETH MWIKALI NYACHIRI**

**DANIEL NYACHIRI OENGA..... DEFENDANTS**

**RULING**

1. What is before me is the Plaintiff's application that was brought by way of Notice of Motion dated 22<sup>nd</sup> February, 2012 seeking an order of temporary injunction to restrain the defendants from re-entering, trespassing onto, fishing, depositing any materials onto the school compound, interfering with and/or in any other manner dealing with the premises situated on all that parcel of land known as **LR. No. Kisii Municipality/ Block III/267**(hereinafter referred to as "**the suit property**") pending the hearing and determination of this suit. The application was supported by the affidavit of the Plaintiff sworn on 22<sup>nd</sup> February, 2012. The Plaintiff contended that she entered into a lease agreement with one, Joseph Nyamao Bonuke and Hellen Bonuke (hereinafter referred to as "**Bonukes**") with respect to premises situated on the suit property which premises the Plaintiff took possession of on 1<sup>st</sup> January, 2012. The Plaintiff claimed that the premises that were let to the Plaintiff by the Bonukes included classrooms, fish ponds and incidental facilities necessary for smooth running and/or operation of the school. The Plaintiff claimed that on 14<sup>th</sup> February, 2012, the defendants trespassed on the suit property and while therein proceeded to the fish ponds on the suit property and commenced fishing without the Plaintiff's permission or authority. The Plaintiff claimed that the defendants who created a disturbance in the process of carrying out the said fishing activities have threatened to come back into the suit premises and take possession of the said fish ponds for their own use without the Plaintiff's permission unless restrained by the court. The Plaintiff annexed to her affidavit in support of the application, a copy of the lease agreement dated 19<sup>th</sup> August, 2011 that the Plaintiff entered into with the Bonukes with respect to the suit property
2. The Plaintiff's application was opposed by the defendants who filed two separate replying affidavits both sworn on 13<sup>th</sup> April, 2012. The defendants contended that the 1<sup>st</sup> defendant is the wife of the 2<sup>nd</sup> defendant and that whereas the 1<sup>st</sup> defendant is a PhD student at Moi University currently working on a thesis research in the area of breeding and rearing of tilapia, the 2<sup>nd</sup> defendant is an aquaculture specialist working with Kenya Marine and Fisheries Research Institute and is currently engaged in specialized research projects for the European Union and World Bank. The defendants claimed that for the purposes of their research, the Bonukes granted them permission to enter into and use the earthen fish ponds that are situated within **LR. No. Kisii**

**Municipality /Block III/ 413** (hereinafter referred to only as “**Plot No. 413**”) which is also owned by the Bonukes. The defendants claimed that following the granting of this permission, the defendants engaged in the process of renovating the said fish ponds, constructing additional ones and stocking the same with fish. The defendants maintained that the said fishponds are on Plot No. 413 and not on the suit property as claimed by the Plaintiff. The defendants denied ever interfering with Plaintiff’s business or the pupils in the Plaintiff’s school. The defendants claimed that they have the right to access the said fish ponds. The 1<sup>st</sup> defendant annexed to her affidavit in opposition to the Plaintiff’s application; a copy of the proposal dated 7<sup>th</sup> January, 2011 that the defendants had presented to the Bonukes for the renovation and use of Bonukes earthen ponds at Sakawa School wetland for the period 2011-2015 which proposal was approved by the Bonukes on 8<sup>th</sup> January, 2011.

3. When the Plaintiff’s application came up for hearing on 22<sup>nd</sup> May, 2013, the court directed that the application be heard by way of written submissions. The Plaintiff filed her written submissions on 6<sup>th</sup> September, 2013 while the defendants had not filed their written submissions by 18<sup>th</sup> September, 2013 when the court gave a ruling date in the matter. I have considered the Plaintiff’s application and the affidavits filed by the defendants in opposition to the same. I have also considered the Plaintiff’s written submissions and the case law cited. The following is my view on the matter. The principles on which applications for a temporary injunction are to be considered are well settled. As it was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A 358** and the case of, **Aikman-vs-Muchoki [1984] KLR 353**, that was cited by the Plaintiff, an applicant for a temporary injunction must show that he has a prima facie case against the respondent with a probability of success and that unless the injunction is granted, he will suffer irreparable loss. If the court is in doubt as to the above, the court will determine the application on a balance of convenience. In the case of **Mrao Ltd. –vs- First American Bank of Kenya ltd (2003) KLR. 125**, that was also cited by the Plaintiff it was held 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 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”.**

4. From the foregoing, the first question that I need to answer is whether the Plaintiff has on the material placed before this court shown on a prima facie basis that the defendants herein have infringed on any of her rights. The Plaintiff has claimed that she is a tenant of the Bonukes on the suit property and that without her permission or authority, the defendants entered the suit property and commenced fishing at the fish ponds situated on the suit property. The Plaintiff has claimed that the fish ponds were part of the premises comprised in the suit property that were let to her by the Bonukes. On their part the defendants have denied trespassing onto the suit property. They have claimed that their activities are on Plot No. 413 where the fish ponds are situated and not on the suit property. They have contended that they were allowed to enter Plot No. 413 for the purposes of renovating and using the said fish ponds by the Bonukes who also own Plot No. 413. They have exhibited a copy of the proposal that they made to the Bonukes for the project that they were going to undertake on the said fish ponds which proposal was accepted by the Bonukes in writing. The Plaintiff did not file any further affidavit in response to the defendants’ replying affidavits. It remains contentious therefore whether the fish ponds in dispute are on the suit property or on Plot No. 413. This is a matter which will have to be resolved at the hearing. In the absence of a prima facie evidence that the fish ponds aforesaid are on the suit property, I am unable at this stage to find that the defendants had trespassed on the suit property when they carried out fishing activities on the said fish ponds. In the circumstances, I am not satisfied that the Plaintiff has established a prima facie case with a probability of success against the defendants. Having reached this conclusion, I am not under any obligation to consider whether the Plaintiff stands to suffer irreparable harm unless the orders sought are granted.
5. The upshot of the foregoing is that I find no merit in the Plaintiff’s application dated 22<sup>nd</sup> February, 2012. The same is dismissed accordingly with costs to the defendants.

**Delivered, dated and signed at Kisii this 7<sup>th</sup> day of February 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Kerongo h/b for Oguttu for the Plaintiff

Mr. Kaburi h/b for Nyatundo for the Defendants

Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**