



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT & LAND CASE NO. 81 OF 2013

ELIAKIM JAOKO AWITI..... PLAINTIFF

VERSUS

BENARD ISABOKE MBAKA.....1ST DEFENDANT

GREGORY AGWATA NDUBI..... 2ND DEFENDANT

RULING

1. The plaintiff is the registered proprietor of all that parcel of land known as SUNA EAST/WASWETA I/15695 (hereinafter referred to only as “**the suit property**”). The plaintiff has brought this suit against the defendants seeking an order of eviction and a permanent injunction restraining the defendants from in any way interfering with the Plaintiff’s occupation and/or ownership of the suit property. The Plaintiff has also claimed mesne profits and costs. Together with the plaint, the plaintiff filed an application by way of Notice of Motion dated

21st February, 2013 under certificate of urgency seeking interlocutory injunction to restrain the defendants from trespassing on, wasting, alienating, disposing off or in any other manner howsoever interfering with the suit property pending the hearing and determination of this suit.

2. The plaintiff’s application came up for hearing on 2nd May, 2013 when the defendants did not appear. The court was not satisfied that the defendants had been properly served with the application and as such adjourned the hearing of the application and directed the Plaintiff’s advocates to fix another hearing date at the registry and ensure that proper service was effected upon the defendants. The application was re-listed for hearing at the registry on 20th June, 2013. On that day again,

only the plaintiff’s advocate appeared in court and after satisfying myself from the affidavit of service sworn by one, Vitalis Onyango Akuku on 19th June, 2013 that the defendants were duly served with the application with a hearing date

endorsed thereon, I allowed the plaintiff’s advocate to argue the application in the absence of the defendants. The plaintiffs’ application is supported by the affidavit sworn by the plaintiff. The plaintiff’s case against the defendants as pleaded in the plaint and the affidavit in support of the application (“**supporting affidavit**”) is that, in the month of January, 2012, the defendants trespassed into the suit property and commenced the construction of semi-permanent structures thereon. The defendants also started cultivating the suit property. The defendants have in the process unlawfully prevented Plaintiff from occupying and using the portions of the suit property in their possession.

The plaintiff claims that the defendants' said illegal activities if allowed to continue will change the nature and character of the suit property thereby subjecting the Plaintiff to irreparable loss which cannot be compensated in damages. The Plaintiff claims that demand has been made upon the defendants to

stop the said activities but they have refused to comply. It would therefore be fair and just in the circumstances if the injunction sought is issued for the purposes of preserving the suit property pending the hearing and determination of the suit. The Plaintiff has annexed to his affidavit in support of the application a copy of the title deed for the suit property which shows that the same is registered in the name of the Plaintiff.

3. In his submission in support of the plaintiffs' application, the plaintiff's advocate relied entirely on the grounds set out in the body of the application and on the contents of the Plaintiff's affidavit in support of the application. The Plaintiff's advocate submitted that the Plaintiff is the registered proprietor of the suit property and as such the defendants will suffer no prejudice if the orders sought are granted.
4. The principles for granting interlocutory injunction are now well settled. The plaintiff herein is not excused from satisfying the said principles simply because the application is not

defended. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1973] E.A. 358**, an applicant for the interlocutory injunction must prove that he has a prima facie case against the defendant with a probability of success and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. The plaintiff has placed evidence before this court which shows

that the Plaintiff is the registered proprietor of the suit property. The plaintiff has also sworn an oath that the defendants have trespassed on the suit property and have commenced farming activities thereon in addition to putting up semi-permanent structures on the property. In the absence of any challenge to the plaintiff's title and the plaintiff's claim that the defendants have trespassed on the suit property, I am persuaded that the plaintiff has established a prima facie case with a probability of success against the defendants since the

plaintiff is the registered proprietor of the suit property and is entitled to possession of the same. I am also satisfied that the plaintiff would suffer irreparable loss if the orders sought are not granted as that would result in the plaintiff being kept away from his property. Due to the foregoing, the plaintiff

has satisfied the principles for granting interlocutory injunction. The plaintiff's application dated 21st February, 2013 is therefore well founded. The same is allowed in terms of prayer No.3 thereof. The plaintiff shall have the costs of the application.

Dated, signed and delivered at KISII this 3rd day of July, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Mogire holding brief for Awino for plaintiff

No appearance for defendants

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

