



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 471 OF 2015

SAMUEL NYAMORI.....PLAINTIFF

VERSUS

FRANCIS ABUYADEFENDANT

RULING

The Defendant filed a Notice of Motion dated 27th April 2020 seeking orders that an interim order of injunction do issue restraining the Plaintiffs either by themselves, their servants and or agents or anyone whomsoever claiming title, deriving authority or acting on their behalf from entering, constructing, building, erecting, remaining in, occupying/continuing to occupy or trespass into the land parcel No. KISUMU/CHIGA/2807 pending the hearing and determination of this suit. That the Plaintiff be committed to civil jail for disobedience of Justice Mwera's court orders granted in 22nd May 2008. That the court be please to order the attachment and sale of the Plaintiff's property to be sold as compensation for the damages caused to the Defendant. That costs of this application be provided for.

The application is based on the grounds set forth in the body of the application and the supporting affidavit of the Defendant as follows. That the Defendant is the registered owner of the suit parcel having purchased the same in 2006, and has been working on the parcel for the last 13 years. That in March 2020 he was informed by a neighbour that some unknown persons were moving in and around the land and destroying the structures, harassing tenants and behaving in a manner likely to cause a breach of peace.

That the Defendant later discovered that the person perpetuating those activities without any justification or reasonable cause was the Plaintiff/Respondent. That through his Advocates, the Defendant has given notice to the Plaintiff who has neglected or refused to heed the notice.

That on 15th April 2020, without any reasonable cause or justification, the Plaintiff poured various materials like sand, chips and stones with a view to commence construction on the land without the Defendant's consent or permission.

That due to the actions of the Plaintiff and the Plaintiff having gone on rampage threatening to kill anybody who legally challenges his actions, the Defendant cannot develop his land on which he planned to commence construction on April 2020.

RESPONDENT'S REPLY

The Respondent filed a Replying Affidavit in opposition to the application date 19th May 2020. The Respondent denied the allegations made by the Defendant deponing that he was last in Kisumu on 1st November 2019 to swear a supporting affidavit with respect to being joined in this proceedings after which he travelled back to Nairobi where he has been to date.

That in the month of April, the Respondent was locked down in Nairobi following the directive by the Government to stem the spread of the COVID-19 pandemic hence there was no way the Respondent would have been in Kisumu carrying out the alleged activities.

The Respondent deponed that he had since contacted his brother one Michael Naymori who resides back at home to inquire about the Applicant's complaints and was informed that the Applicant was misleading the court as there was no destruction to the suit property taking place as alleged.

That the Applicant was arguing the main case in the application instead of waiting to do so at the defence hearing. That the application was only coming as a backdrop of the court allowing the Respondent to replace the deceased administrator.

DEFENDANT'S SUBMISSIONS

Counsel for the Defendant filed written submissions, laying out the requirements for granting an interlocutory injunction as per ***Giella v Cassman Brown***. Counsel submitted that for the court to determine whether the Applicant had a *prima facie* case with a probability of success, the court has to determine whether there exists a legal right which has apparently been infringed by the opposite party calling for an explanation or rebuttal from the latter, as held in ***Mrao v First American Bank Limited & 2 others*** [2003] eKLR.

Counsel submitted that the Applicant was the legal owner of the suit parcel having purchased and had the parcel subdivided and transferred. That the Plaintiff sued the Applicant and an order of maintaining status quo was granted. That he confirmed from locals that he person trespassing on the land was the Plaintiff and the agent. That the Applicant was forced to move to court after his Advocates letter to the trespassers was ignored. That it is clear that the Applicant has a *prima facie* case with chances of success.

Counsel submitted that even though the value of the property can be ascertained and damages payable, damages was bit always a suitable remedy where the Applicant has established a clear legal right or breach. Counsel cited ***Waithaka v Industrial and Commercial Development Corporation*** [2001] KLR 374 and ***Joseph Siro Moisama v HFCK & 3 others*** Nairobi HCC No. 265 of 2007.

Counsel submitted that on the balance of convenience, the Plaintiff/Respondent would suffer less injury or losses compared to the Applicant. That it was in the interest of justice that the Applicant be granted an injunction.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent filed written submissions, submitting that the Defendant makes no mention of the Respondent who was joined to this proceeding following the death of Samuel Otieno Nyamori, thus the description of the alleged violator is not clear in the Defendant's supporting affidavit.

Counsel submitted that the Defendant's application seems to be an omnibus one seeking both injunction and contempt orders and such orders ought to have been made in separate applications. That the Defendant seems to be arguing the main case.

Counsel pointed out that there is a previous order of status quo which the Applicant describes as injunction orders against both parties from either side of each other's share in the suit property, hence the court cannot issue two injunctive orders over the same subject matter. That the Applicant should have just pursued contempt if he had the evidence to sustain it.

Counsel submitted that the Applicant had failed to prove any of the requirements to obtain an interim grant of an injunction. That the Applicant failed to demonstrate the alleged breach, there being no evidence annexed showing destruction to any properties in the suit parcel. That the descriptions of the alleged culprits was also unclear and the Applicant merely relied on hearsay and speculations. That no evidence was tendered to place the Respondent or the previous administrator at the scene of crime.

Counsel submitted on the issue of contempt that the Applicant has failed to avail any affidavit of evidence confirming service of the alleged breach order upon the Respondent or the previous deceased administrator.

Issues for Determination

1. Whether prayers for interim injunction are merited

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 Applicant has not sufficiently demonstrated his averment that the Respondent trespassed onto the property and carried out the alleged activities. The confirmation that the unknown persons who trespassed onto the suit parcel and destroyed structures were agents of the Respondent apparently came from locals in the area who the Applicant does not name. The Applicant also lays no evidential foundation to his averment that the Respondent went on a rampage and threatened to kill anyone who legally challenged him. Therefore, the Applicant has failed to establish a *prima facie* case.

2. Whether prayers for contempt are merited

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 wilfulness 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.”

The Applicant failed to sufficiently demonstrate that the persons who allegedly trespassed onto the property were the Respondent and/or his agents. Further, the Applicant failed to produce the notice of breach sent to the Respondent as alleged. The application ought to be, and is hereby dismissed with costs.

DATED AT KISUMU THIS 10TH DAY OF DECEMBER 2020

ANTONY OMBWAYO

JUDGE

This Judgment has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE