



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**CIVIL CASE NO 186 OF 1974**

**NJOROGE KIRONYO**

**PETER WAITHAKA**

**KAMAU NJOROGE**

**JOHN KIHU ..... PLAINTIFFS**

**VERSUS**

**KORONYO NJOROGE..... DEFENDANT**

**JUDGMENT**

This is an application by the defendant for interlocutory injunction to restrain the plaintiffs from taking possession and occupation of any portion of the suit premises and from carrying out any developments on the land until the hearing of the action.

The defendant and the second, third and fourth plaintiffs are all the sons of the first plaintiff and the defendant is the registered proprietor of the property. The dispute between the parties springs primarily from an allegation by the plaintiffs that the defendant became the registered proprietor at the instance of the father in order to hold the property upon trust for the second, third and fourth plaintiffs who are his younger brothers and to whom he is therefore accountable. The plaintiffs further allege that they have been in occupation and possession of the property for upwards of fifteen years, have acquired a statutory title, and have carried out developments on the property.

The defendant maintains that the registration of the property in his name was effected in his own right in accordance with the law and not as a trustee and denies in his defence that the plaintiffs have been in occupation or possession of the premises as alleged. In support of the present application he states in an affidavit that the plaintiffs are now threatening and attempting to take possession of the property and to trespass and carry out developments thereon, causing him great and irreparable loss. The application, which is by chamber summons served on the plaintiffs, came before me on 9th January 1976 when at the request of counsel for the plaintiffs I adjourned the matter to 2nd February to enable further affidavits to be filed. No affidavit having been filed by the plaintiffs and counsel for the plaintiffs not having appeared when the resumed hearing came on, I must accept the facts set out in the defendant's affidavit as correct.

There arises the question of jurisdiction. The summons purports to have been brought under rules 1 to 3 order XXXIX, of the Civil Procedure Rules, section 3A (formerly section 97) of the Civil Procedure Act, and the inherent jurisdiction of the court. It is clear that, as was pointed out by Mr Daine, who appeared

for the defendant, rules 1 to 3 of order XXXIX enable only a plaintiff and not a defendant to apply for relief under that order, but he referred me to a passage in 21 *Halsbury's Laws of England* (3rd Edn), paragraph 862, where it is stated that under the procedure in the High Court of Justice in England an application such as the present may be brought by either a plaintiff or a defendant. This position, however, arises from the express provisions of order 29, rule 1(1), of the Rules of the Supreme Court 1965 in England, to which no counterpart is to be found in our rules.

Section 3A of the Civil Procedure Act declares that nothing in the Act shall be deemed to limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court, and this limitation clearly applies also to the Civil procedure Rules made under section 81 of the Act. It is necessary therefore to consider whether the Court has an inherent power to grant an interlocutory injunction at the instance of the defendant. Section 3(1) of the Judicature Act declares that, subject as therein, the jurisdiction of the High Court shall be exercised in conformity with the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12th August 1897 and the procedure and practice observed in Courts of justice in England at that date. By section 25(8) of the Supreme Court of Judicature Act 1873 (of England), which was later re placed in similar terms by section 45 of the Supreme Court of Judicature (Consolidation) Act 1925 (of England), but may be taken as representing the position in that country in 1897, power was conferred upon the High Court there to grant an injunction or to appoint a receiver by an interlocutory order in all cases in which it should appear to the Court to be just or convenient so to do: and that any such order might be made either unconditionally or upon such terms and conditions as the Court should think just, with the added provision that:

If [an injunction is asked for] whether before, or at or after the hearing of any cause or matter, ... to prevent any threatened or apprehended waste or trespass, the injunction may be granted, if the Court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

That such an order may be made at the instance of a defendant would appear to follow from the decision in *Sargant v Read* (1876) 1 Ch D 600, where the power to appoint a receiver under the section was so exercised. If then the jurisdiction conferred upon this Court by section 3(1) of the Judicature Act includes that conferred upon the High Court of Justice in England by the Act of 1873, the omission of any provision in order XXXIX for the granting of an interlocutory injunction to a defendant cannot, having regard to section 3A of the Civil Procedure Act, properly be construed as withholding by implication from this Court in the exercise of its inherent jurisdiction the power to grant such an injunction at the instance of a defendant.

Furthermore, approaching the matter as one of principle, I cannot see why a defendant, who, as here, has submitted to the jurisdiction of the court by an unconditional entry of appearance and has filed a defence claiming an interest in the property in dispute, should not be entitled in a proper case to the same measure of interim protection by way of an interlocutory injunction in regard to that interest as would the plaintiff in regard to the interest claimed by him.

For the reasons which I have indicated, I am of the opinion that I have jurisdiction to grant the relief sought and, the defendant by his counsel having given the usual undertaking to indemnify the plaintiffs if so required by the Court, against any damages to be incurred by them as a result of the injunction, I grant an injunction as prayed in the summons. The costs are reserved.

*Application granted.*

Dated at Nairobi this 10<sup>th</sup> Day of May, 1976

**L.G.E. HARRIS**

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**JUDGE**