



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 72 OF 2018

KENYA AFRICAN NATIONAL UNION.....PLAINTIFF/APPLICANT

VERSUS

COUNTY GOVERNMENT OF KAKAMEGA..... DEFENDANT/RESPONDENT

RULING

The application is dated 9th October 2018 and is brought under section 3 and 3A of the Civil Procedure Act and Order 40 Rule 1 of the Civil Procedure Rules seeking the following orders:-

1. That this application be certified as urgent and the service of the same be dispensed within the first instance.
2. That a temporary injunction do issue against the defendant, its agents, servants and/or anybody acting upon its instructions from trespassing, demolishing, and/or interfering with the plaintiff's exclusive use of the suit land KAKAMEGA TOWN/BLOCK II/230 pending the inter-parties hearing hereof.
3. That pending the hearing and determination of this suit a temporary injunction do issue restraining the defendant/respondents, its agents, servants and anybody acting on its behalf from trespassing, demolishing, removing and/or interfering with the applicants exclusive use of the suit land KAKAMEGA TOWN/BLOCK II/230.
4. That the OCS Kakamega Police Station to oversee the compliance of the above orders.
5. Costs of this application be provided.

It is grounded on the annexed affidavit of JONATHAN WECHÉ CHACHA and on the following general grounds, that the applicant is the sole and duly registered proprietor of L.R. NO. KAKAMEGA TOWN/BLOCK II/230. That the respondents without any colour of right whatsoever is forcefully attempting to interfere with the peacefully use of the suit land by the applicant. That the applicant has a prima facie case with high chances of success.

The respondent submits that L.R. No. Kakamega Town/Block 11/230 is the property of the defendant although the plaintiff is the lessee through its registered trustees named on the lease certificate on the plaintiff's own annexure 2 marked as 'JWC2'. That a close look at the certificate of lease shows that the Trustees of the plaintiff who are persons named on the certificate of lease are the ones with legal capacity to file suit and as long as the trust exists, the plaintiff has got no legal capacity to bring upon action in respect of the suit land, a subject of trust. That the kiosks allegedly removed were illegal structures within the Central Business District and underserving for that matter. That for any structures to be constructed on the Government land, the lease has to satisfy the following:-

- (i) Approved plan from the Physical Planning Department.
- (ii) Approval from the Public Health Department i.e. Inspection Health Certificate.
- (iii) Occupation Certificate by the Public Health Certificate.
- (iv) Sanitary facilities.
- (v) Provision of solid waste and liquid management.
- (vi) Drainage Disposal facilities.

That the above were not satisfied by the occupants of the plaintiff/applicant. There was no proved losses incurred by the plaintiff as only empty illegal kiosks were removed. That the plaintiff do not have a prima facie case with high chances of success.

This court has carefully considered the submissions and the annexures therein. The principals governing the grant of interlocutory injunction are clear. As stated in the case of Giella vs. Cassman Brown (1973) EA 358.

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

Furthermore, as elaborated in the case of Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others (2003) Hon Bosire J.A. held that:

“So what is a prima facie case? I would say that it is a case in which on the material presented to the court or 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”

Further he goes on to state that *“..... a prime 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 the applicant’s case upon trial. That is clearly a standard which is higher than an arguable case.”*

The application is based on the grounds that the applicant is the sole and duly registered proprietor of L.R. NO. KAKAMEGA TOWN/BLOCK II/230. That the respondents without any colour of right whatsoever is forcefully attempting to interfere with the peacefully use of the suit land by the applicant. The applicant has annexed a certificate of lease and an allotment letter to prove his claim. I find that the applicant has shown a prima facie case with a probability of success. I order that the status quo be maintained pending the hearing and determination of this case. Costs of this application to be in the cause.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26TH DAY OF FEBRUARY 2019.

N.A. MATHEKA

JUDGE