



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 87 OF 2016

EASTERN PRODUCE KENYA LIMITED.....PLAINTIFF

VERSUS

CHEPSIRE (SAVANI) FARMERS CO-OPERATIVE

SOCIETY LIMITED.....DEFENDANT

RULING

Eastern Produce Kenya Ltd, (hereinafter referred to as the plaintiff) has come to court against *Chepsire (Savani) Farmers' Co-operative Society Ltd*, (hereinafter referred to as the defendant) claiming that by a grant of Easement dated 19th December, 1979 (hereinafter the "easement"), made between the defendant and the plaintiff, then known as "East African Coffee Plantations Limited", the defendant as beneficial owner thereby granted unto the plaintiff, rights and privileges over Land Reference Number 4075 that include the right to construct and maintain a water pipeline, a road of access, a power house and a wayleave for the power line and the right to the free and uninterrupted flow of water through the water furrow (hereinafter the "furrow") or water pipelines, full and better particulars of which are set out in the body of the Grant of Easement dated 19th December, 1979. The rights and privileges acquired by the plaintiff under the easement, specifically the right to the free and uninterrupted flow of water through the furrow, were to provide a means to the plaintiff for feeding its hydro site with water. The plaintiff uses the hydro power generated to pump water for the use in the factory villages, Kapgoros Division villages, Management villages as well as for the use by the neighbouring community, including Chepsire Primary School, Chepkiwen Primary School, Chepsire Dispensary and the households around Chepkiwen Centre.

On or about 9th January 2016, the defendant and/or its servants and/or its agents forcibly, illegally and wrongfully accessed the furrow and obstructed and/or closed and/or caused to be obstructed and/or closed the free and uninterrupted flow of water through the furrow to the plaintiff's site consequently preventing its operation. The defendant and/or its servants and/or its agents has also planted seedlings on the furrow and has damaged the fence running along the furrow.

The said actions by the defendant and/or its servants and/or its agents constitute a gross violation of the plaintiff's rights and privileges under the easement and have cause and continue to cause and will continue to cause, unless restrained by orders of this Honourable court, the plaintiff and the neighbouring community to suffer loss and damage. Thus, the plaintiff has been unlawfully deprived of enjoyment of its rights and privileges under the easement. Moreover, The plaintiff has been unable to operate its hydroelectric site which runs on water channeled through the furrow; The plaintiff has been unable to use power from the hydro-electric site to pump water to the many people depending on it, including Chepsire and Chepkiwen Primary Schools and Chepsire Dispensary hence the company is sustaining considerable costs in using alternative power to provide water to hundreds of people who used to be supplied water

using hydroelectric power station. If this situation prevails, the livelihood of the hundreds of people depending on the water pumped by the plaintiff using power generated from the hydro site is at stake.

The plaintiff prays for a declaration that the defendant and/or its agents and/or its servants has infringed upon the plaintiff's rights and privileges under the easement being the right to the free and uninterrupted flow of water through the water furrow shown coloured red on Plan Number 95427 annexed to the Grant of Easement dated 19th December, 1979 and that the plaintiff is entitled to the free and uninterrupted flow of water through the water furrow or water pipelines as shown coloured red on Plan Number 95427 annexed the Grant of Easement dated 19th December, 1979. The plaintiff further prays for a mandatory injunction compelling the defendant, whether by its servants and/or agents or otherwise to forthwith open the furrow and to remove from the furrow all materials and items used to close and obstruct the free flow of water through the furrow shown coloured red on Plan Number 95427 annexed to the Grant of Easement dated 19th December, 1979 and lastly, a permanent injunction restraining the defendant by itself, whether by its servants and/or agents or otherwise from obstructing the flow of water in the furrow shown coloured red on Plan Number 95427 annexed to the Grant of Easement dated 19th December, 1979 or to howsoever interfere with the free flow of water in the said furrow.

Accompanying the plaint, the plaintiff has filed an application for an injunction do issue restraining the defendant, its servants and/or agents and/or assigns from continuing to obstruct and/or prevent of, or from in anyway whatsoever interfering with the free flow of water through the water furrow shown colored red on Plan Number 95427 annexed to the Grant of Easement dated 19th December, 1979 pending hearing and determination of the suit herein. The application is based on grounds that the plaintiff is the registered proprietor of land reference number 5413/2 as grantee for a period of 950 years from 1959 pursuant to Grant No. I.R. 16950 in the South West of Nandi Hills Town in Kericho and which land Adjoins the plaintiff's aforesaid land whilst the defendant is the registered as lessee of the land parcel Number L.R. No. 4075 for the term of 950 years from 1959 pursuant to Grant No. I.R. 16950 in the South West of Nandi Hills in Kericho and which land adjoins the plaintiff's aforesaid land. By a Grant of Easement dated 19th December, 1979 (hereinafter the "easement") made between the defendant and the plaintiff (then known as "East African Coffee Plantations Limited"), the defendant as beneficial owner thereby granted unto the plaintiff, rights and privileges over Land Reference Number 4075 that include the right to construct and maintain a water pipeline, a road of access, a power house and a wayleave for the power line and the right to the free and uninterrupted flow of water through the water furrow (hereinafter the "furrow") or water pipelines, full and better particulars of which are set out in the body of the Grant of Easement dated 19th December, 1979. The rights and privileges acquired by the plaintiff under the easement, specifically the right to the free and uninterrupted flow of water through the furrow, were to provide a means to the plaintiff for feeding its hydro site with water. The plaintiff uses the hydro power generated to pump water for the use in the factory villages, Kapgoros Division villages, Management villages as well as for the use by the neighbouring community, including Chepsire Primary School, Chepkiwen Primary School, Chepsire Dispensary and the households around Chepkiwen Centre. Hundreds of people depend on the water pumped by the plaintiff using the power generated from the plaintiff's hydro site.

On or about 9th January 2016, the defendant and/or its servants and/or its agents forcibly, illegally and wrongfully accessed the furrow and obstructed/closed and/or caused to be obstructed/closed the free and uninterrupted flow of water through the furrow to the plaintiff's site consequently preventing its operation. The defendant and/or its servants and/or its agents has also planted seedlings on the furrow and has damaged the fence running along the furrow. Unless the orders sought herein are granted by this Honourable court, the said actions by the defendant and/or its servants and/or its agents which actions constitute a gross violation of the plaintiff's rights and privileges under the easement will continue to cause the plaintiff and the neighbouring community irreparable loss and damage. The plaintiff seeks the protection and the assistance of the police to maintain peace and ensure compliance with and enforcement of the orders of the Honourable court. It is in the interests of justice that the orders sought herein are granted.

In the replying affidavit of John Kimutai Rono, the Interim Chairman of the defendant, he states that the

plaintiff/applicant's supporting affidavit is full of lies and misinformation which was meant to hoodwink and mislead the Honourable Court to grant the said orders granted on 18th January, 2016. That the defendant has never been registered as a lessee of the said Land Parcel L. R. No. 4075 at any given time and has never owned land at the South West of Nandi Hills Town in Kericho. The applicant has not established any connection or by way of recent search at Lands Office that the respondent ever owned the said L.R. No. 4075. That members of the society have never been aware of the aforesaid easement and further wish to state that if there was any easement agreement by the plaintiff and any member of the cooperative society, it may have been on individual capacity as the society won't have committed itself to a property they never owned. That he could not comprehend how the purported officials could have entered into an agreement over a property they never owned. That the current area map shows how L. R. No. 4075 also known as Nandi Hills/Kapsimotwo Block 1 (Chepsire) drawn in the year 1991, was subdivided and individual title Deeds issued without showing the existence of any easement or way leave. That the plaintiff obtained orders which cannot be enforced as already there is No. L. R. No. 4075 except several title deeds that have been issued to individual members. That the owners of those individual titles have never been members of Chepsire (Savani) Farmers Co-operative Society. That it is true that the plaintiff's factories have never closed down as they are connected to the electricity supplied by the Kenya Power and Lighting Company. That the plaintiff filed this suit in Nairobi to punish the defendant/respondent as the cause of action arose in Nandi Hills. That the orders as granted herein cannot be enforced as the plaintiff is aware that the said parcel of land was issued to individuals who have never been members of the defendant.

In the further affidavit, the plaintiff through the Group Finance Director states that the defendant was at all material times registered as proprietor as lessee of the land parcel Land Reference Number 4075. He is informed by Mr. Peter Njeru, an Advocate of the High Court practicing as such with the plaintiff's Advocates on record and which information he verily believes to be correct that a recent copy of the title to Land Reference Number 4075, obtained from the Lands Registry at Nairobi, on or about 17th February, 2016, confirms that the defendant has at all material times been the registered proprietor as lessee of the Land Reference Number 4075.

He further states that the purported subdivision of L.R. No. 4075, as alleged was done subject to the existing easement as provided for in law and that If at all the map attached to the defendant's Replying Affidavit is genuine, it is the plaintiff's conjecture that that map was prepared with the sole intention of avoiding the defendant's obligation arising under the existing easement over L.R. No. 4075 so as to facilitate the alleged subdivision process. The defendant has not disclosed who the alleged owners of the alleged subdivisions of L.R. 4075 are. That the power generated by the plaintiff's hydro plant and which plant remains inoperative since the defendant and/or its servants, and/or its agents blocked the furrow, is used by the plaintiff to supplement and/or its agents blocked the furrow, is used by the plaintiff to supplement and/or subsidize the power purchased by the plaintiff from Kenya Power. That due to the obstruction of the furrow as aforesaid, the plaintiff is likely to be unable to continue pumping water to the many people depending on it, including Chepsire and Chepkiwen Primary Schools and Chepsire Dispensary mainly because it will not be sustainable for the plaintiff to continue purchasing all the power required from Kenya Power. That he verily believe that in the circumstance, it is in the interest of justice the orders sought in the plaintiff's Notice of Motion dated and filed on 15th January, 2016 are issued pending the hearing and determination of the suit herein.

The plaintiff submits that he has established a prima facie case. The legal rights and privileges confirmed to it by virtue of a grant of easement dated December, 1979, made between it then known as East Africa's Coffee Plantation Ltd and the defendant herein have been infringed by the defendant. The plaintiff being the dominant tenant of the easement, acquired the right to the free and uninterrupted flow of water through the water furrow or water pipelines. The plaintiff submits that any subdivision of the property ought to have considered the easement and that the easement continues to run on the property despite the subdivisions.

On irreparable injury likely to be suffered by the plaintiff, the plaintiff submits that the water from the furrow provides a means to the plaintiff for feeding its hydro site with water. The plaintiff in sequence uses the hydro power generated to pump water for the use in the factory villages, Kapgoros Division

villages, Management villages as well as for the use by the neighbouring community, including Chepsire Primary School, Chepkiwen Primary School, Chepsire Dispensary and the households around Chepkiwen Centre.

Due to the defendant's illegal obstruction of the free and uninterrupted flow of water through the furrow, the plaintiff's operations have been rendered nugatory. Not only has the Plaintiff been unable to operate its hydro electric site which runs primarily on water channeled through the furrow, the plaintiff has also been unable to use power from the hydro-electric site to pump water to the neighbouring community depending on it. In addition to the aforementioned, the plaintiff is sustaining considerable costs in using alternative power to provide water to the neighbouring community. The plaintiff thus submits that if an injunction is not granted, the livelihood of the hundreds of people depending on the water pumped using power generated from the hydro site will remain at stake.

On balance of convenience, the plaintiff submits that the balance of convenience undoubtedly lies in its favour. If the injunction sought is not granted, the plaintiff will be wholly deprived of its legal rights and privileges under the easement. Consequently, the neighbouring community at large will be deprived of water pumped from the plaintiff's site. The defendant on the other hand would suffer no prejudice. The plaintiff has the right to the free and uninterrupted flow of water through the furrow as granted to it by virtue of the easement dated 19th September, 1975. The defendant has not provided any evidence before this court nor in its replying affidavit to prove the contrary. In light of the foregoing, the law and the totality of evidence adduced show that the plaintiff has demonstrated sufficient grounds for the grant of an injunction and has met the test for the grant of an injunction as was settled by the case of **Giella Vs Cassman Brown & Co. Ltd.** It is therefore just and equitable in light of the foregoing submissions that the orders sought in the plaintiff's application be granted.

The defendant submits that the only option available is for the plaintiff/applicant is to seek orders compelling the Registrar of titles and Directors of Survey to rectify maps to indicate the existence of the easement and cancel the titles already issued. The defendant will urge this Honourable court at appropriate time to dismiss this suit on the ground that he is wrongfully sued. This is because on the 19th November, 1993, they had surrendered the said property to the government of Kenya. The defendant urges the court to refer to the applicant's further affidavit dated 18th April, 2016, paragraph 5, where he has annexed a copy of the title obtained from the Land's registry. The said title, being L.R. No. 4075 was in the name of East African Coffee Plantations Limited, who transferred it to Chepsire (Savani) Farmers Co-operative Society Limited on 9th December, 1993, the defendant surrendered the said title to the Government of the republic of Kenya and therefore the defendant ceased being the registered owner.

The power to grant temporary injunction is in the discretion of the Court. This discretion however should be exercised reasonably, judiciously and on sound legal principles. Before granting a temporary injunction, the court must consider the following principles: --

- 1. whether the applicant has demonstrated a prima facie case with a probability of success.***
- 2. Whether the applicant is likely to suffer irreparable harm if injunction is not granted.***
- 3. Where the balance of convenience tilts if the court is in doubt.***

The existence of a prima facie case in favor of the plaintiff is necessary before a temporary injunction can be granted. **Prima Facie** case has been explained to mean that a serious question is to be tried in the suit and in the event of success, if the injunction be not granted the plaintiff would suffer irreparable injury. The burden is on the plaintiff to satisfy the court by leading evidence or otherwise that he has a **Prima Facie** case in his favor of him. A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. This court finds that the plaintiff has demonstrated that he is the registered proprietor of land reference number 5413/2 as grantee for a period of 950 years from 1959 pursuant to Grant No. I.R. 16950 in the South West of Nandi Hills Town in Kericho and which land Adjoins the plaintiff's aforesaid land whilst the defendant was the registered as lessee of the land parcel Number L.R. No. 4075 for the term of 950 years from 1959

pursuant to Grant No. I.R. 16950 in the South West of Nandi Hills in Kericho and which land adjoins the plaintiff's aforesaid land. By a Grant of Easement dated 19th December, 1979 made between the defendant and the plaintiff then known as "East African Coffee Plantations Limited the defendant as beneficial owner thereby granted unto the plaintiff, rights and privileges over Land Reference Number 4075 that include the right to construct and maintain a water pipeline, a road of access, a power house and a wayleave for the power line and the right to the free and uninterrupted flow of water through the water furrow (hereinafter the "furrow") or water pipelines, full and better particulars of which are set out in the body of the Grant of Easement dated 19th December, 1979.

The alleged rights and privileges allegedly acquired by the plaintiff under the easement, specifically the right to the free and uninterrupted flow of water through the furrow, were to provide a means to the plaintiff for feeding its hydro site with water. The plaintiff uses the hydro power generated to pump water for the use in the factory villages, Kapgoros Division villages, Management villages as well as for the use by the neighbouring community, including Chepsire Primary School, Chepkiwen Primary School, Chepsire Dispensary and the households around Chepkiwen Centre. Hundreds of people depend on the water pumped by the plaintiff using the power generated from the plaintiff's hydro site. Though it is alleged that the land was subdivided and allocated to the defendant's members it is a valid argument that the plaintiff's rights on the easement were not extinguished on surrender and subdivision.

Irreparable injury means that the injury must be one that cannot be adequately compensated for in damages and that the existence of a prima facie case is not itself sufficient. The applicant should further show that **irreparable injury** will occur to him if the injunction is not granted and there is no other remedy open to him by which he will protect himself from the consequences of the apprehended injury. On whether the plaintiff is likely to suffer irreparable harm that cannot be compensated with damages, the court finds that the plaintiff's right to water is constitutional and that denial of the same cannot be adequately be compensated in any way by damages. The water is a source of livelihood not only to the plaintiff but surrounding school's children and hospitals. The court should issue an injunction where the **balance of convenience** is in favor of the plaintiff and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer. In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it. On a balance of convenience, the court finds that it tilts towards granting a temporary injunction as the plaintiff is likely to be more inconvenienced if the injunction is not granted due to the fact that there will be a reduction in electric power and water which will affect the whole community as opposed to the defendant who will not be inconvenienced if the same is granted as the plaintiff has heavily invested on the ground based on the easement registered. The upshot of the above, is that the application is allowed.

Dated and delivered at Eldoret this 3rd day of February, 2017.

ANTONY OMBWAYO

JUDGE