



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC CASE NO. 123 OF 2016**

**FEB HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**CHARLES MAGUA Alias**

**CHARLES HENRY MANGUA.....DEFENDANT**

**RULING**

This is in respect to the plaintiff's Notice of Motion dated 8th August 2016 seeking the following orders:

**1. Spent.**

**2. Spent.**

**3. That pending the hearing and determination of this suit, this Honourable Court be pleased to grant an injunction restraining the defendant, his agents, servants, employees or any other person claiming under them from carrying out any rock drilling, rock blasting, rock extraction or quarry mining operations in the land parcels No. KIINE/RUKANGA/2876 and KIINE/RUKANGA/2877 or anywhere near the land parcel No. KIINE/RUKANGA/3513 or in any other manner interfering with the plaintiff's quiet enjoyment of land parcel No. KIINE/RUKANGA/3513.**

**4. That the Officer Commanding Sagana Police Station (OCS Sagana) do enforce the order of the Court herein.**

**5. Spent.**

**6. Spent.**

**7. That this Honourable Court be pleased to make such further orders as are necessary for the ends of justice.**

**8. That costs of this application be provided for.**

The application is founded on the grounds set out therein and is also supported by the affidavit of **SAMUEL MUKUA** the plaintiff's Clerk of Works.

It is the plaintiff's case that it is the registered proprietor of land parcel No. KIINE/RUKANGA/3513 (hereinafter the suit land) in which it is constructing a four (4) storey hotel by the name Suntec Hotel.

The defendant is the proprietor of land parcels No. KIINE/RUKANGA/2876 and KIINE/RUKANGA/2877 (hereinafter the defendant's properties) on which he has assembled machinery and is carrying out rock blasting activities using explosives and is also drilling holes thereon which are interfering with the plaintiff's hotel and other structures which may lead to the collapse of the plaintiff's hotel which is just 30 metres away from the point of blasting. The defendant's activities are therefore interfering with the plaintiff's right to the use and enjoyment of the suit land apart from also causing danger to life, safety and health of the people living nearby. Besides, the blasting activities being carried out on the defendant's properties do not have the approval licences from the **National Environment Management Authority** under the **Environmental Management and Co-ordination Act (NEMA)**, the **Mining Act** or the **Explosives Act** and are therefore illegal and unlawful and ought to be stopped forthwith. That on 30th July 2016, the defendant agreed to halt the activities but it resumed the blasting on 4th August 2016. That necessitated the filing of this application.

In opposing the application, the defendant filed a replying affidavit in which he confirmed that his properties No. KIINE/RUKANGA/2876 and KIINE/RUKANGA/2877 are adjacent to the suit land in which a hotel is under construction. The defendant also deponed that he had previously only planted mangoes and oranges on his properties but when the plaintiff started constructing the hotel on the suit land, he decided to put up a house as the area was now developing. That he has put up a perimeter fence between his properties and the suit land but denied having attempted to blast any rocks on the same adding that the construction of the hotel would infact be beneficial to him and so he would not do anything to affect its construction and all that he has done is to use his bulldozers and earthmovers to create a road and level the ground on his properties. That the plaintiff's agents have visited his properties for purposes of taking photos without his consent and are therefore guilty of trespass and possession and use of explosives without the relevant licences is a criminal matter which ought to have been reported to the Police if it was true. That this application is premature, frivolous and laden with malice and should therefore be dismissed.

On 14th December 2016 when the said application came up for hearing, counsel for the plaintiff **MR. THUO** informed the Court that he and **MR. GIKUNDA** counsel for the defendant had agreed to have the application canvassed by way of written submissions. The Court therefore directed that the plaintiff files and serves their submissions within 21 days and the defendant to have a similar period upon service upon him. The parties were thereafter to take a date in the registry to confirm compliance. However, on 27th March 2017 when the matter came up for mention, none of the parties had filed submissions and neither did they attend the Court. It was not until 14th June 2017 that **MR. MIRITI** counsel for the plaintiff informed the Court that he had filed and served his submissions and therefore sought a date for the ruling. As there was no appearance by the defendant or his counsel nor any explanation as to why he had not filed his submissions, the Court fixed July 14th 2017 as the ruling date.

I have considered the application dated 8th August 2016, the rival affidavits and annexures thereto as well as the submissions filed by counsel for the plaintiff.

The application seeks two main orders:

- 1. An order of temporary injunction pending trial.**
- 2. An order that the Officer Commanding Sagana Police Station reinforces the temporary injunction.**

An order for temporary injunction pending trial will only be granted if the applicant satisfies the principles laid down in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:

- 1. The applicant must show the existence of a prima facie case with a probability of success at the trial.**
- 2. A temporary injunction will not normally be granted unless the applicant might otherwise**

*suffer irreparable injury which cannot adequately be compensated by an award of damages and;*

**3. If in doubt, the Court will determine the application on the balance of convenience.**

A prima facie case has been defined in the case of **MRAO VS FIRST AMERICAN BANK OF KENYA LTD & TWO OTHERS C.A CIVIL APPEAL No. 39 of 2002 (2003 e K.L.R)** as:

***“... a case 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”.***

In **NGURUMAN LTD VS JAN BONDE NIELSEN & OTHERS C.A CIVIL APPEAL No. 77 of 2012,** the Court of Appeal while addressing the issue of a prima facie case stated thus:

***“The applicant need not establish title. It is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance of, or as otherwise put, on a preponderance of probabilities. This means no more than the Court takes the view that on the face of it, the applicant’s case is more likely than not to ultimately succeed”.***

The Court then went to state as follows:

***“We reiterate that in considering whether or not a prima facie case has been established, the Court does not hold a mini trial and must not examine the merits of the case closely. All that the Court is to see is that on the face of it, the person applying for an injunction has a right which has been or is threatened with violation”.***

Finally, in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILM SALE LTD 1986 3 ALL E.R 772,** it was stated that a Court while considering such an application should take the route or course that appears to carry the lower risk of injustice should it turn out to have been **“wrong”**.

It is common ground that the suit land is adjacent to the defendant’s properties and while the plaintiff is constructing a hotel, the defendant is also in the process of putting up a house on his properties. The defendant however denies that he is using explosives to carry out any blasting activities thereon adding that he is only levelling the ground to create a road to access his house. I have looked at the plaintiff’s annexures and particularly annexure **“SM 3”** which are photographs showing what is clearly a drilling machine with scattered rocks nearby which demonstrate that blasting activities are being undertaken on the defendant’s properties. The defendant alleges that the plaintiff’s agents have entered his properties for purposes of taking photos without his consent and are therefore guilty of trespass. That is a confirmation therefore that the annexed photographs were indeed taken on the defendant’s properties. The plaintiff has on its part pleaded that it approached the defendant to see if he had any approval or licences to carry out the blasting activities but the defendant was initially evasive before turning hostile. The plaintiff therefore believes that the defendant does not possess the requisite approvals and/or licences – see paragraphs 13 and 14 of the supporting affidavit. The defendant’s response to those averments is contained in paragraph 21 of the replying affidavit in which he has deponed that the use of explosives without the relevant permits/licences is a criminal matter which ought to have been reported to the Police for immediate action. In view of the clear photographic evidence depicting the use of explosives to blast rocks which are scattered nearby, one would have expected the defendant to show that he had the requisite permit. This is because, **Section 11 (1) of the Explosives Act Chapter 115** prohibits the use of blasting materials without a permit. It states:

***“No person shall use, or cause to be used, any blasting materials –***

***(a) at a depth of ten metres or more, measured from the surface along or down a shaft, adit, well or tunnel unless he is in possession of a valid miner’s blasting certificate issued to him under the Mining Act (Cap 306), or is under the immediate supervision of the holder of such a***

*certificate; or*

***(b) in all other cases, unless he is in possession of a valid miner's blasting certificate issued to him under the Mining Act (Cap 306) or of a valid permit issued to him for such purposes by an inspector, who is hereby authorized to do so, or unless he is under the immediate supervision of a person in possession of either such certificate or permit"***

**Section 12 of the Explosives Act** makes it criminal to contravene **Section 11** thereof. Prima facie, therefore, the defendant's activities on his properties appear to be in contravention of the law. A transgression of the law which is likely to waste or damage another person's property is no doubt sufficient reason to warrant the grant of a temporary injunction pending suit. It is instructive to note that the remedies sought by the plaintiff in his plaint filed simultaneously with this application include a prayer that the defendant's rock drilling and blasting operations are illegal and unlawful and an order permanently restraining the defendant from carrying out those activities. In my view therefore, the plaintiff has established a prima facie case to warrant the grant of a temporary injunction.

It is also the plaintiff's case that the activities on the defendant's properties could cause health and environmental hazards including causing the hotel that is under construction to collapse and endanger the lives of the workers. Further, flying debris could hurt people on adjacent properties. Therefore, apart from seeking to protect imminent danger to his hotel which is under construction, the plaintiff alleges a threat to the environment. Given the irreversible impacts of many environmental hazardous acts, remedies such as damages may not be sufficient and where there is a continuing violation of the environment, a Court properly seized with the matter would not hesitate in issuing a temporary injunction to mitigate the dangers caused to the environment by any activity being undertaken by a party. The plaintiff has therefore also satisfied the second limb in the **GIELLA** case (supra).

Finally, if I was in doubt, which I am not, the balance of convenience would tilt in favour of granting the temporary injunction. The plaintiff has therefore satisfied this Court that it is entitled to an order of injunction pending trial.

The other prayer sought by the plaintiff is that the Officer Commanding Sagana Police Station (OCS) do enforce the Court order. The Police should not be involved in the execution of orders emanating from civil proceedings. In **KAMAU MUCUHA VS RIPPLES LTD 1993 K.L.R 35 KWACH J.A** expressed himself as follows:

***"The only valid criticism of the order of the Judge which I can see as of now, but which does not swing the scale one way or the other in this application, is the direction that the assistance of the Police should be enlisted to secure compliance by the applicant. The Police should never be involved in such matters as there is specific provisions for the enforcement of an injunction under Order 21 rule 28 of the Civil Procedure Rules"***

**Order 40 Rule 3 (1) of the Civil Procedure Rules** provides for the punishment that may be meted out to a party that does not comply with an order issued by a Court. It is to be expected that all Court orders whether one agrees with them or not must be complied with. In **HADKINSON VS HADKINSON 1952 ALL E.R 567, ROMER L.J.** stated thus:

***"It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made against by a Court of competent jurisdiction to obey it unless and until that order is discharged"***.

A party does not therefore need to employ the coercive powers of the Police in order to ensure compliance with orders of the Court. Those orders must be complied with and sanctions for non-compliance thereof including detention in prison, are provided for in law. In any case, the Police are charged with the duty under **Section 24 of the National Police Service Act**, to maintain law and order and do not therefore require any orders or prompting by this Court to intervene where the law is being flouted. I do not see the need to issue any orders to the Officer Commanding Sagana Police Station

(OCS) to enforce the orders of injunction.

Ultimately therefore and having considered the plaintiff's Notice of Motion dated 8th August 2016, I make the following orders:

***1. That pending the hearing and determination of this suit, an order of temporary injunction is issued restraining the defendant, his agents, servants, employees or any other person claiming under him from carrying out any rock drilling, rock blasting, rock extraction or quarry mining operations on land parcels No. KIINE/RUKANGA/2876 and KIINE/RUKANGA/2877 or anywhere near the parcel of land No. KIINE/RUKANGA/3513 or in any manner interfering with the plaintiff's quiet enjoyment of parcel No. KIINE/RUKANGA/2513.***

***2. Costs shall be in the cause.***

***3. The parties to comply with the pre-trial directions so that this suit is heard and determined in the next twelve (12) months.***

**B. N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**

Ruling dated, delivered and signed in open Court this 14<sup>th</sup> day of July 2017

Mr. Odongo for Plaintiff present

Mr. Gikunda for Defendant present.

**B. N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**