



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LANDS COURT**

**AT MALINDI**

**ELC NO. 159 OF 2016**

**KATSRAN LOGISTIC LIMITED .....PLAINTIFF/ APPLICANT**

**VERSUS**

**AIRTEL KENYA LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. Before me is a Notice of Motion Application dated 14<sup>th</sup> June 2016. The Plaintiff Katsran Logistic Limited is praying for Orders: -

.....

**4. THAT a mandatory injunction does issue against the Defendant, its employees, agents/servants ordering them to remove the telecommunication signal tower erected upon land known as Chambe/Kibabamche/390.**

**5. THAT an interlocutory injunction does issue against the Defendant, its employees, agents/servants, restraining them howsoever from trespassing into or in any way interfering with the Plaintiff's parcel of land known as Chambe/Kibabamshe/390 pending the hearing and determination of the main suit.**

**6. THAT the costs hereof be paid by the Defendant.**

2. The Application is supported by an Affidavit sworn by the Plaintiff's Managing Director Henry Katambo on 14<sup>th</sup> June 2016. The Application is premised on the grounds summarized on the body of the application as follows: -

*i. the Plaintiff is the registered owner of land known as Chambe/Kibabamche/390;*

*ii. That the Plaintiff is suffering irreparably in that the Defendant has trespassed into its parcel of land aforesaid and unlawfully erected a telecommunication mast/signal tower and as a result the Defendant, its servants, employees and agents have continuously trespassed into the Plaintiff's land to access the telecommunication mast/signal tower;*

*iii. That the Defendant has refused to remove the said telecommunication mast/signal tower notwithstanding verbal and written demands from the Plaintiff.*

3. The application is opposed by Airtel Networks Kenya Ltd erroneously described by the Plaintiff as Airtel Kenya Ltd. In a Replying Affidavit sworn by their Manager Governance and Acquisition one Gilbert Ng'etich, the Defendant denies that it has trespassed upon the Plaintiff's parcel of land described as Chambe/Kibabamche /390. Instead the Defendant avers that on or about 5<sup>th</sup> March 2012, it entered into a lawful agreement with one Justin Kahindi Katana who leased unto them all that property known as Chembe/Kibabamshe/210 for a term of six years effective 1<sup>st</sup> March 2009 for purposes of installation of a generator and a technical room to be used for housing various telecommunication equipment and an air conditioning system.

4. It is further the Defendant's contention that since the year 2014, they transferred all their sites to an entity known as Kenya Towers Ltd and hence the telecommunication equipment complained about no longer belongs to them. Accordingly, it is the Defendant's case that the Plaintiff's application ought to be dismissed.

5. I have considered the application and the affidavit in reply. I have also considered the rival submissions and authorities placed before me by the Learned Counsels representing the Parties herein.

6. The principles for the grant of an interlocutory injunction have been long settled in the often-cited case of **Giella -vs- Cassman Brown Company Ltd (1973) EA 358**; where Spry V.P. stated that:

*"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 be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."*

7. Accordingly, this court is obliged to first and foremost consider whether or not the Applicant has made out a prima facie case with a probability of success. A "Prima facie" case as was stated in **Mrao Ltd vs- First American Bank of Kenya Ltd & 2 Others (2003) Eklr(Civil Appeal No. 39 of 20002)** includes:-

*"but is not confined to a "genuine and arguable case. It is 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."*

8. The court in **Mrao Ltd (Supra)** further went on to state that: -

*"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."*

9. In the instant application, the Plaintiff avers that it is the registered owner of all that land known as Chambe/Kibabamche/390. A copy of the Certificate of Lease Marked "KLL 1" is attached to the Supporting Affidavit. It is the Plaintiff's case that it is suffering irreparably after the Defendant herein trespassed into its parcel of land aforesaid and erected thereon a telecommunication Mast/signal tower.

10. On its part, the Defendant contends that the telecommunication equipment complained about is not on the land described as Chambe/Kibabamche/390 but on a parcel of land they leased effective 1<sup>st</sup> March 2009 from one Justin Kahindi Katana, the proposed Administrator of the Estate of one Toya Baya which Parcel of land is known instead as Chembe/Kibabamshe/210. The Defendants have annexed both a Sale Agreement dated 5<sup>th</sup> March 2012 as evidence of the Lease (marked "GN-1") as well as a copy of the Lessor's title to the land (marked GN-2).

11. A perusal of the material placed before me reveals that while the Defendant has been a lessee on parcel No. Chembe/Kibabamshe/210 since the year 2009, the Plaintiff's Certificate of Lease for the said Chambe/Kibabamche/390 was issued on 9<sup>th</sup> December 2015. Although it is not clear from the pleadings

when the telecommunication equipment and the construction housing it was built on the land occupied by the Defendant, it is evident from the annexed agreement between the Defendant and the said new owners Keya Towers Ltd (marked GN-3) that the equipment was in place as of 1<sup>st</sup> March 2014 when the transfer took place. The said transfer was advertised in the Daily Nation Newspaper of 31<sup>st</sup> October 2014 as per annexure GN-4 of the Replying Affidavit.

12. Thus, while the Plaintiff contends that it is the one suffering irreparably from the Plaintiff's trespass, it is apparent that the Defendants and/or their successors who have not been sued herein have been in occupation and have used their portion of the land since 2009. The Plaintiff must have been aware of the defendant's presence and the development on the parcel of land by the time they acquired their title on 9<sup>th</sup> December 2015.

13. As it were, no evidence has been availed by the Plaintiff tending to show that the portion of land occupied by the Defendant is in danger of being wasted, damaged or wrongfully alienated to Third Parties as to put it out of reach by the Plaintiff at the conclusion of the main suit.

14. Accordingly, I do not find merit in the application dated 14<sup>th</sup> June 2016. The same is dismissed with costs to the Respondent.

**Dated, signed and delivered at Malindi this 13<sup>th</sup> day of July, 2017.**

**J. O. OLOLA**

**JUDGE**