



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 89 OF 2015

ABDIKARIN MOHAMED ALI.....1ST APPLICANT

SHEIK HASSAN SHEIK ALIGELI.....2ND APPLICANT

VERSUS

ALI DIGALE GURE.....1ST RESPONDENT

MOHAMED ABDI MAOW.....2ND RESPONDENT

HASSAN ABDI MAOW.....3RD RESPONDENT

NOOR GEDI ELMI.....4TH RESPONDENT

DIHISON MOHAMED ELMI.....5TH RESPONDENT

ADOW SALAT DAGANE.....6TH RESPONDENT

OMAR JELLE ADAN.....7TH RESPONDENT

ISSE IDLE ADAN.....8TH RESPONDENT

ABDULLAHI ADAN ELMI.....9TH RESPONDENT

SHOBOW MOHAMED ELMI.....10TH RESPONDENT

RULING

This is in respect to the plaintiffs/applicants' Notice of Motion dated 19th October 2015 seeking the following orders:-

1. *Spent.*
2. *Spent.*
3. *That the defendants/respondents by themselves, servants, agents or any other person claiming under their authority and HASSAN KHALIF MARAABE (the Chief Jarorot Location within KORAKORA be temporarily restrained from trespassing, sub-dividing, alienating, transferring or in any other way dealing with FAKIR FARM No. 29 or any part thereof pending the hearing and determination of the main suit.*
4. *That the Officer Commanding Station (OCS) Garissa Police Station to enforce the order.*

5. *That the costs of the application be awarded to the plaintiffs/applicants.*

The application is based on the grounds set out therein and supported by the affidavit of **SHEIKH HASSAN SHEIKH ALIGELI** the 2nd plaintiff/applicant sworn also with the authority of the 1st plaintiff/applicant herein to which are annexed several documents. The plaintiffs/applicants case is that they are the registered owners of **FAKIR FARM No. 29** measuring 200 acres (the suit farm) following an Arbitration conducted between them and the defendants/respondents. However, the defendants/respondents have refused to abide by the award of the Arbitrators who were the Provincial Administration and have instead, using the authority of the local chief Hassan Khalif Maraabe, forcefully entered the suit farm intending to acquire the same. That on 7th October 2015 and again on 14th October 2015, the defendants/respondents in the company of the said chief invaded the suit farm, chased away their workers who were preparing the farm for the new season and the farm equipment are under threat of destruction. That they are the owners of the suit farm and have documents of title – annexures **SHSAG 1** and **SHSAG 2**.

The application is opposed and in replying affidavit sworn by **HASSAN ABDI MAOW** the 3rd defendant/respondent, it is deponed as follows:-

- *That the defendants/respondents have never done anything to merit the filing of this application which is an attempt by the 2nd plaintiff/applicant to reap where he did not sow and delay this case.*
- *That the only person known to them in connection with this suit farm is ABDIKARIN MOHAMED ALI the 1st plaintiff/applicant who is the sole proprietor thereof.*
- *That ABDIKARIN raised a child named EBLA ABDI ALIOI who was born of his late cousin ABDI ALO who passed on several years ago and that was when the 2nd plaintiff/applicant married EBLA and started claiming co-ownership of the suit farm with ABDIKARIN yet he does not know the true history of the same having come to the suit farm many years after the 1st plaintiff/applicant had established it.*
- *That the plaintiffs/applicants have not alluded to the fact that the said ABDIKARIN died in April 2014 yet the 2nd plaintiff/applicant claims to have obtained his authority to file this application.*
- *That the defendants/respondents are the registered members of a group known as JARIROT FARM GROUP since the year 2004 and the farm was registered by the then Garissa County Council as farm No. 129.*
- *That their farm shares a common boundary with the suit farm and the boundaries are well and they have no claim over it or its assets.*
- *That the plaintiffs/applicants have not explained how they determined that the suit farm measures 200 acres.*
- *That the application is meant to paint them in bad light and solicit the sympathy of this Court since at no time have the members of JARIROT even met or resolved to enter the suit farm and there are no water pumps, canals or water pipes on the suit farm nor is there any agricultural cultivation or activity going on thereon.*
- *That it was out of the defendants/respondents not wanting to be bothered with claims for land that they offered to donate part of their land to the plaintiffs/applicants so as to give them access to River Tana.*
- *That when the suit was registered, the 2nd plaintiff/applicant was not a co-owner of the same and the Certificate No. 2900091 dated 29th October 1998 annexed to the 2nd plaintiff/applicant's supporting affidavit is not a document of ownership but is only the registration of the suit farm as a business name.*
- *That the 2nd plaintiff/applicant has no single document to prove that he is a co-owner of the suit farm and his rights, if any may only lie as an administrator of the Estate of the 1st plaintiff/applicant but he has no locus since no letters of administration have been exhibited.*
- *That therefore there are no valid grounds upon which the orders sought may be granted.*

The application was, by consent of both Mr. Otieno advocate for the plaintiffs/applicants and Mr. Onono advocate for the defendants/respondents, canvassed by way of written submissions which have been

filed.

I have considered the application, the rival affidavits and annexures thereto and the submissions of counsel.

An application for temporary injunction has to be considered in light of the principles set out in the case of **GIELLA VS CASSMAN BROWN & CO. LTD 1973 E.A 358** which are:-

1. ***The applicant must show that he has a prima facie case with a probability of success.***
2. ***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; and,***
3. ***If the Court is in doubt, it will determine the application on the balance of convenience.***

A prima facie case, on the other hand, was defined by the Court of Appeal in **MRAO VS FIRST AMERICAN BANK OF KENYA & TWO OTHERS C.A CIVIL APPEAL No. 39 of 20002** in the following terms:-

“A prima facie case in a civil application 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”

An interlocutory injunction is an equitable relief and a party approaching the Court must do so with clean hands. And as was held in the case of **FILMS ROVER INTERNATIONAL VS CANNON FILMS 1986 3 ALL E.R 772**, a Court considering such an application will take the route or course that appears to carry the lower risk of injustice.

I have considered this application in light of the above principles. It is clear that whereas neither the plaintiff/applicants nor the defendants/respondents have any documents of title registered under the known legal regime in this county in respect to their farms i.e. **FIKIR FARM and JARIROT FARM** respectively, both appear to be recognized by the County Council of Garissa where the suit farm is situated. Indeed that is conceded in the replying affidavit of **HASSAN ABDI MAOW** when he depones in paragraph 14 (a) and (b) thereof as follows:

14 (a) “That the only person we knew from the beginning in connection with FIKIR is ABDIKARIN MOHAMED ALI (ABDIKARIN). The 1st applicant herein”

(b) “That it is ABDIKARIN who was the sole proprietor of FIKIR and is the person not used to deal with from the beginning and as far as we are concerned he is still the sole proprietor of FIKIR (see the applicant’s receipt dated 9th October 1986 and 9th February 1988”

It would appear to me from the same replying affidavit that the defendants/respondents recognize the existence of the suit farm and their case is that infact they are not interfering with it. In paragraph 29 of his replying affidavit, **HASSAN ABDI MAOW** goes on further to depone as follows:-

29 “That not having entered FIKIR, not having the need to enter FIKIR and not having the reason to enter FIKIR there is no reason why Jarivot members would have involved the local chief on any adventure on FIKIR as severally alleged by the applicant. The allegations in that respect are baseless and once again are meant to paint us in bad light”

That is a clear affirmation that the suit farm indeed exists and the plaintiffs/applicants have annexed a certificate confirming that it is registered under the Registration of Business names Act as No. 290091. An order of interlocutory injunction is meant to preserve the property in dispute until the suit is heard and determined. It is clear from the bundle of letters and other documents annexed to the parties’ affidavits

that there has been a long standing dispute between them over who should work on the suit farm. However, as I have shown above, the defendants/respondents have stated that they are not interfering with the suit farm whose existence they recognize. They also recognize the 1st plaintiff/applicant as the sole proprietor of the same but do not appear to recognize the 2nd plaintiff/applicant. The certificate of registration numbers 290091 dated 29th October 1998 however show the two plaintiffs/applicants as carrying on business under the name of **FIKIR FARM**. At this point, I am not required to make any final findings on the issues pleaded. What I am required to make a finding on is whether the plaintiffs/applicants have established a prima facie case and on the material before me, I am satisfied that they have.

The defendants/respondents argue that the 1st plaintiff/applicant in fact died in April 2014 which fact the 2nd plaintiff/applicant has not disclosed. No evidence was produced to that effect but even if that is the correct position, the 2nd plaintiff/applicant has come to Court in his own capacity as a co-owner of the suit farm and I would not consider that non-disclosure to be such as would disentitle him to the orders sought bearing in mind that this suit was filed in 2010.

On the issue of whether the plaintiffs/applicants will suffer irreparable damage that cannot be adequately compensated by an award of damages, the defendants/respondents claim is that they have not entered the plaintiffs/applicants' farm and this application is "***much ado about nothing***". That may be so but if on the other hand the defendants/respondents are threatening the plaintiffs/applicants with violence through the chief and trying to forcefully enter the suit farm, then that would amount to a transgression against the law for which the plaintiffs/applicants would be entitled to an order of temporary injunction – **MOHAMED VS COMMISSIONER OF LANDS & FOUR OTHERS K.L.R (E & L) 1 Page 217.**

It is also clear from the letters annexed to the parties affidavit that this dispute appears to be degenerating into a situation where physical violence may ensue. In a letter dated 2nd November 2007 by the 2nd plaintiff/applicant and addressed to the District Commissioner Garissa, he says in the last paragraph as follows:-

“However, this dispute has taken long and there is fear that there can be a breakage of law and order. We are therefore appealing to your high office to once again intervene and look into this matter with a view of reaching permanent solution”

Then there is another letter annexure **SHAG 2** from the Provincial Commissioner North Eastern Province addressed to the District Commissioner Garissa dated 19th September 1993 in the following terms:-

“RE: FARM DISPUTE BETWEEN SHEIKH HASSAN ALI GELE AND ALI DIGALE, MOHAMED ABDI MAOW

Mr. Sheikh Hassan Ali Gele has been to this office about a farm (dispute) between him and Ali Digale and Mohamed Abdi Maow which has eventually led to threats against this life.

The purpose of this letter is to ask you to look into this issue with a view of solving it”.

It is obvious from those letters that the dispute herein has the potential of degenerating into a conflict which this Court by making the orders that I am about to make, must arrest in the interest of public tranquility. And if an order of temporary injunction will ensure peace and tranquility on the suit farm pending the hearing and determination of this suit, then this Court has a responsibility to make such orders.

There is a prayer that the Officer Commanding Station (OCS) Garissa Police Station do enforce the orders granted by this Court. Ordinarily, Courts do not involve the Police in such orders. My experience has been that sometimes, the Police are wrongly used to evict parties when such orders are issued.

Having said so, the Police have a duty under **Section 24 of the National Police Service Act** to maintain law and order and do not need to be directed by the Court or indeed any other authority to execute that mandate. All I can say is that if there is any disobedience of a Court order, the party in contempt can be dealt with as provided in law.

Ultimately however, and after considering all the matters herein, this Court makes the following orders:-

1. ***The respondents by themselves, servants, agents or any other person claiming under their authority including Hassan Khalif Maraabe the chief Jarorot Location within Korakora Division are hereby restrained from trespassing into, alienating, transferring or in any other way dealing with FIKIR FARM No. 29 or any part thereof pending the hearing and determination of this suit.***
2. ***Costs in the cause.***

B.N. OLAO

JUDGE

3RD JUNE, 2016

Ruling delivered, dated and signed in open Court this 3rd day of June 2016.

Mr. Otieno for Applicant – present

Mr. Onono for Respondent – absent.