



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 524 OF 2015

DANIEL MAGERO 1ST PLAINTIFF

EZEKIEL ODUK2ND PLAINTIFF

VERSUS

DAVID OWINO OKONGO 1ST DEFENDANT

SOUTH NYANZA SUGAR COMPANY LIMITED2ND DEFENDANT

RULING

1. The plaintiffs filed the instant suit vide a plaint dated 30th November 2015. The plaintiffs claim they are the beneficial and legal owners of land parcel **Kamagambo/Kanyimach/901** where they have grown sugarcane. The plaintiffs further claim that on or about 1st November 2015, the 2nd defendant acting in concert with and at the behest of the 1st defendant entered onto the plaintiffs said land and therein wrongfully and illegally harvested and took delivery of the sugarcane crop growing in the plaintiffs land with the object of milling the same and paying the proceeds thereof to the 1st defendant.
2. Simultaneously with the plaint the plaintiffs filed a Notice of Motion application seeking the following prayers:-
 - a. **An order of temporary injunction do issue against the 2nd defendant to restrain it from processing and paying out any money over account number 416356 field number 240 Kanyimach sub location in the name of David Owino Okongo to the said David Owino Okongo or any other person except the plaintiffs until the final determination of this application.**
 - b. **The 2nd defendant do forthwith account for all the proceeds in account number 415356, field number 240, Kanyimach sublocation and to pay the same to the plaintiffs, Daniel Magero and Ezekiel Oduk.**
 - c. **The 2nd defendant do process and payout all the moneys due over account number 416356 field number 240, Kanyimach sublocation to Daniel Magero and Ezekiel Oduk forthwith.**
 - d. **Upon such payment being made to Daniel Magero and Ezekiel Oduk, the 2nd defendants do be deemed as fully discharged over the stated account number 416356, field number 240, Kanyimach sublocation.**
 - e. **The costs of this application be provided for.**
3. The application was supported on the grounds set out on the body of the application and on the supporting and supplementary affidavits sworn by Daniel Magero and Ezekiel Oduk respectively.

The applicants aver that they are the beneficial and legal owners of land parcel **Kamagambo/Kanyimach/901** and that the court had in HCC No. 204 of 2012 issued an injunction restraining the 1st defendant from encroaching on or trespassing on the said land parcel. The plaintiffs state that the 1st defendant defied the said court order and in contempt of the said order forcefully entered and planted sugarcane on the plaintiffs' said land parcel with the active support of the 2nd defendant. The plaintiffs aver that the 1st defendant ought not to be allowed to benefit from his wrongful acts in total disregard of the plaintiffs rights and interest.

4. The 1st defendant swore a replying affidavit dated 16th February 2016 in opposition to the plaintiffs' application. The 1st defendant position is that the 1st plaintiff obtained the transfer of land parcel **Kamagambo/ Kanyimach/133** from one Samson Okongo fraudulently and subsequently subdivided the same to parcels 901 and 902 whereby he transferred parcel 901 to himself and parcel 902 to one Silpa Ayoma one of the wives of Samson Okongo. The 1st defendant further avers that the issue of the aforesated fraudulent subdivision and the resultant transfer is the subject of HCC No. 204 of 204 of 2012 pending before this court. The 1st defendant asserts that he on or about 30th November 2012 entered into an agreement with the 2nd defendant for the harvesting of sugarcane and delivery from land parcel **Kamagambo/Kanyimach/902** as per annexure "DOO-1". The 1st defendant denies that he trespassed onto **parcel No. 901** and states that the sugarcane that was delivered to the 2nd defendant was harvested from land **parcel No. 902** and not **parcel No. 901** as claimed by the plaintiffs.
5. The 2nd plaintiff swore a further affidavit in response to the 1st defendant's replying affidavit dated 9th March 2016. The 2nd plaintiff reiterated the cane was harvested from his land parcel 901 and not 902 and averred that the sugarcane out growers supply contract entered into between the defendants was instrument of deceit intended for fraudulent purposes. The 2nd plaintiff deponed that the 1st defendant was deliberately lying to the court since in the 1st defendant's **land parcel 902** there was mature cane of over 14 months old that was not harvested while in the 2nd plaintiff's **parcel 901** there was mere sugarcane regrowth following the harvesting carried on by the 1st and 2nd defendants in November 2015. The 2nd plaintiff argued that from the 1st defendant's replying affidavit it was evident that he purposively and in connivance with the 2nd defendant chose to disobey the court order issued in HCCC No. 204 of 2012 by committing continuous acts of trespass on the 2nd plaintiff's land parcel No. 901.
6. The company secretary of the 2nd respondent, one Gabriel Otiende also swore a replying affidavit in opposition to the plaintiffs application dated 20th April 2016. The 2nd defendant reiterated that it had entered into an outgrowers sugarcane supply contract with the 1st defendant over land parcel number **Kamagambo/Kanyimach/902** and that the harvested cane was from land parcel **902** and not **901** as pleaded by the plaintiffs.
7. The parties argued the application by way of written submissions. The plaintiffs submissions were filed on 10th March 2016, the 1st defendant's on 4th April 2016 and the 2nd defendant's on 25th April 2016. I have reviewed the pleadings and considered the application by the plaintiffs together with the affidavit in support and in opposition and the annexures thereof and I have also considered the submissions by the parties. The orders sought by the plaintiffs in the Notice of Motion dated 30th November 2015 are mandatory in nature and the issue for the court to determine is whether the plaintiffs have satisfied the conditions upon which the court can grant a mandatory injunction on an interlocutory application.
8. The principles upon which the court will grant an interlocutory injunction remain the same as were established in the leading case on the subject of **Giella –vs- Cassman Brown Co. Ltd [1973] EA 358**. An applicant must establish a prima facie case with a probability of success; must also demonstrate he stands to suffer irreparable harm that is not compensatable in damages unless the injunction is granted, and, in the event the court entertains any doubt in regard to either of the two antecedent conditions, the court may determine the application on consideration of the balance of convenience. These principles apply both in regard to interlocutory prohibitive injunctions and mandatory injunctions. In regard to a mandatory injunction the standard of proof is higher than in

the case of prohibitory injunctions. This is because where a prohibitory injunction is given that can be reversed at the conclusion of the case if the court finds for the respondent. In the case of mandatory injunction that is not possible because the act sought to be done through a mandatory injunction will have been done and cannot be reversed. Thus in the case of mandatory injunction there ought to be no disputed facts and the case should be plain and obvious such that there would be no justification to delay granting the relief sought at the interlocutory stage to enable the ends of justice to be met.

9. The principles on which a mandatory injunction may be granted were considered by the court of appeal in the case of **Kamau Mucuha –vs- Ripples Ltd [1993] eKLR** where though holding a mandatory injunction may be granted in an interlocutory application the court held that it will only be granted in exceptional circumstances and in the clearest of cases. In the case **Hancox, C. J** stated thus:-

“Speaking for myself, I entirely agree that, historically, the principals laid down with regard to temporary mandatory injunctions are that they will only be granted exceptionally and in the clearest of cases.”

Further the principle to be applied is well articulated in Vol. 24 Halsbury Laws of England, 4th Edition para 948 thus:

“A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once or if the act done is simple and summary one which can be easily remedied, or if the defendant attempts to steal a match on the plaintiff, a mandatory injunction will be granted on an interlocutory application.”

Similarly in the English case of **Locabail International Finance Ltd –vs- Agro Export & Another [1986] All ER 901** the Court of Appeal held:-

“A mandatory injunction ought not to be granted in an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard than was required for a prohibitory injunction.”

10. Applying the above principles to the facts and circumstances of the present case, I am not persuaded that the case is clear and/or plain and obvious and neither can I say that there are any special circumstances attendant that make the grant of a mandatory injunction desirable. The 1st and 2nd defendants insist that the sugarcane that was harvested and delivered to the 2nd defendant was from land parcel 902 and not 901 as the plaintiffs claim. It is not disputed that the 1st defendant was authorized by the owner to farm cane on parcel 902. Although the plaintiffs claim the cane was harvested from parcel 901 owned by the 2nd plaintiff there is no direct evidence to prove this fact. Apart from alleging that the 2nd defendant on or about 1st November 2015 the 2nd defendant unlawfully entered land parcel 901 and harvested sugarcane there is little by way of proof. Therefore there is a dispute as to whether or not the 2nd defendant harvested cane from parcel 901 and that fact can only be established at the trial.
11. Besides, to the extent that the plaintiffs' claim is limited to obtaining a full account and payment of all moneys in account number 415356 field number 240, Kanyimach sublocation it is capable of being ascertained at the trial if it is proved the harvest was from land **parcel 901** and therefore damages would in my view be an appropriate remedy. In the premises it is my holding and finding that the plaintiffs' application dated 30th November 2015 lacks merit and I order the same

dismissed with costs to the defendants.

Judgment dated, signed and delivered at Kisii this 3rd day of June, 2016.

J. M MUTUNGI

JUDGE

In the presence of:

.....for the 1st and 2nd plaintiffs

.....for the 1st and 2nd defendants

J. M MUTUNGI

JUDGE