REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

ELC CASE NO. 330 OF 2012 (O.S.)

EUNICE WANGUI KIRAGU.............PLAINTIFF/APPLICANT

VERSUS

MARY ADHERA ADHAYA........DEFENDANT/RESPONDENT

RULING

1. The plaintiff/applicant **Eunice Wangui Kiragu,** being the plaintiff in the suit, filed a Notice of Motion dated **20th December, 2012** seeking the following substantive order; **That pending the hearing and determination of this suit inter partes, the Honourable Court be pleased to issue a temporary injunction restraining the defendant by herself, her servants and/or agents from offering for sale, selling, transferring, alienating, trespassing or in any other way interfering with land parcel No. Nakuru/Municipality Block 10/152 ("the suit property")**

2. The application is premised on the grounds set out therein and is supported by the plaintiff's affidavit sworn on **20th December, 2012.** She depones that she entered into a registered lease with the defendant/respondent on **16th June, 2009** but had been in actual occupation of the suit property since 2003. She had established a successful school by the name **Hill Valley Academy** on the suit property, a result of heavy investment of over Kshs.10 million. This notwithstanding, the defendant had put up the suit property for sale and should she succeed in selling it, her investment would be greatly prejudiced and her income threatened which would cause her to suffer irreparable harm.

3. The application is opposed. The defendant filed a replying affidavit dated **11th April, 2013** through **Pamela Akinyi Jura,** her daughter to whom she had donated a Power of Attorney, as she was indisposed. **Pamela Akinyi Jura** deponed that the plaintiff was not being totally honest, as she had sublet the suit property to a third party, **Christ Chapel Ministries** and had been collecting from them a higher rent than what she was remitting to the defendant. She denied that the plaintiff had put up the developments on the suit property which to the best of her knowledge had been erected by the third party. She further deponed that the existence of a tenancy agreement did not invalidate the rights of the property owner to transfer her own property.

4. In a rejoinder vide a further affidavit sworn on **4th June, 2013** the plaintiff stated that **Pamela Akinyi Jura** had no locus to respond to the application because the only donee she knew was **Geoffrey Adhaya**

Adera, who held a Power of Attorney taken out on **15th April, 2005** and which had never been revoked. She further averred that she had been diligently paying the monthly rent; that the subletting was done with the defendant's consent; that she had even evicted the third party from the suit property but this was overruled by the defendant who started collecting rent directly from them.

5. In response **Pamela Akinyi Jura,** averred that she had the legitimate power of attorney as the one belonging to her brother, **Geoffrey Adhaya Adera** had been revoked attached and marked **(PAJ 5(a)).**

6. When this application came up for Interparties hearing, both counsels agreed that the application would be disposed of by way of written submissions. The Applicant filed their written submissions on **16th December, 2013** while the defendant filed theirs on **10th February, 2014.**

7. Counsel for the plaintiff submitted that the decision in **Giella vs Cassman Brown & Co. Ltd (1973) EA 358** favoured their case, as the applicant had a *prima facie* case with probability of success as the Plaintiff had been in occupation of the suit properties since 2003 through a registered lease. They relied on the case of **Mohamed Ahmed Noor & 3 Others v Bora Developers Ltd & 2 Others (Nairobi HCCC No 607 of 2003)** The court in the aforementioned that the case held that the principle of proportionality should be applied opting for the lower rather than the higher injustice and that the property owner's right should not interfere with the lessee's right to carry out business. Counsel further submitted that the Plaintiff would suffer irreparable damage that could not be compensated by an award in damages as the parents of the pupils in the school had already started pulling out their children from the school in fear that the school was shutting down.

8. Counsel for the Defendant equally relied on the case of **Giella vs Cassman Brown & Co. Ltd.** They submitted that the Plaintiff had not established a *prima facie* case and invoked **sections 24, 25 and 26** of the **Land Registration Act, 2012**. It was the defendant's contention that the plaintiff had not established a *prima facie* case and had come to the court with unclean hands as she had breached the lease agreement by subletting the suit property to third parties who erected permanent structures therein. Counsel for the Defendant further submitted that the Plaintiff could not seek an injunctive relief for a contractual breach as held in **Kimondo & Another v UAP Provincial Insurance Ltd (2010) 1 EA 192**.

9. After considering the application, affidavits and submissions, I find the issues for determination to be as follows;

i) Is the power of Attorney donated to Pamela Akinyi Jura valid?

ii) Is the applicant entitled to the orders of injunction sought ?

iii) Costs

10. On the first question for determination on whether the Power of Attorney donated to **Pamela Akinyi Jura** is valid and if not whether she has the locus to swear the replying affidavit, I find that the Power of Attorney is valid. From the attached copy marked as **(PAJ2)** it is clear that the same was duly registered on **4th April, 2013** as required by law. Further the earlier Power of Attorney donated to **John Adera Adhaya** was revoked on **30th May, 2009** marked **(PAJ 5(a))**. Having held that the Power of Attorney is valid, I also find that **Pamela Akinyi Jura** has the locus to swear the replying affidavits and I will now proceed to determine whether the plaintiff is entitled to the orders of injunction sought.

11. The principles upon which the court will grant an injunction are well settled and articulated in the decision of **Giella vs Cassman Brown & Co. Ltd (1973) EA 358.** The applicant needs to show that he has a *prima facie* case with probability of success; that he stands to suffer irreparable damage that cannot be compensated by an award in damages and if the court is in doubt, it will determine the application on a balance of convenience. These principles are to be applied sequentially in that the court need not consider

the second and third principles if it finds that the appellant has a *prima facie* case. It must also be noted that the purpose of an injunction is to maintain the status quo pending the hearing and determination of the matter before it.

12. To show that she has established a *prima facie* case with probability of success, the plaintiff has exhibited a copy of a lease agreement **(EWK1)** showing that she had leased the suit property from the defendant from **1st January, 2009** to **31st December, 2018**. The monthly rent was Ksh12,500/= payable quarterly with no increment during the tenancy period. The lessor allowed her to put up temporary structures but the lease did not mention anything about sub-letting the property to a third party and neither did it contain a clause on termination of the lease

13. The plaintiff admits that she was given notice to vacate the suit property. Her complaint however was that the defendant had gone ahead to advertise the property for sell in total disregard of the 10 year lease existing between them and the loss of business she would suffer considering the heavy investment she had put in the suit property.

14.In my humble view, although it is true that the lease agreement did not expressly allow the plaintiff to sublet the suit property to a 3rd party, it can be inferred from the pleadings that the defendant was aware of the presence of the 3rd party in the suit property. She cannot now turn around and use this ground against the plaintiff when she herself had been collecting rent directly from this subtenant. I am however of the view that this issue and others will require further interrogation of the parties' evidence by way of oral submissions during the trial so that the parties are subjected to cross examination to test the credibility of the evidence tendered.

15. So has the applicant established a *prima facie* case? The plaintiff entered into a lease agreement with clear terms but went ahead and sublet the property to a 3rd party without authority from the defendant although it is clear the defendant knew about 3rd party, the plaintiff has not come to court with clean hands and should therefore not enjoy an equitable remedy. In addition the plaintiff has admitted being given notice to vacate the suit property although she has not indicated the time frame for the above reasons am not satisfied that the plaintiff has established a prima facie case with probability of success.

16. I have considered one of the authorities relied on by the Plaintiff, **Mohamed Ahmed Noor & 3 Others v Bora Developers Ltd & 2 Others (Nairobi HCCC No 607 of 2003) Odunga J** quoted the case of **Suleiman vs. Amboseli Resort Limited [2004] 2 KLR 589 where** **Ojwang, AJ (as he then was) expressed himself as follows:**

"The plaintiff has averred that all along during his occupancy of the suit shop, the defendant has noted, acknowledged, acquiesced in, and approved the alleged sub-tenancy; and that on the strength of that status quo of the business relations, the plaintiff has over the years set up what appears to be a large and successful business on the suit premises dealing with curios and gifts – items intimately linked with the tourist industry. That fact is nowhere disputed; and neither is it denied that the plaintiff's trade is a unique and sensitive one, which, as it is now, has a substantial goodwill that is greatly endangered if the plaintiff should be evicted. In law, these circumstances, new rights may have emerged which ought, as a vital question of ends of justice, to be litigated and determined by the best method of the judicial system and that method is the full trial, with examination of witnesses, taken through examination-in-chief, cross-examination and re-examination. At the end of that process the question of rights and liabilities will be determined with finality, and a new status quo in relations amongst the parties will have been put in place. It is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory that ultimate end of justice…The argument that the law governing the grant of injunctive relief is cast in stone is not correct, for the law has always kept growing to greater levels of refinement, as it expands, to cover new situations not exactly foreseen before. Traditionally, on the basis of the well-accepted principles, the Court has had to consider the following questions before granting injunctive relief: (i) is there a prima facie case with a

probability of success? (ii) does the applicant stand to suffer irreparable harm, if relief is denied? (iii) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The Court, in responding to prayers for interlocutory injunctive relief, should always opt for the lower rather than the higher risk of injustice…Although the court is unable at this stage to say that the applicant has a prima facie case with a probability of success, the Court is quite convinced that it will cause the applicant irreparable harm if his prayers for injunctive relief are not granted; and in these circumstances, the balance of convenience lies in favour of the applicant rather than the respondent. There would be a much larger risk of injustice if the court found in favour of the defendant, than if it determined this application in favour of the applicant".

What I understand the judge to be saying in the aforementioned case is that the Court must in addition to the conditions set out in the Giella case consider what has become known as the principle of proportionality under the overriding objective. The Court is enjoined to give effect to the overriding objective in the exercise of its powers under the Act or the interpretation of any of its provisions."

17. It is not dispute that the Defendant is the registered proprietor of the suit property and indeed she has all the right in the world to dispose of her property as she deems fit within the law. However, in doing so she must take into consideration the considerable time, expense and effort that the plaintiff has put in to ensure that her business of running the school is successful. Selling off the property without adequate notice to enable the plaintiff look for alternative premises and relocate her school would cause her undue hardship and irreparable harm as defined in the **Giella v Cassman Brown** case, which would not be adequately redressed by way of damages.

18. With the facts and evidence placed before me, I am of the view that although a prima facie case with a probability of success has not been established, the Plaintiff would not be compensated adequately by way of damages if the orders sought are not granted.

19. For the above reason, I find merit in the Notice of Motion dated **4th July, 2013** and hereby allow the application, and hereby order as follows:

20. A temporary injunction is hereby granted to restrain the Defendants from disposing off of the suit property, until the hearing and determination of the suit.

21. However, the plaintiff will furnish an appropriate undertaking as to damages within 60 days caused by the defendant to be assessed should the defendant be successful in the outcome of case.

Dated signed and delivered in Nakuru this day of 25th day of July 2014.

L N WAITHAKA

JUDGE

PRESENT

Ms Kilach for the defendant

Mr Ikua holding brief for Mr Mwangi for the plaintiff

Emmanuel Maelo : Court Clerk.

L N WAITHAKA

JUDGE