REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND DIVISION

ELC. CASE NO. 496 OF 2014

ELIZABETH NJERI NDARU..............................1ST PLAINTIFF/APPLICANT

JOSPHAT NYAGA KAMWETI........................2ND PLAINTIFF/APPLICANT

ALLOICE OJWANG NYARIWO.......................3RD PLAINTIFF/APPLICANT

JOHN OYAO NEKO………………..…………..4TH PLAINTIFF/APPLICANT

BENJAMIN OTUMA MBAYA...........................5TH PLAINTIFF/APPLICANT

VERSUS

JOSKA ENTERPRISES......................................DEFENDANT/RESPONDENT

RULING

Coming up before me for determination is the Notice of Motion dated 22nd April 2014 in which the Plaintiffs/Applicants seek for orders of temporary injunction restraining the Defendant/Respondent from evicting them, entering, repossessing or in any other manner interfering with their use of the parcel of land known as L. R. No. 11521 (hereinafter referred to as the "suit property") pending the hearing and determination of the Application and suit. The Plaintiffs also request for the costs of this Application be borne by the Defendant.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 3rd Plaintiff, Alloice Ojwang Nyariwo, sworn on 22nd April 2014 in which he averred that the Defendant is the registered proprietor of the suit property. He further stated that by a Lease Agreement dated 20th May 2011 (a copy of which he attached), he and the other Plaintiffs were allowed to remove stones, sand, ballast and other related materials from the suit property for a period of ten (10) years and to pay themselves for work done therein. He further added that the suit property had a valley terrain and was not habitable at the time of the agreement but that their activities thereon are slowly making the suit property habitable. He then stated that he and the other Plaintiffs were on 17th April 2014 served with a letter by the Defendant requiring them to vacate from the suit property forthwith, failure to which they would be evicted forcefully. He further stated that as per the agreement of lease, the

Defendant was obliged to compensate them in the even that they wish to repossess the suit property before the term of ten years expires. He further stated that he and the other Plaintiffs and their families rely on the suit property for their livelihoods and that they stand to suffer loss and damage if the orders sought are not granted.

The Application is not contested. Despite being duly served, the Defendant did not file any response herein.

The Plaintiffs filed their written submissions which have been read and taken into account in this ruling.

The main issue for determination in this Application is whether or not to grant the Plaintiffs the temporary injunction which they seek. In deciding whether to grant the temporary injunction sought after by the Plaintiffs, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

> **"The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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."**

Have the Plaintiffs made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

> **"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."**

Looking at the facts of this case, it is clear that the Plaintiffs openly admit that the registered proprietor of the suit property is the Defendant and that their only claim on the suit property is as lessees thereof pursuant to an Agreement for Lease dated 20th May 2011, a copy of which they furnished this court. Their contention is that under that lease agreement, they were entitled to extract building materials from the suit property for a term of 10 years. The agreement was that the Plaintiffs would pay themselves from the materials extracted from the suit property and sold. This is not disputed by the Defendant at all. To that extent, I consider that the Plaintiffs have established a prima facie case with high chances of success at the main trial.

As to whether damages would suffice to fully compensate the Plaintiffs for the loss they have suffered, I refer to clause 5 of the said lease agreement which stated as follows:

> **"That in the event that the Lessor wishes to terminate the Lease before the expiry period, it shall compensate the lessees to the extent of the work done."**

This provision applies in these circumstances as the Defendant has informed the Plaintiffs of its desire to terminate the lease agreement prior to its expiry. This clause clearly stipulates that the Plaintiffs are to be compensated for such an action. I am therefore convinced that the payment of damages as compensation to the Plaintiffs shall suffice to compensate them adequately. I therefore find that the Plaintiffs have not fulfilled the second condition set out in the celebrated case of **Giella v. Cassman Brown** set out above.

Since the Plaintiffs have failed to prove the second ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other ground. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha**

Education Society (2001) 1 EA 86 as follows:

> **“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is … sequential so that the second condition can only be addressed if the first one is satisfied…”**

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 24TH DAY OF OCTOBER 2014.

MARY M. GITUMBI

JUDGE