



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 217 of 2013

LINDA BOND & 10 OTHERS .....PLAINTIFFS

=VERSUS=

GEORGE MURITU GATHECA

t/a MUNGARU ENTERPRISES..... DEFENDANT

RULING:

By a Notice of Motion dated 8/2/2013 brought *Under Section 1A, 1B, and 3A of the Civil Procedure Act, Order 40 Rule 1 & 2 of the Civil Procedure Rules* and all the enabling provisions of the law, the applicants herein have sought for various orders:-

- a) Spent,
- b) Spent,
- c) That an interim injunction be granted restraining the Defendant / Respondent either by himself , his agents, servants , successor or assigns from entering , quarrying, harvesting and / or taking stones from the property known as **LR No. 10531**, pending the Referral and determination of the dispute herein to arbitration .
- d) That the Kenya Police at Makongeni Police Station do assist in enforcing the Court Order.
- e) That costs of the application be provided for.

The application is supported on the grounds on the face of the application and on the supporting Affidavit of *Lieutenant Colonel Nahashon Njiru*.

Briefly, the applicants allegations are that the applicant entered into a “ **Use of Quarry Agreement**” with the Respondent on 1<sup>st</sup> August 2010. The Agreement was to run for 5 years on condition that the Respondent would pay **Kshs.85,000/=per month** in exchange for the right to harvest stones from the applicants land. The Agreement also provided that the rent would be reviewed after 6 months from 11/8/2010 upon which if all parties were satisfied the period would be extended.

Subsequently, the parties reviewed the terms of the agreement and clarified their obligation in a Tenancy agreement dated 1<sup>st</sup> August, 210. The lease provided that the Tenancy would run for a period of 15 years or when the stone is exhausted from the quarry and that the applicant would lease **0.9547 hectares** of its property to the Respondent to use as a quarrying. The Respondent was to pay

**Kshs. 135,000/=** at the start of every calendar month for use of the quarrying. Further the Respondent would comply with the Laws, Rules and Regulations or by- Laws enacted passed made or issued by the government of Kenya or any other laws in relation to the occupation conduct or use of the premises. However, the applicant later learnt in November 2011 that Respondent had been quarrying without an Environmental Impact Assessment (EIA) licence. Furthermore, the Respondent was quarrying beyond the agreed area of **0.957 hectares** contained in the lease to areas very close to the Applicants training College thereby causing excessive vibrations that disrupted classes. That Respondent has also not paid rent for a period of 1 year resulting in arrears in excess of **1.9 Million**. The Applicant therefore informed the Respondent of the alleged illegality of his quarrying activities and that the quarry agreement had been terminated but the Respondent ignored the Applicant's request.

The Applicant's forfeited the Lease via a notice dated 20<sup>th</sup> February, 2012 and attempted to exercise their right of entry on 15/11/2012 but were forcefully resisted. That the Defendant has breached the **Lease Agreement** and damages are not adequate remedy.

The respondent opposed the application and stated that the applicants have erroneously believed that they are party to any dealings between the Respondent and **NEMA**. Respondent submitted that applicants are complete strangers to any dealings between the Respondent and **NEMA** and that in any event **NEMA** office in Thika vide letter dated 2/9/2011 confirmed that the Respondent had met all the necessary conditions in accordance with the provisions of Section 58 (1) of **EMCA 1999**. Respondent further contended that the actions by the applicants are intrusive, uncalled for and bad in faith.

Further that the applicants acted out of malice and bad faith as they never explored the arbitration avenue provided for in clause 10(b) of the Tenancy Agreement. Therefore, the applicants had no colour of right of re-entry and the action by applicants was pure act of malice and harassment to the Respondent. The Respondent also averred that the application has no prima facie merit and should be dismissed with costs.

The applicants herein are essentially seeking for restraining orders against the Respondent pending the reference of the matter to arbitration. Since the applicants are seeking injunction orders; they have to fulfil the conditions for granting of such orders. These conditions were laid down and in the case of **Giella Vs Cassman brown Co Ltd (1973) EA 358**. These threshold principles are:

Firstly, 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. The same principles were also held in the case of **EA Industries Vs Trufoods (1972) EA 420**.

From the available documents attached to the notice of motion dated 8/2/2013, there is no doubt that salvation Army Kenya East Territory is the registered owner of **LR No. 10531** situated in Thika County. There is also no doubt that the said salvation Army Kenya Territory entered into "**Use of Quarry Agreement**" and later **Tenancy Agreement** with Mungaru Enterprises. The said Mungaru enterprises was to harvest stones on the leased portion of land for kshs.135,000/= per month. The terms of Tenancy Agreement are well stipulated in 'NN2'. There is no doubt that in the said Tenancy Agreement, in clause 10(b) there is provision for arbitration in the case of a dispute. The applicants allege that a dispute has arisen and the matter ought to be referred to arbitration. However, restraining orders should be granted before hand.

The applicants' averred that the alleged breach of agreement was failure by the Respondent to adhere to **NEMA** regulations. Applicants also alleged that Respondent has failed to pay the monthly rent which now amounts to about **Kshs. 1.9 Million**.

From the available evidence have the applicants demonstrated they have a **prima facie case** with high probability of success?. The applicants have complained that the Respondent has continued with the quarrying actions without approval or licence from **NEMA**. However, there is evidence that NEMA local

office in Thika had given an indication that Respondent had complied with requirements of **EMCA** . The Environmental Impact Assessment licence is an issue between **NEMA** and Respondent. How are the applicants coming in ?

The applicants again contend that Respondent has not paid the agreed monthly rent for about one year. What are the actual complaints by the applicants?. Are they lack of EIA licence or non payment of the monthly rent?.

I find that the applicants herein have not demonstrated that they have a prima facie case with probability of success. On the second aspect of irreparable injury, if the respondent is in breach of contract then the Tenancy Agreement is very clear. The arbitrator can arbitrate the matter and order for payment of damages. The applicants leased the land for harvesting of stones. That is what the Respondent is doing. Respondent is not carrying a different activity that would cause different impact on the land.

On the issues of **EIA** Licence, that is between the Respondent and **NEMA** and there is no evidence that **NEMA** are likely to charge the applicants herein. I find that the Applicants have also failed to satisfy the Court that they will suffer irreparable loss or injury which cannot be compensated by damages. The issue at hand is the Tenancy Agreement. If there is a breach of the same, the Tenancy Agreement is very clear as to how the dispute would be solved. The balance of convenience does not tilt in favour of the applicants.

Having carefully considered the rival arguments, I find that the applicants have failed to satisfy the conditions for the grant of **temporary injunction** as was set out in the case of **Giella vs Cassman Brown ltd (1973)EA 358.**

The upshot of this application is that the Notice of Motion dated 8/2/2013 lacks merit and the same is dismissed entirely with costs to the Respondent.

*Dated, signed and delivered this 24th May, 2013*

**L. N. GACHERU**  
**JUDGE**

**In the Presence of:-**

.....For the Plaintiffs  
.....For the Defendant  
.....Court Clerk

**L. N. GACHERU**  
**JUDGE**