



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 188 OF 2011

1. GALLOT INDUSTRIES LTD.
2. M.G PARK LIMITED..... PLAINTIFFS/APPLICANTS

VERSUS

1. PETER WANE
2. PAUL MUNGUTI DEFENDANTS/RESPONDENTS

R U L I N G

The application dated 27/7/2011 is brought under **Order 40 Rules 1 and 2** of the **Civil Procedure Rules Section 3A and 63 e of the Civil Procedure Act** and all other enabling provisions of the law.

The application seeks the following orders:-

1. **(Spent).**
2. **(Spent).**
3. **(Spent).**
4. **That the Municipal Council of Mavoko do grant consent to the Plaintiffs to fence the said parcels.**
5. **That the OCS Athi River Police Station do ensure compliance of this order.**
6. **That costs of this application be paid by the defendants.”**

The application is supported by the affidavit of **Mohan Galot** the Chairman and Governing Director of the Applicant Companies. According to the said affidavit, the Applicants are the registered owners of the parcels of land the subject matter of this suit as evidenced by the annexed title documents.

The Applicants' complaint is that sometimes in the month of July 2011, the Respondents illegally entered the aforesaid parcels of land and started sub-dividing the same and putting up beacons.

The Applicants deposed in a supplementary affidavit sworn on 8/11/2011 that the Respondents are not officials of **City Carton Welfare Association** which claims ownership of land parcel **No. 14949 Athi River**.

In opposition to the application, the Respondents swore a replying affidavit on 12/9/2011. It is contended that the Respondents are officials of **City Cartons Welfare Association**, the registered owner of land

parcel No. **14949 Athi River**. That the said land parcel was allocated to the **Welfare Association** in the year 1985 and approximately 800 members of the welfare group reside therein. The Respondents denied having trespassed on the Plaintiffs' parcel of land.

The application was canvassed by way of written submissions which I have duly considered. The Applicant claims to be the registered owner of land parcels No. **12867/7, 12867/15, 12867/6 and 12867/14 in Athi River Township**. The Respondents claim is that **City Cartons Welfare Association** is the registered owner of land parcel No. **LR 14949 Athi River**. These are different parcels of land. There is no affidavit evidence on how the land claimed by the Respondent is related to the land claimed by the Applicants.

The 1st and 2nd Respondents have stated that they are officials of **City Cartons Welfare Association** but have not exhibited any documents relating to the welfare association or their alleged positions as the officials of the Association. Consequently, I would agree with the Applicants' counsel that the Respondents have failed to establish any *locus standi* as far as **City Cartons Welfare Association** is concerned.

The orders sought herein are directed against the 1st and 2nd Respondent individually and not the alleged 800 members of **City Cartons Welfare Association**.

The Applicants have established a *prima facie* case with a probability of success. They have met the requirements set out in the case of **Giella Vs Cassman Brown & Co. Ltd. (1973) EA 358**.

The 1st and 2nd Respondent, having failed to provide any evidence relating to the land parcels claimed by the Applicants should be the ones to give way pending the hearing and determination of the suit. As stated by the Court of Appeal in **Sharif Abdi Hassan –vs- Nadhif Juma Ada C.A 121/2005:-**

“Where there is a dispute over land between a registered proprietor and a trespasser, it is the trespasser who should give way pending the determination of the dispute.”

With the foregoing, this court is inclined to allow prayer Number 3 of the application. As regards prayer No. 4 of the application, it is noted that the **Municipal Council of Mavoko** is not a party herein. Prayer Number 4 therefore fails. This being a civil suit and there being no disobedience of any court orders so far in relation to this suit, prayer Number 5 for the **OCS Athi River Police Station** to ensure compliance with the orders is unwarranted.

Consequently, prayer number 3 of the application is allowed.

Costs to the Applicant.

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B. THURANIRA JADEN

JUDGE

Dated and delivered at Machakos this **11th** day of **July** 2013.

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B. THURANIRA JADEN

JUDGE