



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**E. L.C. CASE NO. 747 OF 2011**

**YELLOW HORSE INNS LIMITED.....PLAINTIFF**

**VERSUS**

**A.A. KAWIR TRANSPORTERS LIMITED..... 1<sup>ST</sup> DEFENDANT**

**PHILMA FARM PRODUCE & SUPPLIERS LTD.....2<sup>ND</sup> DEFENDANT**

**THE COMMISSIONER OF LANDS.....3<sup>RD</sup> DEFENDANT**

**CITY COUNCIL OF NAIROBI.....4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 2<sup>nd</sup> December 2011 in which the Plaintiff/Applicant seeks for the following orders:

1. Spent
2. That a temporary injunction order do issue to restrain the Defendants by themselves, their agents, servants and/or employees or any other person or group of persons purporting to act on their behalf from alienating, entering into, subdividing, taking possession and/or interfering with the suit premises known as L. R. No. 209/11803/2 (hereinafter referred to as the "Suit Premises") in any manner whatsoever and/or registering a Grant and/or Title or any other document whatsoever relating to the Suit Premises in favour of the 1<sup>st</sup> Defendant or any other person whomsoever pending the hearing and determination of this application.
3. That a temporary injunction order do issue to restrain the Defendants by themselves, their agents, servants and/or employees or any other person or group of persons purporting to act on their behalf from alienating, entering into, subdividing, taking possession and/or interfering with the suit premises known as L. R. No. 209/11803/2 (hereinafter referred to as the "Suit Premises") in any manner whatsoever and/or registering a Grant and/or Title or any other document whatsoever relating to the Suit Premises in favour of the 1<sup>st</sup> Defendant or any other person whomsoever pending the hearing and determination of this suit.
4. That the OCS Embakasi Police Station do ensure due compliance of the injunction order that may issue herein against the Defendants so as to keep peace.
5. That the cost of this application be provided for
6. That such other and/or further relief be granted as this Honourable Court may deem fit and just to grant.

The application is supported by the grounds appearing on the face of it as well as the Supporting Affidavit of Mary Njuku sworn on 22<sup>nd</sup> December 2011 in which she deponed that the Plaintiff is the registered proprietor of the Suit Premises by virtue of a Grant registered as number I.R. 112602/1 a copy of which she produced. She said that the Plaintiff received that lease of the Suit Premises from the Government of Kenya for a term of 99 years from 1<sup>st</sup> March 1996. She then stated that on 19<sup>th</sup> November 2011, some people invaded the Suit Premises allegedly on the instructions of the 2<sup>nd</sup> Defendant and attempted to evict the Plaintiff's workers on the Suit Property on the basis of an ex-parte injunction order issued by this Court on 12<sup>th</sup> October 2011 in Constitutional Petition No. 194 of 2011 filed by the 2<sup>nd</sup> Defendant and 3 Others against the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Defendant and two others. She further stated that the Plaintiff was thereafter enjoined in that suit in which both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were each claiming to be the legitimate and bona fide owners of the Suit Premises along with another parcel of land known as L.R. No. 209/11803/3. She further stated that from the pleadings filed in that suit, the Plaintiff came to learn that despite the fact that it was the registered proprietor of the Suit Premises, both the 3<sup>rd</sup> and 4<sup>th</sup> Defendants colluded to have a Grant in respect of the Suit Premises issued to the 1<sup>st</sup> Defendant on the basis of a purported letter of allotment by the 3<sup>rd</sup> Defendant dated 2<sup>nd</sup> November 1995. She also stated that from the same pleadings of that suit, she discovered that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants caused another Deed Plan No. 321512 to be issued by the Director of Surveys in which the Suit Premises had been described as L.R. No. 209/20052 (original no. 209/11803/2) which was annexed to a Grant in the name of the 1<sup>st</sup> Defendant which is now pending registration. She further stated that the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in an attempt to nullify the Plaintiff's title to the Suit Premises procured a report dated 7<sup>th</sup> May 2010 from a Forensic Documents Examiner in which the Plaintiff's title along with another title in respect of L.R. No. 209/11803/3 are alleged to be forgeries. She swore that the said Forensic Report was fabricated and tailored with the sole aim of unlawfully and illegally dispossessing the Plaintiff of the suit Premises without following the due process of law. She further indicated that the 1<sup>st</sup> Defendant has never been in occupation of the Suit Premises pursuant to a temporary occupation license or otherwise as is alleged. She also stated that the 2<sup>nd</sup> Defendant is also claiming the Suit Premises on the basis of an alleged letter of allotment dated 24<sup>th</sup> July 1995 which is fraudulent and intended to dispossess the Plaintiff of the Suit Premises. She pointed out that the 2<sup>nd</sup> Defendant has never been in occupation of the Suit Premises from 1984 as is alleged. She further stated that the 2<sup>nd</sup> Defendant's claim to the Suit Premises based on the purported letter of allotment cannot override the Plaintiff's title to the Suit Premises which is protected under the provisions of the law. She further stated that on 12<sup>th</sup> December 2011, either the 1<sup>st</sup> or 2<sup>nd</sup> Defendant sent goons to the Suit Premises where they demolished the Plaintiff's guard house and store constructed therein in readiness to commence the construction of a perimeter wall.

The Application is contested. The 1<sup>st</sup> Defendant filed its Replying Affidavit sworn by Abdi Ahmed Abdi, a Director of the 1<sup>st</sup> Defendant, on 19<sup>th</sup> January 2012 in which he stated that the Plaintiff's suit as well as the Notice of Motion were incurably defective and should be struck out because the said Mary Njuku had not filed an authority duly signed and sealed by the Plaintiff authorizing her to sign the verifying affidavit to the Plaintiff and the Supporting Affidavit to the application. He further said that the Plaintiff's suit and application were an abuse of the process of court as there is already in existence an order given in Constitutional Petition No. 194 of 2011 by the Honourable Mr. Justice Majanja preserving the Suit Premises and further directing all the parties to maintain the status quo pending the hearing and determination of the Petition. He stated further that the Plaintiff is the 6<sup>th</sup> Respondent in that Petition and ought to have raised whatever grievances it may have in the said Petition and not to file a fresh suit and/or seek further injunctive orders as is purported herein. Further, he stated that the Plaintiff has not demonstrated by way of documents or otherwise that it is the lawful and legitimate owner of the Suit Premises and/or that it has been in actual possession of the Suit Premises. He asserted that the Plaintiff's title is illegal, null and void and that the 1<sup>st</sup> Defendant is the legitimate owner of the Suit Premises. He further enumerated the manner in which the 1<sup>st</sup> Defendant became the legitimate owner of the Suit Premises. He said that prior to 1995, L.R. No. 209/11803/3 was part of a portion of unsurveyed Government land measuring approximately 50 acres. He stated further that in 1992, the said unsurveyed land was allocated to the then Nairobi City Commission by the Government of Kenya vide a letter of

allotment dated 25<sup>th</sup> August 1992. He then said that the Nairobi City Commission subsequently issued Temporary Occupation Licenses at a fee to various companies operating Tankers/heavy duty vehicles within Nairobi. He stated that the 1<sup>st</sup> Defendant was amongst the companies that were issued with the Temporary Occupation Licenses. He stated further that the 1<sup>st</sup> Defendant occupied the Suit Premises in 1993 with the knowledge and approval of the Nairobi City Commission while paying the requisite license fee. He then pointed out that there is no evidence to show that the Plaintiff was already in occupation of the Suit Premises as at 1992 or 1993. He stated further that while still in occupation of the Suit Premises, the 1<sup>st</sup> Defendant applied to the then President of Kenya for a permanent allocation of a portion of the subject property measuring 16 acres which application was approved by the President on 24<sup>th</sup> September 1995. He then stated that the Nairobi City Commission then wrote to the Commissioner of Lands on 25<sup>th</sup> October 1995 confirming it had no objection to the allocation and issuance of a lease in favour of the 1<sup>st</sup> Defendant for the portion of 16 acres. He stated that thereafter the Commissioner of Lands issued to the 1<sup>st</sup> Defendant a letter of allotment dated 2<sup>nd</sup> November 1995 for a parcel measuring 8.85 hectares. He then stated that the allotted parcel was thereafter surveyed and officially allocated to the 1<sup>st</sup> Defendant who immediately took possession thereof in 1995 while believing that the allocated property measured 8.85 hectares as per the letter of allotment. He then stated that in July 2010, he was contacted by Police Officers from the CID in regard to some forged titles and that after the interrogations, he realized that the 1<sup>st</sup> Defendant was only allocated 10 acres instead of 16 acres as approved by the President. He said that it emerged that fraudulent titles had been issued in the name of Brookside Studios Limited and Yellow Horse Inn Limited in respect of the 6 acres left out during the survey. He says he was advised to apply to be allocated the remaining 6 acres which he did on 3<sup>rd</sup> October 2010 following which the Commissioner of Lands issued two letters of allotment dated 29<sup>th</sup> June 2011 in favour of the 1<sup>st</sup> Defendant in respect of L.R. No. 209/11803/3 and L.R. No. 209/20052. He said that the 1<sup>st</sup> Defendant accepted the allotment offer and paid the requisite fee. He said that the property was surveyed by the Land Surveyor of the City Council of Nairobi in co-ordination with the Commissioner of Lands and Deed Plans and Beacon Certificates were issued in respect of the two parcels and that the Commissioner has processed the titles for the two parcels in favour of the 1<sup>st</sup> Defendant but the same had not been released to the 1<sup>st</sup> Defendant following the orders issued by the court in Constitutional Petition No. 194 of 2011 preserving the status quo until further orders of the court.

The 2<sup>nd</sup> Defendant filed its Replying Affidavit sworn by Joseph Macharia Maina on 6<sup>th</sup> February 2012 in which he stated that he was a Director of the 2<sup>nd</sup> Defendant. He stated that the 2<sup>nd</sup> Defendant claims a right to the Suit Premises and has filed a Constitutional Petition No. 194 of 2011 to assert and determine its right. He stated that the 2<sup>nd</sup> Defendant shall challenge the Grant held by the Plaintiff on the grounds that it is a forgery as deposed to by the 1<sup>st</sup> Defendant and further challenge the grant in favour of the 1<sup>st</sup> Defendant on the ground that the process of issuing the same was fraudulent.

The 4<sup>th</sup> Defendant filed its Replying Affidavit sworn by John Kich Ayiecho, the Chief Valuer, who stated that the Plaintiff/Applicant is not the registered owner of the Suit Premises but falsified documents on the Suit Premises and has been using them to pay rates. He stated further that vide a letter of allotment dated 20<sup>th</sup> June 1996, it came to the 4<sup>th</sup> Defendant's attention that the Suit Premises was owned and registered in the name of Nduachi Company Limited. He further stated that the Plaintiff filed ELC No 346 and 347 of 2009 against the 4<sup>th</sup> Defendant and another party claiming she was the owner of the Suit Premises but that the judge dismissed her application after considering the evidence. He stated that the Plaintiff thereafter abandoned those suits without setting them down for hearing. He further stated that the Plaintiff again tirelessly went on to file an Appeal which is still pending conclusion. He stated that it is an abuse of the process of the court for the Plaintiff to again file this suit on the same subject matter. He pointed out that there is another suit namely Constitutional Petition No. 194 of 2011 filed by the 2<sup>nd</sup> Defendant where there is a preservative order to the Suit Premises and that the Plaintiff should not have filed this suit.

The Plaintiff made a response through the Further Affidavit of Mary Njuku sworn on 28<sup>th</sup> February 2012 in which she stated that she was authorized by the Plaintiff to swear affidavits and sign all necessary

documents on its behalf in this case. She also stated that Constitutional Petition No. 194 of 2011 is about the alleged violation of rights and freedoms of the Petitioners whereas the issues raised in this suit are in respect of ownership of the Suit Premises. She reiterated that it is the Plaintiff, not the 1<sup>st</sup> Defendant who is in possession of the Suit Premises and that the Plaintiff's title over the Suit Premises was validly and legally obtained. She also stated that the 2<sup>nd</sup> Defendant's claim to the Suit Premises is baseless and without any merits. She also stated that the Plaintiff would suffer irreparable loss and damage if an injunction order is not granted and it is only fair and just that the Plaintiff's application herein be allowed.

Written submissions were filed by the Plaintiff, the 1<sup>st</sup> and 4<sup>th</sup> Defendants, all of which I have read and taken into consideration.

In determining whether or not to give the Plaintiff/Applicant the orders they seek of an interlocutory injunction, I will refer to and rely on the principles laid down in the celebrated case of **Giella versus Cassman Brown (1973) EA 358** 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.”*

Has the Plaintiff/Applicant 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.”*

Has the Plaintiff/Applicant established a ‘genuine and arguable case’? There is no question in my mind as to the fact that the ownership of the Suit Premises is under very intense contention as between the various claimants thereto being the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. Going by the evidence supplied so far and the information supplied to this court by the parties involved, it emerges that it is not possible to determine on a prima facie basis, who is the legitimate owner of the Suit Premises at this interlocutory stage. This will have wait until full trial of this case. Hence, at this stage of the proceedings, this court finds that the Plaintiff/Applicant has not established a prima facie case. That being my finding, I see no reason for further interrogating whether the other two conditions set out in the **Giella** case have been met.

In light of the foregoing, the application is hereby dismissed with costs to the Defendants.

**SIGNED AND DELIVERED AT NAIROBI ON THE 20<sup>TH</sup> DAY OF SEPTEMBER 2013.**

**MARY M. GITUMBI**

**JUDGE**