REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 270 of 2010

MARY WAMBUI MUNGAI.....1ST
PLAINTIFF

JEMIMA WACHEKE KIMARI.....2ND
PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF RUIRU.....1ST
DEFENDANT

CAX INVESTMENTS LIMITED.....2ND
DEFENDANT

RULING

Two substantive prayers are sought in the application before this court dated 2nd June 2010. The 1st and 2nd Plaintiffs are seeking orders that pending the hearing of this suit:-

1. The 1st and 2nd Defendants by themselves or by their agents, servants or otherwise howsoever be restrained from interfering with the 1st and 2nd Plaintiffs' access to, use of and quiet possession of the properties known as Ruiru East/Block 5/238, 5/239, 5/240 and 5/241 and Ruiru/Ruiru East/Block 5/515.

2. The 1st and 2nd Defendants by themselves or by their agents, servants or otherwise howsoever be restrained from entering upon, remaining on or continuing in occupation of, excavating, constructing, building or in any way whatsoever interfering and dealing with the properties known as Ruiru East/Block 5/238, 5/239, 5/240 and 5/241 and Ruiru/Ruiru East/Block 5/515.

The Plaintiffs averments are as follows. That the 1st Plaintiff is the registered owner of the properties known as Ruiru East/Block 5/238, 5/239, 5/240 and 5/241, on which is erected a supermarket currently leased to Nakumatt Holdings Limited and 90 residential flats. It is also averred that the 1st and 2nd Plaintiffs are also the registered owners and entitled to the possession of an adjacent property known as Ruiru/Ruiru East/Block 5/515 (hereinafter referred to as the suit property), and on which is erected a car park that serves the said supermarket. The Plaintiffs claim that the car park on the suit property was

constructed at their own cost and with the approval of the 1st Defendant in 1998. Further, that the property on which the car park is erected was eventually allotted to them, where after they were issued with a certificate of lease after payments of the requisite fees.

The Plaintiffs allege that the 1st and 2nd Defendants have wrongly entered the suit property and placed a board thereon indicating that they intend to construct a dispensary on the said property. Further, that the 1st and 2nd Defendants have commenced excavation of the suit property, digging trenches with a view to commencing the construction of the said dispensary, and thereby destroying the said car park, notwithstanding repeated requests by the Plaintiffs to vacate and deliver up the same.

The Plaintiffs' submission is that they will suffer irreparable injury unless the 1st and 2nd Defendants are restrained by this Honourable Court, and they are ready, able and willing to furnish a suitable undertaking as to damages, if any, which may be suffered by the 1st and 2nd and Defendants as a condition for the grant of the orders sought herein.

The Plaintiffs have produced as evidence copies of correspondence on the authority to construct the said car park, and the letters of allotment of the suit property. The Plaintiffs have also annexed copies of the certificates of lease with respect to the suit property and the properties registered in the 1st Plaintiff's name, and photographs of the developments made on the said properties.

The 1st Defendant's in reply state that their claim only relates to the suit property. The 1st Defendant admits that it authorized the Plaintiffs to develop the said property as a car park, on condition that the said development was to be undertaken jointly with it. The 1st Defendant's also states that other than the letter dated the 23rd April 1998 by the then clerk, Mr. Njihia, the 1st Defendant's council never passed a resolution to validate the said authority as required by law. Further, that the allotment letter dated the 7th October 2004 in respect of the said property was clear that the same was to the 1st Defendant and the Plaintiffs' jointly.

The 1st Defendant avers that it was therefore wrong and indeed fraudulent, for the Plaintiffs to obtain the lease to the suit property in their own names, and they cannot therefore claim exclusive priority interest in the said property. The 1st Defendant has annexed as evidence its letters granting authority to the Plaintiffs to construct the car park, a copy of the allotment letter and a copy of the certificate to the suit property.

Both the Plaintiffs' and 1st Defendant's Advocates have filed written submissions and authorities in support of their respective arguments. The Plaintiffs' Advocate filed written submissions dated 29th June 2010, and contends that as the registered owners of the suit property, the Plaintiffs have full and exclusive possession, and the 1st and 2nd Defendants have no legal right or claim to the car park and should give way to the Plaintiffs' rights pending the determination of the suit. The Plaintiffs' Advocate has relied on the Court of Appeal decisions in **Cheruiyot v Bartiony (1988) KLR 422 and Jaj Super Power Cash and Carry Ltd v Nairobi City Council & Others, Civil Appeal No. 111 of 2002 (Nairobi).** The Plaintiffs' Advocate also argues, citing various case law, that the suit property is now private property and not available for alienation by the 1st Defendant, and that in any case the 1st Defendant is estopped from resiling their approval, having allowed the Plaintiffs to incur substantial expense in the development of the car park on the suit property.

The 1st Defendant in submissions dated 4th November 2011 argue that section 144 of the Local Government Act (Cap 265) allows it to issue licenses to persons to occupy land, and also allows it to use that land for any other function. Further, that the construction of a dispensary was for the public benefit, and the Plaintiffs cannot plead indefeasibility of a title which was procured fraudulently in order to defeat the public interest. The Defendant's Counsel relies on the decision in **John Peter Mureithi and 2 others v Attorney General and 6 others (2006) eKLR** in this regard. The 1st Defendant also argues, citing various case law, that the mere possession of the suit property did not confer ownership on the Plaintiffs, and that since they have concealed that they obtained the certificate of lease of the suit property

fraudulently, they should not be granted the injunction sought.

There was no response or opposition to the Plaintiffs' application by the 2nd Defendant.

After consideration of the pleadings filed in this case and submissions made by the parties, the main issue before the court is whether the Plaintiffs have met the conditions necessary to grant them injunctive relief. These conditions are laid down in **Giella v Cassman Brown & Co Ltd (1973) EA 358.** The first requirement is whether the Plaintiffs have shown a *prima facie* case. I wish to state at the outset that in my view, a *prima facie* case is shown by evidence tendered and not through the pleadings or prayers sought as submitted by the 1st Defendant. It is the evidence produced by the Plaintiffs in this application that will determine whether indeed a *prima facie* case has been made out for the prayers sought or not.

The Plaintiffs in the suit filed by Plaint dated 2nd June 2010 claim the Defendants have wrongly entered property that is registered in their names, and commenced excavation on the same. They as a result seek prayers restraining them from dealing with the suit property and interfering with their access and use of the same, as well as damages for trespass. They have brought evidence to show that they were allocated the suit property and have title to the same, and also of the developments they have made thereon.

The 1st Defendant argues that the Plaintiffs have not shown a *prima facie* case for two reasons. That the allotment was jointly to the Plaintiffs and 1st Defendant, yet the Plaintiffs alone were fraudulently registered as owners, and that the possession and developments on the suit property does not confer ownership on the Plaintiffs. The only evidence I could find of the 1st Defendant's ownership of the said property is the joint allotment to it and the Plaintiffs as evidenced in the allotment letter dated the 7th October 2004.

The Court of Appeal in **Dr. Joseph N.K. arap Ngok v Justice Moijo ole Keiwa and 4 others, Civil Application No.NAI 60 of 1997** stated as follows with regard to allotment:

"Title to landed property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of title document pursuant to provisions held."

The Court of Appeal further held that in cases of double allotment, a party who has been issued a good title takes precedence over all other alleged equitable rights to the title. I believe that this argument would equally apply to cases of joint allotment. In the present application both the Applicant and 1st Defendant do not dispute that there was joint allotment , however, only the Plaintiffs' were issued with a certificate of lease.

The circumstances of the issue of the said title and/or whether it was done fraudulently, or is overridden by the public interest are all issues that will have to be decided at the trial of the suit filed herein, and not at this stage. I therefore find that the Plaintiffs' have established a *prima facie* case, by virtue of evidence of title, and also of possession as shown by the photographic evidence adduced of the suit property, which in any event is not disputed by the Defendants.

The only requirement I now need to consider is whether damages will be an adequate remedy to the Plaintiffs. On this issue the Plaintiffs have shown that the car park on the suit property was adjacent to other properties owned by the 1st Plaintiff, and was constructed for the use of third parties on the said adjacent properties. I am of the opinion that it will be difficult for the Plaintiffs to acquire a similar facility even if they were to be compensated in monetary terms. In any case the 1st Defendant have not offered this alternative, nor indicated the availability of such a facility. Furthermore, the 1st Defendant submissions on this issue is that the Plaintiffs' are misguided that they are the sole owners and beneficiaries of the said car park, and will therefore suffer no irreparable harm.

In light of the foregoing, I hereby allow the Plaintiffs' application dated 2nd June 2010, and grant an

injunction pending the determination of this suit on the following terms:

1. The 1st and 2nd Defendants by themselves or by their agents, servants or otherwise howsoever be restrained from interfering with the 1st and 2nd Plaintiffs' access to, use of and quiet possession of the parcel of land known as Ruiru/Ruiru East/Block 5/515.

2. The 1st and 2nd Defendants by themselves or by their agents, servants or otherwise howsoever be restrained from entering upon, remaining on or continuing in occupation of, excavating, constructing, building or in any way whatsoever interfering and dealing with the parcel of land known Ruiru/Ruiru East/Block 5/515.

The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ___14th__ day of ____February_____, 2012.

P. NYAMWEYA

JUDGE