



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU**

Civil Case 259 of 2009

**MOSES GITONGA t/a RECTRON INNOVATORS....1ST APPLICANT
JOSEPH GITHITU WANGI.....2ND APPLICANT
CHEBET KIBET.....3RD APPLICANT
VERSUS**

**COUNTY COUNCIL OF NAKURU.....1ST RESPONDENT
JOSEPH MARIGI.....2ND RESPONDENT
JOHN STUMA.....3RD RESPONDENT
DANSON MAINA.....4TH RESPONDENT**

RULING

The applicants have instituted this suit against the respondents for a permanent injunction and a declaration in respect of three parcels of land, GILGIL UNSURVEYED COMMERCIAL PLOT NOS.A, C and D (the suit plots).

In the meantime they are asking the court in the instant application that the respondents be restrained by a temporary order of injunction pending the hearing and determination of this suit from trespassing, disposing of and/or dealing or interfering in any way with the suit plots. They also want the demolition of the respondents' structures on the suit plots and that they be compelled to restore the beacons that have been interfered with.

It is the applicants' contention that the 1st respondent allocated the suit plots to them by issuing to them allotment letters following a council meeting held on 22nd December, 2005. They argue further that, without any colour of right or justification, the respondents have invaded part of the suit plots also claiming ownership; that their plea to the 1st respondent to intercede has fallen "on deaf ears." A report was made to the police and the 4th respondent arrested but not charged in court.

In reply, the 2nd to the 4th respondents filed an affidavit sworn on their behalf by the 2nd respondent in which he has maintained that they are the lawful allottees of the suit plots known as Gilgil Jua Kali Site, Gilgil; comprising 159 plots, allocated by the Commissioner of Lands in 1999. It is averred that the applicants have unlawfully curved out of the respondents' plots 0.2Ha, which is the subject of this dispute.

The 1st respondent has filed both grounds of opposition and a replying affidavit sworn by its clerk. The 1st respondent has stated that the application and indeed the suit do not disclose any reasonable cause of action against it. It is however conceded on its behalf that the suit plots were allocated the applicants; that the respondents were also allocated in the same area some 1.8Ha plots, although they have always insisted on having 2.0Ha, as a consequence thereof they have encroached on the suit plots.

I have considered these arguments, written submissions and useful authorities cited. Being an application from both prohibitory and mandatory interlocutory injunctions, the well settled strictures in the case law must be satisfied. The leading case in the former is no doubt, **Giella Vs. Cassman Brown Co. Limited** (1973) EA 358. First the applicant must demonstrate that he has a *prima facie* case with a probability of success at the trial. It must also be remembered that an interlocutory injunction will normally not issue if an award of damages can compensate the applicant and finally if the court is in doubt the matter must be decided on a balance of convenience. **Mrao Ltd. Vs. First American Bank of Kenya Ltd.** (2003) KLR 125 has defined what constitutes a *prima facie* case.

I can only clarify that the court cannot at this interlocutory stage delve into the merits of the suit nor can it make any definite findings either of facts or law. That is the province of the trial court. Has the applicant demonstrated the existence of a right which appears to have been infringed by the respondents as to require the court to call for rebuttal from the latter?

The applicants have exhibited allocation letters by the 1st respondent, the local authority where the suit plots are situated. They

have also annexed clearance certificates confirming payment of various charges upto January, 2009; the 1st applicant's development plan has been approved by the 1st respondent; there are enough.

correspondence from 1st respondent as well as its replying affidavit confirming that the suit plots were allocated to the applicants and that it is the respondents who have encroached on the suit plots. The correspondence further confirms that the respondents have uprooted the beacons.

The respondents insist that the 1st applicant fraudulently caused 0.2Ha to be curved out of the respondents' plots. It is not clear by what means and with who this was done. The respondents have also deposed that the Commissioner of Lands allocated to them the land in question in 1999 for a period of 99 years. The dispute involves only a portion of the suit plots measuring 0.2Ha. The 1st applicant through a company called Rectron Innovators was allocated plot C, the 2nd applicant plot D and the 3rd applicant plot A.

The sizes of the plots are not specified in the allocation letter. But the size of the respondents' plot is given specifically in the Letter of Allotment as 1.8Ha. Their claim of 2.0Ha has not been explained and on these grounds alone, I am persuaded that the applicants have demonstrated a *prima facie* case.

On the issue of an award of damages, I am of the view that the 2.0Ha in dispute is a substantial portion of land and if the respondent's activities on it are not restrained, the nature of the land in question may totally change to the applicant's detriment. The balance of convenience, in view of my finding on *prima facie* case, tilts in favour of the applicants.

I turn to consider the prayer for mandatory interlocutory injunction. Case law is unanimous that it is a relief that ought not to be granted on an interlocutory application in the absence of a special circumstances and even then only in clear cases. See Locabail International Finance Ltd. Vs. Argroexport and others (1986) 1 All ER 901. See also Kenya Breweries Ltd. Vs. Okeyo (2002) EA 109 (CAK).

The issue in this dispute relates to ownership and extent of three parcels of land. Until that issue is resolved, it would be imprudent to order, at this interlocutory stage, the demolition of the structures on the disputed portion or to do anything about the beacons.

For the reasons stated, there will be a temporary order of injunction to restrain the respondents in terms of prayer 2 of the summons dated 8th September, 2009 pending the hearing and determination of the suit herein. Costs will be in the cause.

Dated, Signed and Delivered at Nakuru this 26th day of February, 2010.

**W. OUKO
JUDGE**