



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 31 of 2010

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC CIVIL SUIT NO. 31 OF 2010

SAMUEL MAINA1ST PLAINTIFF

JOHN KING'ORI GATURU2ND PLAINTIFF

**JAMES KARANJA (Suing as Chairman, Secretary
& Treasurer respectively, of CITY PARK HAWKERS**

DEVELOPMENT PROJECT3RD PLAINTIFF

V E R S U S

THE CHAIRMAN, SECRETARY AND

TREASURER OF ASIAN FOUNDATION1ST DEFENDANT

CITY COUNCIL OF NAIROBI2ND DEFENDANT

R U L I N G

ON the evidence before the court, the 2nd Defendant is the proprietor of L. R. No. City Park Market with the original plot number L.R. 209/6559/R Parklands Nairobi which covers a total of 5 acres. In the market operate hawkers who pay rent to the 2nd Defendant. The 2nd Defendant and the Asian Foundation did on 15th March, 2006 enter into a joint management agreement to manage the market. Under the agreement the Asian Foundation agreed to carry out construction/upgrading of several of market's components, including the construction of roofs, stalls, parking lots, toilet block, compost yard and boundary wall in order for the market to function as a fruit and vegetable market and as a market place for related goods and services. The 2nd Defendant was to continue to collect cess, business licences fees and other taxes and charges from those operating in the market. The role of the Asian foundation was basically that of the charitable organization to construct and manage a sanitary market.

The Plaintiffs are Chairman, Secretary and Treasurer, respectively, of City Park Hawkers Development Project which is described as an outfit of over 1000 hawkers who operate in the market. They say that they were brought to the market by a directive of the former president, Daniel Arap Moi, in 1990 following which the Provincial Administration allocated each a space in the market. They, however, each pay rent to the 2nd Defendant. They are basically opposed to the management agreement above and want it set aside, unless an order is made that the agreement includes them. In the suit they seek an injunction against the Defendants. They want them stopped from renovating, development and or construction whatsoever of the market.

The present application is **under Order 39 rules 1, 2, 3 and 4** of the **Civil Procedure Rules** for an interlocutory injunction pending the hearing and determination of the suit. The application is defended.

The court received written submissions from Mr. Okere from the Plaintiffs, Mr. Ongicho for the 1st Defendant and Mr. Murage for the 2nd Defendant.

The agreement above was between the 2nd Defendant and the Asian Foundation. The Plaintiffs sued the Chairman, Secretary and Treasurer of the Asian Foundation as 1st Defendant whom they described as:-

“Office bearers of the Asian Foundation which is duly registered as such under the Societies Act Cap. 108 Laws of Kenya with the capacity of being sued on behalf”

In the affidavit filed to support the chamber application, the deponent (John King'ori Gaturu) did not provide the evidence that the 1st

Defendant was a society. On the contrary, the 1st Defendant pleaded in its defence that it was a registered company under the **Companies Act, Cap. 486** and limited by guarantee. Navinchandra Bharmal Shah is the Executive Officer of the company and swore a replying affidavit in which he annexed a certificate of incorporation which is marked “NBS2”. The result is that the 1st Defendant, as sued, is an entity not known in law and the suit against it is incompetent.

Secondly, the Plaintiffs described themselves as officials of a society. The affidavit of Shah depones that there is no such society and that what the Plaintiffs have is only a business name. He made reference to the Plaintiff’s own document “JG1” which was annexed to the supporting affidavit of Gaturu. This is only a business name. The Plaintiffs can only bring a suit in individual names, and not as officials of an entity that has no existence in law. To this extent, once again, the suit was incompetent as against both the Defendants as the Plaintiffs do not have capacity to bring or maintain it.

Going to the merits of the application, the principles applicable in dealing with interlocutory injunctions have been settled since the decision in **Giella –Vs- Cassman Brown & Co. Ltd. [1973] EA 358**. The Applicant has to demonstrate a *prima facie* case with a probability of success at the trial. The Applicant should show that, if the application is not granted, he is likely to suffer injury or loss that damages may not adequately compensate. If the court is in doubt, it will decide the case on balance of convenience.

The facts are that the 2nd Defendant is the owner of the disputed property in which the Plaintiffs are tenants (hawkers) who pay rent. The 2nd Defendant has a certainly better claim as the registered proprietor under **section 23 (1) of the Registration of Titles Act (Cap 281)** against whom no injunction in the nature indicted in the application can issue. Coupled with the finding above that the suit is defective, I find that the Plaintiffs do not have a *prima facie* case.

The Plaintiffs did not seek to show what damage they will suffer if the injunction is not granted, or whether such damage will be irreparable. The 2nd Defendant should have the capacity to pay whatever damage that may be occasioned to the Plaintiff. So should be the 1st Defendant who have been shown to be spending in excess of KShs. 20,000,000/= on the project.

The balance of convenience usually tilts in favour of a registered owner of land. Further, the Defendants seek to provide an environmentally healthy market in which vegetables and other foods can be sold and bought. This will not only benefit the Plaintiffs who will operate here but also the rest of the public who will come here to buy. In the premise, an interlocutory injunction cannot issue.

In conclusion, the suit and application are struck out with costs. For the avoidance of doubt, the *ex parte* injunction issued on 5th May, 2010 is vacated.

DATED AND DELIVERED AT

NAIROBI

THIS 27TH DAY OF SEPTEMBER 2010

A. O. MUCHELULE

JUDGE