

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ELC. 113 OF 2010

TELPOSTA PENSION

SCHEME TRUSTEES REGISTEREDPLAINTIFF

V E R S U S

CITY COUNCIL OF NAIROBIDEFENDANT

R U L I N G

This application under **Order 39 rules 2, 5 and 9** of the **Civil Procedure Rules** and **sections 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act** was served but did not elicit any response. The facts contained in the supporting affidavit sworn by Lucy J. Barno, legal adviser of the Plaintiff, were therefore not controverted.

The Plaintiff is the registered proprietor of L.R. No. 209/16954 on which is erected Teleposta Towers consisting of a 29 storeyed 3 tower office block with 3 basement levels consisting of 408 parking bays. "LJB1" is copy of the Grant and Deed Plan. Part of this suit property was previously known as L.R. No. 209/13957/2 which was vested to the Plaintiff vide Legal Notice No. 154 published in the Kenya Gazette No. 59 of 15th November, 1999. "LJB2" are copies of the Vesting Order and the Grant. The other part that forms L.R. No.209/16954 is the adjacent plot that belonged to the Defendant on which the Defendant had designated 45 parking bays for use by the public. The Plaintiff bought this plot for KShs.14,969,200/=. "LJB 3" and "LJB 4" are evidence of the purchase. The new Grant was then issued on 1st December, 2006.

Subsequent to the purchase, amalgamation and issue of the new Grant, the Plaintiff converted the 45 parking bays into a recreational area to which it has since enjoyed exclusive ownership, possession and use. By letter dated 20th November, 2007 the Defendant demanded a fresh KShs. 16,200,000/= for the 408 parking bays. The Plaintiff responded on 4th April, 2007 that the matter had been settled. Copies of the letters are "LJB 5". Matters rested there until 15th March, 2010 when the Defendant's employees, guards and agents came and attempted to evict the Plaintiff's hired security guards from Radar Security and the managing agents Lloyd Masika Limited and further attempted to forcefully take possession and control of the parking bays and illegally levy parking fees on those using them. They also attempted to clamp down and bar entry to the parking area. The Plaintiff's agents repulsed them, but they promised to return on 16th March, 2010. The Defendant's people came visiting as promised and that is what forced the Plaintiff to file this suit and application.

The suit sought both permanent and mandatory injunctions. The application prayed for interlocutory injunction and interlocutory mandatory injunction.

An interlocutory mandatory injunction can only be sought by way of motion under the inherent powers of the court, and not by summons under **Order 39. (See Belle Maison Ltd -Vs- Yaya Towers Ltd, HCCC No. 2225 of 1992 at Nairobi.)**

The principles governing the grant of interlocutory injunction have been settled since the decision in **Giella -Vs- Cassman Brown & Co. Ltd [1973] EA 358**. The applicant has to show that he has a *prima facie* case with a probability of success; if the injunction is not granted he is likely to suffer such loss or injury that damages may not adequately compensate; and, if the court is in doubt, it will decide the application on the balance of convenience.

The Plaintiff has shown it is the registered proprietor of the suit premises on which the parking bays are. It has the Certificate of Grant which, under **section 23 (1)** of the **Registration of Titles Act (Cap. 281)**, provides it with conclusive evidence of proprietorship (**Mbothu & 8 Others -Vs- Waitimu & 11 Others [1986] KLR 171**). A proprietor of land is entitled to its exclusive possession, occupation, use and quiet enjoyment. I find that the Plaintiff has demonstrated a *prima facie* case with a probability of success. Interference with the parking bays will interfere with the right of ownership, and therefore the intrusion by the Defendant has to be restrained.

In conclusion, I allow the Plaintiff's application dated 16th March, 2010 in terms of prayer four (4) together with costs.

DATED AND DELIVERED AT NAIROBI

THIS 18TH DAY OF OCTOBER 2010

A. O. MUCHELULE

JUDGE