



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

CIVIL SUIT 10 OF 2009

JANE NJERI NGARU1ST PLAINTIFF

ESTHER NJERI MUIGAI.....2ND PLAINTIFF

VERSUS

EXDAMUM CONTRACTORS AND

DEVELOPERS LIMITED.....DEFENDANT

RULING

1. These are two applications in this case. The Plaintiffs' application is dated 29/01/2009 and filed in court on 30/01/2009. The same is brought under O.XXXIX Rules 1, 2 and 9 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act and all other enabling provisions of the law. The application seeks an order of injunction against the Defendant by himself his servants and or agents from continuing with the trespass, excavating or in any manner whatsoever interfering with the Plaintiffs quiet enjoyment and possession of all those parcels of land known as LR Numbers Juja/Kiaura Block 1/35; Juja/Kiaura Block 1/36 and Juja/Kiaura Block 1/35, Juja/Kiaura Block 1/37 pending the hearing and determination of this suit. The Applicants also pray that the Officer Commanding Station be compelled to ensure compliance with the order of injunction. The Applicant also prays for costs of this application.

2. The grounds upon which the application is premised are that (a) the Defendant has trespassed into the Plaintiff's parcels of land aforementioned; (b) the Defendant has ignored notice requiring him to vacate the suit premises; (c) efforts to involve the local police to resolve the dispute have been fruitless (d) the Defendant has threatened the Plaintiff with bloodshed; (f) the quarry resources at the suit premises are quickly dwindling unless the Defendant is restrained; (g) the Defendant's activities pose (sic) a breach of peace and (h) the ends of justice would be best brought to bear if the orders sought are granted.

3. The application is also supported by the sworn affidavit of **Jane Njeri Ngaru** dated 29/01/2009. She has sworn the affidavit on her own behalf and on behalf of the 2nd Defendant, **Esther Njeri Muigai**. The deponent says that the Defendants have trespassed onto the suit land after plans to enter into a binding lease agreement failed. She also says that despite cancellation of the intended lease, the Defendants proceeded and began mining and excavation activities and also failed to pay any rent which rent had accumulated to about Kshs.2,000,000/= by the time of filing suit. The deponent says that it is unjust for the Defendant to continue to mine and excavate the suit premises without paying rent for the same, hence this application.

4. This application is opposed. The Replying Affidavit is sworn by **David Muthami Muthee** and is dated 24/02/2009. The deponent says that LR Nos. Juja/Kiaura Block 1/37 and Juja/Kiaura Block 1/36 are not registered in the names of the Plaintiffs and that as such the Plaintiffs have no business seeking injunctive orders over the same. According to annexure "DMM1" LR No. Juja/Kiaura Block 1/36 is registered in the name of **Cicilia Nduta Mwaura** while Block 1/37 is registered in the name of **Elizabeth Waneni**. The deponent goes on to say that there is no dispute over LR No. Juja/Kiaura Block 1/35 since it was not included in the lease agreement. The deponent also says that consequent upon execution of the lease agreement on 12/12/2007, the Applicants were paid a sum of Kshs.625,000/= in cash purposely to be used for the refilling of the excavation site upon termination of the contract; that the said amount was not meant for clearing of bushes as alleged by the Applicants. The deponent contends further that there are no excavation activities on the Applicants premises and that the only activities going on are on Juja/Kiaura Block 1/37 for which the Applicants have been paid rental charges.

5. The deponent also says that the Respondents and the Applicants did agree that for any part of 2 weeks where there was no mining activity, any payment for such period would be suspended until activities resumed, as long as the Applicants were informed well in time of the mechanical breakdowns. Annextures "DMM 2" is a copy of such purported notification though the same is not dated. Annexture "DMM 3" are copies of payment vouchers or "Petty Cash Vouchers" as follows:-

01/11/2008	-	Kshs.125,000/= (To Esther Njeri)
23/12/2008	-	Kshs. 50,000/= (To Jane Njeri)
28/06/2008 (cheque)	-	Kshs.250,000/= (to Elizabeth W. Kingori)
28/06/2008 (cheque)	-	Kshs.125,000/= (To Jane Njeri Wangari)
28/06/2008) (cheque)	-	Kshs.125,000/= (To Cicilia Nduta Mwaura)
28/06/2008 (cheque)	-	Kshs.125,000/= (To Esther Njeri Muigai)
29/05/2008 – cash	-	Kshs.125,000/= (To Jane Njeri Ngaru)
29/05/2008 – Cash	-	Kshs.125,000/= (To Jane Njeri Ngaru)
29/05/2008 – cash	-	Kshs.125,000/= (To Jane Njeri Muigai)
12/11/2008 – cash	-	Kshs. 10,000/= (To Jane Njeri Ngaru)
27/10/2008 – cash	-	Kshs. 10,000/= (To Esther Njeri Muigai)
01/11/2008 – cash	-	Kshs.125,000/= (To Jane Njeri Karagi)
29/09/2008 – cash	-	Kshs.125,000/= (To Cecilia Nduta Mwaura)
29/09/2008 – cash	-	Kshs.125,000/= (To Esther Njeri)
18/12/2008 – cash	-	Kshs.250,000/= (To Cecilia Nduta & Esther Njeri)

6. The deponent says that since the Defendant has invested in excess of Kshs.22,000,000/= it would suffer irreparable loss if the orders sought herein are granted. The deponent of the Replying Affidavit also denies that any of the Defendant's directors has threatened violence upon the Applicants.

7. The second application is dated 13/03/2009. The application is filed by the Defendant and also brought under Order XXXIX rules 1 and 2 of the Civil Procedure Rules, Sections 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law. The Defendant seeks injunctive orders against the Plaintiffs/Applicants from levying distress, attaching, harassing or in any way interfering with the Defendant's quiet enjoyment and activities of excavation on LR No. Juja/Kiaura Block 1/34. The Defendant also prays that the Officer Commanding Juja Police Station do ensure compliance with the injunctive order. The Defendant/Applicant also prays for costs of the application.

8. The Defendant/Applicant contends that they entered into an excavation agreement with the Plaintiff's on 12/12/2007, and that since then the Defendant has been excavating and making payment as agreed save when the machinery was faulty or spoilt. That in 2008, a dispute arose between the parties and as a result of that dispute the Defendant has been unable to carry out any excavation since 25/02/2009 when the Plaintiffs blocked access to the excavation site. The Defendant also alleges that the demand for monies by the Plaintiff is unwarranted and that the proclamation carried out by the Plaintiffs was motivated by malice and gross under valuation of expensive machinery, equipment and motor vehicles.

9. The application is supported by the sworn affidavit of **David Muthami Muthee** dated 13/03/2009. The deponent says that an excavation agreement was entered into on 12/12/2007 between the Plaintiffs, himself and one Elizabeth Wanini (now deceased) for excavation of building stones on properties known as LR Juja/Kiaura Block 1/37, Juja/Kiaura Block 1/34 and Juja/Kiaura Block 1/36 upon which the Plaintiffs received Kshs.1,000,000/= as unrefundable monies for the refilling of the excavation to be undertaken on are on LR No. Juja/Kiaura Block 1/37 which is registered in the name of Elizabeth Wanini. The deponent also says that payment of rental was agreed to be on monthly basis with a rider that for any period of 2 weeks that the Defendant was unable to excavate owing to mechanical problems, then the payment for such period would be deferred until production resumed; and on condition that requisite notice was given to the Plaintiffs in good time. The deponent also says that the Defendant has been making payments on time with the last payment having been made on 6/01/2009. The annexures marked "DMM 2" attest to the alleged payments. The deponent contends that since there are no monies owing for the entire period the Defendant has excavated on the named plots, the Plaintiffs' decision to proclaim was malicious and is an approach taken by the Plaintiffs to try and settle the dispute that arose between the parties in the year 2008. The Defendant says it stands to suffer irreparable loss unless the orders sought herein are granted.

10. This application by the Defendant is opposed. The Replying Affidavit dated 17/03/2005 is sworn by Jane Njeri Ngaru. While acknowledging receipt of the sum of Kshs.1,000,000/= paid to the Plaintiffs on execution of the lease, she says that the money was to enable the Plaintiff to clear the bushes, an allegation that the Defendants have denied. Jane Njeri Ngaru says that there was no agreement that the payments would be deferred for part of any 2 week period when the Defendant's machinery broke down. She asks the court to discard the purported and unsigned notices from the Defendant to the Plaintiffs. The deponent also says that the payments from the Defendants have been far apart and very few and that in any event, all the payments made by the Defendant were made in 2008. The deponent also says that the Plaintiffs have always been willing to resolve the dispute between themselves and the Defendant. The deponent reiterates the Plaintiff's contention that the Defendant through its director has threatened bloodshed. She asks this honourable court to dismiss the Defendant's application.

11. Before I consider the submissions made by counsel, it is necessary to set out the Plaintiff's claim since the decision to grant or not to grant the orders sought by the Applicant will depend on whether the Plaintiffs' have established a prima facie case with a probability of success. This suit was commenced by way of a plaint dated 8/01/2009. The Plaintiffs allege that by a lease agreement dated 12/12/2007, the Plaintiffs agreed to lease out to the Defendant for mining/excavation activities the parcels of land known as LR Numbers Juja/Kiaura Block 1/35;

Block 1/36 and Block 1/37. They also allege that the lease was later found to be null and void for failure to comply with relevant legal provisions. The Plaintiffs admit receiving advance payment which they say was applied towards clearing bushes on the suit property. They also say that the lease was formally terminated and the Defendant duly notified thus making the Defendant a trespasser on the suit property. The Plaintiff's claim against the Defendant is for:-

(a) A permanent order of injunction do issue restraining the defendant whether by itself, its servants, agents and/or by any other means from trespassing onto the plaintiffs parcels of land namely LR Numbers Juja/Kiaura Block 1/35, Juja/Kiaura Block 1/36 and Juja/Kiaura Block 1/37; continuing the trespass and/or carrying out mining/excavation activities in the suit properties;

(b) Damages for trespass until the possession is delivered up;

(c) Costs of this suit;

12. At the hearing of the two Applicants parties agreed to put in written submissions. There is no dispute about the facts giving rise to this case save that the parties are not agreed on suspension of rental payments for part of any 2 week period where the Defendant could prove to the Plaintiffs that there was no excavation due to machinery breakdown. The Plaintiffs also contend that the Defendant has not remitted payments on a regular basis. The Plaintiffs contend that they have established a prima facie case with a probability of success and are thus entitled to the order of injunction sought.

13. It is also the Plaintiff's case that the Defendant has withheld material particulars from their pleadings in that there have been no payments made since the end of 2008. The Plaintiffs cited **Nairobi HCCC No. 2382 of 1999 – John Muritu Kigwe & Another –vs- Agip Kenya Limited.**

14. On its part, the Defendant's case is that the Defendant has visibly demonstrated that it has made payments to the Plaintiffs in respect of the lease agreement. The Defendant also contends that the Plaintiffs have not brought themselves within the principles for the granting of injunctions as set out in the case of **Giella –vs- Cassman Brown & Co. Ltd. [1973] EA 358.**

14. The principles for the granting of injunctions as set out in the **Giella** case are that the Applicants must demonstrate (a) that they have a prima facie case with a probability of success; (b) that they are likely to suffer irreparable damage unless the orders sought are granted and (c) if the court is in doubt it should decide the case on a balance of convenience.

15. I have now considered the two applications as filed. I have considered the facts giving rise to this case. I have also considered the submissions made by both sides. I have considered the law as well. The issue that arises is whether in the circumstances herein, the Plaintiffs have met the requirements of the **Giella** case principles in respect of their application dated 29/01/2009. The same question arises with respect to the Defendant's application dated 13/03/2009.

16. After the above considerations, I do find and hold that the Plaintiffs have not demonstrated to me that they have a prima facie case with a probability of success. There is evidence placed before this court to show that the Defendant has paid rental moneys to the Plaintiffs up to and including December 2008. The Plaintiffs do not deny this fact. The only contention the Plaintiff's have is that there have been no payments for the year 2009. Granted that there have been no payments for the year 2009, the position is that all other payments have been made. In any event, the dispute came to court in early January 2009, and as such I do not think that the Plaintiffs expected the Defendant to continue paying. For this reason, I do not think that the Plaintiffs are entitled to an order of injunction against the Defendants.

17. Secondly, the Plaintiffs have not placed evidence before this court to show what damage, if

any, they would suffer if the order of injunction is not granted. In any event, it would seem to me that the Plaintiffs are ready and willing to sit and discuss whatever disagreements there are between themselves and the Defendant. I also find that the Plaintiff's complaint that excavation by the Defendant is going on on plots owned by the two Plaintiffs is unsupported by evidence. The Plaintiffs have not disputed the Defendant's contention that the only plot which was being worked before the Plaintiffs blocked access to it is the one that was owned by **Elizabeth Wanini** (now deceased). None of the Plaintiffs claims to be the Administrator of the estate of the late Elizabeth Wanini and as rightly pointed by the Defendant, the Plaintiffs have no right to make any claims in respect of the estate of the late Elizabeth Wanini. Even if I was to consider the balance of convenience, the same would tilt in favour of the Defendant.

18. For the above reasons, I do find and hold that the Plaintiffs' application dated 29/01/2009 lacks merit. The same is hereby dismissed in its entirety.

19. I now return to the Defendant's application dated 13/03/2009. In view of what I have said above, I am satisfied that this application must succeed. The Defendant has shown that it has spent a substantial amount of money on this project. The Defendant has also shown that the Plaintiffs have, without justifiable cause blocked access to the mining site and thus prevented the Defendant from continuing to extract building stone. The Defendant has produced evidence to show that it has faithfully paid rent to the Plaintiffs upto and including December 2008; though the Defendant said the last payment was made on 6/01/2009. In the circumstances, it is clear that if the Plaintiffs are not enjoined the Defendant will suffer grave loss. I therefore allow the Defendant's application dated 13/03/2009 in terms of prayer 2 thereof, namely that the Plaintiffs herein be and are hereby restrained whether by themselves, their employees and/or servants from levying distress, attaching, harassing or in any way interfering with the Defendant's quiet enjoyment and activities of excavation on LR No. Juja/Kiaura Block 1/35 Juja Kiaura Block 1/36 and Juja/Kiaura Block 1/34 pending the hearing and determination of this suit. I decline to involve the police in this matter and accordingly, I refuse to grant order number 3 of the Defendant's application. As for costs, I order that each party shall bear their own costs.

Orders accordingly.

Dated and delivered at Nairobi this 19th day of June, 2009.

R.N. SITATI

JUDGE

Delivered in the present of:-

..... for the Plaintiffs

..... For the Defendant

..... Court clerk