



REPUBLIC OF KENYA

HIGH COURT AT NAIROBI (MILIMANI LAW COURTS

ENVIRONMENTAL & LAND CASE 279 OF 2009

CHARLES RAY COULSTON.....1ST PLAINTIFF/APPLICANT

DARLENE ANN COULSTON.....2ND PLAINTIFF/APPLICANT

FRANCIS MAITHA.....3RD PLAINTIFF/APPLICANT

VERSUS

FERDINARD WAITUTU.....1ST DEFENDANT/RESPONDENT

**TABITHA WANGARI.....2ND
DEFENDANT/RESPONDENT**

R U L I N G

1. The application before the court is the Amended Chamber Summons dated 19/06/2009 which seeks two main orders, namely

(a) *That a temporary injunction do issue against the Defendants/Respondents restraining them their agents and or servants, or any other person acting on their behalf from trespassing into or remaining upon, constructing developing, building subdividing and or erecting any structures or wasting LR No. BLOCK 118/631 at Nairobi pending the hearing and determination of the application.*

(b) *That a temporary mandatory injunction do issue against the Defendants/Respondents compelling them to remove any structures fence and any material erected by themselves on LR No. Block 118/631 at Nairobi pending the hearing of this application.*

(c) *That costs be in the cause.*

2. The application is premised on the annexed affidavit of **Francis Maitha** and on the grounds that:-

(a) *The Plaintiffs/Applicants are the registered owners of LR No. Block 111/631 at Nairobi (the suit property).*

(b) *The Suitland was donated to them by Drumvale Farmers Co-operative Society to develop the same to cater for homeless children whereby they have constructed a nursery, primary and a secondary school.*

(c) *The 1st Defendant being the Area Member of Parliament has encroached on the suit property and has started to construct a building under the guise of Constituency Development Fund*

initiative.

(d) *The said acts are prejudicial to the interests of the Plaintiffs more nor (sic) to the homeless children that are being catered for by the Plaintiffs.*

3. The Affidavit in support is sworn by **Francis Maitha** with the authority of **Charles Ray Coulston** and **Darlene Ann Coulston** respectively. The deponent says that he is the registered owner of the suit property jointly with the 1st and 2nd Defendants as per the Certificate of Lease dated 29/11/2006. The three are registered proprietors as trustees for **Made In the Streets Children Centre** Made. That on the suit property stand nursery, primary and secondary schools under the name and style "**Made In The Streets**" children's Institution. The deponent says that despite these structures being on the suit property, the Defendants have caused to be constructed thereon other structures and have further demolished the wooden structure and fence erected on the suit property. He says that the acts of the Defendants are hampering the operations of the schools and further that the Defendants have hired goons who are intimidating the students in the school. The Applicants want the Defendants' actions halted through both temporary and mandatory injunctions.

4. Filed contemporaneously with the application is the Applicants' amended plaint dated 19/06/2009. The Plaintiffs allege that they are the registered owners of the suit property and have been in direct possession since 1999 on which they have constructed an education facility providing for homeless street children. The Plaintiffs also allege that the Defendants have without the consent and authority of the Plaintiffs encroached upon the suit property and constructed a building thereon and fenced off part of the suit property as a result of which the Plaintiffs' right to ownership is in jeopardy, resulting in continual loss and damage. The Plaintiffs pray for judgment against the Defendants jointly and severally for:

(d) *An injunction restraining the Defendants/Respondents their agents and servants from entering, remaining or otherwise interfered (sic) with the Plaintiffs' use and occupation of LR No. Block 118/631 at Nairobi.*

(e) *Costs of this suit and interest thereon.*

(f) *Any other alternative relief this Honourable Court may deem fit to grant.*

5. Though the application was served upon the Defendants/Respondents, they did not appear nor did they file any Replying Affidavit or Grounds of Opposition to the application. The application was certified urgent on 2/07/2009 but no ex parte orders were granted. The application was then fixed for inter partes hearing on 9/07/2009. On 9/07/2009, the Applicants were directed to serve again for mention on 23/07/2009. The two Defendants were served on the 13/07/2009 at 11.00 a.m. and 12.30 respectively. Both Defendants declined to acknowledge the service. For the reason that the Defendants were duly served, the application proceeded ex parte by way of written submissions. The Plaintiffs urge the court to find that the Defendants have no basis for encroaching upon the suit property without the consent and/or authority of the Plaintiffs, and to grant the orders sought.

6. The principles for the granting of injunctions were set out in the case of **Giella –vs- Cassman Brown & Co. Limited [1973] EA 358**. For the Plaintiffs/Applicants in this case to succeed on their application they must –

(a) *Show that they have a prima facie case with a probability of success*

(b) *Show that unless the orders sought are granted they will suffer irreparable loss and damage*

(c) *Convince the court that if there is any doubt on (a) and (b) above, the balance of convenience would still tilt in their favour.*

7. The question that arises is whether the Plaintiffs/ Applicants have satisfied the above conditions. Before I go into the merits of the application, I must comment on the nature of the orders sought. Under

both items (a) and (b) set out at the commencement of this ruling, the Plaintiffs/Applicants seek temporary and mandatory injunctive orders pending the hearing and determination of this application. It is to be noted that any injunctive orders granted pending the hearing and determination of the application concerned are issued at the ex parte stage. No such orders were granted at that stage when the application was certified urgent by Mbogholi Msagha J on 2/07/2009. It does seem to me therefore that since I have not heard the application inter partes, there will be no purpose to be served by the orders sought by the Applicant. Orders should not be issued in vain. Judicial time is too precious to be used for issuing orders that will serve no purpose.

8. For the above reasons and for the reason that the Plaintiffs/Applicants have not sought to be given injunctive orders pending the hearing and determination of the suit, I find and hold that the amended chamber summons dated 19/06/2009 lacks merit. For this reason too, I see no merit in proceeding to consider whether the Plaintiffs/Applicants have satisfied the conditions for the granting of injunctions as set out in the **Giella case** (above). I find and hold that the drafting of these prayers was not properly done and as a result, the Plaintiffs/Applicants have lost the opportunity to get the orders sought.

8. The upshot of what I have said above is that the Plaintiffs/Applicants' application ought to be dismissed. Accordingly the application is dismissed with no order as to costs.

9. Before I conclude this ruling it may be helpful for Plaintiffs' counsel to consider whether this suit should not be withdrawn and/or discontinued all together, so that the limitation of time allowing a fresh and properly drawn suit and accompanying application can be filed.

Orders accordingly.

Dated and delivered in Nairobi this 17th day of September, 2009.

R.N. SITATI

JUDGE

Delivered in the presence of:-

Mr. Okach (Present) For the Plaintiff/Applicant

No appearance for the Defendant/Respondent

James Nyagah – Court clerk