REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL CASE 64 OF 2005

KWANZA ESTATES LIMITED……..……..PLAINTIFF

VERSUS

MUNICIPAL COUNCIL OF NAKURU……DEFENDANT

RULING

The plaintiff herein, Kwanza Estates Ltd, has filed an application under **Order XXXIX rules 1, 2 and 3 of the Civil Procedure Rules** seeking the orders of this court to have the defendant by itself, its agents be restrained from further interfering with the plaintiff's peaceful and quiet possession or from further interfering with the perimeter fence erected on all that piece of land known as *Nakuru Municipality/Block 9/90 (hereinafter referred to as the suit land)* pending the hearing and determination of the suit filed herein. The grounds in support of the application as stated on the face of the application are that the plaintiff was the owner of the suit land wherein he had erected a perimeter fence around it to improve the security of the tenants occupying the premises erected on the said suit land. The plaintiff contends that the defendant, through its employees had destroyed part of the fence and had therefore exposed the building to insecurity. The plaintiff argues that it would stand to suffer irreparable loss and damage if an injunction is not issued to restrain the defendant from further interference. The application is supported by the annexed affidavit of Geoffrey Makana Asanyo, the Managing Director of the plaintiff company. He swore a further affidavit in support of his application.

The application is opposed. Stephen Kahanya Mburu, an Engineer employed by the defendant has sworn a replying affidavit in opposition to the plaintiff's application.In summary, the defendant has deponed that it does not dispute or otherwise question the ownership by the plaintiff of the suit land. The defendant however contends that there exists a public road between the suit land and parcels No. *Nakuru Municipality/Block 9/89* which the plaintiff had encroached into and blocked access to the members of the public without the permission or the approval of the defendant. The defendant further depones that upon realizing the encroachment of the public access road by the plaintiff, it issued a notice to the plaintiff to remove the illegally erected fence, which notice the plaintiff failed to adhere to hence the decision of the defendant to demolish the fence. In essence, the defendant is deponing that the plaintiff has no right whatsoever to erect a fence on a public road and therefore block the access of the members of the public between two of main streets of Nakuru town.

At the hearing of the application, I heard the submissions made by Mr Konosi on behalf of the plaintiff and Mrs Mbeche, on behalf of the defendant. Other than what was deponed by the plaintiff's Managing Director, Mr Konosi submitted that the plaintiff had been authorized by the government to use part of land (*which the defendant claims to be a public access road)* to be a parking area for the tenants occupying the suit land. He further argued that in actual fact, there was no access road to Geoffrey Kamau Way as contended by the defendant. The plaintiff submitted that its peaceful occupation of the suit land and the adjoining parking area had been unlawfully interfered with by the defendant and therefore it

ought and should be restrained by means of a temporary injunction pending the hearing and determination of the main suit.

Mrs Mbeche for the defendant reiterated the contents of the replying affidavit sworn by the defendant. She further submitted that the plaintiff had blocked the access road between Geoffrey Kamau Way and the Kijabe Road. She argued that the plaintiff, had, without permission, erected a fence on the said public road and thus blocked access to the members of the public. Inspite of the defendant giving adequate notice to the plaintiff to remove the fence in question and therefore reopen the access between the two roads, the plaintiff had failed to adhere to the notice, hence the decision by the defendant to forcefully remove the said illegally erected fence. Learned Counsel further argued that under the provisions of **Section 182 of the Local Government Act**, the defendant had general control of all the public streets which are situated within its area of jurisdiction. She submitted that an alleged letter of authority from any other quarter without the consent of the defendant did not have any effect in law. She urged the court to dismiss the plaintiff's application with costs.

I have carefully read the pleadings filed by the parties to this application. I have also considered the arguments made by the parties to this application. The issue for determination by this court is whether the plaintiff has established such a strong case as to enable this court grant it the orders of interim injunction sought. The principles guiding this court on whether or not to grant interlocutory injunction are well settled.As was stated in the oft quoted case of **Giella –vs- Cassman Brown [1973]E.A. 358** by the Court of Appeal, the principles are

> **"First, an applicant must show a prima facie case with a**
>
> **probability of success. Secondly, an interlocutory injunction**
>
> **will not normally be granted unless the applicant might otherwise**
>
> **suffer irreparable injury, which would not adequately be compensated**
>
> **by an award of damages.**
>
> **Thirdly, if the court is in doubt, it will decide an application on a balance of convenience. (E.A. Industries –vs- Trufoods [1972]EA 420)**."

In **Mrqo Ltd –vs- First American Bank of Kenya Ltd & Others [2003]KLR 125,** Bosire J. A. at page 135 stated that

> **"The power of the court in an application for an interlocutory**
>
> **injunction is discretionary. Such discretion is judicial. And as is**
>
> **always the case judicial discretion has to be exercised on the basis**
>
> **of the law and evidence."**

In the instant application, it is the plaintiff's case that it was authorized by the Ministry of Lands and Settlement to use the space between the suit land and parcel number Nakuru Municipality/Block 9/89 as a private parking for the tenants who have rented premises in the suit land. The letter of authority has been annexed as **"GMA1".**

The letter is dated the 30th of August 1989. It states:

> "**RE: BLOCK 9/90 NAKURU MUNICIPALITY**
>
> **REQUEST TO USE AVAILABLE SPACE**

FOR PRIVATE PARKING

I refer to your letter dated the 9th of May 1989.

You may develop the area shown as shaded on

the attached plan for parking purposes.

G. L. MUKOFU

FOR: COMMISSIONER OF LANDS"

On the other hand, the defendant, a statutory body established under the Local Government Act, contends that the parcel of land between the suit land and parcel number *Nakuru Municipality/Block 9/89* is a public access road between the two main streets in the area. The defendant argues that it was not aware that the plaintiff had such authority and even if it did, the letter in question did not amount to a legal document granting the plaintiff rights over a public access road.

Having considered the arguments made, it is not disputed that the parcel of land in question, as it appears on the Survey Plan attached by both the plaintiff and defendant, is a public access road between Kijabe road and Geoffrey Kamau Way. The plaintiff however contends that it was allowed by the Government, through the Ministry of Lands and Settlement to use the said parcel of land as a parking area for its tenants who have rented premises in the suit land. Having read the letter in question, I have taken the liberty of reproducing it in full in this ruling, does the said letter grant the plaintiff a right to legally occupy the suit land? I do not think so. In my considered view, the letter in question is a letter of comfort which does not create any legal right capable of enforcement over the parcel of land in question. In any event, a Ministry of Lands and Settlement official cannot in law grant exclusive right of occupation to an individual of a public access road. That right, under the **Government Lands Act** is reserved to the President of the Republic of Kenya alone. The plaintiff had no basis in law therefore to erect a fence on a public access road. I agree with the submission by the defendant that it was required by statute to remove obstacles which were illegally erected by the plaintiff and which resulted in an access road to the members of the public been blocked off.

I do therefore hold that the plaintiff has failed to establish a *prima facie* case as envisaged by the case of **Giella –vs- Cassman Brown (supra)**. In this case I hold that the plaintiff has failed to present to this court materials which proves that it has a legal right over the parcel of land in question so as to enable this court grant it interlocutory injunction to protect or preserve such right which has or had been infringed. I would not therefore address the other principles for granting an injunction having made the finding that the plaintiff has failed to establish a *prima facie* case. For the reasons stated hereinabove, the plaintiff's application lacks merit and the same is dismissed with costs.

DATED at NAKURU this 3rd day of October 2005.

L. KIMARU

JUDGE