



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC/E205 OF 2020**

**1. PETER MWANGI MACHARIA**

**2. FRANCIS MACHARIA KABUE**

**3. IRUNGU MWANGI & OTHERS**

**(T/A RUNYEKI & KIRITI PARTNERSHIP.....PLAINTIFFS**

**=VERSUS=**

**NEW KIONA LIMITED.....1<sup>ST</sup> DEFENDANT**

**THIONGA KIUNGA.....2<sup>ND</sup> DEFENDANT**

**LUCY WAITHERA.....3<sup>RD</sup> DEFENDANT**

**MASTERWAYS PROPERTIES LIMITED.....4<sup>TH</sup> DEFENDANT**

**GEORFFREY MUCHIRI GITONGA.....5<sup>TH</sup> DEFENDANT**

**DAVID WANGAI GITONGA.....6<sup>TH</sup> DEFENDANT**

**GEORE KAMAU KARUNDU.....7<sup>TH</sup> DEFENDANT**

**RULING**

**1. This is the Notice of Motion dated 28<sup>th</sup> October 2020 brought under Section 1A, 1B, 3A and 63(c) of the Civil Procedure Act, Order 40 Rule 1, 2, 3 and 10 and order 51 Rule 1 of the Civil Procedure Rules 2010, and the inherent power of the court.**

**2. It seeks orders:-**

**1. Spent.**

**2. Spent.**

**3. That the honourable court be pleased to issue an order of temporary injunction restraining the defendants and more particularly the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendant by themselves, the shareholders, agents or representatives and/or anyone from interfering, wasting, leasing, enclosing, disposing, demolishing and reconstructing and/or in any way whatsoever dealing with the plot LR NO. 36/VII/337 pending the hearing and determination of this suit and/or any further orders of the court.**

**4. That this honourable court be pleased to issue an order that accounts be taken of such rental receipts and of all the monies received and/or paid out by the defendants on account of the suit property namely Land Parcel Plot LR No. 36;/VII/337, during the periods from the year 2005, to the date hereof.**

**5. That the honourable court be pleased to issue an order directing the officer commanding Eastleigh Police Division to secure**

**and oversee the enforcement of the above order against any of the defendants by themselves, agents or servants found interfering, demolishing and/or reconstructing the property known as the LR NO. VII/337.**

**6. That this honourable court be pleased to issue any further order/directions as may meet the interests of justice.**

**7. That costs of this application be provided for.**

3. The grounds are on the face of the application and are set out in paragraphs (a) to (h).

4. The application is supported by the affidavit of Peter Mwangi Macharia, the 1<sup>st</sup> plaintiff/applicant, herein sworn on the 28<sup>th</sup> October 2020.

5. The application is opposed. There is a replying affidavit sworn by Lucy Waihera Mwangi the 3<sup>rd</sup> defendant/Respondent, on the 23<sup>rd</sup> November 2020. There is also a replying affidavit sworn by Geoffrey Muchiri, Gitonga the 5<sup>th</sup> defendant/respondent and a director and property manager of the 4<sup>th</sup> defendant/respondent sworn on the 24<sup>th</sup> November 2020.

6. The application was canvassed by oral submission on the 7<sup>th</sup> December 2020 and 9<sup>th</sup> December 2020.

7. It is the plaintiffs/applicants case that the suit property was jointly purchased by members of two partnerships namely Runyeki & Kiriti Partnership and New Kiona Limited on 25<sup>th</sup> April 1969. That the purpose of purchasing the suit property was to erect commercial premises, where they would collect rental income which then would have been shared equally among the shareholders of the said partnerships. Further that the 4<sup>th</sup> – 7<sup>th</sup> defendants/respondents are in the process of evicting tenants in the said premises in order to lease the same to a third party.

8. They state that they have established a prima facie case with a probability of success at the trial. They pray that the application be allowed.

9. The 1<sup>st</sup> – 3<sup>rd</sup> defendants/respondents on their part contend that a partnership existed as from 25<sup>th</sup> April 1969. That the plaintiffs/applicants have failed to establish a prima facie case with a probability of success at the trial. Further that the 1<sup>st</sup> defendant/respondent is a limited liability company and not a partnership. Further that the plaintiffs/applicants have failed to demonstrate that damages will not suffice if these orders are not granted.

10. The 4<sup>th</sup> – 7<sup>th</sup> defendants/respondents associated themselves with the submissions of the 1<sup>st</sup> – 3<sup>rd</sup> defendants/respondents. The plaintiffs/applicants stated that the 1<sup>st</sup> – 3<sup>rd</sup> defendants/respondents took over the running of the affairs in the suit property in January 2002.

11. The 1<sup>st</sup> plaintiff/applicant has deponed that his father passed on in 2016. There is no explanation as to why the 1<sup>st</sup> plaintiff's father did not act all these years. It is not in doubt that the 4<sup>th</sup> defendant/respondent has been managing the suit property for over eighteen (18) years. They also pray that the application be dismissed with costs.

12. I have considered the notice of motion, the affidavits in support and the annexures. I have considered the affidavits in response and the oral submissions. The issues for determination are:-

**(i) Whether the plaintiffs'/applicants' application meets the threshold for grant of temporary injunction.**

**(ii) Who should bear costs?**

13. It is necessary to briefly examine the legal principles governing the applications of this nature. In an application for interlocutory injunction, the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were set out in the precedent setting case of **Giella vs Cassman Brown & Co. Ltd [1973] EA 358**. In the case of **Mrao Ltd vs First American Bank of Kenya Limited & 2 Others [2003] KLR 125** the Court of Appeal set out what amounts to a prima facie case. I am guided by the above authorities.

14. I find that the plaintiffs/applicants have failed to demonstrate that a partnership existed as from 25<sup>th</sup> April 1969. It is also their case that the defendants took over the management of the suit property in January 2002. The delay in bringing this application has not been explained. It is on record that the 1<sup>st</sup> plaintiff's father passed on in 2016. Why did he not act? I find that the plaintiffs/applicants have not established a prima facie case with a probability of success at the trial.

15. In the case of **Kenleb Cons Ltd vs New Gatitu Services Station Ltd & Another [1990] KLR 557 Bosire J (as he then was) stated that:-**

*“to succeed in an application for injunction an applicant must not only make a frank and full disclosure of all relevant facts to the just determination of the application but must also show that he has a right, legal or equitable, which requires protection by injunction.”*

I am not satisfied that the plaintiffs/applicants deserve this kind of protection.

16. The plaintiffs/applicants have failed to demonstrate that they will suffer irreparable loss that cannot be compensated by an award of damages if these orders are not granted. I am guided by the case of **Oloo vs Barclays Bank of Kenya Ltd [2002] KLR 394**.

17. In conclusion I find no merit in this application and the same is dismissed. The cost do abide the outcome of the main suit.

It is so ordered.

**Dated, signed and delivered in Nairobi on this 18<sup>th</sup> day of February 2021.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Ms Mbugua for C. N. Kihara for the plaintiffs

Mr. Wangalwa advocate for the 1<sup>st</sup> – 3<sup>rd</sup> defendants.

Mr. Gaita for the 4<sup>th</sup> -8<sup>th</sup> defendants

Phyllis – Court Assistant