



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 114 OF 2017**

**GLADYS MUMBI IRUNGU.....PLAINTIFF**

**VERSUS**

**DAVID GIKARI.....1<sup>ST</sup> DEFENDANT**

**STEPHEN KURIA ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF NAKURU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

***(An application for injunction; plaintiff generally accusing the defendants of threatening to interfere with suit premises and business carried out therein; no specific case put before the court sufficient to call for an explanation or rebuttal from the defendants; application dismissed)***

1. This is a ruling in respect of plaintiff's Notice of Motion dated 17<sup>th</sup> March 2017. The application is brought under Order 40 rule 1 (a) of the Civil Procedure Rules, among others. The applicant seeks the following orders:

**1. Spent.**

**2. Spent.**

**3. THAT pending the hearing and determination of this suit this Honourable Court do issue an order of temporary injunction restraining the Respondents by herself, servants agents or employees from selling, sub-dividing, changing, leasing out, moving into, constructing thereon, wasting, damaging or in any other way interfering with plot of land No. 10/1 measuring 0.0837 acres within Nakuru Railway Station.**

**4. THAT the costs of this Application be provided for.**

2. The application is supported by an affidavit sworn by the plaintiff on 17<sup>th</sup> March 2017 wherein she deposes that she has a lease for 6 years with effect from 1<sup>st</sup> July 2013 from Kenya Railways Corporation in respect of "plot of land No. 10/1" measuring 0.0837 acres within Nakuru Railway Station. She paid the requisite charges to Kenya Railways. She has been operating an Mpesa business on the premises and has paid license fees to the 3<sup>rd</sup> defendant. She has also sublet the premises to third parties who operate a welding business and car wash business thereon. She accuses the defendants of threatening to interfere with the car wash business. She deposes that the 1<sup>st</sup> and 2<sup>nd</sup> defendants intend to construct stalls on the

premises with an intention of leasing them to the public. Such an eventuality will lead to her suffering losses. She thus prays for the injunctive orders sought in the application. In the plaint, she seeks a declaration that she is the lawful lessee of the suit property and a permanent injunction restraining the defendants from interfering with the suit property.

3. Through Notice of Withdrawal of suit dated 7<sup>th</sup> September 2017 and filed in court on the same date, the plaintiff withdrew the suit against the 2<sup>nd</sup> defendant.

4. The 1<sup>st</sup> defendant responded to the suit through statement of defence filed on 2<sup>nd</sup> April 2017 wherein he generally denies the averments made in the plaint. He did not file any grounds of opposition or replying affidavit in response to the application.

5. The 3<sup>rd</sup> defendant on its part responded to the suit through statement of defence filed on 13<sup>th</sup> April 2017. Additionally, the third defendant filed a Notice of Preliminary Objection and Grounds of Opposition dated 13<sup>th</sup> April 2017 in response to the application. The 3<sup>rd</sup> defendant took the position that no reasonable cause of action was disclosed against it and that it had no claim or adverse interest in the suit property. Simultaneously, the 3<sup>rd</sup> defendant filed Chamber Summons dated 13<sup>th</sup> April 2017 in which it sought striking out of the suit against it. The application is still pending.

6. Parties agreed, and the court ordered, that the application be disposed of by way of written submissions. In that regard, the applicant filed submissions 14<sup>th</sup> July 2017 while the 3<sup>rd</sup> defendant filed submissions on 29<sup>th</sup> August 2017. The applicant filed further submissions on 7<sup>th</sup> September 2017 in response to the 3<sup>rd</sup> respondent's submissions. The 1<sup>st</sup> defendant did not file any submissions. I have considered the application, the affidavits filed, the pleadings in response to the suit, submissions as well as the authorities cited.

7. The 3<sup>rd</sup> defendant has among others filed a pleading titled "Notice of Preliminary Objection and Grounds of Opposition". Does it amount to a valid preliminary objection and should it be disposed of first? The law relating to preliminary objections is settled since **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. A preliminary objection must be on a pure point of law. The point of law should be precisely, briefly and clearly defined in the notice of preliminary objection. I have read the "Notice of Preliminary Objection and Grounds of Opposition" and I am not persuaded that it discloses any pure point of law. I will therefore treat it as Grounds of Opposition.

8. In an application for an interlocutory injunction, the applicant must establish a prima facie case with a probability of success. Even where a prima facie case is established, an injunction ought not to issue if damages can adequately compensate the applicant. Finally, if the court is in doubt as to the answers to the above two tests then the court should determine the matter on a balance of convenience. These principles were enunciated in the case of **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. Recently in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, the Court of Appeal further elaborated the test by stating that all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

9. Has the applicant herein established a prima facie case? The Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen** (supra) had the following to say on the definition of "*prima facie case*" in civil cases:

**Recently, this court in Mrao Ltd. V. First American Bank of Kenya Ltd & 2 others [2003] KLR 125 fashioned a definition for "*prima facie case*" in civil cases in the following words:**

**"In civil cases, a *prima facie* case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A *prima facie* case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the**

**applicant's case upon trial. That is clearly a standard, which is higher than an arguable case."**

**We adopt that definition save to add the following conditions by way of explaining it. The party on whom the burden of proving a *prima facie* case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion.**

10. Consequently, the applicant must show that there exists a right which has apparently been infringed by the defendants to call for an explanation or rebuttal from them. The applicant must show a clear and unmistakable right to be protected and the threat or the invasion of the right has to be material and substantive. The applicant has maintained in her submissions that since she has a lawful lease in respect of the suit premises and since she obtained licenses from the 3<sup>rd</sup> defendant then she has a *prima facie* case.

11. There is no dispute that applicant herein holds a lease for 6 years with effect from 1<sup>st</sup> July 2013 from Kenya Railways Corporation in respect of plot of land No. 10/1, the suit property. She has been carrying out business on the property and has indeed obtained licenses from the third defendant for that purpose for the years 2015 and 2016. However, her duty to show a *prima facie* case extends beyond showing that she is lawfully on the premises. The defendants don't seem to dispute the propriety of her being on the premises.

12. The applicant has made a general accusation that the defendants have threatened to interfere with her business, to destroy, waste or change her plot. She has not given details as to the date when threats were made, which particular defendant made the threats, whether the threats were oral or written. She accused the 1<sup>st</sup> and 2<sup>nd</sup> defendants of intending to construct stalls for leasing to the public but has withdrawn the case against the 2<sup>nd</sup> defendant without any explanation. I am not persuaded that the applicant has demonstrated a material and substantive threat. The applicant needed to be specific. As was stated by the Court of Appeal in **Mrao Ltd vs First American Bank** (supra), a *prima facie* case is more than an arguable case. An applicant needs to go beyond merely raising issues.

13. I am aware that the 1<sup>st</sup> and 3<sup>rd</sup> defendants did not file replying affidavits. They however have defences on record in which they deny the allegations by the plaintiff. At the end of the day, the applicant has a duty to put before the court a case that is sufficient to call for an explanation or rebuttal from the defendants. I see none. Generalized allegations, even if not specifically responded to by an affidavit, do not suffice.

14. Not surprisingly, the 3<sup>rd</sup> defendant has reacted to the suit and the application herein by seeking striking out on account the suit allegedly not disclosing a cause of action against it. Needless to state, the application for striking out will have to be heard and determined on its merits, if any. Nevertheless, for purposes of satisfying the requirements for grant of an interlocutory injunction, I find that no *prima facie* case has been established. That being the case, irreparable injury and balance of convenience need no consideration.

15. For the foregoing reasons, Notice of Motion dated 17<sup>th</sup> March 2017 is dismissed with costs.

**Dated, signed and delivered in open court at Nakuru this 1<sup>st</sup> day of November 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Mbiyu for the plaintiff/applicant

No appearance for the 1<sup>st</sup> defendant/respondent

Prof. Wabwire for the 3<sup>rd</sup> defendant/respondent

Court Assistant: Gichaba