



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 300 OF 2019**

SAMUEL MAINA NJARIA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

CATHERINE WANGUI MWANGI.....2<sup>ND</sup> PLAINTIFF/APPLICANT

VERSUS

FELIX MAINGI NGUL.....1<sup>ST</sup> DEFENDANT/RESPONDENT

ROBERT KILONZO.....2<sup>ND</sup> DEFENDANT/RESPONDENT

THE REGISTRAR OF TITLES.....3<sup>RD</sup> DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT/RESPONDENT

PETER WANJOHI (OFFICIAL LIQUIDATOR) DRUMVALE FARMERS

COOPERATIVE SOCIETY LIMITED.....5<sup>TH</sup> DEFENDANT/RESPONDENT

**RULING**

1. This is the Notice of Motion dated 17<sup>th</sup> September 2019 and amended on 15<sup>th</sup> March 2021 brought under sections 1A, 1B, and 3A of the Civil Procedure Act Chapter 21 of the Laws of Kenya, order 40 rules 1(a), 4(1) of the Civil Procedure Rules 2010 and all other enabling provisions of the law.
2. It seeks orders:-
  1. *Spent.*
  2. *Spent.*
  3. *That pending the hearing and determination of this suit, this honourable court be pleased to issue a temporary injunction restraining the Defendants/Respondents either acting by themselves, or their agents, employees, servants, assigns, or any other person whomsoever from selling, disposing, advertising for sale, charging, leasing, subleasing, subdividing, dealing or interfering with adversely, constructing on, developing and/or trespassing over the property known at Title Nos Nairobi Block 118/1150 and Nairobi Block 118/1132 in any way whatsoever.*
  4. *That this honourable court be pleased to grant the Applicant leave to forcibly evict the 1<sup>st</sup> and 2<sup>nd</sup> Respondents or their agents, employees, servants, assigns, or any other such person whomsoever from Title Nos. Nairobi 118/1150 and Nairobi Block 118/1132.*
  5. *That officer commanding Kamulu police station be ordered to supervise and enforce these orders.*
  6. *The Plaintiffs/applicants be at liberty to apply to this honourable court for such further directions and orders for purposes of meeting the ends 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 (i).
4. The application is supported by the affidavit of Samuel Maina Njaria, the 1<sup>st</sup> Plaintiff/Applicant herein, sworn on the 17<sup>th</sup> September 2019.
5. The application is opposed. There is a replying affidavit sworn by Felix Maingi Ngui, the 1<sup>st</sup> Defendant/Respondent herein, sworn on the 5<sup>th</sup> November 2019.
6. On the 9<sup>th</sup> June 2021, the court with the consent of parties directed that the Notice of Motion be canvassed by way of written submissions.
7. The Plaintiffs'/Applicants' submissions are dated 16<sup>th</sup> July 2021. It is the Plaintiffs'/Applicants' case that on or about 5<sup>th</sup> March 2018, the 5<sup>th</sup> Defendant/Respondent acting on his capacity as the liquidator of Drumvale Farmers Corporative Society Limited duly transferred the suit properties to the Applicants vide a Transfer of Lease dated 2<sup>nd</sup> March 2018.
8. It is further their case that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/Respondents have transferred the said properties onto their names.
9. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' case is that the issues herein are subject of **Tribunal Case No 720 of 2016** which is still pending hence this suit ought to be struck out for being an abuse of the court process.
10. The 5<sup>th</sup> Defendant/Respondent's case is that the Plaintiffs/Applicants application is merited and ought to be granted
11. I have considered the notice of motion and the affidavits in support. I have considered the replying affidavit and the annexures, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
  - (i) **Whether the Plaintiffs/Applicants' Applicant meets the threshold for grant of temporary injunction.**
  - (ii) **Who should bear costs of this application?**
12. In an application for injunction, the onus is on the applicant to satisfy the court that it should grant an injunction. The principles were laid down 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 Ltd & 2 Others [2003] KLR 125** the Court of Appeal stated what amounts to a prima facie case. I am guided by the above authorities.
13. It is not in dispute that there exists **Tribunal Case No 720 of 2016** before the Cooperative Tribunal. The same involves the bonafide members of the 5<sup>th</sup> Defendant/Respondent and the Official Liquidator and the Commissioner of Cooperatives. The said case is still pending.
14. It should be notice that the Plaintiffs herein claim to have been issued with Transfer of Lease for the two properties on March 2018.
15. It is also not in dispute that the same were issued during the pendency of the case before the Cooperative Tribunal. It is my view that the case at the Tribunal should be prosecuted to conclusion.
16. I find that the current suit was filed to defeat the possible outcome of the **Tribunal Case No 720 of 2016**. In the case of **Gimalu Estate Ltd & Another vs International Finance Corporation & Another Nairobi HCCC No 55 of 2007** (unreported) J Warsame stated as follows:-

***“The central vein that runs through all the suits is that the plaintiffs are bent on frustrating the defendants to certain despair. The whole purpose of filing the present suit when other suits are pending for determination on the same subject matter is merely to get an injunction to stop or postpone the sale of the suit properties and not to have the issues allegedly raised in the different suits determined. Prima facie that is a contrived attempt to subvert the cause of justice. In my view the actions of the plaintiffs is a contemptuous game to contaminate the due process of the court with a view to create a conundrum or contagious disease within the corridors of justice.*”**
17. I find that the Plaintiffs/Applicants have failed to establish a prima facie case with probabilities of success at the trial.
18. They also seek to forcibly evict the 1<sup>st</sup> and 2<sup>nd</sup> Respondents from the suit properties. This is not an order that can be granted before all parties are heard during a trial.
19. I find that the Plaintiffs/Applicants have failed to demonstrate that they will suffer irreparable loss that cannot be compensated by an award of costs if these orders are not granted.
20. In conclusion, I find no merit in this application and the same is dismissed. The costs do await the outcome of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN NAIROBI ON THIS 18TH DAY OF NOVEMBER 2021.**

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**L. KOMINGOI**

**JUDGE**

In the presence of:-

**MR. BUNDI FOR MR. GITONGA FOR THE PLAINTIFFS**

**MR. CHIMEI FOR THE 1ST AND 2ND DEFENDANTS**

**NO APPEARANCE FOR THE 3RD AND 4TH DEFENDANTS**

**MR. WACHAKANA FOR THE 5TH DEFENDANT**

**STEVE - COURT ASSISTANT**