



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KISUMU**

**ELC NO. 59 OF 2019**

NYANUAYA YIENE JACOB.....1<sup>ST</sup> PLAINTIFF

RICHARD AWITI OKENGO.....2<sup>ND</sup> PLAINTIFF

DAVID OTIENO ODANGA.....3<sup>RD</sup> PLAINTIFF

THE REGISTERED TRUSTEES KISUMU CENTER

JUAKALI ARTISANS ASSOCIATION.....4<sup>TH</sup> PLAINTIFF

**-VERSUS-**

KISUMU COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT

CITY MANAGER KISUMU COUNTY.....2<sup>ND</sup> DEFENDANT

KISUMU COUNTY COMMISSIONER.....3<sup>RD</sup> DEFENDANT

CABINET SECRETARY, MINISTRY OF TRANSPORT.....4<sup>TH</sup> DEFENDANT

THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT

**RULING**

*Nyanuaya Yiene Jacob and others known as registered trustees of Kisumu Center Jua Kali Artisan Association (hereinafter referred to as the plaintiffs) have come to this court against Kisumu County Government and the City manager of Kisumu County, the Commissioner Kisumu County and the Attorney General(hereinafter referred to as the defendants) praying for a temporary injunction restraining the defendants its servants, employees and representatives from further interfering, disposing, auctioning and or selling, encroaching, trespassing, erecting structures or in other way dealing with the property namely Kisumu Municipality Block 6/517 pending the hearing of the suit.*

*The application is based on the grounds that the plaintiffs are the legal owners of the suit parcel and that the defendants intend to illegally put up a permanent structures on the Applicants parcel. That the Respondents act amount to trespass and interference with the Applicant's property.*

*The affidavit of Nyanuaya Yiene Jacob reiterates the grounds of the application. There is no replying affidavits from the respondents.*

The conditions for the granting of an interlocutory injunction were set out in ***GIELLA VS. CASSMAN BROWN & CO., LTD. [1973] E.A. 358*** at p. 360 where it was stated:-

***“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 the balance of convenience (E.A. INDUSTRIES VS. TRUFOODS [1972] E.A. 420.)”***

In the case of *R. J. R. Macdonald vs. Canada (Attorney General)*, which was cited with approval by the High court in *Paul Gitonga Wanjau v Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR the principles in *Giella vs Cassman Brown* were captured as follows:

- "i) Is there a serious issue to be tried?;
- ii) Will the applicant suffer irreparable harm if the injunction is not granted?
- iii) Which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits? (often called "balance of convenience")

The test for granting of an interlocutory injunction was considered in the American *Cyanamid Co. vs Ethicom Limited* (1975) A AER 504 where three elements were noted to be of great importance namely:

- i. There must be a serious/fair issue to be tried,
- ii. Damages are not an adequate remedy,
- iii. The balance of convenience lies in favour of granting or refusing the application.

In *Mrao Ltd vs Ltd vs First American Bank of Kenya and 2 others*, (2003) KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others vs Jane W Lesaloi and 5 others*, (2014) eKLR, the Court of Appeal defined a prima facie case as:

*"A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later".*

In *Paul Gitonga Wanjau vs Gathuthi Tea Factory Company Ltd & 2 others* [2016] eKLR, the court cited with approval the following passage by *Steven Mason & McCathy Tetrault* in an article entitled *"Interlocutory Injunctions: Practical Considerations"*

*"With some exceptions, the first branch of the injunction test is a low threshold. As stated by the Supreme Court in R. J. R. Macdonald Vs. Canada (Attorney General). Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at the trial. Justice Henegham of the Federal Court explained the review as being "on the basis of common sense and a limited review of the case on the merits." [11] It is usually a brief examination of the facts and law."*

Further, in *Kenleb Cons Ltd vs New Gatitu Service Station Ltd & another*, (1990) eKLR the court held as follows on what a party seeking an injunction must demonstrate:

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

Expounding on the principles in *Giella vs Cassman Brown & Co Ltd*, the court of Appeal, in the case of *Nguruman Limited vs Jan Bonde Nielsen & 2 others* [2014] eKLR, stated that:

*"If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration."*

*I do find that the plaintiffs have demonstrated a prima facie case with a likelihood of success as the certificate of lease given on 20<sup>th</sup> June, 2016 shows that the plaintiffs are the registered proprietors the suit property. The plaintiffs were issued with a rent clearance certificate in respect of the suit property. It is evident that the defendants intend to develop the suit property by constructing a market complex .it is also evident that the suit parcel of land is the source of the plaintiffs' livelihood and therefore the plaintiffs are likely to suffer irreparable harm if injunction is not granted because even if paid damages the same may not be adequate to compensate their suffering. The balance of convenience tilts towards the grant of temporary injunction as the plaintiffs, who are in possession, are likely to be more inconvenienced if an injunction is not granted as they will be evicted and will lose the source of their livelihood.*

*The plaintiffs have satisfied the test for grant of temporary injunction and therefore I do grant a temporary injunction restraining the defendants its servants, employees and representatives from further interfering, disposing, auctioning and or selling, encroaching, trespassing, erecting structures or in other way dealing with the property namely Kisumu Municipality Block 6/517 pending the hearing of the suit Costs of the application in the cause. Orders accordingly.*

**DATED AND DELIVERED THIS 29<sup>th</sup> DAY OF JANUARY, 2020.**

**A. O. OMBWAYO**

***ENVIRONMENT & LAND - JUDGE***

**In presence of:**

OMONDI T FOR PLAINTIFFS

N/A FOR DEFENDANTS

**A. O. OMBWAYO**

**ENVIRONMENT & LAND – JUDGE**