



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 237 OF 2018

HAPPY COW LIMITED1ST PLAINTIFF

DUNCAN MAINA MUTURI2ND PLAINTIFF

AGNES WANGARI KIBIRA3RD PLAINTIFF

VERSUS

EVERLYNE CHEPKIRUI MILGO.....1ST DEFENDANT

JAMES CHERUIOT ARAP KOSKE2ND DEFENDANT

CHIEF LAND REGISTRAR3RD DEFENDANT

RULING

1. By Notice of Motion dated 26th June 2018, the plaintiffs seek the following orders:

1. ...

2. ...

3. *THAT a temporary order of injunction be issued against the 1st and 2nd defendants by themselves, their agents or servants restraining them from taking occupation, entering or remaining on, transferring or disposing of or in any way dealing with or interfering with the plaintiffs' or the public use or possession of LR. Nakuru Municipality Block 23/829,830 and 831 pending the hearing and final determination of the instant suit.*

4. *THAT costs of this application be provided for.*

2. The application is supported by an affidavit sworn by Catherine Njeri Kibue, the Managing Director of the 1st plaintiff. She deposed that the plaintiffs are the registered owners of the parcels of land known as Nakuru Municipality Block 23/543, Nakuru Municipality Block 23/544 and Nakuru Municipality Block 23/545 and that the said parcels were designated for commercial use and were therefore planned with a parking area which doubled as a road reserve. She further stated that the 3rd defendant subdivided the parking area and illegally created new plots being Nakuru Municipality Block 23/829, Nakuru Municipality Block 23/830 and Nakuru Municipality Block 23/831 and issued titles in respect thereof to the 1st and 2nd defendants. She added that the 1st and 2nd defendants have begun to disrupt the plaintiffs' businesses by taking down structures at the parking area and generally depriving the plaintiffs and the public of parking space.

3. The 1st and 2nd defendants opposed the application through a replying affidavit sworn by Everlyne Chepkirui Milgo, the 1st defendant. She deposed that through letters of allotment dated 18th October 1996, the Commissioner of Lands allocated Un-surveyed Residential Plot No.3 – Nakuru Municipality and Un-surveyed Residential Plot No. 4 – Nakuru Municipality to her and Un-surveyed Residential Plot No.5 – Nakuru Municipality to the 2nd defendant. She further deposed that they complied with the terms of the offer and Certificates of Lease were ultimately issued to them in respect of the said plots whose title numbers became Nakuru Municipality Block 23/829, Nakuru Municipality Block 23/830 and Nakuru Municipality Block 23/831. She added that they have been in possession of the plots and that the allegations that they are a parking lot are lies.

4. An order was made that the application be canvassed through written submissions. The applicants filed submissions but the 1st and 2nd defendants did not file any. The 3rd defendant neither filed any response to the application nor submissions. State counsel appearing for him left it to the court to determine the application as it deems fit. The applicants argued in their submissions that they have satisfied the test laid

down in **Giella vs Cassman Brown** and that the orders sought should therefore issue.

5. I have carefully considered the application, the affidavits filed and the submissions. A litigant who is seeking an interlocutory injunction must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He has to establish a *prima facie* case with a probability of success. Even if he establishes a *prima facie* case, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages would be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

6. From the material placed before the court, there is no dispute that the applicants are the owners of the parcels of land known as Nakuru Municipality Block 23/543, Nakuru Municipality Block 23/544 and Nakuru Municipality Block 23/545 while the 1st and 2nd respondents are the owners of the parcels of land known as Nakuru Municipality Block 23/829, Nakuru Municipality Block 23/830 and Nakuru Municipality Block 23/831. The applicants' titles are leasehold titles with 99 year terms running from 1st August 1991 while the 1st and 2nd respondents' titles are also leaseholds with 99 year terms running from 1st October 1996. Thus, the applicants' titles are first in time. It is further apparent from the material placed before the court that the 1st and 2nd respondents' said properties were curved out of an area that was adjacent to the applicant's plots. Whether or not the area was planned and reserved as a parking is a matter for determination by the trial court. Nevertheless, owing to the fact that the 1st and 2nd respondents' titles were issued much later and taking into account that the said plots measure roughly 0.03 hectares which is much smaller than the applicants' plots sizes of roughly 0.09 hectares, I am persuaded that the applicants have established a *prima facie* case and that there is need to preserve the suit properties pending hearing and determination of the suit. Damages will not, in the circumstances of this case, be an adequate remedy. I am therefore persuaded that an injunction should issue.

7. The foregoing notwithstanding, prayer 3 of the present application is worded rather widely and if granted as prayed may result in an eviction which is not the intention of the court to achieve. I will grant modified orders purely for purposes of preserving the suit properties and no more. I therefore make the following orders:

a) A temporary injunction is granted restraining the 1st and 2nd defendants by themselves, their agents or servants from selling, leasing, transferring or disposing of the parcels of land known as Nakuru Municipality Block 23/829, Nakuru Municipality Block 23/830 and Nakuru Municipality Block 23/831 pending hearing and determination of this suit.

b) Costs to the plaintiffs.

Dated, signed and delivered in open court at Nakuru this 3rd day of March 2020

D. O. OHUNGO

JUDGE

In the presence of:

Ms Wangari holding brief for Mr Kisilah for plaintiffs/applicants

No appearance for the 1st & 2nd defendants/respondents

No appearance for the 3rd defendant/respondent

Court Assistants: Beatrice & Lotkomo