



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. NO. 179 OF 2015**

DUNCAN IRUNGU KIMANI..... 1<sup>ST</sup> PLAINTIFF

STEPHEN NJUGUNA MWANGI..... 2<sup>ND</sup> PLAINTIFF

RUTH NJAMBI MWANIKI..... 3<sup>RD</sup> PLAINTIFF

PATRICK KIMANI NDERA... ..... 4<sup>TH</sup> PLAINTIFF

VERSUS

NAIROBI CITY COUNTY.....1<sup>ST</sup> DEFENDANT

ANDREW MACHARIA.....2<sup>ND</sup> DEFENDANT

**RULING**

Coming up before me for determination is the Notice of Motion dated 2<sup>nd</sup> March 2015 in which the Plaintiffs/Applicants seek for an order of temporary injunction restraining the Defendants/Respondents from developing and or interfering with their possession and ownership of the parcel of land known as Land Reference Number 36/V/16 in No. 6A Section 1 Eastleigh (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 3<sup>rd</sup> Plaintiff, Ruth Njambi Mwaniki, sworn on 2<sup>nd</sup> March 2015 in which she averred that she together with her co-Plaintiffs are joint owners of the suit property having purchased it from the previous owners. She annexed a copy of an Indenture marked “TKK1”. She further averred that both she and her co-Plaintiffs took possession of the suit property and erected both permanent and semi-permanent structures thereon. She further averred that they have been paying land rates religiously and without delay to the 1<sup>st</sup> Defendant. She stated further that on 25<sup>th</sup> February 2015 the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant caused to be affixed notices warning her and her co-Plaintiffs to vacate the suit property within 30 days alleging the same to be public land. She added that despite pleading with the Defendants/Respondents to stop trespassing and or interfering with her quiet enjoyment on the suit property, the Defendants/Respondents have persisted in the said trespass and continue to intimidate her

with eviction. She added that she has suffered loss and damage as her tenants are threatening to vacate the suit property for fear of eviction at any time.

The Application is contested. The 1<sup>st</sup> Defendant filed the Replying Affidavit of Karisa Iha, sworn on 8<sup>th</sup> April 2015, in which he averred that he is the Director of Legal Affairs of the 1<sup>st</sup> Defendant. He further averred that it is apparent that the purported indenture was made between Jijay Limited on the one hand as the vendor and Michael Njeru Mbiriaku, James Ruganya, Stephen Mwenda, Njoroge mbogua, Kimani Kiuru and Esther Wanjiru Gacigo as purchasers and nowhere do the names of the Plaintiffs appear. He added that the Plaintiffs/Applicants did not exhibit any sale agreement evidencing the fact that they ever purchased the suit property from anybody. He further added that the permanent and semi-permanent structures erected on the suit property by the Plaintiffs/Applicants were done without the approval of the defunct Nairobi City Council pursuant to the provisions of the **Physical Planning Act**. He stated further that the mere fact that the defunct Nairobi City Council accepted rates payment does not sanitize an act that was an illegality *ab initio* and further does not confer proprietary rights on the Plaintiffs. He stated that owing to the arbitrary and unilateral erection of the illegal structures on the suit property by the Plaintiffs/Applicants, the same were proper candidates for demolition. He added that the Defendants/Respondents are not trespassing on the suit property but it is the Plaintiffs/Applicants who are trespassing on a public land earmarked for construction of a social hall.

The Application is further contested by the 2<sup>nd</sup> Defendant who filed his Grounds of Opposition dated 15<sup>th</sup> April 2015 in which he set out the following grounds:

1. That the Plaintiffs/Applicants are non-suited as against the 2<sup>nd</sup> Defendant and therefore undeserving of the orders sought;
2. That the Plaintiffs/Applicants have not established a prima facie case with likelihood of success at the hearing of the suit;
3. That the Plaintiffs/Applicants have failed to show that they stand to suffer irreparable harm not capable of compensation by way of damages;
4. That public interest would require that public land and resources be accorded protection and secured through due process; and,
5. That the Plaintiffs/Applicants have not demonstrated ownership of the suit property.

In response thereto, the Plaintiffs/Applicants filed the Supplementary Affidavit of Ruth Njambi Mwaniki sworn on 27<sup>th</sup> May 2015 in which she averred that the suit property was bought on 18<sup>th</sup> May 1970 by the parties set out in the indenture most of whom have passed on leaving the suit property to their beneficiaries who are the Plaintiffs/Applicants. She further added that they are in possession of the suit property. She further added that they are taking out letters of administration so as to have the land registered in their names. She further stated that it was not necessary to enter into agreements for sale since they were inheriting the land.

The parties filed their written submissions.

The issue that I am called upon to determine is whether or not to grant the order of temporary injunction sought after by the Plaintiffs/Applicants. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

**“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally 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.”**

Have the Plaintiffs/Applicants made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**,

a prima facie case was described as follows:

**“a prima facie case in a Civil Application includes but is 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 that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”**

The first item to investigate in establishing whether the Plaintiffs/Applicants have established a prima facie case is their alleged ownership of the suit property. In the Supporting Affidavit to this Application at paragraph 2, the Plaintiffs/Applicants averred that they were joint owners of the suit property having purchased it from the previous owners. To prove that assertion, they annexed a photocopy an indenture marked “TKK1”. However, as has been pointed out by the 1<sup>st</sup> Defendant, that indenture bears the name of Jijay Limited on the one hand as the vendor and Michael Njeru Mbiriaku, James Ruganya, Stephen Mwenda, Njoroge Mbogua, Kimani Kiuru and Esther Wanjiru Gacigo as purchasers. Nowhere do the names of the Plaintiffs appear. The Plaintiffs/Applicants subsequently changed their position as purchasers of the suit property to “beneficiaries” or “heirs” in their Supplementary Affidavit. They conceded that the named purchasers on the indenture were their parents who are now deceased and they are yet to take out letters of administration. My finding at this interlocutory stage is that the Plaintiffs/Applicants have failed to establish any proprietary interest in the suit property that should be protected pending the hearing and determination of this suit. In other words, the Plaintiffs/Applicants have failed to establish a prima facie case with high chances of success at the main trial.

Since the Plaintiffs/Applicants have failed to prove the first ground in the grounds set down in the celebrated case of ***Giella versus Cassman Brown***, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of ***Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86*** as follows:

**“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”**

Also, in the case of ***Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR***, the Court of Appeal had this to say:

**“If prima facie case is not established, then irreparable injury and balance of convenience need no consideration.”**

In light of the foregoing, I hereby dismiss this Application with costs to the Defendants.

**DELIVERED AND SIGNED IN NAIROBI THIS 1<sup>ST</sup>**

**DAY OF JULY 2016.**

**MARY M. GITUMBI**

**JUDGE**