



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Environmental & Land Case 145 of 2012**

JEREMIAH NYANDUSI ABUGA.....1<sup>ST</sup> PLAINTIFF  
WILLIAM WAMBUA KINENI.....2<sup>ND</sup> PLAINTIFF  
KENNEDY KUOLOTA.....3<sup>RD</sup> PLAINTIFF  
ADAN SOGUH.....4<sup>TH</sup> PLAINTIFF  
JANE KAGAI.....5<sup>TH</sup> PLAINTIFF  
BEATRICE NZIOKA.....6<sup>TH</sup> PLAINTIFF  
JENNIFER NDUKU.....7<sup>TH</sup> PLAINTIFF  
DANSON MAGANGA ONYANGO.....8<sup>TH</sup> PLAINTIFF  
JOEL KIPKEMOI KOSIKEI.....9<sup>TH</sup> PLAINTIFF  
AUGUSTINE NDAMBUKI.....10<sup>TH</sup> PLAINTIFF  
EVANS NGUGI ND'UNG'U.....11<sup>TH</sup> PLAINTIFF  
JOHN GITONGA.....12<sup>TH</sup> PLAINTIFF  
DAVID MUEMA KIMUYU.....13<sup>TH</sup> PLAINTIFF  
NANCY MUTHONI.....14<sup>TH</sup> PLAINTIFF  
DAVID KARENJU KAROGO.....15<sup>TH</sup> PLAINTIFF  
HENRY KIMATHI MAILU.....16<sup>TH</sup> PLAINTIFF  
MOSES ELOKOI LOMULEN.....17<sup>TH</sup> PLAINTIFF  
FRANCIS GITAU KINUTHIA.....18<sup>TH</sup> PLAINTIFF

**-VERSUS-**

**RULING**

The Plaintiffs brought a Notice of Motion dated 20<sup>th</sup> March 2012 under Order 40 Rule 1(a) of the Civil Procedure Rules seeking an order that the Defendant, its agents and servants be restrained by order or temporary injunction from damaging, or destroying or removing the Plaintiffs' buildings/structures standing on the premises known as L.R. 209/9042/145, and/or from evicting the Plaintiffs there from until the final determination of this suit. The application is supported by the 1<sup>st</sup> Plaintiff's affidavit sworn on 20<sup>th</sup> March 2012. The Plaintiffs' case in summary is that they have been in occupation of the suit land known as L.R. 209/9045/145 for a period in excess of 10 years, and that they have put up permanent and semi-permanent dwelling houses thereon with the knowledge of the Defendant. The Plaintiffs have annexed evidence of certificates of membership issued by Embakasi Village Upgrading Project from whom they purchased the portions of the suit land.

The Plaintiffs have stated that the Defendant has threatened to demolish the said structures at the expiry of 30 days from 21<sup>st</sup> February 2012 through an enforcement notice which was attached to their application. The said enforcement notice required the Plaintiffs to stop further development and to remove the structures on the suit property within 30 days, in default of which the Defendant would remove the said structures at the Plaintiffs' expense. The Plaintiffs contend that the estimated developments on the suit land is in excess of Kshs 45,000,000/=, and maintain that if the Defendant is not restrained from demolishing the structures, they will be rendered homeless, destitute and will incur loss which cannot be compensated in damages.

Through a further affidavit sworn on 11<sup>th</sup> June 2012, the Plaintiffs contend that the Defendant has recognized the Plaintiffs as legal occupants of their respective portions of land, and has provided water in the premises which the Plaintiffs consume and pay for. The Plaintiffs aver that they have submitted and paid for proposed building plans to the Defendant and copies of the application for approval as well as the receipt for payment by the 16<sup>th</sup> Plaintiff have been attached as evidence.

Further, the Plaintiffs have stated that the suit land is not public land but private land which the Defendant is not the custodian. Finally, the Plaintiffs have stated that they did not expect any justice from the officials of the Physical Planning Act who are from the Defendant.

The Plaintiff's counsel filed submissions on the application dated 12<sup>th</sup> June 2012 wherein he reiterated the facts as set out the affidavits and contended that the Plaintiffs have satisfied the conditions laid down in the case of **Giella -vs- Cassman Brown & Co. Ltd(1973)EA 358.**

The application is opposed and the Defendant filed a replying affidavit sworn by its Director of City Planning on 21<sup>st</sup> April 2012. The Defendant has stated that the application before court is fatally defective having been brought under the wrong provisions of the law, lacks merit, discloses no cause of action against the Defendant and is an outright abuse of the Court process liable for dismissal. The Defendant contends that this court lacks jurisdiction as an injunction cannot issue against a local authority and that the only way one can move the Court is through Judicial Review proceedings.

According to the Defendant, the 1<sup>st</sup> Plaintiff had no authority to act, and the Plaintiffs have no *locus standi* to bring this suit as they have no title documents to the land they are claiming hence there is no interest to be protected. It is the Defendant's case that although the Plaintiffs have claimed to have constructed the structures on the suit land with the knowledge of the Defendant, no proof of knowledge of the Defendant on the development of the suit land has been exhibited as there are no approved plans attached to their pleadings to show the plans were approved.

Further, the Defendant has averred that the Plaintiffs have not shown how Embakasi Village Upgrading Project, which has not been made a party to this suit, acquired the land. It is also submitted that since the

Defendant is the custodian of all public land under the Trust Land Act, the suit land is vested in the Defendant and the Plaintiffs cannot allege ownership unless they have a letter of allotment. The Defendant has also contended that an injunction is not mandatory since the Plaintiffs have quantified their claim, and can be compensated by way of damages.

The Defendant's submissions on the application are dated 2<sup>nd</sup> August 2012. Counsel for the Defendant submitted that the Plaintiff has failed to meet the principles set out in **Giella -vs- Cassman Brown & Co. Ltd.** Counsel for the Defendant stated that the Plaintiffs have not exhibited title documents to the suit land and have in the premises not established a *prima facie* case. It was further submitted that the Plaintiffs would not suffer irreparable injury as they have quantified the claim which would adequately be compensated by way of damages. Counsel for the Defendant also submitted that the balance of convenience tilts in favour of the Defendant as the owner of the suit land. Finally, it was submitted for the Defendant that the Court has no jurisdiction at first instance since the Plaintiffs have not shown that they approached the liaison committee under the provisions of part II of the Physical Planning Act.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The issues to be determined are firstly, whether this court has jurisdiction to hear and determine the application herein, and secondly if so, whether the Plaintiffs have met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction.

On the first issue it is argued that the application herein is immature as the Plaintiffs have not exhausted the mechanisms provided under the Physical Planning Act before moving this court for an injunction. The Defendant has argued that this court has no jurisdiction in light of the provisions of section 38 of the Physical Planning Act which provides the procedure for challenging an enforcement notice. The procedure entails first making an appeal to the relevant Liaison Committee under section 13 of the Act. Appeals from the Liaison Committee lie to the National Liaison Committee and further appeals lie in the High Court under section 38(6). The enforcement notice served upon the Plaintiffs required them to appeal to the liaison committee before 22<sup>nd</sup> March 2012.

While section 38 of the Physical Planning Act which requires appeals to be made to the liaison committee in the first instance cannot oust the original jurisdiction of the High Court granted by the Constitution under Article 165(3), the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**, held that where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. This Court is also now enjoined to promote alternative dispute resolution methods under Article 159 of the Constitution.

The Plaintiffs have not brought any evidence of compliance with section 38 of the Physical Planning Act, and argue that they will not be accorded justice under the said provisions as members of the liaison committee are from the Defendant's office. I have perused the provisions of section 8 of the Physical Planning Act on the composition of the liaison committees, and find that their membership is drawn from the Defendant, various ministries of government, and the private sector. In addition, the Plaintiffs will be entitled to legal representation during the hearing of the said appeals. It is thus my finding that the Plaintiffs have not exhausted the available procedural mechanisms for the resolution of the dispute herein, before moving this court.

The Plaintiff's application is in the premises stayed for the foregoing reasons, pending the Plaintiff's compliance with the procedures of appeal provided for under the Physical Planning Act as detailed out in the foregoing. Pursuant to the provisions of section 3A and 63(e) of the Civil Procedure Act the *status quo* to be maintained shall be that the Defendant shall not in any manner interfere with the Plaintiff's occupation of the suit property pending the hearing and determination of the said appeal. I also in the interests of justice hereby extend the period for the Plaintiffs to lodge an appeal under section 38 of the Physical Planning Act by a further 60 days from the date of this ruling, and in default the *status quo* orders herein shall lapse.

There shall be no order as to costs at this stage.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_11<sup>th</sup>\_\_\_ day of \_\_\_April\_\_\_, 2013.

**P. NYAMWEYA**  
**JUDGE**