REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI COMMERCIAL AND ADMIRALTY DIVISION

Civil Case 622 of 2009

PARKVIEW SHOPPING ARCADE LTD……...…1ST PLAINTIFF

RIVER VIEW PLAZA LTD……..2ND PLAINTIFF

JEWEL PLAZA LTD…….3RD PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI……..…….DEFENDANT

RULING

Before me is the plaintiff's an application seeking orders of interlocutory injunction, pursuant to the provisions of **Order XXXIX Rules 1, 2, 3 & 9** of the **Civil Procedure Rules** and **Sections 3A, 63(c) & (e)** of the **Civil Procedure Act**, to restrain the defendant by itself or by its servants from interfering with the plaintiffs' parcel of land opposite Westgate Mall and next to Ukay Centre identified as LR. Nos. 209/12174, 209/12828, 209/12829 and 209/11307 (*hereinafter referred to as the suit properties*) and more particularly from charging parking fees or any other fee to any person or customers of the plaintiffs' using the said car park pending the hearing and determination of the application.

The grounds in support of the application are stated on the face of the application. The plaintiffs contend that they are the registered owners of the suit properties. Pursuant to the said registration, the plaintiffs had invested substantial sums of money in developing and improving the properties and to that end they had developed a modern car park facility. Prior to the plaintiffs developing the said car park, they had submitted plans to the relevant authorities, including the defendant, which authorities had granted the requisite approvals. The plaintiffs complained that in April 2009, the defendant in total disregard of the plaintiffs' proprietary rights over the suit properties, and without any notice or lawful excuse, deployed its agents to the said car park and began charging customers parking fees by purporting to treat the said car park as a public car park. The plaintiff state that dispute negotiating with the defendant with a view to securing an amicable settlement of the encroachment, the defendant had deliberately and maliciously ignored the plaintiffs' plea and had continued to trespass on the said properties. It was in this regard that the plaintiffs moved to the court to seek appropriate intervention to restrain the defendant from its continued interference and trespass to the suit properties thus causing the plaintiffs to suffer loss and damage. The plaintiffs contend that they have established a prima facie case

to entitle the court grant the orders sought. The application is supported by the annexed affidavit of Felix Peter Kikwawi, the group human resource manager of the plaintiffs.

In response to the application, the defendant filed grounds of opposition to the application. The defendant states that under **Sections 22, 27, 35, 36, 37, 38 & 150** of the **Water Act**, the defendant is the custodian of wetlands within its jurisdiction, and in this case, includes the suit properties. The defendant contends that under **Section 2** of the **Wayleaves Act**, the suit properties do not qualify to be private property. The defendant states that the suit properties is government land (wetlands), which the defendant has jurisdiction to charge rates and other fees The defendant was in the circumstances entitled to levy parking fees in accordance with its by-laws of 2007 which had designated the suit properties as among the public parking space that the defendant could levy parking charges. The defendant therefore prayed for the plaintiffs' application be dismissed with costs.

At the hearing of the application, I heard rival submissions made by Mr. Taibjee for the plaintiffs and Miss Wanjala for the defendant. I have read the pleadings filed by the parties herein in support of their respective opposing positions. I have also carefully considered the arguments made by counsel for the parties herein. The issue for determination by this court is whether the plaintiffs have established a case to entitle this court grant the interlocutory injunction sought. The principles to be considered by this court in deciding whether or not to issue an interlocutory injunction are well settled. The plaintiffs must establish that they have prima facie case that will likely succeed during the hearing of the case. The plaintiffs must also establish that they would suffer irreparable injury that cannot be compensated by an award of damages. In the unlikely event that the court may be in doubt, it shall determine the case on a balance of convenience (See **Giella vs Cassman Brown [1973] EA 358**).

The facts of this case are more or less not in dispute. The plaintiffs are the registered owners of the suit properties. The plaintiffs have been so registered since 1994. It is apparent that the suit parcels of land adjoin a river which the defendant alleges to be a wetland. The defendant did not however present any evidence before this court to support its contention that the suit properties are situate in a wetland. It appears from the submission made on behalf of the defendant that the defendant was challenging plaintiff's ownership of the suit parcels of land on the basis that the plaintiffs had unlawfully procured titles in respect of a wetland. The defendant has not filed any suit to obtain the nullification of the said titles in respect of the suit properties issued to the plaintiffs. As it were, the ownership of the suit parcels of land are not in dispute.

The same issues that the defendant seem to be bringing forth in this application purporting to challenge the title of the plaintiffs were considered by the High Court and a decision rendered in favour of the plaintiffs. In **Nairobi HCCC No.438 of 2004 Park View Shopping Arcade Ltd vs Charles Kangethe & Others**, Ojwang J held as follows at page 30 of his ruling in regard to the claim by the defendants in that suit that the plaintiffs were not entitled to ownership of the suit properties allegedly by virtue of environmental protection:

"*If, therefore, the defendant/respondents had genuinely wished to pursue the cause of environmental protection, by virtue of the empowerment they have under Section 3(1) of the Environmental Management an co-ordination Act (Act No.8 of 1999), then the logical and correct cause of action for them would have been to approach the ministry of Environment and plead for compulsory acquisition of the suit land, under Section 75(6) of the Constitution. It is not acceptable they should forcibly occupy the suit land and then plead the public interest in environmental conservation, to keep out the registered owner. The effect of their action is to deprive the registered owner of his land, without full and fair compensation. Since this act of deprivation is coming from private persons rather than from the State, its unlawfulness is stark and beyond dispute. The defendants have, in effect, taken it upon themselves to declare the environmental status of the suit land, but this can only be validly done by the Minister".*

The learned judge was alluding to the provisions of **Section 42(2)** of the **Environmental Management and Co-ordination Act** which grants power to the Minister in charge of the environment to declare lake shores, wetlands, coastal zones and riverbanks to be protected areas. The judge then declared the 1st plaintiff to be the legal owner of one of the suit properties (i.e. LR. No.209/12174) thus entitling it to

constitutional protection. In its grounds of opposition to the plaintiffs' application, it was apparent that the defendant was reviving the environmental question to challenge the plaintiffs' ownership of the suit properties. The present suit is not in respect of the challenge to the titles of the suit properties currently possessed by the plaintiffs. The issue in dispute in this application, and eventually in the main suit, is who is entitled to charge parking fees on the car park developed by the plaintiffs on the suit properties.

Having evaluated the facts of this case, it was clear that the defendant has no legal right over the suit properties. The suit properties are private parcels of land owned by the plaintiffs. The plaintiffs have used considerable expense to develop a modern car park on the suit properties. The plaintiffs have been declared by a court of competent jurisdiction to be the lawful owners of the suit properties. No evidence was placed before this court to suggest that there is a contrary decision by a court of law declaring the land that the suit properties are situate to constitute part of wetland. Even if this court, for argument sake, were to accept the position advanced by the defendant that the suit properties constitute a wetland, that argument would defeat the defendant's alleged right to charge parking fees on the said parcels of land. What is good for the goose is equally good for the gander. The defendant cannot charge parking fees on a wetland. If the plaintiffs cannot create a car park in a wetland, similarly the defendant cannot charge parking fees in a wetland. A wetland being a protected environment cannot be made to be a public parking space that would entitle the defendant to charge parking fees. It is evident that the defendant is using the guise of protecting the environment to deny the plaintiffs the fruits of its investment. The defendant wants to reap where the plaintiffs have sown. It wants to charge parking fees on a car park that has been developed by the plaintiffs.

For the foregoing reasons, I hold that the plaintiffs have established a prima facie case as to entitle this court to grant them the order of interlocutory injunction sought. The plaintiffs have established that they have suffered irreparable loss which cannot be compensated by an award of damages by the defendant's trespass on the suit parcels of land. The balance of convenience tilts in favour of the plaintiffs who are the registered owners of the suit properties. Prayers 3 and 4 of the plaintiffs' application dated 24th August 2009 are allowed pending the hearing and determination of the suit. The plaintiffs shall have the costs of this application.

DATED AT NAIROBI THIS 4TH DAY OF NOVEMBER 2009.

L. KIMARU

JUDGE