REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO 299 OF 2018

EASTERN BY-PASS ESTATE LIMITED ..... APPLICANT

=VERSUS=

GEOFFREY NG'ANG'A MBUTHIA.....1ST RESPONDENT

NAIROBI CITY COUNTY.....2ND RESPONDENT

SUB-COUNTY ADMINISTRATOR, KASARANI SUB-COUNTY.....3RD RESPONDENT

RULING

1. Through a notice of motion dated 26/6/2018, the plaintiff company seeks the following interlocutory orders against the defendants:

> **4. That pending the hearing and final determination of this suit this honourable court be pleased to issue a temporary injunction restraining the respondents whether by themselves and/or through their servants and/ or agents or any person howsoever from entering into, remaining upon, excavating stones, scooping soil/ sand or dealing in any manner whatsoever with all that property known as Land Reference Number 11493 contained in Grant Number I.R 21237 and its resultant subdivisions.**
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> **5. That this honourable court be pleased to direct the Deputy County Commissioner Kasarani Sub-County, the Administration Police Commander, Kasarani, the Officer Commanding Police Division Kasarani, the Officers Commanding Stations Kasarani Police Station, Ruai Police Station and Mwiki Police Station, the Administration Police Commander, Kasarani and their Officers to assist in implementation of the Orders which this Honourable Court is pleased to grant.**
>
> **6. That the costs of (5) above be borne by the Respondents.**
>
> **7. That costs of and occasioned by this Application be awarded to the Plaintiff.**
>
> **8. That such other or further order as may be just to meet the ends of justice and to safeguard and protect the Plaintiff's rights be issued.**

2. The application is the subject of this ruling. It is supported by an affidavit sworn on 26/6/2018 by Joseph Gitahi, chairman of the board of directors of the plaintiff company. The case of the applicant is that it is the legal owner of all that parcel of land known as Land Reference Number 11493 comprised in Grant Number I.R 21237 (the suit property). It has not surrendered any part of the land to the 1st and 2nd respondents for public use and there has been no compulsory acquisition of the land. The respondents have forcefully entered the suit property and are engaged in acts of waste which include digging trenches, excavating stones, scooping soil/sand and carrying away the stones, soil and sand for their own use and for sale to third parties.

3. Stephen G. Mwangi swore a replying affidavit dated 22/8/2018 on behalf of the respondents. The case of the respondents is that on 7/3/2011, Real Plan Consultants made an application on behalf of the plaintiff to the Director of City Planning for the sub-division and change of user of LR NO. 1149 into 2085 plots. The change of user was granted at the Town Planning Committee Meeting held on 23/3/2011 where it was resolved that the applicant should surrender 10% of the land for public use. Formal approval for subdivision of the land was issued on 27/5/2011 and the survey plan for the subdivision of the land was approved on 28/8/2014. Subsequently, the 1st defendant requested for authority to carry stones from the demarcated public utility plots to repair roads in Mwiki Area.

4. It is also the case of the respondents that the applicant is aware of the public utility plots and duly consented to the surrender before approval of the sub-division. The respondents did not use force to enter the suit property and there has been no trespass. The Government does not require permission to make use of public utility land.

5. Parties submitted orally at the plenary hearing of the application on 12/11/2018. Ms Mureithi for the applicant submitted that the applicant had met the requirements for a temporary injunction as spelt out in **Giella v Cassman Brown (1973) EA 358.** She argued that the applicant was the registered owner of the suit property. She further submitted that subdivision was not complete and therefore, the respondents did not have access to the property until the process was complete. She relied on the case of **Kivui Maweu V H.Young &Co. EA LTD[2005]eKLR** where the respondent failed to establish that the applicant had surrendered his land to the public and the plaintiff was granted an injunction. The applicant further submitted that they will suffer irreparable damage and there was need to preserve the suit property as the land was being wasted by the respondents. She added that approval for subdivision was obtained in 2011 but delay in its finalization was occasioned by an existing loan.

6. Mr Mutua for the respondents relied entirely on the replying affidavit sworn by the Chief Officer in charge of Lands in the County Government of Nairobi. He submitted that the Physical Planning Act required presentation of plans and surrender of public utility land. He stated that authority to excavate hard core was duly granted by the County Government. He further submitted that it was the 1st defendant's mandate to build roads in the area.

7. I have considered the application together with the parties' rival affidavits and submissions. I have also considered the principle upon which jurisdiction to grant an interlocutory injunction is exercised. The key issue in the application is whether this application satisfies the criteria for grant of the interlocutory injunction pending the hearing and determination of the suit herein. That criteria was spelt out in **Giella v Cassman Brown (1973) EA 358.**

8. Firstly, the applicant was required to demonstrate a prima facie case with a probability of success. Secondly, the applicant was required to demonstrate that it stands to suffer irreparable damage that cannot be adequately indemnified through an award of damages. Thirdly, should the court be in doubt, the application would be determined on a balance of convenience.

9. The evidence before court indicates that the applicant owns the suit property and it conceptualized a subdivision plan which spelt out how the land was to be utilized. The sub division and development plans have been approved by the County Government subject to the applicant surrendering to the County Government 10% of the suit property to be utilized as per the public utilities set out in the approved development plan. The public utilities approved are: (i) commercial centre; (ii) police station; (iii) chief's office; (iv) primary school; (v) nursery school; (vi) playground and (vii) secondary school. The respondents subsequently entered the suit property and engaged in extractive activities which include extracting stones, soil and sand for road construction in Mwiki Area. Those activities have persisted.

10. The applicant contends that the said extractive activities are lowering the value of the land within the material subdivision scheme and are scaring away potential purchasers whose expectation is to have a serene environment. The position of the respondents is that the material public utility plots were surrendered and authority to excavate hardcore from the designated public utility plots was duly granted by the County Government.

11. In my view, the surrender process is not a single event that happens in one day; it is a process that runs from the time the approval for subdivision and development is granted to the time of titling and grant of vacant possession. Secondly, it does emerge from the materials presented by the respondents that the public utility plots were approved for development of specific public projects namely commercial centre, police station, chief's office, primary school, nursery school, play grounds, and secondary school. It is therefore a contravention of the Physical Planning Act for the defendants to depart from the plan and turn some of the public utility plots into a quarry. Secondly, quarrying activities within a subdivision and development scheme that is residential in nature is not only harmful to the environment but has the potential of scaring away potential buyers of residential properties within the scheme.

12. For the above reasons, the court is satisfied that the plaintiff/applicant has satisfied the first and second limbs of the requirements in **Giella v Cassman Brown (1973) EA 358.** Consequently, the notice of motion dated 26/6/2018 is granted in the following terms:

> **a. Pending the hearing and determination of this suit, the defendants whether by themselves and/or through their agents are restrained against excavating stones or scooping soil/sand or dealing with the suit property or the public utility plots in a manner other than the development of the approved public utilities, namely, commercial centre, police station, chief's office, primary school, nursery school, play grounds, and secondary school**.
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> **b. The Deputy County Commissioner-Kasarani Sub-County, the Administration Police Commander-Kasarani, the Officer Commanding Police Division-Kasarani, the Officers Commanding Station Kasarani Police Station, Ruai Police Station and Mwiki Police Station, the Administration Police Commander-Kasarani and their Officers shall assist in implementation of the above order.**
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> **c. The respondents shall bear costs of this application.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5TH DAY OF FEBRUARY 2019

B M EBOSO

JUDGE

In the presence of:-

Mr Mureithi for the plaintiff/ Applicants

June Nafula - Court Clerk