**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 197 OF 2018**

**NOVAPEKU (PK) CONSTRUCTION AND**

**ENGINEERING COMPANY LIMITED.....1ST PLAINTIFF/APPLICANT**

**PETER KURIA NJOROGE.....2ND PLAINTIFF/APPLICANT**

**JAMES GACHERU KARIUKI.....3RD PLAINTIFF/APPLICANT**

**VERSUS**

**COUNTY GOVERNMENT OF KIAMBU.....DEFENDANT/RESPONDENT**

**RULING**

The Plaintiffs/Applicants herein filed a claim against the Defendant on ***30th October 2017***, and averred that the 2nd Plaintiff is the proprietor of the Lease hold interest of all that parcel of land known as ***Kiambu/Municipality Block 11/109***, where he consented to the 1st Plaintiff to construct semi-permanent business premises using cargo fabricated containers which business premises had been rented out to 3rd Plaintiff amongst others.

However, on ***22nd September 2017***, without any Notice or lawful excuse, the Defendant trespassed into the lawfully constructed business premises aforesaid where they forcefully gained entry and forcefully carted away the said semi-permanent fabricated business premises.

The Plaintiffs therefore filed this suit and sought for Judgment against the Defendant for various prayers among them; ***a Mandatory injunction to compel the Defendant to reinstate the Plaintiffs' business premises namely the fabricated container stalls and other merchandize for 3rd Plaintiff***.

Thereafter the 1st and 2nd Plaintiffs filed a ***Notice of Motion*** application dated ***26th October 2018,*** and sought for orders that the Defendant be compelled to return the containers ***No.MSKU2355812 (20ft)*** and ***MSKU8156016 (40 ft)*** belonging to the 1st Plaintiff/Applicant pending the hearing and determination of the suit and that the Defendant be restrained from using the said containers in any manner whatsoever. Further that access be granted to the Applicants for purpose of inspection of the said containers.

The application is opposed and the Respondent through ***John W. Wanjohi***, the ***County Attorney*** averred that the Plaintiffs/Applicants defied an ***Enforcement Notice*** issued to them and erected the said containers on the suit premises without approval. Further that the orders sought are mandatory in nature and if granted, they have the effect of bringing this suit to an end.

The application was canvassed by way of written submissions which this Court has read and carefully considered. The Court too has considered the annextures thereto.

The Plaintiffs' application is two folds. They have sought for injunctive orders to restrain the Defendant from using the confiscated containers and also an order to compel the Defendant to return the said containers for them.

On the first fold of the orders sought, the Plaintiffs have alleged that the Defendant is using the said containers for storage. For injunctive orders to be granted, the Applicants needed to establish the principles set out in the case of ***Giella…Vs…Cassman Brown Co. Ltd 1973 EA 358***. These are:-

***a) The Applicant must establish that he has a prima facie case with probability of success.***

***b) That the Applicant will suffer irreparable loss which cannot be adequately compensated in any way or by an award of***

***damages.***

***c) When the Court is in doubt, to decide the case on a balance of convenience.***

A *prima-facie* case was described in the ***Mrao Ltd… Vs… First American Bank of Kenya Ltd & 2 Others (2003) KLR 125***, to mean;-

> ***"In civil cases, it is a case which on the material presented to the Court or a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for a explanation or rebuttal from the latter"***

Though the Plaintiffs/Applicants alleged that the Defendant is using the confiscated containers for their storage, no such evidence was brought out. The Defendant/Respondent alleged that the Plaintiffs' containers were confiscated because the Plaintiffs/Applicants did not comply with the ***Enforcement Notice*** which had been served upon them under ***Section 38(1)*** of the ***Physical Planning Act***, which provides:-

> ***"When it comes to the notice of a local authority that the development of land has been or is being carried out after the commencement of this Act without the required development permission having been obtained, or that any of the conditions of a development permission granted under this Act has not been complied with, the local authority may serve an enforcement notice on the owner, occupier or developer of the land."***

The Defendant has also averred that the Plaintiffs did not exhaust all the mechanism for arbitration of this matter before coming to court as provided by ***Section 33(3)*** of the ***Physical Planning Act***, which states:-

> ***"Any person who is aggrieved by the decision of the local authority refusing his application for development permission may appeal against such decision to the relevant liaison committee under section 13."***

The Defendant relied on the case of ***Mutanga Tea & Coffee Co. Ltd….Vs…Shikara Ltd & Another (2015) eKLR***, where the Court held:-

> ***"…We are therefore satisfied that the learned Judge did not err by striking out the appellant's suit and application which sought to invoke the original jurisdiction of the High Court in circumstances whereas the relevant statutes prescribed alternative dispute resolution mechanisms and afforded the appellant the right to access the High Court by way of Appeal, which mechanisms he had refused to invoke. To hold otherwise would, in the circumstances of this Appeal, be to defeat the constitutional objective behind Article 159(2)(c) and the very raison d'etre of the mechanisms provided under the two Acts"***

Since the Plaintiffs/Applicants alleged that the Defendant is using the containers for storage and no evidence was brought out and since the Defendant has alleged that the containers were confiscated because of non-compliance with an ***Enforcement Notice***, the Court finds that these issues can only be determined in a full trial after calling of evidence. Thus the Court finds that the Plaintiffs/Applicants has not established a *prima-facie* case with a probability of success as described in the ***Mrao case***. Having failed to establish a *prima-facie* case, the Court finds no reason to deal with the other limbs in ***Giella…Vs…Cassman Brown (supra)*** as the determination of these grounds is sequential. See the case of ***Kenya Commercial Finance & Co. Ltd…Vs Afraha Education Society (2001) 1EA 86***, where the Court held that:-

> ***"The sequence of granting an interlocutory injunction is firstly that an Applicant must show a prima-facie case with probability of success if this discretionary remedy will inure in his favour. Secondly, that such an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury; and thirdly where the court is in doubt it will decide the application on a balance of convenience. See Giella..vs..Cassman Brown & Co. Ltd 1973 EA pg 360 Letter E. The conditions are sequential so that the second condition can only be addressed if the first one is satisfied and when the court is in doubt then the third condition can be addressed."***

On the second fold of compelling the Defendant to return the containers, the said orders are mandatory in nature. It is evident that mandatory orders of injunction are granted in very special and exceptional circumstances at the interlocutory stage. These are orders that are sought in the Plaint and if granted at this stage, it would mean that some of the prayers in the Plaint have been exhausted at the interlocutory stage without the benefit of hearing evidence of all the parties.

Have the Applicants herein established existence of exceptional circumstances as was stated in the case of ***Kenya Breweries Ltd & Ano….Vs….Washington O. Okeyo, Civil Appeal No.332 of 2000. 1EA 109***, where the Court held that:

> ***"A mandatory injunction can be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the Court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied or if the Defendant attempted to steal a march on the Plaintiff…. a mandatory injunction will be granted on an interlocutory application".*** See ***Volume 24 Halsbury Laws of England 4th Edition Paragraph 948.***

This Court finds that there are issues in dispute as to whether the Plaintiffs did flout the provisions of the ***Physical Planning Act*** and whether they failed to comply with the ***Enforcement Notices*** served upon them. Therefore, this Court finds that there is no evidence of existence of any special or exceptional circumstances to warrant this Court issue the mandatory orders of injunction at this interlocutory stage. Beside, no evidence was brought out to show that the Defendant is trying to steal a match against the Plaintiffs/Applicants herein.

For the above reasons, the Court finds the Plaintiffs/Applicants' ***Notice of Motion*** application dated ***26th October 2018*** is not merited. The same is dismissed entirely with costs being in the cause.

The parties herein to comply with Order 11 within a period of 45 days after the close of the pleadings, then set the suit for full trial expeditiously so that the disputed issues can be resolved at once.

It is so ordered.

***Dated, Signed*** **and** ***Delivered*** **at** ***Thika*** **this** ***8th*** **of** ***April 2019*****.**

**L. GACHERU**

**JUDGE**

**8/4/2019**

In the presence of

Mr. S. N. Nganga holding brief for Mr. Kamau for 1st Plaintiff/Applicant

for 2nd Plaintiff/Applicant

for 3rd Plaintiff/Applicant

Mr. Ranja for Defendant/Respondent

Lucy - Court Assistant

**Court** – Ruling read in open court in the presence of the above stated advocates.

**L. GACHERU**

**JUDGE**

**8/4/2019**