



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 222 OF 2014**

**JOHN MUTHEE NGUNJIRI**

**PETER OTIENO OKETCH**

**CHARLES MAINA WANDAKA**

**EVAN EKALICHE ATTANASI**

**SILAS RICHARD MUKOLWE**

**(Registered trustees for and on behalf of Kenya African**

**National Union Nakuru Branch).....PLAINTIFFS**

**VERSUS**

**KENYA POWER & LIGHTING CO LTD.....1<sup>ST</sup> DEFENDANT**

**THOMAS KIMAGUT**

**SAMBU T/A SOLAI AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of plaintiffs' Notice of Motion dated 5<sup>th</sup> June 2018, an application pursuant to which the plaintiffs seek an injunction to restrain the defendants, their agent and/or servants from entering into, selling, transferring, registering and/or interfering with their peaceful and quiet enjoyment and use of the parcel of land known as Nakuru Municipality/Block 9/31 pending hearing and determination of this suit.

2. The application is supported by an affidavit sworn by Silas Richard Mukolwe, one of the plaintiffs. The defendants opposed the application through a replying affidavit sworn by Mellap Wataka, an advocate in the law firm of Hamilton Harrison & Mathews which is on record for the defendants.

3. The applicants' case is that Kenya African National Union Nakuru Branch is the registered proprietor of the parcel of land known as Nakuru Municipality/Block 9/31 (the suit property) and that the 1<sup>st</sup> defendant has erroneously attached the suit property with a view to selling it by public auction to satisfy a decree issued in **HCC No. 14 of 2004 (Milimani)**. Further, that a notification of sale was issued stating that the said property was to be sold by public auction 8<sup>th</sup> June 2018.

4. The defendants in response contend that indeed **HCC No. 14 of 2004 (Milimani)** exists and that judgment was on 7<sup>th</sup> August 2009 entered in favour of the 1<sup>st</sup> defendant in the said case. Further, that the attachment referred to is in execution of a decree issued in the said case and that this court lacks jurisdiction to supervise or control proceedings before the High Court.

5. The application was heard by way of written submissions. Both the plaintiffs and the defendants duly filed submissions. I have considered the application, the affidavits filed and the submissions. The principles applicable while considering an application for an interlocutory injunction are settled. An applicant seeking such an order must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will issue if

damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

6. There is no dispute that the attachment of the suit property is pursuant to orders made by the High Court in **HCC No. 14 of 2004 (Milimani)**. In view of the provisions of Article 162(2) of the constitution, this court has the same status as the High Court and therefore, broadly speaking, a judge of this court has a concurrent jurisdiction to that of a judge of the High Court. I cannot therefore arrogate to myself jurisdiction to enquire into or stop orders and decisions made by a judge of the High Court. The Court of appeal stated as much in **Bellevue Development Company Ltd v Francis Gikonyo & 7 others [2018] eKLR**:

*The learned Judge reasoned, correctly in my view, that an enquiry into the complaints in the appellant's petition against the Judges called upon him to determine the lawfulness or good faith basis of both their decisions and their conduct, and he could not purport to arrogate to himself the power to review their decisions over which he had no authority. Such an undertaking would have been a plain nullity as had been stated by this Court in PETER NG'ANG'A MUIRURI vs. CREDIT BANK LTD & 2 OTHERS Civil Appeal No. 203 of 2006 which the learned Judge cited. The Court in dispelling the notion that a judge of concurrent jurisdiction could supervise fellow judges had stated as follows;*

*“It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with powers of review over decisions of concurrent or superior jurisdiction, such decision is at best a nullity.”*

*This position is so well established that it would be a strange aberration for a judge to embark on what is essentially an examination of the judicial conduct and pronouncements of judges of the same status as himself, a task that is left to courts and judges of higher status in the hierarchy, by way of appeals.*

7. In so far as the applicants wish to have this court grant an injunction whose effect is to stop execution of orders made by the High Court, such a course of action is totally unacceptable. A case founded on such an argument will fall flat on its face before this court. It does not disclose a *prima facie* case. I therefore find and hold that the applicants have not established a *prima facie* case. That being so, I need not consider the tests of irreparable injury and balance of convenience.

8. In the end, Notice of Motion dated 5<sup>th</sup> June 2018 is dismissed with costs to the defendants.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of May 2019.**

**D. O. OHUNGO**

**JUDGE**

**In the presence of:**

**No appearance for the plaintiffs/applicants**

**No appearance for the defendants/respondents**

**Court Assistants: Beatrice & Lotkomoi**