



**REPUBLIC OF KENYA**

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

**ELC CASE NO.785 OF 2017**

**(FORMERLY CIVIL CASE NO.21 OF 2017-KIAMBU)**

POSTAL CORPORATION OF KENYA.....1<sup>ST</sup> PLAINTIFF/APPLICANT

FAVE GAS OIL (K) LTD.....2<sup>ND</sup> PLAINTIFF/APPLICANT

**-VERSUS-**

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

**RULING**

Coming up for determination is the Plaintiffs/Applicants *Notice of Motion* application dated 5<sup>th</sup> October 2017, wherein they have sought for the following orders:-

- a) *That pending the inter-parte hearing and determination of this suit filed herein, an order of injunction do issue, restraining the Defendant/Respondent jointly and severally whether by themselves, their agents, employees or otherwise howsoever, from in anyway whatsoever interfering with the Plaintiffs'/Applicants' quiet possession of all that property known as Kiambu/Mun.Block 2/284.*
- b) *That pending the inter-parties hearing and determination of this application, an order of injunction do issue, restraining the Defendant/Respondent through its agents, employees or otherwise howsoever, from cutting down trees, demolishing structures and/or in any way whatsoever interfering with that property known as Kiambu/Mun.Block 2/284.*
- c) *That the OCS Kiambu Police Station to enforce the orders issued herein.*
- d) *That the Honourable Court be pleased to issue any other or further orders it deems meet and just.*

The application is premised upon the following grounds:-

- 1) *The 1<sup>st</sup> Plaintiff/Applicant herein is registered as the proprietor over all that property known as Kiambu/Mun.Block 2/284 having been issued with a Certificate of Lease for a period of 99 years commencing 1<sup>st</sup> April 1977.*
- 2) *Since acquiring possession of the suit property the 1<sup>st</sup> Plaintiff/Applicant has expended substantial public resources in building structures and planting trees thereon.*
- 3) *In the year 2017, the 1<sup>st</sup> Plaintiff/Applicant entered into a Lease Agreement with the 2<sup>nd</sup> Plaintiff/Applicant for a period of Ten (10) years.*
- 4) *That on or about 3<sup>rd</sup> October 2017, the Defendant/Respondent through its servants, agents and/or employees trespassed onto the Plaintiff's suit property and unlawfully demolished the structures and cut down the trees thereon.*
- 5) *The 1<sup>st</sup> Plaintiff/Applicant is a public body and consequently the suit property constitutes public land as provided for under Article 62(b) of the Constitution of Kenya.*
- 6) *The actions of the Defendant/Respondent threaten the Plaintiffs'/Applicants' continued quiet possession of the suit property.*
- 7) *The 1<sup>st</sup> Plaintiff/Applicant is the registered proprietor of the suit property and has at all material times been in possession*

*thereof and is thereby deserving of the protection of this Honourable Court.*

The application is also supported by the **affidavit** of **Joel Mageto**, the **property manager** of the 1<sup>st</sup> Plaintiff herein who averred that the 1<sup>st</sup> Plaintiff/Applicant is the registered proprietor of land parcel known as **No.Kiambu Mun. Block 2/284**, and possesses **Certificate of Lease** for a period of **99years** commencing from **1<sup>st</sup>April 1977** as per **annexture**

**JM-1.** He also averred that the 1<sup>st</sup> Plaintiff/Applicant entered into a **Lease Agreement** with the 2<sup>nd</sup> Plaintiff/Applicant in which the 1<sup>st</sup> Plaintiff leased the suit property to the 2<sup>nd</sup> Plaintiff/Applicant for a period of **ten (10) years** as is evident from **annexture JM-2.** He alleged that on **3<sup>rd</sup> October 2017**, the Defendant/Respondent through its servants, agents and/or employees trespassed unto the Plaintiffs' suit property and unlawfully demolished the structures thereon and cut trees and therefore the actions of the Defendant/Respondent has threatened the Plaintiffs'/Applicant's **continued** and **quiet possession** of the suit property. Further that the 1<sup>st</sup> Plaintiff/Applicant has been in possession thereof and desires protection of this Court. He urged the Court to allow the instant application for the interest of justice.

The application is also supported by the affidavit of **James Mungai Mbugua** a Director of the 2<sup>nd</sup> Plaintiff Company and who associated himself with the averments made by **Joel Mageto**, in the instant **Notice of Motion** application.

The application is contested by the Respondent and **Dr. Martin Njogu Mbugua**, swore a **Replying Affidavit** and averred that the **suit** and instant **Notice of Motion** application as filed are **vague** and **fatally defective** and should be dismissed with costs. He contended that the Defendant has been wrongly sued and is therefore a stranger to the suit. It was his further contention that the 1<sup>st</sup> Plaintiff had by a letter dated **3<sup>rd</sup> October 2017**, admitted that members of the public had invaded the suit property and he sought the assistance of the **Governor of Kiambu County.** He also denied that the Defendant/Respondent instructed members of the public to invade the instant premises.

The deponent averred that this suit should therefore be brought against the said members of the public and not the Defendant herein. Further that the 1<sup>st</sup> Plaintiff/Applicant did not act in good faith since it had requested the Governor's assistance on **3<sup>rd</sup> October 2017.** He also contended that **Joel Mageto** did not have written authority from the **Board of Directors** to swear the Affidavit in support of the application.

He also contended that **James Mungai Mbugua**, did not attach minutes or resolution of the company authorizing him to bring this suit. Further, it was contended that the Defendant who is the **Lessor** had not given his consent whatsoever for the disposition of the suit property by the 1<sup>st</sup> Plaintiff to the 2<sup>nd</sup> Plaintiff and there was no resolution passed by 1<sup>st</sup> Plaintiff's **Board of Directors** allowing public land to be leased to the 2<sup>nd</sup> Plaintiff which is a **Private Company.** He urged the Court to dismiss the instant application.

The Defendant also filed a **Notice of Preliminary Objection** and urged the Court to dismiss both the suit and **Notice of Motion** dated **5<sup>th</sup> October 2017**, on the following grounds:-

- 1) **This Court has no jurisdiction to entertain and determine this dispute.**
- 2) **This suit has been prematurely filed.**
- 3) **This is a dispute between the county and National Government and that Section 31 of Intergovernmental Relations Act No.2 of 2012 states that:-**
  - a) **Resolve disputes amicably and**
  - b) **Apply and exhaust the mechanisms for alternative dispute resolution provided under this Act or any other legislation before resorting to judicial proceedings as contemplated by Article 189(3) and (4) of the Constitution.**
- 4) **The Plaintiff has failed to follow Article 189(3) of the Constitution which states that:-**

**“Government at either level shall in any dispute between governments make every reasonable effort to settle the dispute, by means of procedures provided under national legislation”.**
- 5) **There is a clear process established under the Act in resolving disputes between County Government and the National Government. The process must be followed before parties resort to court.**

**James Mungai Mbugua**, filed a further **affidavit** on **16<sup>th</sup> January 2018**, and denied in total all the averments made by the Defendant/Respondent in its **Replying Affidavit.** He contended that the Defendant/Respondent through its Governor, employees, agents, servants and/or officers proceeded to trespass unto the suit land by demolishing the fence and cutting down all the trees thereon and even relocated a **bus-park** to the said land. He also contended that members of the public invaded the suit land on instructions of the Defendant/Respondent and the said members of public are indeed **Matatu operators.** That even with the knowledge that the suit land belongs to the 1<sup>st</sup> Plaintiff/Applicant, the Defendant/Respondent has continued to **levy licence** and other **fees** from the **Matatu operators** who are operating from the suit land.

The Court directed that both the **Notice of Preliminary Objection** and **Notice of Motion** application be canvassed together by way of written submissions. Parties complied and filed their respective rival submissions which this Court has carefully read and considered. The Court has also considered the pleadings in general, the annexures thereto and the cited authorities. The Court too has considered the relevant provisions of law and makes the following findings;

The Court will first determine the **Notice of Preliminary Objection**. This is because a **Preliminary Objection** if upheld might determine the instant substantive **Notice of Motion** application preliminarily.

**Black Law Dictionary, 9<sup>th</sup> Edition** describes '**Preliminary Objection**' as follows:-

**“An objection that if upheld would render further proceedings before the tribunal impossible or unnecessary”.**

Further, in the case of **Mukisa Biscuits & Co. Ltd.....Vs...West End Distributors Ltd (1969) EA 696**, the Court defined a Preliminary Objection as follows:-

**“...So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.**

Taking into account the above description of a **Preliminary Objection**, the Court will first consider whether what the Defendant has raised amounts to **Preliminary Objection** or not. It is trite that a **Preliminary Objection** must stem from the pleadings and should be capable of bringing the matter to a conclusion preliminarily. See the case of **Quick Enterprises Ltd...Vs...Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

**“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”**

The Defendant alleged that the court has no jurisdiction to entertain the dispute herein and that the suit has been filed prematurely.

It is trite also that jurisdiction is everything and where the court is devoid of jurisdiction, then it ought to down its tools. See the case of **Owners of the Motor Vessel 'Lillian S'...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1**, where the Court held that:-

**“...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.**

Since the Defendant has raised the issue of jurisdiction, then the Court finds that the said **Preliminary Objection** if upheld is capable of bringing the matter to an end at the preliminary stage and therefore on that point alone, the **Notice of Preliminary Objection** herein meets the criteria of what constitutes a **Preliminary Objection**.

However, on the other issues raised in the **Notice of Preliminary Objection**, the Court would need to ascertain facts from elsewhere and the said **Preliminary Objections** do not stem from the pleadings itself. The said issues are disputed and have to await the calling of evidence in the main suit.

Therefore, this Court will only determine the issue of **jurisdiction** in this **Preliminary Objection**.

The Defendant has alleged that the dispute herein is between the **National Government** and the **County Government of Kiambu** and that the Constitution prescribes for harmonious resolution of disputes that may arise between the Governments. It was the submissions of the Defendant that such disputes should be resolved as provided by **Article 189(3)** of the **Constitution** which provides that in case of any dispute between the Governments, the same should be settled through procedure of **Alternative Disputes Resolution** by **negotiations, mediation and arbitration**.

However, the Court has looked at the **Plaint** herein and the prayers sought in the instant **Notice of Motion** application. It is clear that the dispute herein relates to ownership of the suit property **Kiambu/Mun.Block 2/284**, situated in **Kiambu** town which is allegedly owned by the 1<sup>st</sup> Plaintiff herein and who holds a **Certificate of Lease** for a period of **99 years**. The 1<sup>st</sup> Plaintiff has alleged that the Defendant herein has trespassed on the said suit property. The dispute herein therefore relates to trespass to land and that falls under **jurisdiction of Environment and Land Court** as provided by **Section 13** of the **Environment and Land Court Act**, which provides:-

**“The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”**

This Court after careful consideration of the instant **Notice of Preliminary Objection** finds it **not merited** and also finds and holds that it **has jurisdiction** to deal with the dispute herein as brought by the Plaintiffs in their claim.

Now turning to the **Notice of Motion** application dated **5<sup>th</sup> October 2017**, the Plaintiffs have sought for injunctive orders against the Defendant herein to restrain it from interfering with the Plaintiffs quiet possession of the suit property **Kiambu/Mun.Block 2/284**.

The application is anchored under **Order 40 Rule 1(a)** of the **Civil Procedure Rules**, which grants the court discretion to issue temporary injunction in situations where the property in dispute is in danger of being **wasted, damaged, alienated** and/or **disposed off** in any other way.

The property in dispute herein is **Kiambu/Mun.Block 2/284**, which is owned by the 1<sup>st</sup> Plaintiff/Applicant as per the **Certificate of Lease** attached to the instant application. However the 1<sup>st</sup> Plaintiff had allegedly leased the said property to 2<sup>nd</sup> Plaintiff for a period of **10 years** as is evident from the lease agreement attached as **JM-2**.

The Defendant has not disputed the ownership of this parcel of land by the 1<sup>st</sup> Plaintiff. However, it has alleged that as a public institution, then the land in issue is a public land and the 1<sup>st</sup> Plaintiff had no authority to lease it without the resolution of its Board of Directors. Further that the Defendant did not give authority for change of use. However, on whether there was resolution of the Board of Directors or not, that is a matter of evidence which cannot be determined now at the interlocutory stage through affidavit evidence.

The Plaintiffs have alleged that the Defendant has invaded the suit property and converted it to a **bus-stage** and has allowed **Matatu operators** to use it as a bus terminal. The Defendant has alleged that the said invasion was done by Members of the Public because the 1<sup>st</sup> Plaintiff had neglected the suit land which had turned into a den of criminals. However, failure to use one's parcel of land is not a licence for another person to invade it without consent of the owner. Furthermore, the 1<sup>st</sup> Plaintiff had already leased the suit property to the 2<sup>nd</sup> Plaintiff who was ready to utilize the same.

As the Court observed earlier, **Order 40 Rule 1(a)** grants the court discretion to issue injunctive orders where the land is in danger of being **wasted** and/or **damaged**. It is not in doubt that the suit property has now been invaded and turned into a **bus-stage** allegedly by **Matatu operators** with the blessings of the Defendant herein. Therefore, it is evident that the suit property herein is in danger of being **damaged** and or **wasted** before the suit is heard and determined. There is sufficient reason to warrant this Court to use its discretion and grant the temporary orders sought. However, the said discretion must be exercised judicially. See the case of **Nyutu & Others...Vs...Gatheru & Others (1990) KLR 554**, where the Court held that:-

**“Whether or not to grant an injunction is in the discretion of the Court and the discretion is a free one but must be judicially exercised”.**

Further as the Court combs through the evidence in determination of the instant application, it will take note that it is not supposed to determine the disputed issues with finality especially basing it on affidavit evidence. See the case of **Agip (K) Ltd...Vs...Maheshchandra Himatlal Vora & Others, Civil Appeal No.213 of 1999**, where the Court held that:-

**“In an application for injunction, the Court should not delve into substantive issues and make finally concluded views of the dispute before hearing oral evidence”.**

All that the Court is supposed to do is to determine whether the Applicants are deserving of the orders sought using the usual criteria. The criteria to be considered is the one laid down in the case of **Giella....Vs...Cassman Brown & Co. Ltd 1973 E.A 358**. These criterias 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.**

Therefore, this Court will juxtapose the available evidence and the above stated criteria and determine whether the instant application is merited or not merited.

The Applicants needed to establish that they have a *prima-facie* case with probability of success at the trial.

As the Court stated earlier, the 1<sup>st</sup> Plaintiff/Applicant is the owner of the suit property and holds a **Certificate of Lease** issued to it on **20<sup>th</sup> November 2006**. The Defendant has not denied this ownership of land by the 1<sup>st</sup> Plaintiff. Further the 1<sup>st</sup> Plaintiff has now leased the suit property to the 2<sup>nd</sup> Plaintiff/Applicant. Further from the **annexure JM-3**, it is evident that the suit property has been invaded by some people whom the Applicants have alleged that they did so with the blessings of the Defendant/Respondent. The Defendant has not categorically denied its involvement but has hidden behind the Members of Public and an alleged cry that the land was **unutilized** and was used as hiding place by criminals.

Before the issues raised by the Defendant are canvassed and determined, the suit property needs to be preserved. That is indeed the essence of temporary injunction. See the case of **Noormohammed Janmohammed...Vs....Kassam Ali Virji Madham (1953) 20 LRK 8:-**

**“the purpose of temporary injunction is to preserve the status quo”.**

Having now carefully considered the evidence in totality, the Court finds that the Plaintiffs/Applicants have established that they have a *prima-facie* case with probability of success at the trial.

On irreparable loss which cannot be compensated by an award of damages, the Court finds that the 1<sup>st</sup> Plaintiff's/Applicant's parcel of land has now been converted into a **bus stage** or terminal. That has led to the **cutting down of trees** and **destruction of the structures** on the suit property. The action of converting of the suit property to a bus terminal would indeed **waste** and **damage** the suit property. Though the suit property can be valued and quantified, the Plaintiffs cannot lose their crystalized right on mere allegation that they can be compensated by an

award of damages. The Court finds that the wasting and damage that would be occasioned to the suit property and the loss of expectation by 2<sup>nd</sup> Plaintiff/Applicant may not be adequately compensated by an award of damages. See the case of *Olympic Sport House Ltd...Vs... School Equipment Centre Ltd HCC No. 190 of 2012*, where the court held that:

***“Damages are not and cannot be substitute for the loss which is occasioned by a clear breach of the Law. In any case, the financial strength of a party is not always a factor to refuse an injunction more so, a party cannot be condemned to take damages in lieu of his crystallized right which can be protected by an Order of Injunction”***

On the balance of convenience, the Court finds that it is not in doubt at all. However, even if the Court was to be in doubt, the balance of convenience tilts in favour of maintaining the *status quo* that existed before the invasion by the Defendant/Respondent herein. See the case of *Agnes Adhiambo Ojwang ..Vs.. Wycliffe Odhiambo Ojijo, Kisumu HCCC No.205 of 2000*, where the Court held that:-

***“the purpose of injunction is to preserve the status quo and the status quo to be preserved is the one that existed before the wrongful act”.***

Therefore the Court finds that *status quo* should be maintained herein and the *status quo* is the *one that existed before the bus stage was allowed to operate on the suit property*.

Having now carefully considered the instant *Notice of Motion* dated 5<sup>th</sup> October 2017, the *Court finds it merited and it is allowed entirely in terms of prayers No.3, 4 and 5 with costs to the Applicants herein*.

Further, the *Defendant is directed to remove the alleged bus stage on the 1<sup>st</sup> Plaintiff's/Applicant's suit property and to resist from charging the Matatu operators who are using the suit property as a bus stage or terminal until this suit is heard and determined*.

The parties should prepare the main suit for hearing expeditiously so that the disputed issues are resolved at once.

It is so ordered.

***Dated, Signed and Delivered at Thika this 13<sup>th</sup> day of July 2018.***

**L. GACHERU**

**JUDGE**

In the presence of

Mr. Wairegi holding brief for M/S Maina for 1<sup>st</sup> Plaintiff/Applicant

Mr. Wairegi for 2<sup>nd</sup> Plaintiff/Applicant

Mr. Nganga holding brief for M/S Mbugua for Defendant/Respondent

Lucy - Court clerk.

**L. GACHERU**

**JUDGE**

**13/7/2018**