



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ELC. CASE NO. 55 OF 2014**

**REGISTERED TRUSTEES OF CHILD WELFARE**

**SOCIETY OF KENYA.....PLAINTIFF**

**VERSUS**

**WARP DRIVE LIMITED .....DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 23<sup>rd</sup> January 2014 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from trespassing onto the property known as L.R. No. 209/9669 off Langata Road, Nairobi (hereinafter referred to as the “suit property”) pending the hearing and determination of this suit. The Plaintiff/Applicant also seeks for an order of mandatory injunction compelling the Defendant/Respondent to remove any building materials and any structures constructed on the suit property to allow the Plaintiff/Applicant unfettered use of the suit property pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Irene Mureithi, the Executive Director of the Plaintiff, sworn on 23<sup>rd</sup> January 2014, in which she averred that at all material times, the Plaintiff/Applicant was and still is the registered proprietor of the suit property and all the developments thereon including a building known as Child Welfare Building. As proof of that assertion, she annexed a copy of the title deed. She further averred that the Defendant/Respondent was and still is the registered proprietor of the parcel of land known as L.R. No. 209/9668, off Langata Road, Nairobi and all the developments thereon (hereinafter referred to as the “adjacent property”) as evidenced by the title deed she annexed. She averred further that in April 1992, the Plaintiff/Applicant constructed the Child Welfare Building on the suit property and were in peaceful occupation thereof since that year until the year 2013 when the Defendant/Respondent embarked on a development on the adjacent property. It was her averment that the Defendant/Respondent has carried out their development in the adjacent property in such a manner that the said development is prejudicial and harmful to the suit property for the following reasons:

1. The Defendant has carried out excavation works that have laid bare a portion of the foundation of the Child Welfare Building and exposed it to the natural vagaries of storm water, weather changes, dumped solid, etc, which weaken it;

2. The excavation works by the Defendant in the adjacent property have caused structural damage to the columns that support the Child Welfare Building;
3. The Defendant has blocked the access road to the Child Welfare Building;
4. The Defendant has trespassed into an area that is designed as their car park and partially excavated the same; and,
5. The Defendant has committed wanton acts of trespass on the suit property by placing a temporary fence purportedly to block them from accessing it.

On those grounds, she sought for the court to grant the prayers in this Application so as to enable them to access the Child Welfare Building, enjoy their parking and protect the integrity of their building.

In her Further Supporting Affidavit sworn on 28<sup>th</sup> March 2014, Irene Mureithi, the Executive Director of the Plaintiff/Applicant averred that the adjacent property was transferred to Malibu Court Limited by the former Defendant/Respondent, Warp Drive Ltd.

The Application is contested. The Defendant/Respondent, Malibu Court Limited, filed the Replying Affidavit of Enock Tuitoek, its Managing Director, sworn on 25<sup>th</sup> March 2014, in which he averred that it is indeed true that the adjacent property was initially registered in the name of Warp drive Limited before it was transferred to Malibu Court Limited. He further confirmed that the previous owner had commenced plans for constructing residential houses on the adjacent property and has obtained approval to the plans from the now defunct Nairobi City Council. He further averred that an approval of the EIA for the proposed construction of 40 residential apartments was also granted to the previous owner by the NEMA. He further added that an EIA Licence was subsequently issued to the previous owner. He further averred that prior to the commencement of the intended project, the adjacent property was transferred to Malibu Court Limited who later embarked on the development based on the previous owner's approvals. He further stated that the development is ongoing in strict compliance with the approvals granted without any summon for having breached any condition or encroachment into the suit property. He denied that there is any excavation of the Child Welfare Building, stating that there is a boundary wall erected at least 1 metre away from the beacons of the adjacent property hence there is no way the excavation works have laid bare the foundation of the Child Welfare Building. He denied that any construction materials have been dumped on the suit property. He denied that any excavation works on the adjacent property have caused structural damage to the columns supporting the Child Welfare Building. He pointed out that the Plaintiff/Applicant has in any event not tabled a report by a structural engineer to attest to that claim. He also averred that the Plaintiff/Applicant has its own access road to the suit property which the Plaintiff has used since the year 1992 which is also used to access the adjacent property. He denied that they have blocked that access road. He also averred that the suit property is fenced and has its own car park within it and it is mischievous for the Plaintiff/Applicant to allege that there has been trespass into that area. He stated further that there has been some random inspection of the adjacent property by respective officers from the Department of City Engineer and City Planning, Nairobi City County on the progress of the construction works and at no point have they been summoned for breach of any of the conditions imposed by the relevant authorities. On those grounds, the Defendant/Respondent sought for this Application to be dismissed with costs.

One of the issues that I am called upon to determine is whether or not to issue an order of temporary injunction as sought by the Plaintiff/Applicant. In deciding whether or not to grant the temporary injunction, I wish to refer to and rely on the precedent set out in the case of **GIELLA versus CASSMAN BROWN (1973) EA 358** in which the conditions for the grant of an interlocutory injunction were settled as follows:

***“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.*”**

***Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”***

Has the Plaintiff/Applicant made out a prima facie case with a probability of success? In the case of **MRAO versus FIRST AMERICAN BANK OF KENYA LIMITED & 2 OTHERS (2003) KLR 125**, a prima facie case was described as follows:

***“a prima facie case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”***

Does the Plaintiff/Applicant have a ‘genuine and arguable case’ and therefore a prima facie case? Before I can go any further to set out my deductions herein, I must point out to the parties that my findings herein are not conclusive and must await the full trial of this suit. This position is supported by the decision in **Airland Tours & Travels Ltd versus National Industrial Credit Bank Milimani High Court Civil Case No. 1234 of 2002** where the court held as follows:

***“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law, most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”***

With that background laid down, I turn to assessing whether or not the Plaintiff/Applicant has met the three conditions for the grant of a temporary injunction. Firstly, I must assess whether the Plaintiff has established a prima facie case with a probability of success at the main trial. In this suit, there is no dispute as to the ownership of the suit property and the adjacent property. The issue in this suit is an alleged trespass of the suit property by the Defendant/Respondent in the process of developing the suit property. The Plaintiff/Applicant has alleged that in the process of developing the adjacent property, the Defendant/Respondent has compromised the integrity of the Child Welfare Building erected on the suit property by exposing its foundation by way of excavation. The Plaintiff/Applicant has also alleged that the Defendant/Respondent has also trespassed on its car parking and excavated a portion thereof and further has interfered with the access to the suit property. All these allegations have been denied by the Defendant/Respondent who has asserted that there is a fence one metre from its boundary and all their activities are confined within the adjacent property. I have looked at the photographic evidence in form of photos that the Plaintiff/Applicant has annexed to their Supporting Affidavit, in particular the photos marked “E3” which shows that indeed part of the foundation of the Child Welfare Building is exposed by the excavation activities and “E9” which does not reveal any fence around the adjacent property as claimed by the Defendant/Respondent. In light of this, I find that indeed, the integrity of the Child Welfare Building is indeed at risk as a result of the developments being carried out by the Defendant/Respondent on the adjacent property. To that extent therefore, I find that the Plaintiff has established a prima facie case with high chances of success at main trial.

Does an award of damages suffice to the Plaintiff/Applicant? My answer to that question is aptly captured in the case of **Niaz Mohamed Jan Mohamed versus The Commissioner of Lands (1996) eKLR** where it was stated as follows:

***“it is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.”***

To that extent therefore, I find that damages would not suffice to atone for the breach of the Plaintiff’s right to have the developments protected pending the hearing and determination of this suit.

In whose favour does the balance of convenience tilt? In the case of **Nguruman Ltd versus Jan Bonde Nielsen (2014) eKLR**, the court had this to say:

***“It is where there is doubt as to the adequacy of the respective remedies in damages available to***

***either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”***

It is my finding that the Plaintiff/Applicant’s developments on the suit property, the Child Welfare Building to be precise, should be protected from any further damage pending the hearing and determination of this suit. In these circumstances, I have no difficulty in holding that the balance of convenience also tilts in favour of the Plaintiffs/Applicants.

The court is also required to consider whether or not to issue the order of mandatory injunction compelling the Defendant/Respondent to remove structures erected on or building materials dumped on the suit property. To that prayer, the Plaintiff/Applicant has not demonstrated to the satisfaction of this court that there has indeed been any structures erected by the Defendant/Respondent on the suit property or that any building materials have been dumped on the suit property. The court will therefore not issue the order of mandatory injunction.

In light of the foregoing, I hereby allow this Application in terms of prayer no. (c) with costs to the Plaintiffs. I dismiss the other prayers in the Application.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2017.**

**MARY M. GITUMBI**

**JUDGE**