



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT**  
**AT MILIMANI**  
**LAND CASE NO. 520 OF 2017**

**CYKA HOLDINGS LIMITED.....PLAINTIFF**

**=VERSUS=**

**NAIROBI CITY COUNTY GOVERNMENT....1<sup>ST</sup> DEFENDANT**

**PLAINSVIEW EDUCATIONAL POINT.....2<sup>ND</sup> DEFENDANT**

**JOYCE MUNGAI.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This is a Ruling in respect of two applications. The first application is dated 15<sup>th</sup> August, 2017 and is brought by the Plaintiff. It seeks the following orders:-

**1. Spent**

**2. Spent**

**3. That this Honourable Court be pleased to issue a temporary injunction restraining the defendants /respondents, their agents, kin, servants and/or employees from evicting the ongoing construction and development of the parking lot pursuant to the Temporary Occupation License (TOL) granted on 12<sup>th</sup> July 2017 by the 1<sup>st</sup> defendant or in any other manner interfering with the applicant's quiet possession and utilization of the subject road reserve as a parking lot pending the hearing and determination of this suit.**

**4. Spent**

**5. That this Honourable Court be pleased to issue a temporary injunction restraining the 2<sup>nd</sup> & 3<sup>rd</sup> Respondents, their officials, family, kin, agents, employees or servants from constructing upon or erecting upon the subject road reserve any form of structure or development that is contrary and adverse to the applicant's Temporary Occupation License (TOL) granted on 12<sup>th</sup> July by the 1<sup>st</sup> defendant or in any other manner reserve pending the hearing and determination of this suit.**

**6. Spent**

**7. That costs of this application be borne by the Respondents.**

2. The second application is dated 18<sup>th</sup> August 2017 and is brought by the second and third defendants. It seeks the following orders:-

**1. Spent**

**2. Spent**

**3. Spent**

**4. Spent**

**5. That the order given by the Honourable Justice Obaga on 15<sup>th</sup> August 2017 and issued on 16<sup>th</sup> August, 2017 be varied, discharged and/or set aside.**

**6. That pending the hearing and determination of this Suit an injunction be issued restraining the Plaintiff, its agents, servants, employees or any other person working under it from constructing a car park or erecting any structure on the Road Reserve forming the frontage to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants' parcels of land, namely, Land Reference Nairobi/Block 93/1049 and Land Reference Nairobi/Block 93/1078 or in any other way interfering with the 2<sup>nd</sup> and 3<sup>rd</sup> defendants quiet possession and utilization of the said Road Reserve.**

**7. That pending the hearing and determination of this Suit, the Honourable Court be pleased to issue a mandatory injunction compelling the plaintiff to at its cost remove any construction works they have carried out and/or erected on the Road Reserve forming the frontage to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants parcels of land, namely Land Reference Nairobi/Block 93/1049 and Land Reference Nairobi/Block 93/1078 and to revert the subject Road Reserve to the same landscaped condition it was before the plaintiff commenced construction, within fourteen days of the order. In default, thereof, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants be at liberty to restore the subject Road Reserve at the Plaintiff's cost.**

**8. Spent**

**9. That the plaintiff be condemned to pay for the costs of this application in any event.**

3. I will first deal with the Plaintiff's Notice of Motion dated 15<sup>th</sup> August 2017. The Plaintiff was building a mixed use Mall on **LR Nos Nairobi/Block 93/1508 and 1509**. In preparation for completion of the mixed use Mall, the plaintiff thought of having parking space for its commercial tenants' customers. The Plaintiff applied for a temporary occupation licence to construct on a road reserve which was across the road. Its application was allowed but when it commenced construction of the parking spaces, the second and third defendants started interfering with the construction. This forced the plaintiff to move to court where it obtained temporary orders of injunction.

4. The plaintiff then went on with the construction which has now been completed if the photographs annexed to the replying affidavit in opposition to the application by the second and third defendants as well the further affidavit of the third defendant are anything to go by.

5. The first defendant has opposed the plaintiff's application based on grounds of opposition dated 17<sup>th</sup> August 2017. The first defendant contends that it repossessed the site on or around 1<sup>st</sup> August 2017 when it realized that the plaintiff had breached the terms of the temporary occupation licence. That because of the breach on the part of the plaintiff, the plaintiff is not entitled to any orders.

6. The second and third defendants have opposed the plaintiff's application based on the supporting

affidavit to the application dated 18<sup>th</sup> August 2017 and replying affidavit sworn on 24<sup>th</sup> August 2017. The second and third defendants contend that the plaintiff was granted temporary occupation licence to construct on the road reserve which fronts its properties and not on the road reserve fronting the land occupied by the second defendant as well as the adjoining land which is used as a playing ground for the pupils of the school.

7. It is clear from the affidavits by the second and third defendants that they are opposed to the car park because it will be a danger to the pupils in that vehicles might plough through the fence and injure pupils. That in the past, vehicles have ploughed through the school fence but fortunately there have been no injuries to pupils. The second and third respondents further contend that the parking might attract motorists from nearby pubs who might park there and that there are likely to be hawkers who might sell drugs to the pupils. That the mixed use Mall which the plaintiff is building might attract tenants who sell wines and spirits which might influence the pupils negatively.

8. I have carefully considered the applicant's application as well as the opposition to the same by the defendants. The first defendant does not deny that it granted a temporary occupation licence to the plaintiff. This licence was granted to the plaintiff on 12<sup>th</sup> July 2017. This grant was pursuant to an application by the plaintiff made on 29<sup>th</sup> June 2017. The application was very particular that the road reserve required was the one across the road. The plaintiff contends that on its side of the plots, there is no road reserve which it could have applied to put up parking space.

9. When the first defendant granted the temporary occupation licence, it referred to the area on the attached drawings which were attached. There was therefore no doubt as to the road reserve which the plaintiff had applied for and which the first defendant granted. Though the first defendant wrote letters to the second and third defendants assuring them that the road reserve fronting their school had not been given out, it is clear that they were acting under pressure from the second and third respondents who had also managed to get another licence over the same area. After the plaintiff moved to court on 15<sup>th</sup> August 2017, the second and third defendants were busy in the offices of the first defendant where a letter was written revoking the licence given to the plaintiff. Though the letter was addressed to the plaintiff, it is the third defendant who took it for service upon the plaintiff. The letter had been copied to the second defendant. Even after the licence had been revoked, the third defendant continued to write to the first defendant which letters received instant response. A case in mind is the third defendant's letter of 17<sup>th</sup> August 2017 which was responded to on the same date.

10. The Plaintiff came to court for injunctive orders. Under such circumstances, the plaintiff is expected to demonstrate that it has a prima facie case with probability of success. A prima facie case does not necessarily mean one which will finally succeed. In the instant case, the plaintiff has demonstrated that it was granted a temporary occupation licence. It made an application which identified the road reserve in question. That space was granted to it as it was identifiable from the attached drawing of the area. The road reserve was across the road. Documents in this case show that the plaintiff moved into the space and started constructing a car park. When the second and third defendants learnt that this is what had happened, they started frustrating the plaintiff by ensuring that the school buses were parked on the road reserve. This is what prompted the plaintiff to come to court. As this was happening, the second and third defendants were busy trying to get the same space which they succeeded. They were doing this even before the revocation. The plaintiff's right had been infringed and it was perfectly in order to seek court protection. The injunctive orders were obtained after the court considered the application letter vis- a vis the licence granted. I do not think that the letter of 29<sup>th</sup> June 2017 was backdated as alleged. The acceptance of the terms of the licence was made on 20<sup>th</sup> July 2017. The licence said that the effective date was 1<sup>st</sup> July 2017. If there was a problem in the stamp by the officials of the first defendant who indicated that the letter was received on 26<sup>th</sup> July 2017, that is the problem with the first defendant which cannot be blamed on the plaintiff.

11. I find that the plaintiff has a prima facie case with probability of success and I reiterate a prima facie case is not one which will succeed at the end of the trail. The plaintiff has to be protected until issues such as which area was given to him has been resolved and this can only be done through a full hearing. There

is also the question of whether the plaintiff's side has a road reserve which would have been subject of the licence given on 12<sup>th</sup> July 2017. I therefore find that the plaintiff's Notice of Motion dated 15<sup>th</sup> August 2017 has merits the same is allowed in terms of prayer **three (3) five (5)** and seven (7).

12. I now come to the second, application dated 18<sup>th</sup> August 2017. This application is inter-related to the one dated 15<sup>th</sup> August 2017. Some of the prayers in this application have been overtaken by events and some have been rendered superfluous because of the findings in the application dated 15<sup>th</sup> August 2017. For example prayer 5 of the application has been rendered superfluous by the decision to grant the injunctive reliefs in the Notice of Motion of 15<sup>th</sup> August 2017. The second and third defendants were seeking to restrain the plaintiff from constructing a car park on the road reserve fronting *LR Nos. Nairobi/Block 93 1049 and 1078*. As confirmed from the further affidavit of the third defendant sworn on 25<sup>th</sup> September 2017, the car park is already complete. The purpose of a temporary injunction is to prevent that which has not happened and not to prevent that which has happened. To this extent no orders of temporary injunction can be granted as prayer six (6) has been overtaken by events.

13. The only prayer which remains for determination is whether a mandatory injunction can be given in terms of prayer 7 of the application. The consideration for granting interlocutory mandatory injunction were well stated in the case of *Kenya Breweries Ltd Vs Washington Okeyo (2002) eKLR* where the court of Appeal stated as follows:-

*“ The test whether to grant a mandatory injunction or not is correctly stated in Vol 24 Halsbury's Law of England 4<sup>th</sup> Edition paragraph 948 which reads:-*

*“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 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”.*

14. In the instant case, this is not a simple matter which can be remedied in a summary manner. The plaintiff who is the defendant in the counter-claim contends that he was granted licence on a road reserve which was opposite its building. The plaintiff contends that there was no road reserve on its side of the road. This is yet to be ascertained. If anything it is the plaintiff in the counter-claim who went and obtained a temporary licence to erect bollards on the road reserve. This was after the defendant in the counterclaim had been given same the road reserve.

15. The second and third plaintiffs in the counter-claim seem to be against not only construction of parking space on the road reserve but also the building itself. A mandatory injunction can only be issued in a very clear case where the court is convinced that at the final hearing, it will come to the same conclusion as in the interlocutory stage. There are no special circumstances which will warrant grant of mandatory injunction at interlocutory stage. I therefore find no merit in the application dated 18<sup>th</sup> August 2017 which is hereby dismissed in its entirety with costs to the defendant in the counter-claim.

16. In summary therefore, the Notice of Motion dated 15<sup>th</sup> August 2017 is allowed in terms of prayers **three (3), five (5) and seven (7)**. The Notice of Motion dated 18<sup>th</sup> August 2017 is dismissed in its entirety with costs to the defendant in the counter-claim.

It is so ordered.

**Dated, Signed and delivered at Nairobi on this 13<sup>th</sup> day of December 2017.**

**E.O.OBAGA**

**JUDGE**

In the presence of;-

Mr Wachira for Plaintiff

Mr Kiingati for the 2<sup>nd</sup> and 3<sup>rd</sup> defendant

Court Assistant: Kevin

**E.O.OBAGA**

**JUDGE**