



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 89 OF 2015**

**JIWEZE DEVELOPMENT LTD & 2 OTHERS.....PLAINTIFFS**

**VERSUS**

**JIM K. KAIRU & ANOTHER.....DEFENDANT**

**RULING**

***(Application for injunction; principles to be applied; plaintiffs being registered owners of suit properties; defendants claiming that the same are public utility and subject to pending judicial review proceedings; properties in the judicial review proceedings being different from suit properties; defendants have not demonstrated any claim over the suit properties; plaintiff establishing prima facie case; application for injunction allowed with costs)***

1. This suit was commenced by way of a plaint filed on 26<sup>th</sup> March 2015. In the plaint, the plaintiffs pleaded that they are the owners of the land parcels numbered Kiambogo/Kiambogo Block 2/19435, 19436, 19437, 19441, 19442, 19443, 19445, 19446, 19447, 19448, 19449, 19450, 19451, 19456, 19460, 19461, and 19287 (Mwariki) (the suit properties) and that the defendants have been interfering with the same without any colour of right. In the suit, the plaintiffs inter alia want a permanent injunction to have the defendants restrained from the suit properties. Together with the plaint, the plaintiffs filed an application for injunction through which they sought to have the defendants restrained from the suit properties pending hearing and determination of the suit. It is this application which is the subject matter of this ruling.

The case of the plaintiffs is as follows :-

2. The 1st plaintiff company purchased a land parcel Kiambogo/Kiambogo Block 2/14285 (Mwariki) from the previous owner on 2nd February 2011. After purchase, they proceeded to subdivide the land into 39 plots which brought forth the land parcels Kiambogo/Kiambogo Block 2/ 19435 - 19473. They sold the rest but retained the parcel numbers 19435, 19436, 19437, 19441, 19442, 19443, 19445, 19446, 19447, 19448, 19449, 19450, 19451, 19456, 19460, and 19461. Later the 2nd plaintiff purchased the parcel numbers 19445-19450.

3. On his part, the 3rd plaintiff purchased the land parcel No. 14287 from one Lucy Wanjiru Njoroge and is now the registered proprietor. Despite their proprietorship, it is their case that the defendants have been interfering with the suit properties by tampering with the beacons, fences and illegally ploughing the same. That is why the plaintiffs want the defendants restrained.

4. The defendants entered appearance and filed a replying affidavit to oppose the application. They stated

that the plaintiffs and themselves had a dispute over the ownership of the land parcel Kiambogo/Kiambogo Block 2/541 which was said to belong to the 2nd defendant company having been set aside for a secondary school. It was averred that a nursery school has been constructed and which is operational in the land parcel No. 541 and 558.

5. It was deposed that the plot No. 541 was grabbed by some two individuals, namely Ernest Maina and Josphat Kamau Kuria and when this was discovered, the defendants filed a case being Nakuru Judicial Review Case No. 35 of 2012. It is stated that the plaintiffs were advised to join this suit but they opted to file this case. It is deposed that the suit properties herein are subdivisions of the land parcel No. 541 which is the subject matter of the judicial review proceedings. They have asked that this suit be consolidated to the judicial review case and that this application be dismissed.

6. On 12<sup>th</sup> October 2015 when the application first came up for inter partes hearing, I directed parties to file a survey report to demonstrate where exactly the nursery school was situated, and deferred the application to 22 October 2015. The defendants did not file anything, but the plaintiffs filed a report prepared by M/s Wahome Werugia, Licenced Land Surveyors. They established that the original parcel No. 14285 from which the 39 subdivisions emanated from, borders a parcel No. 558 which is a public utility plot.

7. There was no development noted on the public utility plot but there was a semi-permanent building on the parcel No. 19435 which is used as a nursery school. It was not however stated, who operates the school.

8. On 2<sup>nd</sup> October 2015, only Mr. Murimi for the plaintiffs appeared. Mr. Gakinya for the defendants did not show up. In his submissions, Mr. Murimi urged me to allow the application for injunction. He was of the view that the suit properties herein are not the same as those which are subject to the the judicial review application. He submitted that there was no basis to deny the plaintiff the injunction sought. He relied on the case of *Nelson Omolo Achola vs George Omondi Ajwala, Kisii ELC Case No. 321 of 2013 (2013) eKLR*.

9. I have considered the pleadings, the various affidavits filed and the submissions of counsel. This is an application for injunction and the principles for the grant of the same were set out in the case of *Giella vs Cassman Brown (1973) EA 358* wherein it was stated that to succeed in an application for injunction, the applicant needs to demonstrate a prima facie case, and show that he stands to suffer irreparable loss. If in doubt, the court will decide the application on a balance of convenience.

10. The plaintiffs have annexed to their application, the title deeds to the suit properties and they same show that the properties belong to them. It is the contention of the defendants that these properties are public utility and are claimed in JR Case No. 35 of 2012. I have looked at the judicial review motion which was annexed to the replying affidavit of the respondents. The land claimed is parcel No. Kiambogo/ Kiambogo Block 2/541 which was said to be public land and which was claimed to have been illegally subdivided into the parcel numbers 14283 and 14284.

11. I do not see the connection between the suit properties herein and the parcel numbers 541 and the resultant subdivisions, namely parcel numbers 14283 and 14284. The plaintiffs purchased the plot No. 14285 which they then proceeded to subdivide into 39 plots. The other independent plot purchased by the 3rd plaintiff is the land parcel No. 14287. These are not the subject matter in the judicial review proceedings. That is the only defence the defendants have raised and having not shown the relationship between these parcels of land, they have failed, prima facie, to demonstrate that they have any claim or any right to be on the suit properties.

12. I am of the view that the plaintiffs have demonstrated a prima facie case with a probability of success. They stand to suffer irreparably if the defendants are allowed to continue with various activities on their properties. I am therefore of the view that the application by the plaintiffs must succeed. I do allow it and restrain the defendants, and/or their servants/agents and/or assigns or any person claiming under them from entering, being upon, interfering with the fences or beacons, or in any other way interfering with the

occupation of the plaintiffs of the suit properties, pending hearing and determination of this suit.

13. The plaintiffs shall also have the costs of this application.

14. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 20<sup>th</sup> January, 2016.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of:-**

Mr D M Gatonye holding brief for Mr. Murimi for plaintiffs/ applicants

No appearance on part of M/s Hari Gakinya & Co. advocates for defendants/respondent

CA: Janet

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**