



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND DIVISION**  
**ELC. CASE NO. 138 OF 2014**

**WACHIRA BERNARD.....1<sup>ST</sup> PLAINTIFF/APPLICANT**

**JOHN KARIUKI.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**KIHARA KANGETHE.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**CITY COUNCIL OF NAIROBI.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

Coming up before me for determination are two applications both filed by the Plaintiffs/Applicants being Notices of Motion dated 27<sup>th</sup> November 2012 and 11<sup>th</sup> December 2012 in which they sought the following orders:

1. That pending the hearing and determination of these Applications and the suit the Defendants be restrained from evicting the Plaintiffs or in any way dealing with the Plaintiffs' leasehold interest in Shop No. 5 Shauri Moyo ex-pangani (hereinafter referred to as the "suit premises");
2. That the 1<sup>st</sup> Defendant be ordered to pay to the Plaintiffs rent arrears for the suit premises accruing from August 2012 to date failure of which the Plaintiffs be at liberty to levy distress;
3. That the costs of these Applications be borne by the Defendants.

The Applications are premised on the grounds appearing on the face of them together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff, Bernard Wachira, sworn on 11<sup>th</sup> December 2012 in which he averred that he together with the 2<sup>nd</sup> Plaintiff are the joint administrators of the estate of the late Bernard Wachira Gachira also known as Macharia wa Gacharia who was allocated the suit premises by the 2<sup>nd</sup> Defendant in the late 1930s. He further averred that upon the death of Macharia wa Gacharia, both he and the 2<sup>nd</sup> Plaintiff took over possession and occupation of the suit premises and subsequently sublet it to the 1<sup>st</sup> Defendant. He further averred that the 1<sup>st</sup> Defendant in collusion with the 2<sup>nd</sup> Defendant with a view to defeating the Plaintiffs' interest in the suit premises have entered into an uncontractual and unlawful arrangement where the 1<sup>st</sup> Defendant, who is their subtenant, fails to pay rent to the Plaintiffs but instead pays the rent to the 2<sup>nd</sup> Defendant. He further averred that the Defendants' actions are contrary to the court order issued by the High Court in **HCCC No. 422 of 1980** preserving the head tenancies and sub-

tenancies relationship by reason of which the Plaintiffs have suffered loss and damage.

The Applications are contested. The 1<sup>st</sup> Defendant, Kihara Kangethe, filed his Replying Affidavit sworn on 31<sup>st</sup> January 2013 in which he averred that his mother, Mary Wanini Kamau, who passed on in the year 2009, was running the shop at the suit premises since the early 1970s and was paying rent to the 2<sup>nd</sup> Defendant. He further averred that he joined his mother in running the shop in the year 1984 and completely took over in the 1990s due to his mother's failing health. He further averred that at no time did he or his mother deal with the Plaintiffs as they were paying rent to the 2<sup>nd</sup> Defendant. He then stated that sometime in the year 2008, the Plaintiffs sent auctioneers claiming arrears in rent but that the Business Premises Tribunal in **BPRT Case No. 995 of 2009** held that he continue to pay rent of Kshs. 5,000/-. He further averred that upon his application and in the presence of the 1<sup>st</sup> Plaintiff, the 2<sup>nd</sup> Defendant subdivided the suit premises from the residential property which is occupied by the 1<sup>st</sup> Plaintiff and gave the shop to him. He further averred that the dispute involving the 2<sup>nd</sup> Defendant's houses in **HCCC No. 422 of 1980** where an order was granted on 18<sup>th</sup> September 1980 only relates to the residential premises and not the shops. He concluded by stating that he has been running his business from the suit premises for almost 30 years since he took over from his deceased mother and that the injunctive orders sought by the Plaintiffs are meant to evict him from the suit premises at a preliminary stage before the entire suit is heard and determined.

The Applications are further contested by the 2<sup>nd</sup> Defendant which filed its Grounds of Opposition dated 6<sup>th</sup> December 2013 in which they stated as follows:

1. That the Plaintiffs/Applicants were strangers to the 2<sup>nd</sup> Defendant, that they did not attend or participate in **HCCC No. 422 of 1980** and that the orders issued in that case do not apply to them.
2. That the Plaintiffs/Applicants have not been evicted by the 2<sup>nd</sup> Defendant as alleged or at all.
3. That the orders of injunction as against the 2<sup>nd</sup> Defendant will cause grave injustice and hardship.
4. That the balance of convenience tilts in favour of the status quo being maintained pending the hearing and determination of the main suit.
5. That the alleged hardship suggested by the Plaintiffs is grossly exaggerated and no evidence has been produced in proof thereof and further that the same can be repaired in damages or an action under the Distress for Rent Act.

Both the Plaintiffs and the 1<sup>st</sup> Defendant filed their written submissions which have been read and taken into account in this ruling.

The Plaintiffs are seeking for an order of temporary injunction restraining the Defendants from evicting them out of the suit premises or dealing with the suit premises in any way and further that the 1<sup>st</sup> Defendant be compelled to pay the Plaintiffs the rent arrears for occupying the suit premises from August 2012 to date. In deciding whether to grant the temporary injunction sought after by the Plaintiffs, 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.”**

Have the Plaintiffs 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.”**

Looking at the facts of this case, the Plaintiffs assert that they are entitled to receive rent for the suit premises on the grounds that they are the administrators of the estate of the late Macharia wa Gacharia who was allocated the suit premises by the 2<sup>nd</sup> Defendant by way of Lease Agreement dated 1<sup>st</sup> January 1972. The Plaintiffs have however not produced any letters of administration to verify their appointment as the joint administrators of the estate of the late Macharia wa Gacharia. Further, the Plaintiffs have not produced a confirmation of grant to show that apart from being the administrators of the estate of the late Macharia wa Gacharia, they are also the beneficiaries of the leasehold interest in the suit premises. In these circumstances, it is not even clear whether the Plaintiffs have any right whatsoever to file this suit. With this very critical preliminary point not cleared, this court cannot issue any orders herein.

In light of the foregoing, these Applications are hereby dismissed with no order as to costs.

**DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF APRIL 2015.**

**MARY M. GITUMBI**

**JUDGE**