



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC NO. 107 OF 2014

**THE CHAIRMAN, THE SECRETARY &
TREASURER OF THE BOARD OF GOVERNORS
OF KAMUKUNJI SECONDARY SCHOOL..... 1ST PLAINTIFF
MIKE GIDEON MBUVI SONKO..... 2ND PLAINTIFF**

VERSUS

**INTER-COUNTRIES IMPORTERS &
EXPORTERS LIMITED.....1ST DEFENDANT
NAIROBI CITY COUNTY.....2ND DEFENDANT
ATTORNEY GENERAL ON BEHALF OF THE
CABINET SECRETARY
MINISTRY OF LANDS.....3RD DEFENDANT**

RULING

Coming up before me for determination is the Notice of Motion dated 6th February 2014 in which the Plaintiffs/Applicants seek for orders of temporary injunction restraining the Defendants from entering, trespassing, excavating, damaging or otherwise howsoever interfering with the 1st Plaintiff's quiet enjoyment, possession and occupation of the parcel of land known as L.R. No. 209/12623 (hereinafter referred to as the "suit property") pending the hearing and determination of this suit.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Patrick Waweru Gakungu, the Principal and Secretary to the Board of Governors of the 1st Plaintiff, sworn on 6th February 2014 in which he averred that the 1st Plaintiff is a public secondary school within the Nairobi City County established and registered in 1989 as a community school. He annexed a copy of a certificate of title in respect of the suit property issued on 1st October 1938 in the

name of the 2nd Defendant then known as the Municipal Council of Nairobi and averred that being under the 2nd Defendant's control, the 1st Plaintiff was allocated the suit property. He stated further that the 1st Plaintiff used the suit property as a school playing ground. He, however, admitted that despite several pleas to the 2nd Defendant to issue the 1st Plaintiff with an allotment letter in respect of the suit property for use in processing the title deed with the Ministry of Lands, the same has not been availed as a result of which the 1st Plaintiff does not have any ownership documents for the suit property to date. He then stated that in the year 1997, it was brought to their attention that the suit property had been illegally leased to the 1st Defendant. He then averred that the 1st Plaintiff raised the issue with the area representatives as well as in parliament. He added that various attempts via correspondences between the various ministries were exchanged but the 1st Defendant's title to the suit property has never been cancelled. He stated that in the year 2012, the 1st Defendant who had not previously entered the suit property commenced excavations therein resulting in various demonstrations by the community in opposition thereto. He stated that due to this opposition, the 1st Defendant resorted to excavating the suit property at night carrying away soil, creating valleys and holes that endangered the students, destroyed sewerage pipes laid down thus creating health risks to the students. He concluded by stating that the 1st Defendant has vowed to continue the said acts of trespass and destruction unless restrained by this court.

The Application is further supported by the Supporting Affidavit of the 2nd Plaintiff, Mike Gideon Mbuvi Sonko, sworn on 6th February 2014 in which he averred that the 1st Plaintiff raised a complaint with his office seeking his assistance in claiming back its illegally allocated school playing field from the 1st Defendant. He further averred that upon a follow up with the 2nd Defendant, he found out that the suit property was public land held in trust by the then Municipal Council of Nairobi for public use and not subject to alienation or transfer. He revealed that a search with the Lands Office revealed that the 1st Defendant had been illegally allocated the suit property to the detriment of the 1st Plaintiff. He added that the 2nd Defendant has promised severally to rectify the anomaly and illegality but to no success hence prompting them to file this suit.

The Application is contested. The 1st Defendant filed the Replying Affidavit of Naushad Abid, its Director, sworn on 24th March 2014 in which he averred that the County Government of Nairobi is the registered owner of the suit property by a grant registered on 1st October 1938 for a term of 99 years in favour of its predecessor the Municipal Council of Nairobi and that on 8th March 1996 the City Council of Nairobi leased out the suit property to the 1st Defendant for a period of 99 years from 1st October 1929. He annexed a copy of the lease document. He further averred that in correspondence the Ministry of Lands confirmed that the suit property does not belong to the 1st Plaintiff but instead belongs to the Nairobi City Council which had leased it to the 1st Defendant. He further averred that the 1st Defendant has been in possession of the suit property since 1996 and has been paying land rates as required without any protest. He further averred that the 1st Defendant made an application to Nairobi City Council for change of user of the suit property from a slaughter house to a commercial plot and the same was approved on 8th February 2012. He added that the 1st Defendant wanted to develop the suit property and applied for an Environmental Impact Assessment study which was conducted and an Environmental Impact Assessment Licence was issued by the National Environmental Management Authority on 17th November 2011. He also stated that the 1st Defendant applied for approval of plans for construction of a boundary wall around the suit property to the City Planning Department and the same was approved. He confirmed that the boundary wall cost the 1st Defendant Kshs. 40 million to construct. He added that a survey was done on the suit property by the City Council of Nairobi to clearly establish the boundaries thereof and a beacon certificate was issued on 31st March 2011. He then stated that in view of the foregoing, it is clear that the 1st Defendant is the lessee of the suit property and that this Application should be dismissed with costs to the 1st Defendant.

The issue that I am called upon to determine is whether or not to issue the Plaintiffs/Applicants the temporary injunction that they seek. In deciding whether to grant the temporary injunction sought after by

the Plaintiffs/Applicants, 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/Applicants 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.”

Have the Plaintiffs/Applicants made out a prima facie case? In determining whether the Plaintiffs/Applicants have established a prima facie case, I must consider whether they have demonstrated their ownership rights over the suit property. This no doubt leads me to an examination of the title documents that they have presented, if any. By their own admission, the Plaintiffs state that they have never received a letter of allotment or any other ownership documents from the 2nd Defendant or from the Ministry of Lands. The documents they have sought to rely upon in their claim over the suit property are copies of correspondences exchanged between various government institutions and individuals. On the other hand, the 1st Defendant, which claims to be a lessee of the suit property, has produced to the court a copy of their lease document entered into between them and the City Council of Nairobi dated 8th March 1996 indicating that they were granted a leasehold over the suit property for a term of 99 years from 1st October 1929. The Plaintiffs allege that this document was obtained illegally. However, no evidence has been produced in this court that goes to prove that assertion. In light of this background, I am of the considered view that the Plaintiffs are yet to establish that they have a valid and good claim over the suit property which warrants issuance of the orders they seek.

Since the Plaintiffs have failed to prove the first ground in the grounds set down in the celebrated case of **Giella versus Cassman Brown**, this Honourable Court need not venture into the other grounds. This position was upheld in the Court of Appeal case of **Kenya Commercial Finance Co. Ltd versus Afraha Education Society (2001) 1 EA 86** as follows:

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is ... sequential so that the second condition can only be addressed if the first one is satisfied...”

In light of the foregoing, I hereby dismiss this Application. Costs shall be in the cause.

DELIVERED AND SIGNED IN NAIROBI THIS 12TH DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE