



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ENVIRONMENT AND LAND DIVISION**

**ELC. CASE NO. 948 OF 2013**

**KENYA BUILDERS & CONCRETE LIMITED .....PLAINTIFF**

**VERSUS**

**NAIROBI CITY COUNTY..... DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 31<sup>st</sup> July 2013 in which the Plaintiff/Applicant seeks for orders of temporary injunction restraining the Defendant/Respondent from closing down or in any way interfering with the Plaintiff/Applicant's business or in any manner entering, trespassing upon or purporting to evict the Plaintiff/Applicant from its property known as L.R. No. 7086 Mihango, Embakasi, Nairobi (hereinafter referred to as the "suit property") pending the hearing and determination of this Application and suit and that costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Dhirajlal Ramji Patel, a Director of the Plaintiff/Applicant, sworn on 31<sup>st</sup> July 2013 in which he averred that the Plaintiff/Applicant is the registered owner of the suit property measuring approximately 32.8 acres. He produced a copy of the Conveyance and a Certificate of Postal search evidencing this assertion. He further averred that the Plaintiff/Applicant is carrying on the business of a quarry on the suit property, mining construction and building stones and has employed over 250 employees and has heavily invested in machinery. He further averred that he holds the requisite licences issued by the Defendant giving him authority to carry on his business. He further stated that the Plaintiff/Applicant also obtained the relevant mining authority from the National Environmental Management Authority (NEMA) and that the Plaintiff/Applicant has observed and adhered to all the terms and conditions imposed by the Defendant/Respondent and NEMA in the respective licenses. He further averred that by a letter dated 18<sup>th</sup> July 2013, the Defendant/Respondent purported to issue a notice to the Plaintiff/Applicant requiring it to close down its business and vacate the suit property within 7 days for allegedly causing noise and excessive vibration, cloud dusts and toxic fumes. He stated that those allegations are untrue and are aimed at illegally dispossessing the Plaintiff/Applicant of the suit property and possibly allocating it to another person. He further stated that NEMA which is the legal authority mandated to raise such complaints has not raised any complaint neither have any neighbors or the public at large raised any complaints. He further stated that the Plaintiff/Applicant stands to suffer irreparable loss and damage if the Defendant/Respondent executes its threat to close its business down as the Plaintiff/Applicant purchased the suit property for valuable consideration.

The Application is opposed. The Defendant filed the Replying Affidavit of N.M. Mungalla, the Deputy Director of Legal Affairs for the Defendant, sworn on 28<sup>th</sup> August 2013 in which he averred that the Plaintiff/Applicant has been carrying out quarrying activities on the suit property since the year 2001. He further averred that by a memo dated 5<sup>th</sup> March 2001 from the Provincial Commissioner, Nairobi, the Plaintiff/Applicant was asked to move out of Kayole Embakasi quarries to Athi River. He further stated that by another memo dated 3<sup>rd</sup> October 2007, the Plaintiff/Applicant was notified of closure of quarries in Nairobi Province. He further stated that the memos were sent to the Plaintiff/Applicant because it was not carrying out its quarrying activities in accordance with the Environmental Management and Coordination Act. He further indicated that the Plaintiff/Applicant's activities resulted in noise and excessive vibration, cloud dust and toxic fumes that visibly affected the flora and fauna in Mihango/Njiru and its environs. He further stated that the Defendant/Respondent was mandated to regulate the activities upon the land within its jurisdiction and has an obligation to promote public interest and take action where such interests are threatened. He also stated that since the notice of closure of quarries within Nairobi province, the Plaintiff/Applicant has been making several applications for extension of time with a promise to wind up, cease its operation and vacate which permissions has been extended from time to time. He indicated further that the Plaintiff/Applicant has never had permission to continue its activities indefinitely.

The Plaintiff/Applicant and the Defendant /Respondent filed their written submissions which have been read and considered in this ruling.

In deciding whether to grant the temporary injunction sought after by the Plaintiff, 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 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 Plaintiff has demonstrated its ownership of the suit property by producing to this court his title deed as well as a certificate of official search. It is on this basis that the Plaintiff has come to court seeking the protection of this court from eviction out of its own property and from the closure of its business by the Defendant/Respondent. The Defendant/Respondent has admitted that the Plaintiff/Applicant is the registered proprietor of the suit property. However, the Defendant/Respondent has sought to restrict the activities that the Plaintiff/Applicant can undertake in the suit property by banning the quarrying activities thereon and seeking its relocation to Athi River. It is not immediately clear on what basis or the source of the Defendant/Respondent's power to make such orders. The Plaintiff/Applicant has contended that the Defendant/Respondent has no such powers and that NEMA is the one which has the mandate to issue orders relating to the use of land to protect the environment. The Plaintiff/Applicant further argued that NEMA has granted it a license to conduct quarrying activities in the suit property. According to section 9(1) of the Environmental Management and Coordination Act, the main object and purpose of NEMA is to exercise general supervision and coordination over all matters relating to the environment in Kenya. NEMA is not a party to this suit. It is

therefore not clear under what law the Defendant/Respondent seeks to control the use of the suit property by the Plaintiff/Applicant. Further, the law is categorical on the position of a registered proprietor of land. Section 24(a) of the Land Registration Act provides as follows:

**“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”**

Clearly, a registered proprietor is entitled to exercise all rights and privileges relating to the land including extraction of any valuable resources as the Plaintiff/Applicant is doing in the suit property. To that extent therefore and as we await the full trial, I find that the Plaintiff/Applicant has established a prima facie case with high chances of success at the full trial.

Does an award of damages suffice to the Plaintiff/Applicant? Land is unique and no one parcel can be equated in value to another. The value of the suit property can be ascertained. However, it would not be right to say that the Plaintiff can be compensated in damages. I hold the view that damages are not always a suitable remedy where the Plaintiff has established a clear legal right or breach. See **JM GICHANGA versus CO-OPERATIVE BANK OF KENYA LTD (2005) eKLR.**

Being not in doubt, I see no reason to determine in whose favour the balance of convenience tilts.

Arising from the foregoing, I hereby allow the Application. Costs shall be in the cause.

**DELIVERED AND SIGNED IN NAIROBI THIS 26<sup>TH</sup>**

**DAY OF JUNE 2014.**

**MARY M. GITUMBI**

**JUDGE**