



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 1377 OF 2013**

**SUSAN MUKAMI KAMWATI.....1<sup>ST</sup> PLAINTIFF**

**LYDIA WANJIRU KARIUKI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**ELITE PAKA SERVICE LIMITED..... DEFENDANT**

**RULING**

**The Plaintiffs' Application**

The Plaintiffs are seeking the various orders hereinbelow in their application filed in court by way of a Notice of Motion dated 12<sup>th</sup> November 2013:

1. A temporary injunction restraining the Defendant from further destroying and blocking the parking or excavating the land on which the suit properties stand pending the hearing and determination of this suit.
2. A temporary injunction restraining the Defendant from interfering with the Plaintiffs' quiet possession of the suit premises pending the hearing and determination of this suit.
3. A mandatory injunction commanding the Defendant to restore the Plaintiffs' properties to the condition they were in prior to the breach and destruction alleged.
4. That the Defendant deposits in an escrow account in the joint names of the Advocates a sum of Kshs.160,000/= every month with effect from the date of filing this suit until the hearing and determination of this suit.

The grounds for the application are detailed in the supporting affidavit and further supporting sworn by the 1<sup>st</sup> Plaintiff and 2<sup>nd</sup> Plaintiff respectively on 12<sup>th</sup> November 2013, and a further affidavit sworn by the 1<sup>st</sup> Plaintiff on 2<sup>nd</sup> May 2014. The suit properties herein are apartments Number 18 and Number 12 in Block C which are constructed on the property known as known as L.R. No. 209/1052/1 (hereinafter "the suit property"). The Plaintiffs aver that they are the purchasers of the said properties from the Defendant by way of sale agreements dated 13<sup>th</sup> December 2011 (as varied on 18<sup>th</sup> July 2012) and 19<sup>th</sup> April 2012, copies of which were attached. Also attached were copies of the leases entered into between the Plaintiffs and Defendant with respect to the suit properties which were registered on 12<sup>th</sup> April 2012.

The Plaintiffs further claim that the Defendant in breach of the said agreements has since September 2013 embarked on destruction of the suit properties by demolishing and/or destroying the common staircase leading to the suit properties, excavating the land on which the apartments

stand and obstructing the designated parking of the Plaintiffs' apartments thereby making them inaccessible. Further, that the Plaintiffs' houses have been vacated or are being vacated by tenants on account of the breach by the Defendant thereby occasioning the Plaintiffs to suffer loss. The Plaintiffs also claim that contrary to the sale agreements there were no approved plans availed at the site office and neither have the same been exhibited, and that the intended construction being undertaken by the Defendant is being carried out illegally and contrary to law.

### **The Defendant's Response**

The Defendant's response is in a Replying Affidavit sworn on 26<sup>th</sup> November 2013, and a Further Affidavit sworn on 26<sup>th</sup> February 2014 by Patrick Mwangi Kibaiya, a Director of the Defendant. The deponent admits that the Defendant entered into a sale agreement and lease with the Plaintiffs, and states that the parties are bound by the terms of the said agreements. Further, that pursuant to the said terms of the agreements, the Respondent commenced the process of erecting additional residential apartments on the suit property in November 2013, and that the Plaintiffs were well aware at the time of executing the sale agreement and tenancy agreements that the Defendant would eventually commence construction works, and further, that they did not vary or formally challenge this term of the agreement.

The Deponent denied that the Defendant had trespassed on the Plaintiff's property, and stated that the Defendant has only carried out developments on the relevant blocks on the suit property, that is Blocks D, E & F. Further, that the suit property has six blocks of apartments, namely Blocks A, B, C, D, E, and F which are distinct and independent from each other, and that the construction of one block does not affect access or tenability of the other.

The deponent further stated that the Defendant is a third party to the tenancy agreements between the Plaintiffs and their tenants, and cannot be made liable for any loss out of a contract that it is a stranger to and which arises from the non-disclosure by the Plaintiffs of material facts to the tenants. Further, that the Defendant was not a party to the contracts between the Plaintiffs and their financiers, and thus cannot bear any liability occasioned for default of payment by the Plaintiffs. The deponent also alleged that the Plaintiffs have new tenants in the premises and had mislead this court that the said construction works have occasioned them loss. He annexed photographs showing that the said apartments are occupied by tenants.

Lastly, the Defendant averred that it has taken a facility to finance the development of the additional apartments, and any order for stay of the construction will occasion it tremendous and irreparable loss as the facility is subject to the construction of the additional residential apartments. It was also alleged that that the Plaintiffs had not come to court with clean hands as they had written to the Defendant's financiers in an effort to frustrate it from getting a loan advancement towards the construction of the additional residential apartments. A copy of the said letter was attached.

### **The Submissions**

This Court issued directions that the parties do file and exchange submissions, which submissions were highlighted by the parties counsel in court on 12<sup>th</sup> May 2014. The counsel for the Plaintiff filed submissions dated 14<sup>th</sup> March 2014 and submissions in reply dated 2<sup>nd</sup> May 2014, wherein she reiterated the facts of the application and submitted that the Plaintiffs are entitled to the relief sought under the provisions of Order 40 Rules 1, 2, and 4 of the Civil Procedure Rules. The counsel submitted that the rights of the Plaintiffs had been infringed as the Defendant had interfered with their use of the common places contrary to clauses 1.1.2, 1.1.5 and 1.1.9 of the leases they entered into and Article 40 of the Constitution. The counsel urged the court to be guided by the principles set out in the case of **Giella vs Cassman Brown & Co Ltd, (1973) EA 358**, and also relied on section 26 of the Land Act of 2012 to argue that the Defendant was bound by the terms of the lease and that its actions are fraudulent and in breach of the memorandum and articles of the management company.

The Advocate for the Defendant filed submissions dated 19<sup>th</sup> March 2014, wherein they relied on the principles set out in **Giella vs Cassman Brown & Co Ltd (supra)** as confirmed in the case of **Joseph Wachira Wamuru vs Savings & Loan (K) Ltd (2010) eKLR**. The counsel submitted that the prayers in the Plaintiffs' application had been overtaken by events as the Plaintiffs both purchased apartments on Block C of the suit property, and the apartments that were demolished were Block D, E & F which are distinct and independent of Block C, and that the Defendant is in the process of developing additional property on the site where the said blocks once stood. The counsel relied on the decision in **Republic vs Minister for Agriculture & 6 Others (2013) e KLR** that the court does not issue orders in vain.

The counsel further submitted that the Plaintiff were aware of the terms of the agreement and correspondence as to the demolition of, and development of apartments on the suit property, and were bound by the said terms, and cannot therefore seek the court to rewrite the terms and conditions of contracts they executed. The Defendant relied on the decision in **Patrick Pakiro Odeke T/A Airport Africana Restaurant vs Kenya Airport Authority (2013) e KLR** that the courts role in such circumstances is to enforce the contracts the parties entered into. The Defendant also argued that the Plaintiffs were bound by their pleadings in which the issue of the approved building plans had not been raised, and cited the decision in **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule and 3 Others (2014) e KLR** in this regard.

It was also submitted that since the Defendant is the registered owner of the suit properties it cannot trespass on the same, neither can the Plaintiffs claim mesne profits from it. The Defendant relied on the decision in **Joan Wairimu Mbuthia & Another vs Peninah Wanjiku Mugo (2013) e KLR** in this respect. Lastly, the Defendant submitted that the Plaintiffs' damage was quantifiable, and convenience tilted in its favour as it was conducting major construction, and relied on the decision in **Peter Kinuthia Waithaka vs Tom Ochieng T/A M'Oketchy Auctioneers & 3 Others (2005) e KLR** in this regard.

### **The Issues and Determination**

I have read and carefully considered the pleadings, annexed evidence and submissions made. The issue to be determined is whether the Plaintiffs have met the threshold for the grant of the temporary and mandatory injunctions sought. I will therefore proceed to determine the Plaintiffs' Notice of Motion on the basis of the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction, and also to determine if the Plaintiff has in addition shown any special circumstances to entitle him to the mandatory injunctions sought as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**.

The principles in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction are that the applicant must establish a *prima facie* case, and that he or she would suffer irreparable loss which may not be compensated by an award of damages. If the Court finds that the two requirements are not satisfied, it may decide an application on the balance of convenience.

The first question I must therefore answer is whether the Plaintiff has established a *prima facie* case. A *prima facie* case was defined by the Court of Appeal in **Mrao Ltd v First American Bank of Kenya Ltd & 2 Others [2003]KLR 1215** 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.”**

The Plaintiffs have availed evidence of the sale agreement and leases entered into with the

Defendant with respect to apartments 12 and 18 in Block C on the suit property to argue that the terms therein have been breached, and that their rights have thereby been infringed. The Defendant also relies on the said sale agreements and leases to argue that the Plaintiffs had agreed to the construction on the suit properties. The relevant provisions in this regard of the sale agreement are paragraph B in the Recitals and clause 5.1 that deal with development on the suit property. Paragraph B of the Recitals states as follows:

**“There exists on the Land Twenty Four (24) residential apartments and the Vendor is in the process of erecting and completing a gym and additional residential apartments on the Land. The residential apartments together with pathways, driveways and other usual amenities hereinafter referred to as “the Estate” in accordance with the approved Building Plans which are available for inspection at the Vendor’s offices.”**

Clause 5.1 of the sale agreement provides more details on the future developments on the suit property thus:

**“The Vendor has erected Twenty Four (24) residential apartments and shall erect and complete additional residential apartments and a gym pursuant to the Agreement for Sale as more particularly detailed in the plans available at the site office at the Estate available for inspection by the Purchaser and the Purchaser shall be deemed to have approved and accepted the same prior to the execution of this Agreement. The Vendor hereby covenants and undertakes to complete the works and finishes on the said Property in accordance with good workmanship”**

In addition the effect of the sale agreements *vis-a-vis* the leases that were subsequently entered into between the Plaintiffs and Defendant is stated in clause 9.1 of the leases, which provides as follows:

**“This Agreement together with the Agreement for Sale contains the entire agreement and understanding between the parties and supersedes all prior discussions and agreements concerning the subject matter hereof. The Lessee acknowledges has not been entered into in reliance wholly or partly on any statement or representation made by or on behalf of the Lessor and/or the Management Company except any such statement or representation that is expressly set out in this Lease or the Agreement for Sale.”**

From the above provisions it is evident that the Plaintiffs were aware and did agree to the Defendant undertaking more developments on the suit property as they executed the sale agreement and leases. The only claim that the Plaintiffs can therefore raise at this stage is with regards to the legality, reasonableness and workmanship of the Defendant in carrying out the said developments on the suit property.

The court in this regard visited the *locus in quo* on 28<sup>th</sup> March 2014 and observed that there are twelve apartments on the suit property which are located in 3 blocks. Each apartment is allocated one parking space and four extra parking spaces are available for visitors. The apartments and parking spaces are all accessed through one common gate. There was a construction site that had been excavated and cordoned off by an iron sheeting fence. The said site was not accessible from the apartments, but through a different independent road. The court also observed that access to the apartments in Block C was by a stairway that has been cordoned off from the adjacent construction site with a glass and iron burglar proofed wall. In addition the court observed that the interference with the Plaintiffs’ use of the premises was in the circumstances minimal, and as would be expected with the adjacent developments.

However, these observations notwithstanding, the Defendant failed to address the issue raised in the Plaintiffs’ pleadings and submissions as to whether the building plans and developments on the suit property has been approved as required by Paragraph B of the Recitals to the Sale agreement entered into by the parties herein, and according to the applicable laws. While this court will not aid

parties to break the terms of a contract they willingly entered into, it will also not allow any illegal development even if it is being undertaken pursuant to contractual provisions.

In the circumstances I am of the view that the Plaintiff's application is one that can only be determined on the basis of a balance of convenience. In this regard I note that the Plaintiffs still have access to, and the use of their apartments, and the party that is likely to suffer the most inconvenience is the Defendant who has taken out a facility to finance its intended development on the suit property. I will therefore only restrain the Defendant from undertaking any further construction and/or developments on the suit property, pending the provision by the Defendant of evidence that they have complied with all the applicable laws and obtained the necessary approvals to undertake the said construction and/or developments on the suit property. The Defendant shall accordingly be at liberty to apply.

The question as to whether the Plaintiff has met the threshold for the grant of orders of the mandatory injunction sought is therefore moot. It was held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. As explained in the foregoing, the Plaintiffs are bound by the terms of the contracts they entered into, and in this regard allowed the Defendant to undertake further developments on the suit property. In addition, the court did not observe any destruction of, or interference by the Defendant of the Plaintiff's apartments. Furthermore, the temporary injunction granted hereinabove will be sufficient to address the Plaintiffs concerns and interests in ensuring that the developments on the suit property by the Defendant is undertaken within the parameters of the law. The mandatory injunctions sought therefore cannot lie and are hereby denied.

The costs of the Plaintiff's Notice of Motion dated 12<sup>th</sup> November 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 1<sup>st</sup> day of July , 2014.

**P. NYAMWEYA**

**JUDGE**