



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**  
**ELC SUIT NO. 1050 OF 2013**

**DAYKIO PLANTATIONS LIMITED.....PLAINTIFF**

**VERSUS**

**JOHN AYAWO ONEKO ..... 1<sup>ST</sup> DEFENDANT**

**MORRISON NDUNG’U.....2<sup>ND</sup> DEFENDANT**

**JOHN WANJOHI MUNDUIA.....3<sup>RD</sup> DEFENDANT**

**DUNCAN KAMAU KINYUA.....4<sup>TH</sup> DEFENDANT**

**NICHOLAS KINYAUA.....5<sup>TH</sup> DEFENDANT**

**THOMAS OMBARA.....6<sup>TH</sup> DEFENDANT**

**RULING**

**The Application**

The application before this Court for determination is a Notice of Motion dated 30<sup>th</sup> August 2013 filed by the Plaintiff seeking a temporary injunction against the Defendants to restrain them from entering, excavating, stone mining, damaging and/or in anyway dealing with Land Reference Number 8442 located at Mwiki Njiru in Nairobi County (hereinafter “the suit property”). Further, that the OCPD Kayole Police Station and the OCS Mwiki Police Station do provide police protection while the orders herein are being served upon the Defendants.

The Plaintiff in a supporting affidavit sworn on 30<sup>th</sup> August 2013 by its Manager, Patricia Sheth, states that it is the registered owner of the suit property. Further, that the Plaintiff had been enjoying quiet and uninterrupted possession of the land until 29<sup>th</sup> August 2013, when the Defendants and/or their servants, agents and employees entered on the suit property and started excavating and stone mining activities thereon.

The deponent stated that the Plaintiff has not leased out the suit property land and/or allowed anyone to excavate and/or mine stones thereon, and that the Defendants are causing wanton destruction of the said

property due to the many people they have put thereon, and have caused many open excavations, holes and gullies that on the said land. The deponent attached a copy of the Plaintiff's title to the suit property, and photographs showing the excavations on the suit property. The deponent also wore a supplementary affidavit sworn on 25<sup>th</sup> April 2014, wherein she reiterated that the land on which the Defendants were undertaking mining activities belonged to the Plaintiff, who had not given any person a licence to mine or extract stones from the suit property.

### **The Defendants' Response**

The Defendants opposed the Plaintiff's Notice of Motion in a replying affidavit sworn on 18<sup>th</sup> February 2014 by the 1<sup>st</sup> Defendant. The Defendants averred that the Plaintiff's application is incompetent and bad in law, as there is no company resolution authorizing the filing of this suit, nor was authority given to the deponent to make and execute any affidavit on its behalf. Further, that the firm of Wainaina & Karimi Advocates are not properly on record as acting for the Plaintiff, either by way of any written authority or resolution from the directors.

The Defendants contended that they have been in possession of the suit property, and have been excavating stones for commercial purposes for 6 years without any interference or injunction from anybody including the Plaintiff, and that the owners of the land who are well known have never raised any objection nor opposed the mining of stones on their land. Further, that that contrary to the Plaintiff's assertions, the suit property has been designated and set aside for stone quarry business, and as such the Defendants' actions in mining are within the activities permitted on the usage of the suit property.

### **The Submissions**

The parties were directed to file written submissions on the Plaintiff's application, and the Plaintiff's counsel filed submissions dated 25<sup>th</sup> April 2014. He argued that the Plaintiff had met the requirements for the grant of a temporary injunction as laid down in **Giella vs Cassman Brown & Co. Ltd (1973) E.A 358** and **Mrao Ltd vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125**. Further, that it had shown that it is the registered owner of the suit property which is privately owned land, and that its rights had been infringed on by the Defendant's actions of excavating on the said property.

Further, that in view of the nature of the activities being carried by the Defendants on the suit property, the Plaintiff will suffer irreparable harm as it will not be possible to restore the suit property to its previous state. Lastly, that the balance of convenience is in favour of the Plaintiff as the Defendants are trespassers on its land.

The Defendants' counsel filed written submissions dated 15<sup>th</sup> July 2014, wherein he argued that the Plaintiff had not shown any ownership documents to the suit property, and that the documents in the Defendants' possession show that the owner of the suit property was the late President Jomo Kenyatta who had approved their occupation.

The counsel relied on the decisions in **Kariuki Njoroge and Others vs Stephen Mugo Mutothori and Others, H.C.C.C No 609 of 2004**; **Impak Holdings Co. Ltd vs Come-Cons Africa Ltd & Another, HCCC No. 605 of 2012**; **East African Portland Cement Ltd vs The Capital Markets Authority and 5 Others, Petition No. 600 of 2013**, and **East African Safari Air Limited vs Anthony Ambaka Kegode & Another (2006) e KLR** in support of his position that the Plaintiff did not have authority to institute the suit without a valid resolution by the company, neither were the Advocates on record authorized by resolution to represent the Plaintiff.

Lastly, the counsel cited Order 4 Rule 1(4) of the Civil Procedure Rules and the cases of **Donwoods Company Ltd vs Chemusian Company Ltd, (2014) e KLR** and **Bactlab Limited vs Bactlabs E.A. Ltd & 5 Others (2012) e KLR** in his submissions that the deponent Patricia Sheth had no authority to swear affidavits on behalf of the Plaintiff.

## **The Issues and Determination**

I have carefully read and considered the pleadings and arguments made by the parties herein. The Defendant has raised a preliminary issue as to whether the Plaintiff's suit and application are properly before the Court. The Defendants' argument is that there is no company resolution by the Plaintiff authorizing the institution of this suit, or appointing the Plaintiff's Advocates to act. They also relied on Order 4 Rule 1(4) of the Civil Procedure Rules which provides that where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.

My view on this preliminary issue is that firstly, the Defendants ought to raise it by way of a substantive preliminary objection so that it can be argued and determined on merit. Secondly, Patricia Sheth, who is a Manager of the Plaintiff in her verifying affidavit and supporting affidavit clearly depones to having the authority of the Plaintiff to swear the said affidavits.

This Court will therefore proceed to address the primary issue for determination, which is whether the Plaintiff has met the requirements stated in **Giella vs Cassman Brown & Co Ltd, (1973) EA 358** as to the grant of a temporary injunction. These 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.

It is my finding in this regard that the Plaintiff has established a *prima facie* case, as it has provided evidence of its title to the suit property, which was transferred to it on 10<sup>th</sup> July 2007. In addition, the Defendants did not bring any evidence of their claim that the suit property had been set aside for mining activities. In any event the suit property is no longer registered in the name of the late Jomo Kenyatta as the Defendants claim in their submissions, and is now owned by the Plaintiff, who has denied giving any permission to the Defendants to carry out mining thereon.

Lastly, it is also my finding that given the nature of the activities being undertaken by the Defendants on the suit property, the Plaintiff will suffer irreparable harm if an injunction is not granted, as it will not be possible to restore the property to its previous state. I therefore allow the Plaintiff's Notice of Motion for the foregoing reasons.

I accordingly order as follows:

1. That the Defendants, their servants, agents and or employees be and are hereby restrained from entering on, excavating and stone mining on, damaging and/or in anyway dealing with Land Reference Number 8442 located at Mwiki Njiru in Nairobi County pending the hearing and determination of this case or until further orders.
2. That the Officer Commanding Police Division Kayole Police Station and the Officer Commanding Station Mwiki Police Station do provide police protection and supervision while the orders herein are being served upon the Defendants, and to ensure compliance of the same.
3. The costs of the Plaintiff's Notice of Motion dated 30<sup>th</sup> August 2013 shall be in the cause.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this \_\_\_\_9<sup>th</sup>\_\_\_\_ day of \_\_\_\_October\_\_\_\_, 2014.**

**P. NYAMWEYA**

**JUDGE**