



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

E.L.C NO 235 OF 2013

MWARIKI FARM CO LTD.....PLAINTIFF

VERSUS

NAKURU WATER AND

SANITATION SERVICES CO LTD.....DEFENDANT

RULING

1. This ruling is on the plaintiff's notice of motion dated **14th February, 2013** seeking an order of temporary injunction to restrain the defendant or its agents from trespassing, interfering, alienating, disposing, constructing or dealing with the property known as **Gichua Trading Centre/206** ("hereafter referred to as the suit property") and costs of the suit.

2. The gist of the plaintiff's story is as contained in the supporting affidavit of **Jim K Kairu**, the Chairman of the plaintiff Company, sworn on **14th February, 2013**. He depones that the Company is the beneficial owner of the suit property, which was set aside by the Company as a public utility plot for the establishment and development of a primary school (**JKKIII**); that the defendant on or about November 2012 entered the suit property and established water selling kiosks without the plaintiff's authority being the beneficial owner of the suit property. The application should therefore be allowed as the defendants are for all intent and purposes, trespassers who are interfering with the plaintiff's intent to develop the suit property for the benefit of the surrounding community.

3. The application is opposed. The defendant filed a replying affidavit sworn on **7th May, 2013** by **Anthony Chege Mwangi**, the defendant's Technical Manager. He depones that the defendant in putting up the water kiosks was merely responding to a letter by the Municipal Council of Nakuru (**ACM1 A**) who had approved a request made to them by the head teacher, **Richard Kabugi** (of Mburu Githua Primary School) (**ACM 1 B**) to construct a water tank within the school compound.

4. On **17th September, 2013** the court issued directions that the application would be disposed off by way of written submissions. The defendant filed their written submissions on **8th November, 2013** but the plaintiff did not file any despite being granted ample time to do so.

5. Counsel for the defendant submitted that the plaintiff had not established a *prima facie* case with a probability of success as laid out in both **Giella v Cassman Brown & Co. Ltd** (1973) EA 358 and **Mrao vs First American Bank of Kenya Limited & 2 Others** (2003) KLR 125. It was his contention that trespass had not been proved; that the defendant had been granted authority to set up the

water point by the authorizing body as was clear from the correspondence (**ACMI A and B**). Counsel for the defendant further submitted, that a school already existed on the suit property therefore the plaintiff was not sincere when they alleged that they wanted to construct a school; that in the event that it emerged that the suit property belonged to the plaintiff and the school did not belong to them then the right person to be sued in this matter was the school Management board, Mburu Gichua Primary school who had requested for the installation of the water point.

6. On whether the plaintiff would suffer irreparable loss, he submitted that the applicant did not stand to suffer any loss because the water tank installed occupied a very modest part of the suit property which would not hinder any expansion plans (if any) and further the surrounding community was benefiting from the provision of clean and safe water from the water point whose members would be the most affected if the orders sought were granted.

7. Finally he submitted that the balance of convenience tilted towards the defendant as by setting up the water point they had greatly improved the livelihood of members of the community by providing clean and safe water.

8. It is now trite law that to be granted injunctive orders at an interlocutory stage, the applicant must fulfill the following conditions laid out the case of **Giella v Cassman Brown & Co. Ltd (supra)**, namely;

(i) The Applicant needs to show that he has a prima facie case with probability of success;

(ii) That he stands to suffer irreparable damage that cannot be compensated by an award in damages

(iii) If the court is in doubt, it will determine the application on a balance of convenience.

9. So has the applicant established a prima facie case?

It is common ground that the suit property is a public utility to be used as a primary school. As it stands now, on the suit property is a primary school, Mburu Gichua Primary School. It is also not in dispute that the head teacher, Mburu Gichua Primary School wrote to the Municipal Council of Nakuru on **25th February, 2012 (ACMI B)** requesting for the construction of a water point within the school compound and that the Council gave its approval on **30th January, 2012** and the defendant acted on that approval. The questions that remain are whether the suit property is owned by the plaintiff, whether Mburu Gichua primary school is also owned by the plaintiff, whether the headteacher, Mburu Gichua primary school was acting as an agent of the plaintiff when he requested for the establishment of the water point or whether the management of the primary school acted without authority and is therefore a trespasser on the plaintiffs land.

11. From the affidavit evidence placed before me, I am not satisfied that the plaintiff has established a prima facie. This is because, whereas the defendant has not disputed that the plaintiff is the owner of the suit property, the plaintiff other than a letter addressed to the Municipal Council of Nakuru dated **11th July, 1994 (JKKII)** listing its assets, has not annexed any documents proof of ownership of the suit property. They have also failed to assist the court by enjoining the board of Governors, Mburu Gichua Primary School and County Government, Nakuru as parties to this suit so that all the necessary parties who will ultimately be affected by any orders issued by this court can fully participate in this suit.

12. For the reasons stated above, the plaintiffs' notice of motion dated 14th February, 2013 is dismissed with costs to the defendant. The plaintiff is also directed to join all the necessary parties to this suit.

Dated, Signed and delivered in open Court at Nakuru this 10th day of December, 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Aim for the defendant/Respondents

N/Afor the plaintiff/ Applicants

Emmanuel Maelo : Court Clerk. .

L N WAITHAKA

JUDGE