



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT OF KENYA AT KISII

LAND CASE No. 83 OF 2013

RAMJI MEGHJI GUDKA LIMITED..... PLAINTIFF

VERSUS

THE TOWN CLERK, MUNICIPAL

COUNCIL OF KISII.....1ST DEFENDANT

THE MUNICIPAL COUNCIL OF KISII.....2ND DEFENDANT

RULING

1. The plaintiff is the registered proprietor of all those parcels of land known as **LR. Nos. Kisii Municipality/ Block III/ 360, 361,362 and 363** (hereinafter referred to only as “**the suit properties**”). The plaintiff brought this suit against the defendants on 22nd February, 2013 seeking among others, a declaration that the Plaintiff is the lawful registered owner of the suit properties, a permanent injunction restraining the defendants from entering into, re-entering, trespassing onto, interfering with and/or in any other manner dealing with the

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suit properties or any portion thereof. Together with the plaint, the plaintiff filed an application by way of notice of motion dated 15th February, 2013 under certificate of urgency seeking interlocutory injunction to restrain the defendants from entering into, re-entering, trespassing onto, interfering with and/or in any other manner dealing with the suit properties or any portion thereof pending the hearing and determination of this suit. The plaintiff’s application was certified as urgent on 25th February, 2013 and the plaintiff granted interim injunction pending the hearing of the application interpartes on 7th March, 2013. The Plaintiff was directed to serve the application upon the defendants. When the application came up for hearing on 7th March, 2013, only the plaintiff’s advocate appeared in court and after satisfying myself from the affidavit of service sworn by one Joshua Otieno Okeyo on 7th March, 2013 that the defendants were duly served with the application, I allowed the plaintiff’s advocate to argue the application in the absence of

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the defendants. The plaintiff's application is supported by the affidavit sworn by one, Ashwin Gudka, the Plaintiff's managing director. The plaintiff's case against the defendants as pleaded in the plaint and the affidavit in support of the application ("**supporting affidavit**") is that, on or about 26th April, 2012, the Plaintiff who wanted to develop the suit properties sought and obtained an approval from the defendants to commence the said development. After such approval, the Plaintiff prepared building plans which were also approved by the defendants. The Plaintiff thereafter engaged a contractor to put up a barbed wire fence around the suit properties in readiness for the intended development which fence was duly installed by the said contractor. On 6th January, 2013, the defendants' servants agents and/or employees without any reasonable cause entered the suit properties, demolished the barbed wire fence that the Plaintiff had installed around the suit properties and

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carried away the materials that were used to put up the said fence. It is the Plaintiff's contention that the actions of the defendants aforesaid have denied the Plaintiff its rights and interest over the suit properties. The Plaintiff claims that the defendants have dispossessed the Plaintiff of the suit properties and have denied the Plaintiff entry into the suit properties for the purposes of carrying out development thereon. It is the plaintiff's contention that as the registered proprietor of the suit properties, it is entitled to exclusive rights to possess, develop and occupy the same. An injunction should therefore issue to restrain the defendants who are trespassers from interfering with the suit properties as prayed for in the application. The plaintiff has annexed to the supporting affidavit, copies of certificates of leases for the suit properties, certificates of official search, rates payment receipts for the suit properties and an agreement between the Plaintiff and the contractor for the putting up of a barbed wire fence around the

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suit properties.

2. In his submission in support of the plaintiffs' application, the plaintiff's advocate adopted the grounds on which the application was brought as set out on the face of the application and on the supporting affidavit. Counsel submitted that the Plaintiff's interest in the suit properties is protected under sections 23, 24, 25 and 26 of the Land Registration Act, No.3 of 2012 and can only be defeated as provided thereunder. Counsel submitted that if the defendants had any issue with the Plaintiff's titles or development on the suit properties, they could have had recourse in a court of law rather than taking the law into their own hands. Counsel submitted that if the orders sought are not granted, the plaintiff would be at the mercy of the defendants a situation that would negate the sanctity of the Plaintiff's titles to the suit property.

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3. The principles for granting interlocutory injunction are now well settled. The plaintiffs herein are not excused from satisfying the said principles merely because the application is

not defended. As was stated in the case of **Giella –vs- Cassman Brown & Company Ltd. [1975] E.A. 358**, an applicant for interlocutory injunction must prove that he has a prima facie case against the respondent with a probability of success and that unless the orders sought are granted, he will suffer irreparable harm. If the court is in doubt, the court will determine the application on a balance of convenience. The plaintiffs have placed material before the court which shows

that the Plaintiff is the registered proprietor of the suit properties. The plaintiff's managing director has stated in his affidavit in support of this application that the defendants' employees and agents entered into the suit properties without the Plaintiff's permission or any lawful cause and damaged the barbed wire fence that the Plaintiff had put around it and have

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since denied the Plaintiff access to the properties for the purposes of carrying out developments that the Plaintiff had intended to carry out thereon. In the absence of any challenge to the validity of the plaintiff's titles and the plaintiffs' claim that the defendants have trespassed on the suit properties, I am persuaded that the plaintiff has established a prima facie case with a probability of success against the defendants. The Plaintiff as the registered proprietor of the suit properties is entitled to possession of the same. I am also satisfied that the plaintiff would suffer irreparable harm if the orders sought are not granted as that would result in the plaintiff being kept away from its property. Due to the foregoing, the plaintiff has satisfied the principles for granting interlocutory injunction and is entitled to the orders sought. However, before making final orders in this matter, an issue has arisen since the filing of this suit which the court has taken judicial notice of. The 2nd defendant herein ceased to exist as a legal entity after the

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announcement of the results of the last general elections that were held on 4th March, 2013 by virtue of the provisions of section 134(1) of the County Governments Act, 2012. This Act repealed the Local Governments Act, Cap. 265 Laws of Kenya under which, the 2nd defendant was established and set up County Governments. Since the 2nd defendant has ceased to exist, the 1st defendant's office that was constituted within the 1st defendant has also ceased to be in existence. The issue that arises in the circumstances is whether this court can issue orders against entities that do not exist in law and if the court cannot, what are the appropriate orders for the court to make in the circumstances. Since these issues arose after the filing of the present application, the Plaintiff's advocate did not address me on the same. In the circumstances, it would not be fair for the court to determine the same without giving the Plaintiff an opportunity to address the court on the same. Due to the foregoing, I will reserve my final orders on this matter until the **E&LCC.NO.83 OF 2013**

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Plaintiff's advocate addresses me on the issues I have raised herein. In the meantime, the interim orders in force are extended until the date of the final ruling on the matter.

Dated, signed and delivered at KISII this 24th day of May, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Oguttu-Mboya for plaintiff

No appearance for defendants

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

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