



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

LAND CASE NO 454 OF 2013

ABDALLAH MOHAMMED A KASANDE.....PLAINTIFF/APPLICANT

VERSUS

ANTHONY NGETICH SEUREYI.....1ST DEFENDANT/1ST RESPONDENT

JUST FOR PROPERTIES2ND DEFENDANT/2ND RESPONDENT

RULING

1. The Notice of Motion dated **8th July, 2013** has been brought under **Article 25 (c) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 and Order 51 Rule 1** of the Civil Procedure Rules seeking the substantive order that, **a temporary injunction be issued to restrain the Defendants/Respondents by themselves, their principals, agents, employees or others from selling, transferring, charging, leasing out, taking possession and occupation of, developing or in any way interfering with the suit property, Title Number Nakuru Municipality/Block 13/314 (hereinafter referred to as the suit property) pending the hearing and determination of this suit.**
2. The application is premised on the grounds on the face of the application and the supporting affidavit of the plaintiff, **Abdallah Mohammed A. Kasinde**. He depones that he is the rightful owner of the suit property, having purchased the same from one **Miriam Cheruto Boit**, with consent from her two sons. Being the owner of the suit property he has leased out the same to tenants and had been faithfully paying rates to the Municipal Council of Nakuru and is well known to all the residents in Bondeni area as the proprietor of the suit property.
3. The applicant further depones that the 1st respondent had attempted to sell the suit property and only failed to succeed after police intervention; that the 2nd Respondent were acting as agents of an undisclosed new owner of the suit property and had began demanding rent from his tenants. He was now seeking injunctive orders to preserve the suit property.
4. On **23rd July, 2013** parties agreed that status quo be maintained as subsisting on that date pending the hearing and determination of the application. They further agreed and that the application would be disposed off by way of written submissions. Counsel for the applicant filed his written submissions on **7th August, 2013**. By **13th June, 2014** when the ruling date for the application was given by court, the respondents had not filed their replying affidavit nor their written submissions.
5. In her submissions, counsel for the applicant stated that the application was unopposed; that the

injunction sought should be granted as there were serious issues raised especially by the 1st respondent in his list of documents filed together with his defence as to the history of the ownership of the suit property and as such, the suit property should be preserved from interference by the respondents. She further submitted that if the court was in doubt, it should exercise its judicial discretion on a balance of convenience in favour of the person who was in possession of the suit property being the applicant herein. She relied on the cases of **Fina Bank Ltd v Spares and Industries Ltd (Civil Appeal No 51 of 2000)** and **Robert Magua Mwarango v Atlas Automobiles Ltd (Civil Case No 2460 of 1993)**.

6. As pointed out earlier, the application was not opposed, perhaps through the sheer inadvertence by the respondent's advocates. It was not until **9th July, 2014** when the respondents filed an application dated **8th July, 2014** under certificate of urgency seeking, that this court stays the preparation/writing and or delivery of the ruling to the motion dated **8th July, 2013** until the respondents had placed on record their replying affidavit and filed their written submissions. They gave their reason as an oversight by their counsel to place their replying affidavit filed on **20th December, 2013** on the court record. I granted leave to the 1st respondent's Counsel to file an affidavit of service as evidence that the firm of Omwenyo & Co Advocates, appearing for the plaintiff/applicants, were duly served with the replying affidavit. Since no evidence was adduced that service had been effected, I declined to admit the replying affidavit filed on **20th December, 2013** or allow the respondents time to file their written submissions and expunged the replying affidavit from the court record. I then proceeded to determine the application *Exparte*.

7. The celebrated case of **Giella vs Cassman Brown (1973) E.A 358**, and later the case of **Kenya Commercial Finance Company Limited v Afraha Education Society (2001) 1 EA 8** lay down the principles to be considered by the court in deciding whether an interlocutory injunctive relief should be granted. The court will consider whether:

1. The applicant has shown that he has a *prima facie* case with a probability of success.
2. Damages will be an adequate remedy and
3. On a balance of convenience, should the court be in doubt it will determine the matter on a balance of convenience.

These principles are to be applied sequentially in that the court need not consider the second and third principles if it finds that the applicant has a *prima facie* case.

8. In considering whether the applicant has established a *prima facie* case, I shall not delve into the merits of the case but will simply establish whether the applicant's rights have been violated by the respondents. To show that the respondents had violated his right, the applicant exhibited a copy of a sale agreement between himself and the "original owner" **Miriam Cheruto Boit**, and a copy of receipt dated **1st August, 2012** for payment of rates for plot No.13/314 to the Municipal Council of Nakuru. Other than the 2 documents mentioned above, the applicant did not exhibit any other document showing proof of ownership of Plot No.13/314 either by the "original owner" or by himself. He alleges that failure to have ownership documents had been caused by delay within the Municipal Council of Nakuru offices. Even if I was to accept his argument, he has exhibited no document lodged to the Municipal Council of Nakuru or any document from the council either allocating this plot to the "original owner" or minutes or transfer of the suit property to him, recognizing him as the new owner.

9. For these reasons, I find that the applicant has failed to establish a *prima facie* case with a probability of success and dismiss the Notice of Motion dated **8th July, 2013** with no orders as to costs.

Dated, signed and delivered at Nakuru this 25th day of July, 2014

L N WAITHAKA

JUDGE

In the Presence of:

Mrs. Omwenyo for the Plaintiffs.

Mr. Olonyi for the Respondents.

Emanuel Maelo: Court clerk