



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

Civil Case 281 of 2010

**1. MARY NJOKI MUNGAI
2. EQUITY MASTERS LIMITED.....PLAINTIFFS/
APPLICANTS**

VERSUS

**STAVROULA ROUSAL.....DEFENDANT
/RESPONDENT**

RULING

1. The application before the Court is the Chambers Summons Application dated 17th December 2010 (“Application”). It is brought under Sections 3, 3A, 63(c) and 63 (e) of the Civil Procedure Act and Order 40, rules 1, 2, and 4 the Civil Procedure Rules and all other enabling provisions of the law. It is supported by the Supporting Affidavits of Mary Njoki Mungai and Albert Maina Githinji sworn on the same day and the grounds stated on the face of the Application.
2. The Application is brought by Mary Njoki Mungai and Equity Masters Limited who are the 1st and 2nd Plaintiffs respectively in the main suit, to wit, HCCC No. 281 of 2010 (hereinafter, “Applicants”) against Stavroula Rousal (the “Respondent”) and seeks eight orders as follows:
 - a. First, that the Application be heard as a matter of urgency.
 - b. Second, that service be dispensed with and the Application be heard *ex parte* in the first instance.
 - c. Third that the Court be “pleased to grant a temporally (*sic*) injunction against the defendant restraining her, through her servants/agents from dealing with the said property being LR No. 12715/632, being the suit premises [“Suit Premises”], pending the hearing of the [A]pplication herein.”
 - d. Fourth, that the Court be pleased to “order the defendant whether by herself and/or servants, agents, assignees and/or nominees and/or any other person acting on her behalf be and is hereby restrained by injunction from advertising, negotiation for sale, selling, charging, leasing, transferring, alienating, and/or having any other dealings whatsoever encumbering in any manner” of the Suit Premises pending the hearing and determination of the instant suit.
 - e. Fifth, that the Respondent and/or her agents or servants be restrained from “trespassing onto, remaining upon, constructing, developing, building, sub-dividing and/or erecting any structures or wasting in any manner and/or exploiting the rights apartunent to ownership” of the Suit Premises pending the hearing and determination of the instant suit.

- f. Sixth, that the *status quo* subsisting at the date of the lodging of the present suit be maintained until the hearing and determination of the suit.
- g. Seventh, that the Court issues any orders “calculated to meet the ends of justice and to ensure that the Plaintiffs’ suit is not rendered nugatory.”
- h. Eighth, that the costs of the present Application be awarded to the Applicants.

3. The Application first came up before *Justice Mwera* (as he then was) on 20/12/10. After hearing Mr. Kibathi, Learned counsel for the Applicants *ex parte*, he granted the first through the third prayers reproduced above. The interim orders were subsequently extended on 20/01/11; 09/02/11; 06/04/11; and 25/07/11 for various reasons. The matter came before me for *inter partes* hearing on 23/11/11. Mr. Kibathi was present for the Applicants. There was no appearance for the Respondent. No Notice of Appointment of Attorneys had been filed for the Respondent. Mr. Kibathi pointed out to me that an Affidavit of Service had been filed in the matter. The various Affidavits of Service on record demonstrated that although the Respondent has been variously served with court documents, she has never deemed it fit to enter appearance or send a representative to court. So satisfied, I permitted Mr. Kibathi to argue the Application *ex parte*. In the circumstances, the Court has to deliver its ruling on the interlocutory injunction based on the uncontroverted affidavit evidence of the Applicants and the submissions of Mr. Kibathi since there are no opposing papers filed on behalf of the Respondent.

4. The Application is predicated on the Complaint dated 17th December, 2010. In the main, the Complaint seeks the injunctive orders, in permanent fashion – and, in addition, orders for costs of the suit.

5. The legal principles for granting interlocutory injunctions are now well settled in Kenya. They are set out in the celebrated case of *Giella vs Cassman Brown* [1973]E.A 358 in the words of Spry V.P.:

First, an Applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be adequately compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.

6. The uncontested affidavit evidence of the Applicants shows the following:

a. That the 1st Applicant is the registered proprietor of the Suit Premises. She has attached a copy of the Title (marked as Exhibit “MNM-1” to her affidavit as well as other documents which evince ownership – including copies of various receipts of payments and demand invoices respecting the Suit Premises.

b. That the 1st Applicant entered into an Agreement for sale of the Suit Premises to the 2nd Applicant on 26th February, 2009. A copy of the Agreement is attached as Exhibit MNM-4 to the 1st Applicant’s affidavit.

c. That pursuant to the Agreement for sale, the 2nd Applicant applied for, and obtained ministerial approval to subdivide the land.

d. That on 9th April, 2010, the Respondent caused to be printed in the Kenya Gazette a notice to the effect that she is the registered proprietor of the Suit Premises who had lost the original certificate therefor and therefore had applied to be issued with a provisional certificate of title.

e. That upon learning of the Kenya Gazette notice, the 1st Applicant wrote to the Chief Lands Registrar, Nairobi on 25/05/2010. In the letter, the 1st Applicant objected to the issuance of the provisional certificate.

f. That it was wrongful for the Respondent to attempt to get a provisional certificate for the Suit Premises, and there is good reason to believe she will persist in her attempt to interfere with the

Applicants' ownership and ownership interests in the Suit Premises unless stopped by an order of the Court.

7. Even though this Application is not opposed, the law requires that I satisfy myself that the conditions for grant of interlocutory injunction are met. Even without the benefit of a developed factual record due to the Respondents' failure to respond to the Applicant's allegations and prayers, I have adverted my mind, in the mode of *Giella v Cassman Brown* (supra), to the fact that a party seeking the drastic remedy of an interlocutory injunction bears the burden of demonstrating whether:

- a. The Applicants have showed that they are likely to prevail on the merits;
- b. The Applicants have demonstrated that they will suffer imminent irreparable harm if the injunction is not granted; and
- c. The harm the Applicants are likely to suffer absent the injunction outweighs the harm the injunction would cause to the adverse party.

8. After perusing all the documents presented – including a copy of the Certificate of Title; the Agreement for Sale; and a letter dated 25/05/2010 by the 1st Applicant addressed to the Chief Lands Registrar; and various receipts and invoices respecting the Suit Premises – all of which are annexed to the Applicants' affidavits, and in the absence of any competing narrative, the inescapable conclusion is that the 1st Applicant is the absolute registered proprietor of the Suit Premises and she, in turn, has sold the same to the 2nd Applicant, who, therefore has a purchaser's interest in the same.

9. In the specific circumstances of this case, I am satisfied that the Applicant easily meets the *Giella* standard. In the absence of any opposing or rival factual account, and on the basis of the documentary evidence before the Court, I easily conclude that the Applicant has established a high likelihood, nay, probability of success on the merits. The copies of the documents placed before the Court which this Court takes as valid and legitimate in the absence of any controverting evidence, demonstrate that the Applicant owns the Suit Premises. As the Court of Appeal remarked in the case of *George Orango Orago v George Liewa Jagalo and Others*, Civil Appeal No. 62 of 2009 at Kisumu (unreported), if it is proved that a person before the Court is in possession, and has title to the land, there is no proper basis for dispossessing him of that land. In that case, the Court of Appeal held that a denial of injunction in such circumstances “would cause [the Applicant] such loss as may not be adequately compensated by an award of damages.” Hence, the second prong of the *Giella* case is thereby satisfied as well. A litigant who, *prima facie*, demonstrates that she holds the *bona fide* title to a parcel of land, and nothing on the record suggests that the title is validly impugned, is deserving of the presumption that a denial of injunction would result in irreparable harm if an injunction to restrain a third party from interfering with the disputed parcel of land does not issue.

10. In the present case, the Applicants have demonstrated their ownership interests in the Suit Premises. The 2nd Applicant has also demonstrated it has already obtained permission to subdivide and develop the Suit Premises. If the Respondent is not stopped from interfering with the Suit Premises, it follows that the 2nd Applicant's development scheme will be thwarted. It therefore follows that it will suffer irreparable injury were that to happen.

11. As to the third *Giella* factor, it is easily satisfied here as well. Since the 1st Applicant is the registered proprietor of the Suit Premises and the 2nd Applicant has *bona fide* purchaser's interests in the same on the one hand, and the Respondent has demonstrated no legitimate claim to the Suit Premises, there is no absolutely no inconvenience or inequity which will flow to the Respondent if the injunction is granted. In the absence of any opposing evidence to the contrary, the Court is entitled to believe the Applicants' position that the balance of convenience is in their favor. I note that the Applicants have done nothing which, to the Court's mind, would disentitle them to equitable relief.

12. In the circumstances of this case, I hereby conclude that the Applicant has satisfied the requisite

standard for the issuance of an interlocutory injunction and I hereby grant the following orders:

- a. The Respondent/Defendant whether by herself and/or servants, agents, assignees and/or nominees and/or any other person acting on her behalf be and is hereby restrained by injunction from advertising, negotiation for sale, selling, charging, leasing, transferring, alienating, and/or having any other dealings whatsoever encumbering in any manner the Suit Premises pending the hearing and determination of the instant suit;
- b. The Respondent/Defendant and/or her agents or servants be and are hereby restrained from trespassing onto, remaining upon, constructing, developing, building, sub-dividing and/or erecting any structures or wasting in any manner and/or exploiting the rights incidental to the ownership of the Suit Premises pending the hearing and determination of the instant suit;
- c. That the *status quo* subsisting at the date of the lodging of the present suit be maintained until the hearing and determination of the suit.
- d. That the Respondent/Defendant pays the costs of this Application.

DATED, SIGNED and DELIVERED at MACHAKOS this day 23RD day of JANUARY 2012.

J.M. NGUGI
JUDGE