



REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 227 of 2012

JOYCE CHEPKEMOI NG'ENO.....PLAINTIFF/APPLICANT

VERSUS

ERICK D. K. NGETICH.....1ST DEFENDANT/RESPONDENT

JOSEPHINE SIGEI.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion described as an Amended Notice of Motion dated 28th June 2012, the Applicant/Plaintiff seeks an order of injunction to restrain the Defendants by either themselves, or by their servants, agents and/or employees from alienating, disposing of, entering into, fencing off and/or in any way dealing with all that parcel of land known as NAKURU/OLENGURUONE/AMARO/512.

2. The Motion is based upon the grounds on the face thereof, and the Applicants Supporting Affidavit sworn on 27th June 2012. The Applicants case is this -

1. She is wife to Samuel Kipkorir A Ngeno (*the husband*),
2. The husband sold the suit land without notice to her.

3. In response to the Application, grounds and Supporting Affidavit of the Applicant, the 1st Respondent has sworn a Replying Affidavit filed on 12th July 2012, on his own and on behalf of his co-defendants in which he concludes as follows -

“23. THAT I swear this Affidavit in opposition to the Application which is highly unmeritorious, moot, speculative and ambiguous as the orders sought away have been overtaken by events as the horses as we have demonstrated have already bolted from the stables.”

4. The ground rules for grant of interlocutory injunctions are stated in the often cited case of **GIELLA VS. CASSMAN BROWN** [1973] E.A. 358. There are three such rules -

- (a) *the Applicant must establish a prima facie with a probability of success,*

(b) ***the Applicant will suffer irreparable damage and loss if the orders of injunction are not granted,***

(c) ***where the court is in doubt on the above principles, it will decide the matter on the balance of convenience.***

5. Those grounds are in turn founded upon the provisions of Order 40 rule 1(a) – that the property in dispute in a suit is in danger of being -

- (i) ***wasted,***
- (ii) ***damaged, or***
- (iii) ***alienated by any party to the suit, or***
- (iv) ***wrongly sold in execution of a decree.***

6. There is no decree being executed in this case. There is no waste or damage to the property in this case. No party has been sued for alienating the suit property.

7. The case here is clear. The Plaintiff's husband, and the Respondents aver, the Plaintiff was well aware at all material time, entered into enforceable Sale Agreements for the sale of the suit lands to the Respondents/Defendants. The Defendants paid the purchase price in full. The Defendants took possession, and are in possession. All this is set out *in extenso* in the Replying Affidavit of the 1st Defendant/Respondent and equally applies to the 2nd Defendants-Respondents.

8. Though served with the said Replying Affidavit way-back in mid July 2012, the Plaintiff/Applicant has not found it fit to file a response thereto by the time this matter was heard in mid-October 2012 (17.10.2012).

9. In this case, the Plaintiff's husband sold the suit land to raise college fees for their son or child studying in Australia. Paragraph 20 of the 1st Defendant's Affidavit says -

“20. That during the purchases of all parcels of land, the vendor was under a lot of pressure from the plaintiff to get the money as allegedly their child in Australia wanted money and she cannot now be heard to feign innocence and ignorance when they hold our money which is colossal.”

10. In paragraph 22, of the his Replying Affidavit the Defendant says -

“22. That it is curious that the plaintiff has not sued her husband when she knows him very well and they stay together at Nakuru Town and is now planning to escape to Australia where his daughter Jesca Cheronno resides”

11. In the circumstances, the Applicant cannot be said to have established any of the trilogy principles in the ***Giella vs. Cassman*** case. Least of all can be said that the suit property is in danger of being wasted or alienated. The Plaintiff's husband alienated the property by entering into the various Sale Agreements on 10th May 2011, (*with 1st Defendant*), 30th April 2012 (*with 1st Defendant*) 27th March 2012 (*with 2nd Defendant*) 10th April 2012 (*with 2nd Defendant*).

12. The 2nd Defendant's husband also sold their property (*Dundori/Mugwathi Block 2169*) to purchase their current matrimonial home and would suffer no irreparable harm if the orders sought were granted and maintained.

13. What the Applicant is trying to do, possibly with the egging of her husband is to have their cake and eat it at the same time. What they cannot be allowed legally to do, is to use the provisions of the Constitution of Kenya and the Land Control Act (*Cap. 302, Laws of Kenya*) as a shield and defender for reneging on enforceable contracts. The court will not grant an injunction to a party who sells a property, receives the full purchase price and having fed fully on the purchase price belch it out, and purport to hide

behind the Constitution and the Land Control Act (*Cap. 302, Laws of Kenya*) and pretend that one was unaware of the husband's transactions. If indeed the Applicant was unaware, there would have been a repute and a further affidavit in response to the Defendant's detailed Replying Affidavit. Neither the Constitution of Kenya nor the Land Control Act are or were intended to be instruments of deception or fraud.

14. In the circumstances therefore, I find and hold that the Plaintiff/Applicant has neither satisfied the principles of the **GIELLA VS. CASSMAN** trilogy, nor the requirements of Order 40 rule 1(a) of the Civil Procedure Rules 2010. The application is completely devoid of merit, and the same is dismissed with costs to the Defendants.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of December, 2012

M. J. ANYARA EMUKULE

JUDGE