



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 156 OF 2019

WINNY SANTIYON SAUROKI.....PLAINTIFF

VERSUS

ISAAC TOWETT.....1ST DEFENDANT

DISTRICT LAND REGISTRAR NAKURU.....2ND DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 10th December 2019. The following orders are sought in the application:

1. *THAT this matter be certified as urgent and be heard ex parte in the first instance.*
2. *THAT pending the hearing and determination of this application inter parties this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st defendants (sic) by himself, his agents and/or servants entering upon, alienating, sub-dividing, selling, transferring, charging from any further construction, from evicting the plaintiff or in any manner, interfering with the ownership of parcel of land known as parcel number Njoro/Ngata Block 1/5749.*
3. *THAT pending the hearing and determination of this application inter parties this Honourable Court be pleased to issue an order barring the 1st respondent from collecting rent from the premises situated in the parcel of land known as parcel number Njoro/Ngata Block 1/5749 and in the alternative the plaintiff/applicant be allowed to collect the rent and/or this honourable court be pleased to appoint an agent to collect the rent and deposit into a joint agreed by both parties.*
4. *THAT pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of temporary injunction restraining the 1st defendants (sic) by himself, his agents and/or servants entering upon, alienating, sub-dividing, selling, transferring, charging from any further construction, from evicting the plaintiff or in any manner, interfering with the ownership of parcel of land known as parcel number Njoro/Ngata Block 1/5749.*
5. *The costs of this Application be provided for.*

2. The application is supported by an affidavit sworn by the plaintiff. She deposed that she was the registered proprietor of the parcel of land known as Njoro/Ngata Block 1/5749 (hereinafter "the suit property") and that she sold it to the 1st defendant at a consideration of KShs 22,000,000 pursuant to a sale agreement dated 9th July 2018. That the 1st defendant paid a total of KShs 15,430,000 leaving a balance of KShs 6,570,000 which was to be paid within 6 months from the date of the sale agreement but which remains unpaid. That the 1st defendant took immediate possession of the property which is developed with rental houses which generate a monthly income of KShs 240,000 which the 1st defendant has been collecting since July 2018. She added that despite not paying the balance of the purchase price, the 1st defendant has gone ahead and transferred the suit property to his name yet she did not sign any transfer or consent.

3. The 1st defendant opposed the application through a replying affidavit in which he confirmed that he indeed entered into the sale agreement. He further deposed that he has paid the purchase price of KShs 22,000,000 in full and that he has overpaid it by KShs 715,000, that he took possession in accordance with the sale agreement and that the plaintiff provided to him signed transfer forms as well as other completion documents which he used to process the transfer to himself.

4. State counsel appearing for the 2nd defendant indicated that the application does not concern the 2nd defendant and that the 2nd defendant would not therefore participate in its hearing. True to that indication, the 2nd defendant neither filed any response nor submissions. The

application was canvassed through written submissions which both the plaintiff and the 1st defendant duly filed. I have carefully considered the application, the affidavits and the submissions.

5. The applicant is seeking an interlocutory injunction. She must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. For the application to succeed, she must thus establish a *prima facie* case with a probability of success. Even if she establishes a *prima facie* case, an injunction will not issue if damages can be an adequate compensation. Finally, if the court is in doubt as to whether damages will be an adequate compensation then the court will determine the matter on a balance of convenience. All these conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant must surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

6. Has the applicant established a *prima facie* case? There is no dispute that the applicant was the registered proprietor of the suit property and that she sold it to the 1st defendant at a consideration of KShs 22,000,000 pursuant to a sale agreement dated 9th July 2018. It is further not disputed that the 1st defendant took possession and that he is now the registered proprietor of the property. The applicant contends that she has received only KShs 15,430,000 out of the agreed purchase price. The 1st defendant on the other hand contends that he has paid much more than the agreed purchase price. Although parties have dwelt quite a bit on what has or has not been paid, I think that is not really material at this point. It is for the trial court to determine the extent of payments as well as the parties' rights and obligations arising from those payments. As vendor, the applicant is entitled to raise questions as to whether or not she will suffer irreparable damage if the purchaser freely deals with the suit property notwithstanding the dispute on payment of the purchase price. I am therefore satisfied that the applicant has established a *prima facie* case.

7. The mere fact that there exists a *prima facie* case is not a guarantee that an interlocutory injunction will issue. The applicant must show that damages cannot be an adequate compensation to her. The Court of Appeal explained this second limb of the test in **Giella** as follows in **Nguruman Limited v Jan Bonde Nielsen & 2 Others** (supra):

On the second factor, that the applicant must establish that he “might otherwise” suffer irreparable injury which cannot be adequately remedied by damages in the absence of an injunction, is a threshold requirement and the burden is on the applicant to demonstrate, prima facie, the nature and extent of the injury. Speculative injury will not do; there must be more than an unfounded fear or apprehension on the part of the applicant. The equitable remedy of temporary injunction is issued solely to prevent grave and irreparable injury; that is injury that is actual, substantial and demonstrable; injury that cannot “adequately” be compensated by an award of damages. An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy.

8. The dispute herein emanates from a transaction of sale of land. There is an agreed purchase price. The applicant concedes that almost three quarters of the purchase price has been paid. She categorically states that a balance of KShs 6,570,000 remains unpaid. She further states at paragraph 9 of her supporting affidavit that the sale agreement has a clause stating that a party in default of the agreement will pay the other 10% of the purchase price. Whereas she has placed a lot of premium on the contention that the property generates a monthly rental income of KShs 240,000 which the 1st defendant has been collecting since July 2018, I note that clause 3 of the sale agreement expressly allowed the 1st defendant to take possession and to collect the rent immediately upon execution of the agreement and payment of the deposit. Thus, any damage to the applicant can accurately be measured from the balance of the purchase price if any, as well as the rent collected. Further, by agreeing that a party in default of the agreement will pay the other 10% of the purchase price, the parties have an additional inbuilt mechanism for determining damages. In these circumstances, the applicant has failed to demonstrate that she will suffer an injury that cannot adequately be compensated by an award of damages if the injunction sought is not granted. That being the case, the orders sought cannot issue. Parties should expedite the hearing of the main suit.

9. In the result, Notice of Motion dated 10th December 2019 is dismissed with costs to the 1st defendant.

10. This ruling is delivered remotely through video conference and e-mail pursuant to the Honourable Chief Justice's “Practice Directions for the Protection of Judges, Judicial Officers, Judiciary Staff, other Court Users and the General Public from the Risks Associated with the Global Corona Virus Pandemic” (Gazette Notice No. 3137 published in the Kenya Gazette Vol. CXXII—No. 67 of 17th April, 2020).

Dated, signed and delivered at Nakuru this 7th day of May 2020.

D. O. OHUNGO

JUDGE