



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 18 OF 2019

**ZUBERI NGUGUNA RAMADHAN (Suing as Personal representative of the estate
of the late FATUMA SWALEH ALIAS FATUMA JUMA)...PLAINTIFF/APPLICANT**

-VERSUS-

KHADIJA REHEMA MUMBI.....1ST DEFENDANT/RESPONDENT

THE COUNTY GOVERNMENT OF NYERI.....2ND DEFENDANT/RESPONDENT

THE LAND REGISTRAR NYERI.....3RD DEFENDANT/RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated 1st July 2019 in which the Applicant seeks the following orders:

i.spent

ii.spent

iii. That an injunction doth issue restraining the Respondents their servants and agents or anyone acting through them from selling disposing or otherwise interfering with plot No. J2-Majengo, U.N.S TP No. 11-Majengo and Kingongo site and Service scheme Plot No. 1 pending the hearing and determination of this suit.

iv. That the cost of this application be met by the Respondents.

2. The application was supported on the grounds on the face of it as well as on the affidavit sworn by the Applicant Zuberi Njuguna Ramadhan on the 1st July 2019.

3. The said application was argued orally on the 13th November 2019 in the absence of the 2nd and 3rd Respondents wherein Counsel for the Applicant submitted to the effect that ex-parte orders having been earlier on issued, the application was premised on the said orders so depicted where it sought for orders of injunction to issue restraining the 1st Respondent from selling or alienating the suit property.

4. That the grounds of application are found in the case of the **Giella -vs- Cassman Brown** which case set out the principles on which an interlocutory injunction should issue. That based on the 1st principle, the Applicant was the personal representative of the estate of Fatuma Swaleh who passed away on 3rd April, 1979 as per the copy of the death certificate and copy of a Grant in favour of the Applicant attached to their application.

5. That during her life time, Fatuma Swaleh had the properties in question. Two of the properties being UNS Tenant purchase plot 11 Majengo and Plot No. J2 Majengo which properties had been transferred to her by the County government of Nyeri as per the annexure marked as ZNR 3 which is a record from the County Government of Nyeri.

6. That the applications for sale happened after Fatuma Juma's death wherein the 1st property was transferred in the year 1981 and the 2nd property in 1993 to the Respondent's mother who is also deceased.

7. That these applications for sale raised important questions to wit whether there were succession proceedings and if the same had been

signed. That in regard to the Kingongo Site and Service Scheme Plot No. 1, although it had been transferred during the life time of Fatuma, the application to sell the same had not been signed by Fatuma Juma. The witness to the application was the purchaser, who was the 1st Respondent's mother.

8. Their argument therefore was that they had a case that was likely to succeed and so they prayed for interlocutory orders.

9. On the second issue of irreparable injury, it was the Applicant's submission that they had grown up on these properties which belonged to their grandmother. It would therefore be in the interest of justice if the said properties were preserved as they stood to be dis-inherited, and secondly, she had some sentimental value of the same.

10. That since the properties were in the name of the 1st Respondent there would be no inconvenience to the 1st Respondent if the orders were issued for status quo.

11. The Applicant also sought orders to issue in their prayers 3 and 4 of the application pending the determination of the main suit and proceeded to submit that at this stage, the court was not required to make findings of the contracted facts but to weigh the relative strengths of the parties. That in the present case, the strength lay in their favour.

12. The Application was opposed by the Respondent who submitted that the same was an abuse of the court process in that the subject properties were registered in the name of the 1st Defendant having gone through Succession Cause in the High Court of Kenya at Nyeri in Succession Cause No. 664 of 2008.

13. That indeed the properties had been previously owned by her late mother of which she was the Administrator. That the Succession Cause was gazetted in the Kenya Gazette wherein the Plaintiff/Applicant did not object to the issuance of grant.

14. That in fact there was a pending criminal case against the Applicant being Criminal Case No. 1143 of 2019 in which the Applicant /Plaintiff is charged with the offence of forgery of the title to plot No. J2 Majengo which was a property that is subject to the present proceedings.

15. It was their submissions that the 1st Respondent's mother had enjoyed quiet possession of the subject properties in her life time and had constructed rental houses on this piece of land wherein the 1st Respondent had continually renovated the houses which she had leased out to tenants and hence were her source of livelihood.

16. That the Applicant had not demonstrated that there was any threat to sell the properties.

17. That the allegation that the Applicant/Plaintiff have been living on the suit land was not true for on the contrary, it had been the 1st Defendant/Respondent who had been living on the same.

18. That the Plaintiff/Applicant did not stand to suffer any irreparable harm if the orders are not granted and lastly that the application was a fishing expedition and the same ought to be dismissed with costs to the 1st Defendant.

19. In rejoinder, counsel to the Applicant submitted that the criminal case was filed after this suit had been commenced. That the two properties had been sold when the owner, Fatuma Juma had already died. That the person who had drawn the applications for sale had been the Applicant who was the purchaser. That further, there had been no succession proceedings filed.

20. It was their submission that they had made out a prima facie case to wit they sought that their application be allowed as no harm would be suffered by the 1st Respondent. That what they sought was for the properties to remain in the custody of the 1st Defendant/Respondent.

Determination

21. The often cited case of **Giella –vs- Cassman Brown & Company Ltd (1973) EA 358** is the leading authority on the conditions that an Applicant needs to satisfy for the grant of an interlocutory injunction. An Applicant needs, firstly to establish and demonstrate they have prima facie case with a probability of success, secondly that they stand to suffer irreparable damage/loss that cannot be compensated in damages if the injunction is not granted and they are successful at the trial, and thirdly in case the court is in any doubt in regard to the first two conditions the court may determine the matter by considering in whose favor the balance of convenience tilts.

22. In the present case there is no dispute, going by annexed documents that the two properties being Plot No. J2 Majengo, U.N.S Tenant purchase plot 11 Majengo and Service scheme Plot No 1 are currently registered in the name of the 1st Respondent.

23. The Applicant has argued and asserted that the 1st Respondent's title was illegally and unlawfully procured and therefore cannot be deserving of protection under the law. However there is no evidence that the Government has recalled and/or revoked her registration as the owner of the parcels of land.

24. I find that the 1st Respondent's registration as owner of the suit parcels of land Prima facie shifts the burden to the Applicant to show or demonstrate that the said ownership is challengeable within the provisions of the law.

25. Quite clearly it is not possible to make a final determination at this interlocutory stage on the validity of the 1st Respondent's ownership

but the mere proof that she is duly registered as the owner of the suit properties which on the face of it was proper, is sufficient to lead the court to hold that the Applicant has not established that there is a prima facie case.

26. I need not consider the other two conditions for the grant of temporary injunction as established in the **Giella –vs- cassman Brown Ltd case (supra)** as the conditions are sequential such that when the first condition fails then there is no basis upon which the court can give an injunction unless the court was entertaining a doubt as to whether or not a prima facie case had been established.

27. The court of appeal in the case of **Kenya Commercial Finance Co. Ltd –vs- Afraha Education Society (2001) IEA 86** cited by **Gitumbi, J** with approval in the case of **Joseph Wambua Mulusya –vs- David Kitu & Another (2014) eKLR** observed as follows:-

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction is sequential so that the second condition can only be addressed if the first one is satisfied”.

28. Consequently, I dismiss the application dated 1st July 2019 with costs to the 1st Respondent.

29. Parties to comply with the provisions of order 11 within the next 21 days for the hearing of the main suit herein.

Dated and delivered at Nyeri this 23rd day of January 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE