



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

CIVIL CASE NO. 71 OF 2009

GIKUMBO FARMERS

MULTIPURPOSE CO. LTD.....1ST PLAINTIFF/RESPONDENT

FAITH WAMBUI NOORIA.....2ND PLAINTIFF/RESPONDENT

HARRISON MAGUH.....3RD PLAINTIFF/RESPONDENT

SHADRACK NJOGU MUGO.....4TH PLAINTIFF/RESPONDENT

PETER MBOGO NJAGI.....5TH PLAINTIFF/RESPONDENT

BETHA KUTHAIA KINYUA.....6TH PLAINTIFF/RESPONDENT

FRANCIS MBOGO WAMUNGE.....7TH PLAINTIFF/RESPONDENT

VERSUS

STEPHEN NJERU GATUMU.....1ST DEFENDANT/APPLICANT

CYRUS NDOGO NYAGA.....2ND DEFENDANT/APPLICANT

MUCHIRI KIAMBATI.....3RD DEFENDANT/APPLICANT

RULING

A. Introduction

1. This is a ruling for the applicants' Notice of Motion dated 12th June 2018 that seeks for the following orders;

a) That this Honourable court be pleased to issue an order of temporary injunction restraining the 2nd - 7th Plaintiffs/ Respondents by themselves, their servants, agents or anyone claiming through them from selling, alienating, charging, leasing, cultivating, trespassing or in any other way interfering with L.R. Ngariama/ Rungeto/2209 and L.R. Ngariama/Rungeto/2211 which lands belong to the 1st Plaintiff/Respondent herein pending the hearing and determination of this suit.

b) That this Honourable court be pleased to issue prohibitory orders over L.R. Ngariama/Rungeto/2209 and L.R. Ngariama/Rungeto/2211 to preserve the same pending the hearing and determination of this suit and until further orders of the court.

2. The application was opposed through the respondents' grounds of opposition dated 3/7/2018 and a replying affidavit sworn on 17/7/2018.

B. Applicant's Case

3. The 1st applicant swore an affidavit in support of the application on his behalf and on behalf of the other applicants and deposed that he

was the chairman of the 1st respondent since 28/9/2016 and that the 2nd – 7th respondents formed a splinter group purporting to be directors of the 1st respondent.

4. The 1st applicant deposed that members of the 1st respondent had contributed money in 2005 and acquired L.R. Ngariama/Rungeto/1352 measuring 0.32 Ha and title issued.

5. The 1st applicant further stated that subsequently the respondents sued the applicants herein and during the pendency of the suit the 2nd - 7th respondents subdivided L.R. Ngariama/Rungeto/1352 into 3 portions being L.R. Ngariama/ Rungeto/2209 - 2211.

6. Subsequently, the 2nd - 7th respondent sold off L.R. Ngariama/ Rungeto/2210 without consent of shareholders of the 1st respondent. He thus deposed that there only remained 2 parcels which needed preservation to protect the investment of the shareholders. It would only be fair for the court to grant the orders sought according to the applicants.

C. Respondent's Case

7. It was the respondents' case that sometime in 2010, the 1st respondent applied and was granted a loan of Kshs. 200,000/= by Bingwa Sacco, a loan that was secured by a charge over Title No. L.R. Ngariama/Rungeto/1352, which title the 1st respondent, is the absolute proprietor.

8. The respondent further stated that subsequently the loan became due and on the 7th April 2017 the members of the 1st respondent in a special general meeting unanimously agreed to excise and sell off 0.05 hectares from L.R. Ngariama/ Rungeto/1352 in order to settle the previously mentioned outstanding loan.

9. It is the respondents' case that the applicants are neither directors nor shareholders of the 1st respondent and consequently the application is pre-mature, pre-emptive, incompetent and devoid of merit.

D. Applicant's Submissions

10. The applicants submitted that their application seeks to protect and preserve the only assets of the 1st respondent remaining namely L.R. Ngariama/Rungeto/2209 and L.R. Ngariama/ Rungeto/2211 pending hearing and determination of the suit herein which determination will centre as to who are the lawful and/or rightful directors of the company.

11. The applicants further submitted that there was no notice convening the meeting to approve selling of the 1st respondents land and further that the respondents failed to demonstrate why they leave out the applicants from meetings that make critical decisions.

12. The applicants submitted that they had established reasonable grounds as to why injunction orders ought to be established.

E. Respondent's Submission

13. The respondents submitted that the applicants failed to make a prima facie case as they had failed to show that they have any proprietary interest in the subject land.

14. The respondent further submitted that the applicants would not suffer any loss since they do not have any proprietary interest in the subject land and in any case damages are an adequate remedy as the value of the subject land is ascertainable and the applicants can be compensated.

15. The respondent further submitted that if the injunction orders are granted they would suffer a disadvantage more than the applicants as they would hold the 1st respondent's property hostage.

F. The Determination

16. Upon perusal of the application together with the supporting affidavit, the grounds of opposition and replying affidavit and the parties' written submissions. The only issue for determination in this application is whether the temporary injunctions sought by the Plaintiff/Applicant ought to be granted pending the hearing and determination of the main suit.

17. It is now established in Kenya that the principles for consideration in determining whether temporary injunction can be granted or not is well settled in the case of **Giella Vs. Cassman Brown & Co. Ltd [1973] EA 358** as follows:

"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 adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

18. Bearing this principle in mind, this honourable court proceeds to interrogate whether the applicant has made out a prima facie case with a probability of success at the trial.

19. Each party presented substantial material by way of affidavits and exhibits in support of their respective positions on that question. In

keeping with the principles in Giella vs Cassman Brown & Co Ltd [1973] E.A 358, all the court is required to do at this stage is to satisfy itself if either party has shown a prima facie case with a probability of success and whether, if the temporary injunction was refused, the party seeking it stood to suffer irreparable harm for which damages would not be an adequate remedy. If in doubt, the court is to consider the balance of convenience and determine, on the facts of the case, whether the balance of convenience lay with the appellants or with the respondents.

20. It is not the role of the court when considering the interim applications to make a final determination on the conflicting affidavit evidence.

21. As Lord Diplock warned in American Cyanamid Co (No 1) vs Ethicon Ltd [1975] UKHL 1

“it is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.” This Court expressed a similar view in Mbuthia vs Jimba Credit Finance Corporation & another [1988] KLR 1 where it was held that **“the correct approach in dealing with an application for an interlocutory injunction is not to decide the issues of fact, but rather to weigh up the relevant strength of each side’s propositions.”**

22. The 2nd – 7th respondents are the directors who are currently running the operation of the 1st respondent by authority of a consent order recorded by the parties in this case on 20/07/2007. This suit arose from a split of directors of the 1st respondent with the 2nd – 7th respondent forming one splinter group while the 2nd group is that of the defendants.

23. With authority to run the operations of the 1st respondent, a loan was borrowed from Bingwa Sacco which the 1st respondent defaulted. This led to a demand notice being issued to the 1st respondent. In a special general meeting held on 7/04/2017, it was resolved that the 1st respondent’s asset LR Ngariama/ Rungeto/1352 be sub-divided and once done plot be sold to clear the loan.

24. All the relevant documents including the minutes of the meeting, the resolution and sale agreement for disposal of LR. Ngariama/Rungeto/2010 were annexed. The respondents therefore acted with the mandate of the shareholders’ contrary to the allegations by the applicants who are only a splinter group of directors who are no longer in charge of the 1st respondent’s operations.

25. I find that the applicants have failed to make a prima facie case with a probability of success.

26. From the material before me, I am not satisfied that the applicants have shown a *prima facie* case with a probability of success.

27. On the second principle of the three Giella vs Cassman Brown conditions to the granting of an interlocutory injunction i.e. that an interlocutory injunction ought to be granted in cases where the Applicant suffers irreparable loss, which cannot be compensated by way of damages. The applicants submitted that that there only remained 2 parcels that needed preservation and it would only be fair for the court to grant the orders sought.

28. Conversely, the respondent submitted that the applicants would not suffer any loss since they do not have any proprietary interest in the subject land and in any case damages are an adequate remedy as the value of the subject land was ascertainable and thus applicants can be compensated. Having established that two parcels of land belong to the 1st respondent and are in the hands of the directors now in charge of the company operations. I am convinced that the applicants would not suffer irreparable any loss let alone loss that cannot be compensated by damages.

29. On the question of balance of convenience. It is my view that a court should issue an injunction where the **balance of convenience** is in favor of the applicants and not where the balance is in favor of the opposite party. The meaning of **balance of convenience** in favor of the applicants is that if an injunction is not granted and the suit is ultimately decided in favor of the applicants, the inconvenience caused to the applicants would be greater than that which would be caused to the respondents if an injunction is granted but the suit is ultimately dismissed.

30. Although it is called balance of convenience it is really the **balance of inconvenience** and it is for the applicants to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the applicants who will suffer. In other words, the applicants have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it.

31. The property that the applicants are purporting to protect and preserve are the properties of the 1st respondent with directors in office. The shareholders consented to selling of LR. Ngariama/Rungeto/2010 to clear the outstanding loan of the company. They had sanctioned the sub-division of the mother parcel in the same resolution. The applicants cannot purport to be the advocates of shareholders who gave their mandate in a meeting.

32. Since the consent order was entered into, the 2nd - 7th respondent have the mandate to run the operations of the company until this case is finally heard and determined.

33. I am of the considered opinion that the applicants have failed to show that they will suffer more inconvenience than the respondents in the event that the orders sought are not granted.

34. Consequently, this application is dismissed with costs for lack of merit.

35. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF JANUARY 2019.

F. MUCHEMI

JUDGE

In the presence of; -

4th Plaintiff/Respondent

Ms. Maroko for Kiguru Kaluga for Applicants