



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

E.L.C. NO. 198 OF 2013

MICHAEL NJUGUNA MBUGUAPLAINTIFF/APPLICANT

VERSUS

DORCAS NYOKABI WAIHENYA.....1ST DEFENDANT/ RESPONDENT

JOSPHAT MWAURA2ND DEFENDANT/ RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 18th February, 2013. It is taken out by Michael Njuguna Mbugua, seeking the following orders *inter alia*:

- a) That this honorable court be pleased to certify this application urgent and the same be heard *ex parte* in the first instance.
- b) That pending hearing and determination of this application inter parties the honorable court be pleased to issue a temporary injunctive order restraining the Defendant/Respondents by themselves, children, servants, employees, agents, legal representatives, and or beneficiaries (if such context arises) from presenting themselves as the owners of all that parcel of land known as Nakuru/Bahati Settlement Scheme/239, leasing or dealing with the same in a manner whatsoever that creates an interest over the same to anybody.
- c) That the honourable court be pleased to issue an order pending hearing and determining this suit restraining the Defendants/Respondents by themselves, spouses, servants, children, employees, agents, legal representatives and or beneficiaries (if such context arises) from preventing the Plaintiff/Applicant entry into the above stated parcel of land, and from interfering in whatsoever manner with his possession, occupation and use of the land.
- d) That pending hearing and determination of this suit, the honorable court be pleased to issue temporary mandatory injunctive order, directing that the Defendants/Respondents by themselves, children, servants, employees, agents, legal representatives and or beneficiaries (if such context arises) or anybody claiming

authority from them, be evicted/ejected from all that parcel of land known as Nakuru/Bahati Settlement Scheme/239.

e) That costs of this application be provided for.

2. The application is supported by the affidavit of **Michael Njuguna Mbugua**, and is based on the grounds stated on the face thereof.

3. It is deposed that the Plaintiff is the lessee of all that land known as Nakuru/Bahati Settlement scheme/329 (hereinafter referred as the Suit Property) from **Loise Wambui Kahenya** (hereinafter referred to as the Lessor) the registered proprietor. Subsequent to execution of the lease agreement, the plaintiff attempted to take exclusive possession of the suit property but was unsuccessful since the 1st Defendant was already in occupation of the said property. Despite assurance from the lessor that the 1st Defendant has no claim over the suit property, the plaintiff has been unable to occupy the property and stands to suffer immensely thus instituting these proceedings.

4. The application is opposed vide the 1st Defendant's Replying Affidavit dated 19th March, 2013. It is sworn by **Dorcas Nyokabi Kimani**, who contends that the 2nd Defendant, **Josphat Mwaura Thuo** (deceased) is the legal absolute owner of the suit land. The lessor, deponent and other children are heirs of the late Josphat Mwaura. The centenarian in his twilight days entered into an oral contract with the lessor for the transfer of the suit land and another in consideration of Kshs. 2,000,000/- to be utilized in his medical expenses. The lessor had the properties registered in her names but failed to effect the transfer of funds to her father's account. According to the deponent, the purported registration was procured by fraud taking advantage of her father's advanced age and ill health. The said registration is subject to an ongoing suit instituted by the centenarian against the lessor being ELC No. 160 of 2012. He seeks cancellation of the title to the suit property.

5. Further, Dorcas Nyokabi deposes that prior to the death of her father, he made a will bequeathing her the suit property. She further contends that the plaintiff herein is a short term lessee and has no *locus standi* to seek the orders sought in the application. She stated that the suit property is her matrimonial home and the orders sought shall infringe on her right to housing and property as protected by the Constitution.

6. By consent, the parties agreed that the application be disposed off by way of written submissions. The Plaintiff filed his submission dated 29th August, 2013 whilst the 1st Respondent's submissions are dated 17th July, 2013. the 1st Respondent also filed a List of Authorities which is dated 26th July, 2013.

7. The Plaintiff/Applicant submitted that the decision in **Giella V Cassman Brown & Co. (1973) EA 358**, laid down the principles for granting an injunction. Firstly, the applicant must show a *prima facie* case with a probability of success. To this, counsel submitted that the plaintiff is the legal lessee of the suit property through a lease agreement made on 31st January, 2013. That the lessor is the registered proprietor thereof thus she passed a good title to the plaintiff.

8. The second principle enunciated in the **Giella** case is that an injunction will not normally be granted unless the Applicant might otherwise suffer irreparable injury. It was the submission of counsel that the lease between the plaintiff and the registered proprietor was for a period of 2 years and at a consideration of Kshs. 200,000/- which was paid to the proprietor on execution of the lease. The Plaintiff has been unable to utilize the suit land and as such he stands to suffer loss if the orders sought are denied.

9. Lastly, counsel submitted that the balance of convenience tilts in favour of the plaintiff. The plaintiff had demonstrated that the lessor was the registered proprietor and adduced a copy of the title deed which is the only *prima facie* evidence of the matters shown therein. Further counsel submitted that the 1st Defendant had not offered any evidence that the title to the suit land was acquired fraudulently or through misrepresentation. He relied on the case of **Gitwany Investment V Tajmal Limited and 3 Others** (2006) eKLR. In conclusion he stated that the plaintiff is entitled to exclusive possession of the suit land and the reliefs sought should therefore be granted in order for the plaintiff to enjoy the rights and

privileges appurtenant thereto.

10. Counsel for the 1st Defendant filed written submissions in opposing the application. He agreed with counsel for the plaintiff that the principles for interlocutory orders are enunciated in the **Giella** case save that a temporary mandatory injunction can only be granted with reluctance and only in special cases. This test was laid down in the case of **Kamau Mucuha V The Ripples Limited** Civil Application No. 186 of 2002 where the Court of Appeal observed that an order which results in granting a major relief claimed in the suit, which may not be granted at final hearing, ought not to be granted at an interlocutory stage. According to counsel, mandatory injunction can only be granted in special cases and where the case is clear and one which the court thinks it ought to be decided at once. He submitted that the late Josphat Mwaura is the legitimate proprietor of the suit land; that the title registered in favour of the lessor was irregularly and fraudulently acquired and this is evidenced by a suit instituted by the 2nd defendant against the lessor before his death seeking cancellation of the purported title to the suit land. In the premises, the plaintiff cannot found his claim on a title procured through fraud and such title is a nullity and cannot confer any rights or interest. He relied on a court of appeal **Simon Towett Maritim V Jotham Muiruri Kibaru** Civil Appeal 292 of 2005 to support that no registration can be based on forgeries. Similarly in **Scott V Brown, Doering McNab & Co.** (1982) 2QB 724 where Lindley LJ stated as follows

“Ex turpi non oritur action. This old well known legal maxim is founded in good sense, and expresses a clear and a well-recognized legal principle, which is not confirmed to indictable offences. No court ought to enforce an illegal contract or transaction which is illegal. If the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proved the illegality the court ought not to assist him.”

11. It was the submission of counsel that the lease agreement between the plaintiff and the Lessor was and is illegal *ab initio* and therefore the application lacks substratum to form a basis of a valid claim.

12. Further counsel submitted that the Applicant's lease cannot defeat the late Josphats Mwaura's indefeasible title to the suit land. He referred to the cases of **Albert May Gracie V AG and 3 Others** HCCC 522 OF 2000 and **Gitwany Investment V Tajmal & 3 Others** HCCC 1114 OF 2002 where in both cases the court held titles issued earlier to be absolute and indefeasible as regards the suit properties therein.

13. Counsel urged the court that in exercising discretion on whether or not to grant injunction to apply the principle of proportionality. He submitted that the court should always opt for the lower rather than the higher risk of injustice. In the present case counsel stated that the 1st Defendant was in occupation of the suit property and granting the orders may deprive her fundamental right to housing and the children's right to shelter. He relied on the decision of **Waki Holding Limited V Jane Mbiro Karukenya**, Civil Case No. 18 of 2003.

14. I have considered the application, replying affidavit and the submission filed by the respective parties. The only issues before this court is whether the Applicant is entitled to interlocutory injunction in the circumstances of the case on the basis of applicable principles.

15. Injunctions are equitable remedies that are granted at the discretion of court. The principles of granting such injunctions were laid down in the celebrated case of **Giella vs Cassman Brown and Company Limited (1973) EA 358** where the Court held at page 360 as follows:-

“First, an applicant must show *prima facie* case with 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 (E.A. Industries vs Trufoods (1972) EA 420.”

16. It is noteworthy that the court is not required to make final findings of contested facts but to weigh the relative strength of the parties cases. This observation was considered by Lord Diplock in **American Cyanamid Co. V Ethicon Limited (1975) 1 ALL ER 504; (1975) A.C. 396 HL** at 510 where he stated as follows:

“It is no part of the Court's function at this stage of the litigation to try and 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.

17. I say so in consideration of the submissions set out by the respective parties. The submissions of the 1st defendant dealt in great depth on the irregularity of the title deed registered in the names of the Lessor and in extension the lease agreement conferring the rights to the Plaintiff herein. These are matters that shall require further evidence to prove whether or not the title deed was obtained fraudulently and or through misrepresentation.

18. The Plaintiff has sought both a prohibitive and mandatory injunctive relief. The principles for granting prohibitory injunction are enunciated in the **Giella v Cassman Brown** case (supra) as correctly submitted by both parties. I am satisfied that the applicant has established a prima facie case. The plaintiff acquired the right to the property through a lease agreement between himself and the registered owner. He annexed a copy of the title deed which under the terms of **Section 26 (1)** of the Land Registration Act, 2012 is entitled to the protection of the law. It provides

“The certificate of title issued by the Registrar upon registration or to a purchaser of land upon transfer or transmission by the proprietor shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that proprietor shall not be subject to challenge, except;

- 1. on the grounds of fraud or misrepresentation to which the person is proved to be a party or**
- 2. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.**

19. Though 1st defendant has challenged the title to the suit land as to have been acquired fraudulently and or through misrepresentation the matter is yet to be concluded by the court. Therefore the court cannot be said to be furthering an illegality or aiding a party implicated in the illegality if such matter is still pending.

20. The applicant does not satisfy the second principle to warrant grant of injunction. The lease agreement is for a specific term and an agreed consideration of Kshs. 200,000/- which was paid to the lessor. The loss incurred is ascertainable and can be compensated by an award of damages. Further the balance of convenience tilts in favour of the 1st Defendant who is in occupation of the suit land.

21. The test for granting a mandatory injunction is on a higher threshold than in the case of prohibitive injunction. The court of appeal have had several occasions to address itself on the issue. In the case of **Kenya Breweries Ltd V Washington Okeyo** (2002) EA 109 the court held that the test for grant of a mandatory injunction was correctly stated in **Vol. 24 Halsbury Laws of England, 4th Edition para 948** that provides:

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could easily be remedied or where the defendant had attempted to

steal a match on the plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high sense of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and higher standard that was required for a prohibitory injunction.

22. It is my considered view that the Applicant herein fails the test set in the above passage. He has not satisfied the court that there is a need to have the matter resolved at once neither is the matter before the court a simple and straight forward issue that would warrant such an order. The 1st Defendant has a *prima facie* case as well and should be given an opportunity to be heard during a full trial. She has raised substantial issues in her replying affidavit and allege that the title acquired by the lessor was so done through fraud and or misrepresentation.

23. In the premises, the Notice of Motion dated 18th February, 2013 fails. The costs of the application are awarded to the 1st Defendant.

Dated and Signed at Nakuru this 9th day of May 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Kibut for the plaintiff

N/A for 1st & 2nd defendant

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE