



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.787 OF 2017

JACINTA MICHENGI NJUGUNA.....1ST APPLICANT

ELIZABETH WAITUHA KIHARA.....2ND APPLICANT

VERSUS

WAWAGE INVESTMENT

COMPANY LIMITED.....1ST RESPONDENT

FRANCIS NJURU NGUGI.....2ND RESPONDENT

PETER GAITO.....3RD RESPONDENT

SAMUEL KIBERU.....4TH RESPONDENT

JOHN WABIRU.....5TH RESPONDENT

JOSEPH WAINAINA.....6TH RESPONDENT

RULING

The matter for determination is the Notice of Motion application dated **10th October 2017**, brought by the Applicants herein under **Order 40 Rules 1(a) and (b)** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, and all other enabling provisions of Law, wherein the Applicant has sought for the following prayers;

1. Pending the hearing of this Application and this suit this Honourable court be pleased to issue a temporary injunction against the Defendants/Respondents, their agents and servants from entering, trespassing encroaching, alienating developing, constructing, selling, transferring, leasing, charging, damaging, interfering in any way with the plot of land known as Plot No.2 Ruiru arising from Share Certificate No.183.

2. That the OCS Ruiru Police Station to supervise the enforcement of the orders of this Honourable court.

3. The costs of the Application be borne by the Respondents

This Application is premised on the grounds stated on the face of the application and on the **Supporting Affidavit of Elizabeth Waituha Kihara**. The grounds are:-

a) The 1st Applicant is at risk of being deprived of her parcel of land being plot No.2 Ruiru by the illegal acts of the 4th, 5th and 6th Respondents' unlawful encroachment and construction on the said plot in collusion with the officials of the 1st Respondent.

b) The 1st Applicant is the beneficial owner of Plot No.2 Ruiru having purchased the same on 11th May 2001 from the 1st Respondent and was issued with Share Certificate No.183.

c) The Applicant is yet to be issued with the title deed by the 1st Respondent who is now colluding with the other Respondents to deprive her of her rights over the suit property.

d) Conduct of the 2nd, 5th and 6th Respondents carrying out works on the suit property amounts to trespass and illegal deprivation of private property contrary to the law.

e) Applicant stand to suffer irreparable loss unless injunctive orders are issued.

The 2nd Applicant swore the **Supporting Affidavit** and averred that the 1st Applicant appointed her to act on her behalf in matters pertaining the suit property. She reiterated the grounds on the face of the affidavit and further averred that the 1st Applicant purchased the suit property from the 1st Respondent and was allocated ¼ acre of the suit property and accordingly became a shareholder of the 1st Respondent as evidenced by share certificate marked as **annexture JMN-1A**. She averred that having paid the legal fees, she was shown the plot in the presence of the 1st Respondent and she took possession of **Plot No.2 Ruiru**, and she has been occupying the same **since 2001**, and the Respondents have colluded to deprive her of her interest in the suit property.

The Application is opposed and the 4th, 5th and 6th Respondents filed their Replying affidavit dated **23rd November 2017**. They averred that they purchased the suit property from the 3rd Respondent as evidenced by **annexture SJJ-1** and the sale was done through the 1st Respondent and they were issued with a share certificate. It was their contention that the Plaintiff is a stranger to them and she is misleading the court and therefore urged the court to dismiss the Application.

The 2nd Respondent also a Director at the 1st Respondent filed his **Replying Affidavit** dated **23rd November 2017** and averred that the Applicants' affidavit is full of falsehood as the Applicants are not in any of their Company's register. He alleged that the Applicant needed help- and that is why they issued her with the said Share Certificate for Visa purposes only.

The Applicant filed a **further Affidavit** dated **27th February 2018**, and averred that when the Respondents trespassed on the suit property it was not vacant and she had erected a kiosk which the Respondents demolished.

The Application was canvassed by way of written submissions and the Applicants through the **Law Firm of Pekke & Co. Advocates** filed their submissions on the **28th February 2018**, and submitted that the Applicant has established *prima facie* case as stated in the case of **Giella...**

Vs...Cassman Brown & Company Limited (1973) EA 358, wherein it was held:

“in an interlocutory injunction application, the Applicant has to satisfy the triple requirements to:-

(a) Establish a prima facie case;

(b) demonstrate irreparable injury if a temporary

injunction is not granted; and

c) show that the balance of convenience is in his favour.”

The Court was therefore urged to allow the Application.

The Respondents through the **Law Firm of Kimani Kahete & Co. Advocates**, filed their submissions on **20th March 2018**, and submitted that the suit as drawn is defective as the 2nd Applicant has no actionable claim against the Respondents. It was further submitted that the applicants claim as presented cannot stand as the orders sought are not enforceable and are only entitled to damages. It was therefore submitted that the Application must be disallowed.

The issue for determination before this Honourable Court is **whether the Applicant has established the threshold for grant of an interlocutory Injunction**.

The **Giella...Vs...Cassman Brown (1973) EA 358 case set out** the Principles to be considered in granting an Interlocutory Injunction. These are:-

1. There is prima-facie case with a probability of success.

2. There is likelihood that the Plaintiff will suffer irreparable injury which loss cannot be compensated in damages.

3. That the balance of convenience tilts in their favour.

1. Whether the Plaintiff has established a Prima-facie case

There are two Share Certificates in this matter that relate to the suit

property. Both the Applicants and the 4th, 5th and 6th Respondents have laid claim to the suit property. There have been allegations by the 1st Respondent that the Share Certificate granted to the 1st Applicant was to only to aid her for purposes of travelling abroad. However at this

stage the Court is not required to apply its mind in deciding whether the evidence is worthy of credit or whether it is believed. See the case of *Airland Tours & Travel Ltd...Vs...National Industrial Credit Bank, Milimani High Court Civil Case No.1234 of 2002*, where the Court held that:-

“In an interlocutory application, the court is not required to make any conclusive or definitive findings of fact or law most certainly not on the basis of contradictory affidavit evidence or disputed provisions of the law.”

The Applicants having produced a share certificate, that the 1st

Respondent has acknowledged having issued her with, it means therefore that she bears some interest in the suit property and has an arguable case. The Court in *Mrao....Vs...First American Bank of Kenya Limited & 2 Others (2003) KLR 125*, described a *prima-facie* case as:-

‘A prima-facie case in in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.’

Though the Applicant’s title has been challenged by the Respondents it came first in time to the Respondents and the 1st Respondent having acknowledged granting her the Share Certificate, the Court finds that the Applicants have established a *prima-facie* case with a probability of success.

2. Whether the Applicant will suffer irreparable injury

The Applicants in their affidavit have averred that they had been in occupation before the Respondents came in and demolished the structures thereon and therefore took over the suit land. The Courts have time and again ruled that an award of damages does not suffice to the Plaintiff as land is unique and may not be replaced.

To that extent therefore, the Court finds that damages would not suffice to atone for the breach of the Plaintiff’s right over the suit property.

In Niaz Mohamed Jan Mohamed...Vs...The Commissioner of Lands (1996)eKLR.

‘It is no answer to the prayer sought that the Applicant may be compensated in damages. No amount of money can compensate the infringement of such a right or atone for transgression against the law if this turn out to have been the case.’

3. In whose favour does the balance of probability tilts.

The Applicants have averred that they have been in possession of the suit property. However they have since been dispossessed by the Respondents who started building on the suit property but are currently not in occupation. The Court is alive to the fact that the 2nd, 4th and 5th Respondents also hold a share certificate whose authenticity has to be determined during trial. Being that the Plaintiff is not currently in possession, the Court finds that the Plaintiffs would not be inconvenienced and that the balance of convenience does not tilt in their favour. The Plaintiffs have not satisfied the three grounds for grant of the temporary injunction. In the case of *Nguruman Ltd....Vs....Jan Bonde Nielsen (2014) eKLR*, the Court had this to say:-

“It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent if it is granted.”

Having failed to satisfy all the three conditions for the grant of a temporary injunction, the Court finds that the balance of convenience tilts in favour of maintaining the *status quo*. The parties shall maintain the *status quo* currently prevailing where none of the parties herein shall occupy the suit property until this suit is heard and determined.

Having now carefully considered the *Notice of Motion* dated 10th

October 2017, the Court finds that the order that commends is the one of maintaining the prevailing status quo to the effect that none of the parties herein should occupy and/or deal with the suit property in whichever way until the suit is heard and determined.

It is so ordered.

Dated, Signed and Delivered at Thika this 25th day of March 2019.

L. GACHERU

JUDGE

25/3/2019

In the presence of

Mr. Kithiri holding brief for Mr. Kimani for Defendant

No appearance for Plaintiff

Lucy - Court Assistant

L. GACHERU

JUDGE

25/3/2019