



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 299 OF 2017

MARGARET MWIHAKI KIBE.....1ST PLAINTIFF

PETER NJONGE MBUGUA.....2ND PLAINTIFF

VERSUS

NAFTALI K. NGUGI.....DEFENDANT

RULING

1. This ruling is in respect of plaintiff's Notice of Motion dated 17th July 2017. The following orders are sought in the application:

1. *Spent*

2. *Spent*

3. *That pending hearing and determination of this suit, this honourable court be pleased to issue a (sic) of injunction restraining the defendants either by themselves, their agents, servants and/or any other person acting on their behalf from trespassing and putting up structures and/or interfering in any way whatsoever with all that parcel of land known as LR No. 12431/75 situated at Njoro.*

4. *That this honourable court be pleased to issue an eviction against the defendants/respondents.*

5. *That the costs of this application be borne by the respondents.*

2. The application is supported by an affidavit sworn by the 2nd plaintiff. He deposed that the 1st plaintiff being the administrator of the estate of the late Benjamin Kibe Kimundui sold to him a portion of LR No. 12431/75 situated at Njoro measuring 100x50 feet on 28th April 2015. The deceased was the registered owner of the said parcel. On 8th July 2017 the defendant went to the property and started constructing a pit latrine on it without any justification. He therefore urged the court to grant the orders sought.

3. In his replying affidavit, the defendant deposed that the 2nd plaintiff had filed this suit without the authority or even knowledge of the 1st plaintiff who according to him is senile. He stated that when he bought the property from the 1st plaintiff, the property had never been sold to anyone. He however did not state the date when he bought it. He added that the orders sought by the 2nd plaintiff are untenable since LR No. 12431/75 measures about 12 acres yet the 2nd plaintiff is only claims a portion of it measuring 100x50 feet.

4. When the matter came up for mention on 18th September 2018, counsel for the applicant informed the court that the defendant had as at that date completed construction on the premises and even brought in third parties to occupy the building. Nevertheless, both parties insisted on the application being heard and determined.

5. The application was heard by way of written submissions. Applicant's submissions were filed on 21st February 2018 while respondent's submissions were filed on 29th November 2018. I have considered the application, the affidavits and the submissions.

6. The plaintiffs seek an interlocutory injunction. They must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. They must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will issue if damages can be an adequate compensation. Finally, if the court is in doubt as to the answers to the above two tests then the court will determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the

applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

7. Both the 2nd plaintiff and the defendant claim to have bought the same property from the 1st plaintiff. The 2nd plaintiff claims that he bought it on 28th April 2015 while the defendant claims that he bought it on 27th June 2017. Yet in the face of all this controversy, the 1st plaintiff who it at the centre of it all has not uttered a single word! I have perused the documents that the plaintiffs have filed alongside the plaint. I see no verifying affidavit sworn by the 1st plaintiff. I equally have not seen any witness statement signed by the 1st plaintiff. This is contrary to the provisions of Order 1 rule 13 of the Civil Procedure Rules. That alone is sufficient to demonstrate that the 1st plaintiff has no *prima facie* case. There cannot be a *prima facie* case without there being a valid case first.

8. Further, though both the defendant and the plaintiffs claim that the 1st plaintiff is the registered proprietor of the parcel of land known as LR No. 12431/75, none of the parties found it necessary to annex a copy of the title document or even a certificate of search. I have also perused the certificate of confirmation of grant annexed by the plaintiffs. LR No. 12431/75 is not mentioned anywhere in it. The closest that I see is LR No. 12431/2 yet LR No. 12431/2 is neither mentioned in the sale agreement presented by the plaintiffs nor in the plaint. The plaintiffs have not demonstrated a *prima facie* case. That being so, I need not consider the other limbs of the test in *Giella*.

9. Notice of Motion dated 17th July 2017 is dismissed with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 8th day of May 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Cheche for the plaintiffs/applicants

Mr Bitok holding brief for Ms Wanderi for the defendant/respondent

Court Assistants: Beatrice & Lotkomo