



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAKURU**

**CASE NO. 313 OF 2015**

**THUO KARANJA.....PLAINTIFF**

**VERSUS**

**JACK MBURU KAGOH.....1<sup>ST</sup> DEFENDANT**

**DORCAS MUTHONI KIMANI (Sued as the legal**

**representative of the estate of Sammy Kimani Demwati)**

**DEMWATI NJUNGE .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of two applications: Notice of Motion dated 10<sup>th</sup> October 2015 filed by the plaintiff and 1<sup>st</sup> defendant's Notice of Motion dated 28<sup>th</sup> March 2017. Both parties seek an injunction against each other. In his application, the plaintiff seeks an injunction to restrain the 1<sup>st</sup> defendant, his agents or servants from entering into, remaining on, mortgaging, charging, selling, transferring or interfering with the plaintiff's quiet enjoyment of the parcel of land known as LR. No. Dundori/Lanet Block 9/176 (the suit property) pending hearing and determination of this suit.

2. The application dated 10<sup>th</sup> October 2015 is supported by an affidavit sworn by the plaintiff. He deposed that he purchased the suit property from Sammy Kimani Demwati who is since deceased on 3<sup>rd</sup> June 2010 but the property was not transferred to him since the deceased was yet to obtain title from the previous owner. He annexed a copy of a sale agreement but which I note to be in respect of a totally different property known as Dundori/Lanet Block 9/181. Though Dundori/Lanet Block 9/176 is mentioned in the said agreement, there is no statement in the agreement that it was the plot which was sold.

3. The 1<sup>st</sup> defendant responded to the plaintiff's suit by filing a defence and counterclaim. He also filed a replying affidavit in response to the plaintiff's application and also filed his own Notice of Motion dated 28<sup>th</sup> March 2017 in which he seeks an injunction to restrain the plaintiff, his agents, servants or anybody claiming under him from selling, advertising for sale, letting, charging, trespassing upon, entering, remaining on or dealing in whatsoever manner with the suit property pending hearing and determination of this suit.

4. The 1<sup>st</sup> defendant's case as is gleaned from his affidavit sworn in reply to the plaintiff's application and supporting in respect of his own application is that he is the registered proprietor of the suit property having purchased it from the deceased through a sale agreement dated 4<sup>th</sup> January 2013. He annexed copies of both the agreement and title deed which shows that he became registered proprietor on 2<sup>nd</sup> April 2013.

5. An order was made that the applications be canvassed by way of written submissions. The 1<sup>st</sup> defendant filed submissions. I see no submissions by the plaintiff. The 2<sup>nd</sup> defendant did not respond to the applications and did not participate in their hearing. In any case, she is not targeted by any of the orders sought.

6. I have considered the applications, the affidavits filed and the submissions. The principles applicable while considering an application for an interlocutory injunction are settled. An applicant seeking such an order must satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. He must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction will not 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 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. As previously noted, though the plaintiff claims to have bought the suit property, the sale agreement that he has exhibited does not bear

this out. In the portion where the identities of the purchaser, the vendor, the property sold and the purchase price are narrated, it refers to a totally different property known as Dundori/Lanet Block 9/181. In such circumstances, I see no evidence of any sale of the suit property herein to the plaintiff. On the other hand, the 1<sup>st</sup> defendant has exhibited a sale agreement that bespeaks a sale of the suit property to him by the deceased. The transaction yielded transfer of the suit property and ultimate issuance of a title deed in favour of the 1<sup>st</sup> defendant. There is thus no doubt in my mind that the plaintiff has failed to establish a prima facie case while the 1<sup>st</sup> defendant has succeeded. As a registered proprietor, the 1<sup>st</sup> defendant is entitled to the protection that the law accords persons who hold registered title. I do not think damages can adequately compensate him.

8. I therefore make the following orders:

a) Notice of Motion dated 10<sup>th</sup> October 2015 is dismissed with costs to the 1<sup>st</sup> defendant.

b) I grant an injunction restraining the plaintiff, his agents, servants or anybody claiming under him from selling, advertising for sale, letting, charging, trespassing upon, entering, remaining on or dealing in whatsoever manner with the parcel of land known as LR. No. Dundori/Lanet Block 9/176 pending hearing and determination of this suit.

c) The plaintiff shall bear costs of Notice of Motion dated 28<sup>th</sup> March 2017.

9. It is so ordered.

10. Ruling herein was to be delivered on 6<sup>th</sup> February 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

**Dated, signed and delivered in open court at Nakuru this 26<sup>th</sup> day of June 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff

No appearance for the 1<sup>st</sup> defendant

No appearance for the 2<sup>nd</sup> defendant

Court Assistants: Beatrice & Lotkomoi