



**REPUBLIC OF KENYA**

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

**CASE No. 164 OF 2018**

**NGOTHO COMMERCIAL AGENCIES LTD.....PLAINTIFF**

**VERSUS**

**DAVID KIPRONO SAMBAL.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR (NAKURU).....2<sup>ND</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated 7<sup>th</sup> May 2018, the plaintiff seeks an injunction to restrain the defendants, their agents, servants and/or employees from in any way interfering with the plaintiff's quiet possession of the property known as Nakuru Municipality/Block 15/110 (the suit property) and from harassing the plaintiff or interfering with the records in respect of the suit property at the land registry pending hearing and determination of this suit. The plaintiff also seeks an order that a restriction lodged against the suit property be removed.

2. The application is supported by an affidavit sworn by Mr Thomas Njenga Ngoto, a director of the plaintiff company. He deposed that the plaintiff purchased the suit property from the 1<sup>st</sup> defendant at a consideration of KShs 1,910,000 pursuant to a sale agreement dated 3<sup>rd</sup> February 2017. That the plaintiff paid the purchase price in full and became the registered proprietor of the suit property on 19<sup>th</sup> June 2017. That the 1<sup>st</sup> defendant made an allegation to the 1<sup>st</sup> defendant that the plaintiff had fraudulently acquired the suit property and as a result the 1<sup>st</sup> defendant registered a restriction against the suit property. That despite calls to remove the restriction, the defendants have failed to do so.

3. In a replying affidavit, the 1<sup>st</sup> defendant stated that he deposited the title of the suit property with the 1<sup>st</sup> defendant as security for a loan but did not sell it or transfer it to the 1<sup>st</sup> defendant. That he discovered that the plaintiff had transferred the suit property to itself without his authority on 19<sup>th</sup> June 2017. That he never signed the sale agreement, transfer or the documents that the plaintiff used to register itself as proprietor. As a result, the 1<sup>st</sup> defendant made a report to the police leading to registration of the restriction.

4. The application was canvassed by way of written submissions. All parties filed submissions. I have carefully considered the application, affidavits filed as well as the submissions. The plaintiff seeks an interlocutory injunction. It must therefore satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. This entails establishing 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.

5. There is no dispute that the plaintiff is currently the registered proprietor of the suit property. As a registered proprietor, the plaintiff is entitled to the rights and privileges under the provisions of **sections 25 and 26 of the Land Registration Act**. Its ownership can only be challenged on limited grounds such as fraud, misrepresentation illegality, unprocedural acquisition or an acquisition through a corrupt scheme. The plaintiff concedes that there have been allegations of fraud and that investigations were commenced by police, leading to registration of the restriction. Indeed, the 1<sup>st</sup> defendant has lodged a counterclaim seeking inter alia, cancellation of the plaintiff's title document on grounds of alleged fraud. The plaintiff is in possession and there is no allegation of damage to the property itself. In these circumstances, I am not persuaded that the plaintiff has demonstrated a *prima facie* case.

6. A reading of the application and supporting evidence reveals that the main and perhaps the only complaint in the application is the restriction. An order of removal of the restriction at this point would be in the nature of a mandatory injunction as opposed to a restraining order. The principles applicable to granting mandatory injunctions at an interlocutory stage are well settled and were recently restated by the Court of Appeal in the case of **Tom Onyango v Mimosa Investments Limited [2017] eKLR** as follows:

*[11] The principles for granting mandatory injunctions at an interlocutory stage are not in dispute. It is the application of those principles in the context of the case which is in contention. As the authorities cited by the respective counsel show, a mandatory injunction may be granted on an interlocutory application as well as at the hearing but in the absence of special circumstances, it will not be normally granted. It may be granted in clear cases where, inter alia, the court is satisfied that the matter ought to be decided at once or where the circumstances are such that the court is satisfied that the case is unusually strong and clear. In exceptional cases, the court has discretion to grant an interim relief although it amounts to granting the final relief itself prayed in the suit.*

7. I am not persuaded that the plaintiff has demonstrated special circumstances that present a clear case which calls for an immediate determination which would warrant granting a mandatory injunction in the nature of ordering removal of the restriction at this stage. If anything, the restriction allows for preservation of the suit property pending hearing and determination of the suit.

8. In view of the foregoing, I find no merit in Notice of Motion dated 7<sup>th</sup> May 2018. It is dismissed with costs to the defendants.

9. Ruling herein was to be delivered on 5<sup>th</sup> June 2019 but was delayed since on that date I was attending an annual conference of the judges of this court. The dates of the conference were scheduled after the date of delivery of this ruling was fixed. 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/applicant

Mr Aim for the 1<sup>st</sup> defendant/respondent

No appearance for the 2<sup>nd</sup> & 3<sup>rd</sup> defendants/respondents

Court Assistants: Beatrice & Lotkomoi