



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 165 OF 2017

ORENGE WILFRED STEPHEN.....PLAINTIFF

VERSUS

PATRICK MUCHOKI WAITHUKI.....1ST DEFENDANT

CAROLINE JEMUTAI TOROREI.....2ND DEFENDANT

THE OCS ELEMENTAITA POLICE STATION.....3RD DEFENDANT

THE NAIVASHA DISTRICT LAND

ADJUDICATION OFFICER.....4TH DEFENDANT

CAROLINE WANJIKU MUCHINA.....5TH DEFENDANT

RULING

1. This ruling is in respect of three applications: plaintiff's Notice of Motion dated 12th April 2017, 5th defendant's Notice of Motion dated 13th March 2018 and 2nd defendant's Notice of Motion dated 23rd April 2018.

2. The plaintiff seeks the following orders in Notice of Motion dated 12th April 2017:

1. Spent.

2. Spent.

3. *THAT this Honorable Court be pleased to issue an order of injunction to restrain the defendants, their servants, workmen, licensees, agents or any other persons acting on their behalf or on behalf of the defendants from howsoever trespassing, entering, encroaching, remaining in, selling, offering for sale, subdividing, taking over, taking over (sic), dispossessing, alienating, reclaiming, fencing, cultivating, returning into and or harassing plaintiff or interfering with her peaceful entitlement and possessing of parcel of land No. 74 at Oljorai Phase II Settlement Scheme at Naivasha District pending hearing and determination of this suit.*

4. Spent.

5. *THAT this Honorable Court be pleased to issue an order of Inhibition restraining any dealings of any nature whatsoever on parcel of land No.74 at Oljorai Phase II Settlement Scheme at Naivasha District.*

6. *THAT the O.C.S Elementaita Police Station O.C.P.D Gilgil Police Station does assist in enforcement of any orders issued herein.*

7. *THAT the cost of this application be borne by the defendants.*

3. On her part, 5th defendant seeks the following orders in her Notice of Motion dated 13th March 2018:

1. Spent.

2. Spent.

3. THAT pending the hearing of this suit, the respondent, whether acting in person, by proxy, through its agents, servants, employees, officer or any other person acting at its behest, be restrained by way of a permanent injunction from entering, trespassing, occupying and/or in any manner whatsoever interfering with the defendant's quiet occupation and utilization of the parcel of land known as Parcel Number 75 Oljorai Phase II Settlement Scheme in Naivasha.

4. THAT costs of this suit be borne by the respondents.

4. Last but not least, 2nd defendant urges the court to grant the following orders in her Notice of Motion dated 23rd April 2018:

1. Spent.

2. Spent.

3. THAT pending the hearing of this suit, the respondent, whether acting in person, by proxy, through its agents, servants, employees, officer or any other person acting at its behest, be restrained by way of a permanent injunction from entering, trespassing, occupying and/or in any manner whatsoever interfering with the defendants' quiet occupation and utilization of the parcel known as Parcel Number 74 Oljorai Phase II Settlement Scheme in Naivasha.

4. THAT the costs of this suit be borne by the respondents.

5. Notice of Motion dated 12th April 2017 is supported by a supporting affidavit and further affidavit both sworn by the plaintiff and opposed through an affidavit sworn by the 2nd defendant; Notice of Motion dated 13th March 2018 is supported by an affidavit sworn by the 5th defendant's and opposed through an affidavit sworn by the plaintiff; and finally, Notice of Motion dated 23rd April 2018 is supported by an affidavit sworn by the 2nd defendant and opposed through an affidavit sworn by the plaintiff. Additionally, the 5th defendant filed a further affidavit sworn on 2nd October 2018.

6. The applications were canvassed through written submissions. I have considered the applications, the affidavits filed and the submissions. Although some of the applicants have used the phrase "permanent injunction", what all the applicants seek are essentially interlocutory injunctions pending hearing and determination of the suit. The respective applicants must 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. All the three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicants are expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

7. The plaintiff contends that through an agreement dated 18th February 2011 and another dated 13th July 2013 she purchased the parcel of land known as plot number 74 at Oljorai Phase II Settlement Scheme at Naivasha measuring 9 acres from the 2nd defendant and paid the full purchase price of KShs 505,000. That the 2nd defendant executed transfer in her favour and that she erected a temporary fence around the property, erected semi-permanent structures and started farming. That on 5th April 2017, the 1st and 2nd defendants went to the said property in the company of security officers and an armed gang, destroyed her fence and started re-fencing and partitioning the property without any justifiable cause.

8. The 2nd defendant denies ever selling the plot to the plaintiff. She has dismissed the agreements and transfer as forgeries. She added that she is settled on the plot together with her family up to the date of swearing her affidavit.

9. On the other hand, the 5th defendant contends that on 16th August 2010, she was allocated plot number 75 at Oljorai Phase II Settlement Scheme at Naivasha measuring 2.4 hectares or 6 acres by the government. On 27th July 2016 she was issued with a title deed for the property but the size in the title document read 1.20 hectares which is less than what was in the letter of allotment. She then discovered that her plot had been subdivided and invaded by the plaintiff in cahoots with the 4th defendant. She annexed a copy of a title deed wherein her property is described as title number Naivasha/Oljorai Phase II/75.

10. As is manifest, there are accusations and counter accusations flying all over the place. Some of the allegations involve forgery which is a criminal offence and whose proof even in these civil proceedings will require proof on a standard higher than a balance of probabilities and lower than proof beyond reasonable doubt. The plaintiff and the second defendant both claim plot number 74 at Oljorai Phase II Settlement Scheme while the 5th defendant indirectly also claims the said plot since her stance is that part of it was hived from her plot which is plot number 75 at Oljorai Phase II Settlement Scheme. In these circumstances, I am in doubt as to which party has a better claim than the other. Only a trial of the suit will unravel that conundrum. Equally, I am in doubt as to whether damages can be an adequate compensation to any of the parties.

11. It seems to me that the applications have to be determined on a balance of convenience and with a view to preserving the suit properties. This is in line with **paragraph 32 of Gazette Notice No. 5178** titled "**Practice Directions on Proceedings in the Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in Other Courts**" which encourages preservation of the suit property. It provides:

During the inter-partes hearing of any interlocutory application, where appropriate, parties are encouraged to agree to maintain status quo. If they cannot agree, after considering the nature of the case or hearing both sides the Judge shall exercise discretion to order for status quo pending the hearing and determination of the suit bearing in mind the overriding interests of justice.

12. The property in dispute here is plot number 74 at Oljorai Phase II Settlement Scheme. Each of the applicants wants either the whole of it or a portion of it. It is what must be preserved.

13. In view of the foregoing, I make the following orders:

a) Pending the hearing and determination of this suit, an inhibition be registered against Parcel Number 74 Oljorai Phase II Settlement Scheme.

b) Costs of Notice of Motion dated 12th April 2017, Notice of Motion dated 13th March 2018 and Notice of Motion dated 23rd April 2018 shall be in the cause.

14. Ruling herein was to be delivered on 27th March 2019 but was delayed since I proceeded on medical leave. The delay is regretted.

Dated, signed and delivered in open court at Nakuru this 29th day of July 2019.

D. O. OHUNGO

JUDGE

In the presence of:

No appearance for the plaintiff

No appearance for the 1st defendant

No appearance for the 2nd defendant

No appearance for the 3rd & 4th defendants

No appearance for the 5th defendant

Court Assistants: Beatrice & Lotkomoi