



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**CASE No. 266 OF 2018**

**ETHICS AND ANTI-CORRUPTION COMMISSION..... PLAINTIFF**

**VERSUS**

**WILLIAM KIMAR..... 1<sup>ST</sup> DEFENDANT**

**NOREEN SHARIFF CHOGE, EVA CHEROGONY AND**

**BYRON KIPNGETICH GAWON CHOGE**

**(SUED AS ADMINISTRATORS OF THE ESTATE OF**

**JIM CHOGE (DECEASED)).....2<sup>ND</sup> DEFENDANT**

**WILSON GACHANJA.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of Notice of Motion dated 23<sup>rd</sup> July 2018. The application seeks the following orders:

1. *Spent*

2. *Spent*

3. *That the 2<sup>nd</sup> defendants by themselves, servants or any other person whosoever be restrained from alienating, selling, transferring, charging, developing, leasing, sub-dividing, wasting, entering and remaining upon, or in any other way dealing with the parcel of land described as Nakuru Municipality Block 5/149, pending the hearing and final determination of this suit.*

4. *That the costs of this application be provided for.*

2. The application is supported by an affidavit sworn by Jecinta Bungei, a forensic investigator employed by the applicant. The 2<sup>nd</sup> defendant responded to the application through a replying affidavit sworn by Noreen Shariff Choge. Additionally, the applicant and the 2<sup>nd</sup> defendant filed submissions. I have carefully considered the application, the affidavits and the submissions.

3. The applicant 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. 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**.

4. The applicant's case is that the parcel of land known as Nakuru Municipality Block 5/149 (hereinafter the 'suit property') is government land which had been planned, reserved and used by the government for the construction of housing for public officers and on which stood a government building. According to the applicant, through a document known as 'Instructions to Prepare a New Lease' dated 19<sup>th</sup> May 1994 a land officer purportedly acting for the Commissioner of Lands offered the suit property to the 1<sup>st</sup> defendant. Subsequently, on 30<sup>th</sup> June 1994 the 3<sup>rd</sup> defendant fraudulently and/or illegally caused a lease to be issued and registered over the suit property in favour of the 1<sup>st</sup>

defendant and that later a certificate of lease was issued in favour of Jim Kiptum Choge (deceased) whose estate is represented by the 2<sup>nd</sup> defendant. According to the applicant the suit property was not available for alienation since it had a government building thereon being house number NKU/HOU/MG/27 and that even if the land was unalienated government land, the Commissioner of Lands did not have any authority to offer the land to the deceased. As such, the allotment to the 1<sup>st</sup> defendant and subsequent transfer to 2<sup>nd</sup> defendant are all null and void.

5. The 2<sup>nd</sup> defendant does not deny that as at the date of the allotment, the suit property was government land with a government house on it. They however maintain that the property was lawfully allocated and that proper procedure was followed in acquiring the suit property. They further argue that this case is an abuse of process and is *res judicata* in view of judgment in **Nairobi Judicial Review Application No. 570 of 2017** and orders in **High Court Succession Cause No. 934 of 2008 (Nairobi)**. They therefore argued that the applicant has not satisfied the test for granting an interlocutory injunction.

6. It is not for me at this stage of the case, to determine whether or not the allocation of the suit property and subsequent issuance of certificate of lease to the 2<sup>nd</sup> defendant were valid and lawful. That is the province of the trial court. Suffice it however to state there is no dispute that the suit property was prior to allocation, government land on which stood a government house. If the applicant succeeds at trial, there is a likelihood that the court would revert the suit property to the government.

7. Regarding the issue of *res judicata*, I remind myself of **Section 7** of the **Civil Procedure Act** which provides:

*No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court..*

8. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** the Court of Appeal stated thus:

*.... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...*

9. I note that the proceedings in **High Court Succession Cause No. 934 of 2008 (Nairobi)** were under the **Law of Succession Act** while those in **Nairobi Judicial Review Application No. 570 of 2017** were brought to enforce, by way of mandamus, an order issued on 2<sup>nd</sup> March 2016 in the former case. The issue of validity of the allotment of the suit property and ensuing titles was never determined. *Res judicata* is therefore not applicable herein.

10. I am thus persuaded that the applicant has established a prima facie case that calls for the preservation of the suit property pending hearing and determination of the suit. The court has a duty to ensure that litigation herein, which is in the public interest, is not rendered an academic exercise in the long run. Damages cannot be an adequate remedy in the circumstances of this case. I will therefore grant an injunction aimed purely at preserving the suit property but not causing an eviction. I will also extend the life of the order of inhibition which was made on 24<sup>th</sup> July 2018 when the application came up under certificate of urgency.

11. I therefore make the following orders:

- a) I grant an injunction restraining the 2<sup>nd</sup> defendant by themselves, servants or agents from alienating, selling, transferring, charging, developing, leasing, sub-dividing, wasting or in any other way dealing with the parcel of land described as Nakuru Municipality Block 5/149, pending the hearing and final determination of this suit.
- b) The inhibition which had been ordered at the ex parte stage shall also remain in force pending hearing and determination of this suit.
- c) Costs to the plaintiff.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 30<sup>th</sup> day of September 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Maina for the plaintiff/applicant

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

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

Mr Mburu holding brief for Mr Kahari for the 3<sup>rd</sup> defendant

Court Assistants: Beatrice & Lotkomoi