



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 413 OF 2017

CHRISTOPHER WANYAMA WAFULA

NIMROD OKWARA

JULIUS MAKAU

JOHN WAWERU

AMOS MBUGUA GATHURI (All suing as the Registered Trustees,

GOPEL ASSEMBLY CHURCH).....PLAINTIFF

VERSUS

BESY TRADING LTD.....1ST DEFENDANT

BANK OF BARODA (KENYA) LIMITED.....2ND DEFENDANT

DOC FIND COMPANY LIMITED.....3RD DEFENDANT

VINCENT KIMARU BARNGETUNY.....4TH DEFENDANT

MAKATIAT LTD.....5TH DEFENDANT

CHARLES MAINA MIANO.....6TH DEFENDANT

RAYMOND K. KIPKENEI t/a KIPKENEI & C0. ADVOCATES..7TH DEFENDANT

COUNTY LAND REGISTRAR, NAKURU.....8TH DEFENDANT

JOSEPHINE APIYO AMUNGA.....9TH DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 30th October 2017, an application through which the plaintiffs seek the following orders:

1. *Spent*

2. *Spent*

3. *Spent*

4. *Pending the hearing and determination of this suit, this Honourable Court be pleased to issue an order of injunction restraining*

the defendants from selling, dealing, transferring, charging or dealing in any manner adverse to the interests of the Plaintiff with the following Plots respectively:

(i) NAKURU MUNICIPALITY BLOCK 16/554 (the 1st and 2nd defendants)

(ii) NAKURU MUNICIPALITY BLOCK 16/555 (the 3rd defendant)

(iii) NAKURU MUNICIPALITY BLOCK 16/556 (the 4th defendant)

(iv) NAKURU MUNICIPALITY BLOCK 16/557 (the 3rd defendant)

(v) NAKURU MUNICIPALITY BLOCK 16/558 (the 5th defendant)

(vi) NAKURU MUNICIPALITY BLOCK 16/559 (the 6th defendant)

5. Pending the hearing and determination of this suit, the 8th defendant be prohibited/inhibited from transferring, charging or dealing in any manner adverse to the interests of the plaintiff with the following parcels of land:

i) NAKURU MUNICIPALITY BLOCK 16/554

ii) NAKURU MUNICIPALITY BLOCK 16/555

iii) NAKURU MUNICIPALITY BLOCK 16/556

iv) NAKURU MUNICIPALITY BLOCK 16/557

v) NAKURU MUNICIPALITY BLOCK 16/558

vi) NAKURU MUNICIPALITY BLOCK 16/559

2. The application is supported by an affidavit sworn by Amos Mbugua Gathuri, one of the registered trustees of Gospel Assembly Church (hereinafter “the Church”). He deposed that the Church purchased the parcels of land known as Nakuru Municipality Block 16/554, Nakuru Municipality Block 16/555, Nakuru Municipality Block 16/556, Nakuru Municipality Block 16/557, Nakuru Municipality Block 16/558 and Nakuru Municipality Block 16/559 from the 5th defendant in the year 2002 at a purchase price of KShs 220,000 per plot. The Church completed paying the purchase price for all the plots by 4th April 2009. The plots were subdivisions of Nakuru Municipality Block 16/45. He further stated that despite the full payment of the purchase price, the 7th defendant who was acting for the 5th defendant demanded from the Church a further KShs 300,000 per plot in a letter dated 27th June 2017. When the Church demanded the title documents which had been in the custody of the 7th defendant, he stated that the title documents had been stolen from his office in the year 2015.

3. Amos Mbugua Gathuri further deposed that the Church reported the matter to the police and after investigations it emerged that the 5th defendant purported to sell the plots to the 3rd defendant through a sale agreement dated 30th November 2014. That Nakuru Municipality Block 16/554 was transferred to the 1st defendant on 25th May 2015 who in turn charged it in favour of the 2nd defendant on 9th July 2015; Nakuru Municipality Block 16/555 was transferred to the 3rd defendant on 24th December 2014; Nakuru Municipality Block 16/556 was transferred to the 3rd defendant on 24th December 2014 which later transferred it to the 4th defendant on 31st May 2016; Nakuru Municipality Block 16/557 was transferred to the 3rd defendant on 24th December 2014; Nakuru Municipality Block 16/558 remains registered in the name of the 5th defendant since 27th November 2014 and lastly Nakuru Municipality Block 16/559 was transferred to the 3rd defendant on 24th December 2014 which later transferred it to the 6th defendant on 30th May 2016. He annexed certified copies of green cards to support these statements. He concluded by stating that transfers of the plots were fraudulent in view of the Church having fully paid for them and in view of the 7th defendant’s earlier contention that the certificates of title had been stolen.

4. The 6th defendant filed a replying affidavit in which he deposed that he is the registered proprietor of Nakuru Municipality Block 16/559 having purchased it from the 3rd defendant through a sale agreement dated 30th May 2016.

5. The 7th defendant filed a replying affidavit in which he deposed that he took over the transaction from M/s Sheth & Wathigo Advocates on the instructions of the 5th defendant who suspected that over KShs 3 million from the proceeds of the sale of the subdivisions of Nakuru Municipality Block 16/45 had not been accounted for. He confirmed that he indeed demanded a further KShs 300,000 per plot from the Church on behalf of his client the 5th defendant and that transfers were registered in favour of the 3rd defendant in respect of Nakuru Municipality Block 16/554, Nakuru Municipality Block 16/555, Nakuru Municipality Block 16/556, Nakuru Municipality Block 16/557 and Nakuru Municipality Block 16/559. Upon consulting the 8th defendant, he realised that the transfers were not supported by necessary documents. He concluded that the 3rd defendant is “a sham company operated by fraudsters”.

6. The 2nd defendant filed a replying affidavit sworn by Sanjay Pratap, its Branch Head at its Nakuru branch. He confirmed that a charge was registered on 9th July 2015 over Nakuru Municipality Block 16/554 to secure a loan of KShs 2,800,000 granted by the 2nd defendant to the 1st defendant. The charge was later discharged and the property sold and transferred to the 9th defendant, a member of staff of the 2nd

defendant, who charged it afresh on 13th September 2017 in favour of the 2nd defendant to secure a housing loan of KShs 4,300,000 granted to her by the 2nd defendant.

7. The 8th defendant's counsel indicated to the court that the 8th defendant would not participate in the hearing of the application and would leave it to the court to decide.

8. The application was canvassed through written submissions. The applicant filed submissions on 4th December 2018, the 6th defendant filed submissions on 29th November 2018 and the 3rd defendant filed submissions on 2nd May 2019. I have not seen any submissions from the rest of the defendants. I have carefully considered the application, the affidavits and the submissions.

9. The plaintiffs seek an interlocutory injunction. They 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**.

10. From the material on record, it is apparent that the Church purchased the parcels of land known as Nakuru Municipality Block 16/554, Nakuru Municipality Block 16/555, Nakuru Municipality Block 16/556, Nakuru Municipality Block 16/557, Nakuru Municipality Block 16/558 and Nakuru Municipality Block 16/559 from the 5th defendant and paid for them. Whether or not further sums are payable to the 5th defendant is really not material at this point. Suffice it to state that the Church did not ultimately become the registered proprietor of the properties. The 5th defendant's advocate in the transaction has described the 3rd defendant which ultimately became registered proprietor of several of the properties as "a sham company operated by fraudsters". I am persuaded that the applicants have established a *prima facie* case. Damages cannot in the circumstances be an adequate remedy. There is need to preserve the suit properties pending hearing and determination of this suit. The orders sought are merited.

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

a) Pending the hearing and determination of this suit, an injunction is hereby issued restraining the defendants from selling, dealing, transferring, charging or dealing in any manner adverse to the interests of the plaintiff with the following plots:

(i) Nakuru Municipality Block 16/554

(ii) Nakuru Municipality Block 16/555

(iii) Nakuru Municipality Block 16/556

(iv) Nakuru Municipality Block 16/557

(v) Nakuru Municipality Block 16/558

(vi) Nakuru Municipality Block 16/559

b) Pending the hearing and determination of this suit, the 8th defendant is prohibited/inhibited from transferring, charging or dealing in any manner adverse to the interests of the plaintiff with the following parcels of land:

(i) Nakuru Municipality Block 16/554

(ii) Nakuru Municipality Block 16/555

(iii) Nakuru Municipality Block 16/556

(iv) Nakuru Municipality Block 16/557

(v) Nakuru Municipality Block 16/558

(vi) Nakuru Municipality Block 16/559

c) Costs to the plaintiffs.

Dated, signed and delivered in open court at Nakuru this 28th day of November 2019.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Kibet holding brief for Mr Mugambi for the plaintiff/applicant

No appearance for the 1st defendant

No appearance for the 2nd defendant

Mr Biko holding brief for Mr Kisilah for the 3rd defendant

No appearance for the 4th defendant

No appearance for the 5th and 7th defendants

No appearance for the 6th defendant

No appearance for the 8th defendant

No appearance for the 9th defendant

Court Assistants: Beatrice & Lotkomoi